

Commercial and Federal Litigation Section Newsletter



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

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...and more!



Message from the Chair

I am honored to succeed my friend and mentor, Mitch Katz, as Chair of this august section. We owe a debt of gratitude to Mitch for his years of service to the Section, including the outstanding past year, which included such highlights as:

- The release of our Women’s Initiative Task Force report “If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR” and its subsequent adoption by the New York State Bar Association House of Delegates. In February 2018, NYSBA President Sharon Stone Gerstman presented the report to the American Bar Association House of Delegates, which in response adopted a resolution affirming that women attorneys remain considerably underrepresented in courtrooms and in ADR and outlined steps that can be taken by the judiciary, law firms, clients, and ADR providers to address this disparity.
- We rode the circuit in a series of bench-bar programs across the state in Erie, Kings, Queens, Manhattan, Nassau, and Westchester Counties, with more to come in the next few months.
- We presented more than 30 CLE programs to educate our members and the bar at large regarding everything from ADR to trial practice to recent amendments to the Commercial Division rules to ethics.

Thanks also to Jamie Sinclair, who stepped down after two years as our Secretary, and Sandra Rampersaud, who was our Treasurer for the past year.

So where do we go from here?

Your new officer team is hard at work planning another outstanding year of programming, social events, reports, and committee work. But there are two things we need from you.

First, we need your participation. Many of you regularly attend our programs and events and fully appreciate the value you receive from participation in the Section. But some of you we see only at the Annual Meeting, or



Robert N. Holtzman

perhaps even more rarely than that. Please come and join us at one of the dozens of events we will have over the next year. Let me or the other officers know you are coming, and please come introduce yourself. I promise that Section events will offer you opportunities to meet, socialize, and network with great lawyers; learn about new developments in the law and related issues (and teach others by leading CLE programs); and join us in celebrating the strong relationship our Section always has had with the federal and state benches.

Second, I challenge you to identify one person—with extra credit for two—to encourage to join you at several Section events this year. At each event, introduce them to the Section officers and other

long-time members. And encourage them to become more involved, perhaps by joining a committee, writing an article for the *Litigator* or newsletter, or planning and presenting a CLE program. We’re all busy, and making this happen takes a bit of effort, but in truth it’s not that hard. And the benefits to each of us, and to the Section at large, increase exponentially when we are joined by new contributors with their own thoughts, perspectives, ideas, and goals.

Our Spring Meeting this year was very well attended. It was held out of state (but not out of the Circuit) at The Equinox in Manchester, Vermont. I enjoyed greeting everyone at this event and our many other outstanding programs throughout the year.

One date to mark in your calendar right now: Our Annual Meeting will take place on Wednesday, January 16, 2019, at the New York Hilton Midtown.

I am joined this year by Laurel Kretzing (Chair-Elect), Jonathan Fellows (Vice-Chair), Anne Sekel (Treasurer), and Natasha Shishov (Secretary). Please reach out to any of us with your ideas or to discuss how we can help you achieve maximum value from Section participation.

Robert N. Holtzman

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The Section Rides the Circuit

By Mark Berman

The Commercial and Federal Litigation Section reaches the entire State, and does so by regularly engaging with commercial practitioners well beyond Manhattan. To that end, in the last year the Section, through Mark A. Berman, former Section Chair and now Co-chair of the Section's Commercial Division Committee, has put together an ongoing series of programs where lawyers can meet on an informal basis with their local Commercial Division Justices. The Section started with Manhattan and then spread throughout the State.

This now permanent program will ensure that NYS-BA members will have opportunities to socially interact with the Justices of our State before whom they appear. Close to 300 lawyers from around the State have attended these programs with one of them even being videotaped. Programs have been held in Manhattan, Nassau, Kings, Queens, Erie, and Westchester counties, and one is also coming up in Onondaga County.

In the spring, the Section went to Nassau County to lunch with Justice Stephen A. Bucaria, as reported in our last Section *Newsletter*. More recently, in April, the Section went to Kings County to have cocktails and hors d'oeuvres with Justice Sylvia G. Ash, Presiding Justice of the Commercial Division, and Justice Lawrence Knipel, Commercial Division Justice and New York State Administrative Judge for Civil Matters, Second Judicial District, at Brooklyn Law School. Many other Supreme Court Justices attended this program. Practitioners heard from guest speaker Carlo A. Scissura, President and CEO of the New York Building Congress and former Chief of Staff and General Counsel to Brooklyn Borough President Marty Markowitz and former President and CEO of the Brooklyn Chamber of Commerce, who addressed the terrific future of Brooklyn's economic development. This was the second time in two years that the Section presented in Kings County and this now yearly program has

been institutionalized as a Section event in Brooklyn.

In May, the Section traveled upstate and Buffalo lawyers had lunch with Commercial Division Justices Deborah A. Chimes and Henry J. Nowak at the Bond Schoeneck & King law firm. The lunch was also attended by former Commercial Division Justice and now Fourth Department Justice John M. Curran. This is the third time in the last few years that the Section under Mark's leadership has put together an event in Buffalo.



Mark Berman

May also saw the Section come to Queens Supreme Court for the first time, where local practitioners had lunch at the courthouse with Presiding Commercial Division Justice Marguerite A. Grays and Commercial Division Justices Leonard Livote and Joseph Risi. The Section filled the boardroom, and the program was so successful that this lunch will be repeated each year.

Then, in June, at the Westchester Supreme Court the Section put on a one-of-a kind CLE program entitled the "21st Century Courtroom—Using Integrated Courtroom Technology in the Commercial Division" in the most advanced state courtroom. At that CLE, after having drinks and refreshments, Section members conducted a mock hearing utilizing all the electronic assets of this courtroom, presided over by Commercial Division Justices Linda S. Jamieson and Gretchen Walsh. (See article by Matthew D. Donovan on page 11.)

Alert: Major Change in Appellate Division Practice

Effective September 17, 2018, the four departments of the Appellate Division have adopted uniform rules of practice applicable throughout the state. The new rules, Part 1250 of 22 NYCRR, may be found at <http://nycourts.gov/rules/comments/orders/ADPracticeRules.pdf>.

Each of the four departments has now adopted local departmental rules of practice supplementing the statewide uniform rules, effective, in all four departments, September 17, 2018. The new departmental rules of practice, parts 600, 670, 850 (replacing part 800), and 1000, respectively, may be found at

- **1st Department:** <http://nycourts.gov/courts/ad1/NewLocalRules600.pdf>
- **2nd Department:** <http://nycourts.gov/courts/ad2/pdf/Local%20Rules.pdf>
- **3rd Department:** <http://www.nycourts.gov/ad3/Rules%20of%20Practice%20Part%20850.pdf>
- **4th Department:** <https://www.nycourts.gov/courts/ad4/Clerk/Part1000-LocalPracticeRules.pdf>.

As always, the Section will keep you informed of any updates and developments.

Buffalo:



Queens:



Spring Meeting Highlights: Trial Tips for Seasoned Commercial Litigators

By Hon. Timothy S. Driscoll and Paul D. Sarkozi

At the Section's Spring Meeting, Paul Sarkozi and Helene Hetchkopf moderated a panel of federal and state judges, who shared their "Trial Tips for Seasoned Commercial Litigators." Panelists U.S. District Judges William Pauley (SDNY) and Nicholas Garaufis (EDNY), as well as New York State Supreme Court Commercial Division Justices Saliann Scarpulla (New York County) and Timothy Driscoll (Nassau County), offered their views on topics such as the decision to proceed with a jury or bench trial, the use of technology at trial, motions in limine, effective presentation of evidence, and key evidentiary issues.

With an homage to David Letterman, here is a "Top Ten" list of the panelists' suggestions.

I. Know Thy Judge

There are nearly 30 judges in the New York State Commercial Division. There are nearly 100 U.S. District Judges and U.S. Magistrate Judges throughout the federal courts in New York State. Each has her own preferences for how lawyers are to conduct themselves during trial. Indeed, even the most seemingly pedestrian concerns, such as where counsel should stand while questioning a witness, may be subject to the judge's own practices. The judge's practices may range to more nuanced questions, perhaps including presentation of direct testimony by affidavit in lieu of live testimony at bench trials (the co-author's favorite!). When in doubt, ask what the judge likes and (perhaps more important) what the judge doesn't like. There is enough stress at trial for parties and their counsel; making sure you know how to comply with the judge's unwritten rules can let you focus on case preparation and avoid unnecessary distraction and conflict. The judge's law clerks and courtroom clerks are valuable resources, as are practitioners who have frequently appeared before the judge. And, of course, the trial lawyer should review and understand the judge's courtroom rules.

II. Find (and Help Your Witnesses to Find) the "Courtroom Voice"

Speaking in a courtroom can be nerve-racking for even the finest public orators. Attorneys should take care not to speak too quickly. You want the finder of fact to pay attention to what you are saying—not to lose interest because of the staccato-like rapid fire cadence of questions and answers that seems rehearsed and rote. The court reporter may give you a warning by asking you or the witness to slow down, but you can avoid that interruption and remonstrance simply by taking extra care to keep your focus on whether the judge and jury are following along. Attorneys may also want to help wit-



Hon. Timothy S. Driscoll



Paul D. Sarkozi

nesses who are not good readers by having the attorney, instead of the witness, read from documents in evidence. The witness can confirm that you have read the document correctly. Relieving this burden from the witness can allow the witness to focus on her recollection of events.

III. Boredom Should Be the Enemy of the Trial Lawyer (Because It Is for the Judge and Jury)

Reading from a script sounds like—surprise—reading from a script. It will quickly lose the interest of the judge and jury. In addition, reading from a script conveys the sense that there is a script. As any experienced trial lawyer knows, there is no script for what happens in a courtroom! Listen to the witness's answers instead, and react accordingly.

IV. Use Technology Carefully

Everyone has sat through interminably long PowerPoint presentations, where the presenter monotonically reads from the slides. Why would anyone choose to subject a jury to that torture? Choose technology that will keep the interest of judges and jurors—enlarging relevant text on a screen, using video where available, etc. And ask the judge if she will permit a test run of the technology the day before the trial, so you can make sure your computer demonstratives appear on the screen, visual displays can be seen and read by the fact finder, and the audio can be heard and is not too loud. Regardless of the technology used, have a "Plan B" in case the technology fails in the courtroom. While paper copies may be "so last millennium," they may save you from the inevitable untimely computer crash. Finally, know what the judge will (and will not) permit with regard to technology.

V. You Don't Get a Second Chance to Make a First Impression

Don't lead off with an unimportant witness, like a document custodian or an expert opining on how data was retrieved from a computer. A jury (or judge) will never be fresher, or more interested in what you have to say, then at the outset of your case.

VI. Don't Forget the Human Element

While trials are the result of hours of pretrial proceedings, scores of document requests, and voluminous emails between counsel, the trial itself is different. Think "tell stories around the campfire" rather than "send nas-tygram emails at 1 in the morning." Relate to the jury and judge. Come up with a theory for your case that is easy to follow, and that keeps their interest throughout the trial. Don't be rude to the witness (or, of course, the judge). Help the jurors to like you.

VII. Use Courtroom Time Efficiently

When you have a significant evidentiary objection, alert the judge in advance—outside the presence of the jury and, when possible, not on the jury's time. Consider sending a letter or bench brief that provides the law and explains why the evidence should, or should not, be admitted. Similarly, minimize the number of sidebars that you request. You don't want the jurors' minds to wander or feel excluded from the process.

VIII. Take Your Time With Documents

Don't be afraid to publish your documents to the jury, whether in hard copy or on a large screen. Highlight, and enlarge, particularly important Sections. Common mistakes include (a) questioning a witness about a document in evidence, without publishing the document to the jury so that they can follow along, (b) publishing a document after the questioning about that document has concluded and the examiner is moving on to a new topic, and (c) using electronic documents without making sure that the witness can see them.

IX. Don't Abuse the Motion in Limine—or the Judge's Patience About Such Motions

A motion in limine is exactly that—an application to the judge to admit, or not to admit, a given piece of evidence. It is not another chance to argue an already denied motion for summary judgment. Moreover, in a bench trial, consider whether to use precious preparation time to file a motion in limine. Trial judges in bench trials are far more inclined to separate the wheat from the chaff as part of a post-trial submission, rather than run the risk that an appellate court would rule that the trial judge erred in not admitting evidence, thereby increasing the chance that the case will need to be retried.

X. Know Your Evidentiary Foundations

In commercial trials, parties need to know what documents can and cannot be admitted via the business records exception to the hearsay rule. Understand the difference between "making" the record in the regular course of business (thus the record can be admissible under business record rule) and merely "receiving" the record in the regular course of business (which often will be insufficient). And remember that to obtain admission of a business record, the lawyer **MUST** provide the four elements of foundation (record was (1) made by someone with knowledge, (2) made at or near the time of the event, (3) made and kept in the ordinary course of business, and (4) the type of record routinely made and kept by the business).

More tips are sure to follow at future Section meetings. Stay tuned!

Justice Timothy S. Driscoll is a Justice of the Supreme Court of the State of New York, and has been assigned to the Nassau County Commercial Division since May 2009. From January 2008 through April 2009, Judge Driscoll sat in the Nassau County Matrimonial Center. Judge Driscoll is also an adjunct professor at Brooklyn Law School and has served as a teaching team member at the Harvard Law School's Trial Advocacy Workshop. Prior to beginning his judicial service on January 1, 2008, Judge Driscoll held a number of posts in the public and private sector. He served as Deputy Nassau County Executive for Law Enforcement and Public Safety from July 2004 to December 2007. In that position, he oversaw all of the public safety and law enforcement agencies in the county, including the Police, Fire Marshal, Probation, Sheriff, Office of Consumer Affairs, Traffic and Parking Violations Agency, Medical Examiner, and Office of Emergency Management.

Paul Sarkozi is the Co-Chair of Tannenbaum Helpern's Litigation and Dispute Resolution Practice. Recognized by Super Lawyers in the *New York Times* since 2012 as one of the Top 100 Lawyers in the New York Metro area, Paul is a savvy litigator and negotiator who focuses on results for his clients. Equally adept in federal and state court, Paul has nonetheless developed a particularly strong reputation in New York's Commercial Division, the branch of the New York court system that handles complex business disputes. He was selected by Chief Judge Jonathan Lippman to serve on his Task Force on Commercial Litigation in the 21st Century and serves on the Chief Judge's Commercial Division Advisory Council as Co-Chair of the Alternative Dispute Resolution Committee. Paul recently served as Chair of the State Bar's Commercial and Federal Litigation Section, which regularly addresses critical issue affecting business litigation in both state and federal courts.

ComFed's Trial Practice Webinar Series: A Look Behind the Curtain

By Catherine Benny

The Commercial and Federal Litigation Section sponsored a seven-part webinar series on trial practice skills. Each webinar discussed a portion of the trial process from opening and closing statements to questioning witnesses, which all aid the attorney in crafting an effective narrative. The series will be recorded and made available on the Section website. I was given the opportunity to speak with the creators of this series, Michael Rakower and Helene Hechtkopf, both of whom are trial attorneys practicing commercial litigation. Mr. Rakower was also a panelist on the webinar dealing with questioning witnesses, and Ms. Hechtkopf was a moderator on the webinar about expert witness testimony. Both individuals offered their views on the preparation that goes into a trial itself, their opinions on technology in the courtroom, their hopes for the series, and their advice for students and practitioners aiming to sharpen their trial skills.

As the lecture series is on trial skills, I asked both practitioners what they believe is the most difficult aspect of preparing for a trial. Mr. Rakower is a partner in his own commercial litigation firm, Rakower Law; he practices in state and federal courts. He stated that the most difficult aspect of trial preparation is determining what pieces of the case matter most and deciding what to forgo. Separating the essential pieces of proof from the rest to craft a cogent narrative that conveys the key concepts and places the client in the most favorable light, while keeping the case interesting, is the core challenge, according to Mr. Rakower.

Given that commercial litigation concerns contracts, which would arguably be less interesting to the average lay person than a criminal trial, I asked him whether he found it difficult to keep the jury's attention. He stated that the important thing to do when speaking to a jury is to home in on the empathetic elements of the case so that the jury understands the importance of their decision. Judges, too, are not immune from boredom. For instance, he recounted a story about a breach of contract case over retirement benefits where he elicited from his client testimony about the importance of the benefits at issue, how long the client had worked in anticipation of receiving them, and the tremendous financial strain the client would experience if he did not ultimately get them.

As to the fact-finder's role as the ultimate decision maker, Mr. Rakower advises practitioners and students interested in commercial litigation to earn and maintain the trust of the jury (and the bench) by (1) avoiding

overpromising during an opening statement since the last thing you want to do is give your adversary a chance to identify at closing those items you said you would prove but did not, (2) carrying yourself with an air of integrity in all of your interactions in the courtroom.

When asked what she believed to be the most difficult part of trial preparation Ms. Hechtkopf, a partner at Hoguet, Newman, Regal & Kenney LLP—a boutique commercial litigation firm—said she believed it was cross examination because you are forced to think on your feet. However, she also felt that opening statements are important as they give you the opportunity to tell your story concisely. Interestingly, Ms. Hechtkopf has also argued more bench trials in the course of her career and, like Mr. Rakower, feels bench trials are more “by the book” but require the same level of preparation. She particularly emphasized the importance of knowing the other side's case and avoiding overpromising to the jury.

I also asked both of the panel creators about their respective opinions on the increased use of technology within the legal profession. Both attorneys view the use of technology in the courtroom and in cases as a tool rather than a distraction. Both Mr. Rakower and Ms. Hechtkopf feel that, in the appropriate circumstances, technology can serve as a good visual aid for the jury and thus help convey a narrative more effectively.

Finally, as an aspiring law student hoping to bolster my own litigation skills, I asked the series creators if they had any advice for students or young attorneys in my position and their responses were surprisingly similar and simple: to observe as many trials as possible and to learn by doing, either through competitions or other such opportunities. Lastly, I asked Mr. Rakower and Ms. Hechtkopf what they hope others gain from the webinar series as a whole. Ms. Hechtkopf stated that this series was a response to the need for a refresher course in trial skills for both young and seasoned practitioners, as prompted by observations of Justice Andrea Masley of the Commercial Division. Mr. Rakower also shared a similar purpose for the series as a refresher course, pointing out that, because the series is divided into seven parts, anyone can identify the particular skill he or she would like to review or sharpen and then select the one-hour webinar that addresses that concept. Mr. Rakower also wanted to extend his gratitude to all the individuals who served as panelists in these series, as without them the series would not have been possible.

Overall, this series consists of informative panels on trial skills that can be helpful to attorneys at any stage in their careers. The panelists have practical experience that allows them to bring insight into topics that may not be covered in a typical treatise, such as courtroom demeanor, maintaining one's composure in the face of criticism during a trial, and techniques to craft the best narrative possible. Regardless of one's specialization or interest area, this series would be useful to anyone looking to learn more about or sharpen their trial skills.

Catherine Benny will be a third year law student at the Maurice A. Deane School of Law at Hofstra University in the fall. She has been a member of the Commercial and Federal Litigation Section for the past two years. She graduated from Hofstra University in 2016 with a B.A. in Political Science.

Janae Cummings: Diversity Fellow

By Beth Gazes

Each year the NYSBA Commercial and Federal Litigation Section has the privilege of placing a talented and rising star as a Diversity Fellow. Last year was no exception. Janae Cummings, now a 3L at Brooklyn Law School, spent the summer in chambers with Hon. O. Peter Sherwood and his principal law clerk, Sara J. Crasson, beginning her future as a New York attorney. As Ms. Cummings explained, this invaluable experience prepared her not just for practicing, but also for paying it forward as a role-model to tomorrow's diverse group of attorneys.

Ms. Cummings worked closely with Judge Sherwood and Ms. Crasson, researching issues, discussing legal arguments, and writing memos. She participated as part of the team while putting her law school knowledge to work. She is grateful to the judge and his staff for making themselves available to her.

Another aspect of the Fellowship that Ms. Cummings valued was the opportunity to forge relationships with mentors in the courthouse. As a result of her experience, she is now mentoring pre-law school students through her membership in the Brooklyn Law School chapter of Black Allied Law Students Association (BALSA).

As part of her application, Ms. Cummings wrote an essay discussing the lack of women—especially women of color—as law firm partners. As she explained, women of color need a strong sense of confidence, believing that



Janae Cummings

they will thrive in law school and in practice. In order to attain that confidence, she says, young women of color need to see similarly situated students and practitioners who realized success.

Each year, the chosen Fellow works full-time within the Commercial Division of the New York Supreme Court, New York County, for ten weeks during the summer break. This position is valued at \$6,000, and subsidized through the generosity of donors to the New York Bar Foundation. The purpose of the fellowship is to create a network and forge relationships that will foster greater diversity among commercial and federal litigators throughout the State of New York.

Since spending last summer in chambers, Ms. Cummings has gone on to intern with the law departments of the Brooklyn Borough President's Office, Viacom, and Thomson Reuters. She is considering practicing in the area of labor and employment.

Beth Gazes is a part-time evening student and Juris Doctorate candidate of Touro Law Center in Central Islip, NY. This is her second year as a member of the Commercial and Federal Litigation Publications Committee.

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Be Prepared to Upgrade to Commercial Division 2.0—at Least in Westchester County

By Matthew D. Donovan

The Commercial Division is world-renowned for its efficiency and innovativeness when it comes to proposing and adopting new and amended rules of practice. Indeed, as recently as March of this year, the Advisory Council proposed amendments to existing Commercial Division Rules 9, 11, and 17 that would reinforce courts' existing authority under the CPLR to direct pretrial evidentiary hearings, encourage parties to consider technology-assisted document review and coding in discovery, and substitute word limits for page limits in motion papers.

But this isn't the only area in which the Commercial Division is on the cutting edge of innovation. On June 21, members of the Commercial and Federal Litigation Section's Committee on the Commercial Division, along with Westchester County Commercial Division Justices Linda S. Jamieson and Gretchen Walsh, presented a CLE program entitled "21st Century Courtroom: Using Integrated Courtroom Technology in the Commercial Division." The program featured a mock traverse hearing during which the participating judges, lawyers, and witnesses showcased in "how-to" fashion the newly implemented Integrated Courtroom Technology (ICT) in the Commercial Division courtroom, Courtroom 105, located in the Westchester County Courthouse Annex in White Plains.

As described in a recent New York State Bar Association *Journal* article co-written by former Westchester County Commercial Division Justice Alan D. Scheinkman, in January of this year, the Westchester Commercial Division became the first civil court in the state to implement ICT, "enabling all courtroom participants—judges, clerks, attorneys, litigants, witnesses, jurors, and members of the public—to take fullest advantage of modern evidence presentation systems." The stated goal of the ICT initiative "was to obtain the latest and best courtroom technology and to tailor it to fit the needs of the Commercial Division" (see Hon. Alan D. Scheinkman and Sheng Guo, *Tech in the Courtroom*, 90 NYSBA *Journal* 3 (March/April 2018)).

Some of the hi-tech features showcased during the June 21 mock hearing included:

- High definition monitors for the bench, counsel tables, witnesses, jurors, and the gallery, which are controlled by the judge or clerk in terms of what is displayed, when, and on which monitors;
- An "ELMO" document camera, fixed at the podium, which can be used to display evidence on all courtroom monitors;



Matthew D. Donovan

- Touch-screen witness monitors, on which witnesses can annotate evidence using their finger or a stylus. Annotated evidence can then be captured, saved, and printed for consideration by the judge and/or jury;
- Courtroom cameras, one facing the bench and another facing counsel tables and the gallery, can be utilized for remote appearances via Skype or other video-conferencing technologies;
- Enhanced audio-conferencing integrated into the courtroom's sound system, complete with a "white noise" function allowing for confidential, side-bar communications between attorney and client or attorney and judge;
- Real-time transcription of court proceedings, which can be displayed on all courtroom monitors; and
- Charging stations available at counsel tables with standard AC outlets and wireless charging for compatible smartphones and tablets.

Notably, Justice Jamieson made a point of advising at the outset of the program that counsel need only bring with them to court their laptop or tablet, a USB flash drive, and their own HDMI cable, but that they should be sure to schedule with court personnel in advance of the proceedings a dry-run and equipment test to ensure compatibility and that everything is in working order. In short, gone are the days of hauling in banker's boxes of trial exhibits and binders duplicated multiple times over for the judge, witnesses, and opposing counsel—at least in the Westchester County Commercial Division.

** Nota bene*—To all current and future Westchester County Commercial Division practitioners: If you missed the June program but want to familiarize yourself with the ICT features in Courtroom 105 in preparation for appearing before Justices Jamieson or Walsh, fear not. The Commercial and Federal Litigation Section's Committee on Continuing Legal Education was on hand to film the presentation, which will be spliced and packaged for distribution on the NYSBA's "CLE Online and On-Demand" site later this year.

Matthew D. Donovan is a commercial litigation attorney and a partner in Farrell Fritz, P.C.

Kings County's New Pre-Note of Issue Conference

By Christie McGuinness

The filing of the Note of Issue is a significant point in a case's procedural posture. It signifies that the case is nearing its standards and goals date, discovery is almost complete in the case, and the case is approaching its readiness to be tried. A Plaintiff is required to file a Note of Issue by a date provided by the court, and that filing triggers two significant deadlines. A party wishing to vacate the Note of Issue has 20 days to vacate the Note of Issue upon its filing, and the filing of the Note of Issue triggers a deadline to move for summary judgment. This article will focus on the Note of Issue nuisances in Kings County, as Kings County has recently implemented a new Pre-Note of Issue conference.

"In Kings County, the Pre-Note of Issue Conference is a very useful conference that allows parties to come together to resolve discovery issues without a party making a motion."

In Kings County, a party must make their summary judgment motion within 60 days after the filing of the Note of Issue or 120 days after the filing of the Note of Issue in cases where the City of New York is represented by Corporation Counsel. Under this backdrop comes the significance of the new Pre-Note of Issue conference in Kings County and the considerations for the litigant following the filing of the Note of Issue.

Recently, Kings County implemented a new Pre-Note of Issue Conference Part. This conference is scheduled by the court prior to the date for Plaintiff to file the Note of Issue. This is an extremely useful conference, as the court has added this additional conference for the parties to come together to discuss outstanding discovery. In that aspect, the conference acts much like a compliance conference where the parties can enter into a discovery order outlining the remaining discovery. However, what is extremely significant about these pre-Note of Issue conferences is that the Court will also set a date for the filing of the Note of Issue, and those dates are not being extended in Kings County. Therefore, where the litigants enter into an order following this conference that requires the Note of Issue to be filed shortly thereafter, typically insufficient time is left to complete the outstanding discovery.

So, the question remains, what is a litigant to do? If significant discovery remains outstanding, in particular depositions and paper discovery, then a party should typically move to vacate the Note of Issue, as that is the sure way to protect the parties' rights. After the time

has passed to vacate the Note of Issue, a party isn't entitled to post-Note of Issue discovery without demonstrating "unusual or unanticipated circumstances" (see 22 N.Y.C.R.R. § 202.21(d)), which is a high burden to meet. Moreover, if the discovery, such as a deposition, is needed in order for a party to move for summary judgment, then timely vacating the Note of Issue is extremely important because it is the best way to ensure a party's ability to take that deposition. Recently, what has been occurring in Kings County is that following the motion to vacate the Note of Issue, the court is not vacating the Note of Issue but instead extending time for parties to move for summary judgment. If a litigant finds that his or her case is not one in which he or she may be able to move for summary judgment without additional discovery, it is unclear what extending the time for summary judgment will accomplish. There will already be an order, pre-Note of Issue, outlining all outstanding discovery, and the court does not seem inclined to vacate the Note of Issue or extend the time for Plaintiff to file its Note of Issue. As a party can move to compel the discovery or move to dismiss for failure to comply, it appears that a party will be able to obtain the necessary discovery through those means.

This situation appears to be unique to Kings County, and parties should always consult the rules of their particular county. In Kings County, the Pre-Note of Issue Conference is a very useful conference that allows parties to come together to resolve discovery issues without a party making a motion. Parties will need to evaluate what discovery is outstanding, whether that discovery is necessary for a summary judgment motion, whether a summary judgment motion is appropriate in their case, and the time frame by which they have to move for summary judgment, bearing in mind that the time to file the Note of Issue is not being extended at that pre-Note of Issue conference.

Christie McGuinness is an associate at London Fischer, LLP, and a 2017 graduate of Brooklyn Law School.



Christie McGuinness



Commercial and Federal Litigation Section Spring Meeting









CPLR Amendments: 2018 Legislative Session


(2018 N.Y. Laws ch. 1-120)

CPLR §	Chapter (Part) (Subpart, §)	Change	Eff. Date
203(g)(2)	1(1)	Replaces exception from general rule on computing time from discovery of facts for limitations purposes in malpractice actions based on negligent failure to diagnose cancer	1/31/18 with provisos
214-a	1(2)	Amends proviso for actions based on negligent failure to diagnose cancer	1/31/18 with provisos
3408(a)	58(HH)(2)	Adds exception for certain home loans secured by reverse mortgages	Same date as 2016 NY Laws ch. 73, Part Q, § 3
5003-b	57(KK) (B, 2)	Add new section on non-disclosure agreements	7/11/18
7515	57(KK) (B, 1)	Adds new section prohibiting certain mandatory arbitration clauses	7/11/18

Notes: The expiration of the revival of Agent Orange actions was extended from June 16, 2018, to June 16, 2020. 2018 N.Y. Laws ch. 82. See CPLR 214-b.

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2018 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's N.Y. Orders 1-26)

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
202.70(g), Rule 11-e(f)	Sup.	Adds new provision on review of electronically stored information (ESI) Link: http://nycourts.gov/rules/comments/orders/AO-242-18.pdf	10/1/18
202.70(g), Rule 11-g(c)	Sup.	Adds (1) new provision on privilege claw-back and (2) Appendix E (Commercial Division Privilege Clawback Provision) Link: http://nycourts.gov/rules/trialcourts/AO-150-18.pdf	7/1/18
500.12(f)	Ct. App.	Adds prohibition on reply briefs by amicus curiae Link: http://nycourts.gov/ctapps/news/nottobar/Nottobar042518.pdf	5/16/18
500.23(a)(4)	Ct. App.	Adds requirement for inclusion of statement of identity of movant and its interests and statement indicating contributions of a party's counsel to amicus curiae brief or any person's monetary contribution for brief Link: http://nycourts.gov/ctapps/news/nottobar/Nottobar042518.pdf	5/16/18
Part 600	1st Dep't	Repeals and replaces Part 600 with new Rules of Practice supplementing the new uniform Practice Rules of the Appellate Division (Part 1250) Link: http://nycourts.gov/courts/ad1/NewLocalRules600.pdf	9/17/18
670.5(e)	2nd Dep't	Adds additional requirements for orders to show cause for temporary stay or other interim relief Link: http://www.nycourts.gov/courts/ad2/pdf/ADM%2020180308%20-%20Amending%20Rules.pdf	3/8/18
670.20(i), (j)	2nd Dep't	Adds provision permitting, prior to oral argument/submission, the submission of citations of authority not previously cited in party's brief, but without additional argument Link: http://www.nycourts.gov/courts/ad2/pdf/ADM%2020180308%20-%20Amending%20Rules.pdf	3/8/18
Part 670	2nd Dep't	Repeals and replaces Part 600 with new Rules of Practice supplementing the new uniform Practice Rules of the Appellate Division (Part 1250) Link: http://nycourts.gov/courts/ad2/pdf/Local%20Rules.pdf	9/17/18
Part 850	3rd Dep't	Repeals and replaces Part 800 with new Part 850, Rules of Practice supplementing the new uniform Practice Rules of the Appellate Division (Part 1250) Link: http://www.nycourts.gov/ad3/Rules%20of%20Practice%20Part%20850.pdf	9/17/18
Part 1000	4th Dep't	Repeals and replaces Part 1000 with new Rules of Practice supplementing the new uniform Practice Rules of the Appellate Division (Part 1250) Link: https://www.nycourts.gov/courts/ad4/Clerk/Part1000-LocalPracticeRules.pdf	9/17/18
1245.1-1245.10	1st-4th Dep'ts	Adds Electronic Filing Rules of the Appellate Division, including formatting requirements for documents filed electronically (Attachment A) Link: http://nycourts.gov/rules/comments/orders/ADEfilingRules-Approved-Announced-02-06-18.pdf	1/1/18
1250.1-1250.17	1st-4th Dep'ts	Adds uniform Practice Rules of the Appellate Division, as revised, applicable to all four departments, including, inter alia, rules regulating: motion practice; methods of perfecting cases; reproduction of records, appendices, and briefs; form and content of records and appendices; exhibits; form and content of briefs; time, number, and manner of filing of records, appendices, and briefs; dismissal of appeals; transferred proceedings; original special proceedings; calendar preference and notice; oral argument; post-argument submissions; decisions, orders, and judgments; costs; remittitur; motions for reargument or leave to appeal to Court of Appeals; court clerk fees Link: http://nycourts.gov/rules/comments/orders/Part1250-PracticeRules-Revised-6-29-18A.pdf	9/17/18

Proposed Rules of Interest to Civil Litigators

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

Note: The comment periods for all of the following proposed rules except for the first have expired.

June 22, 2018: Request for Public Comment on a Proposed Amendment of Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), Relating to the Selection of Mediators

Description of proposal: <http://nycourts.gov/rules/comments/PDF/CommDivMediation.pdf>

Email to: rulecomments@nycourts.gov by August 20, 2018

March 14, 2018: Request for Public Comment on Proposed Amendment of Rule 17 of the Rules of the Commercial Division (22 NYCRR §202.71[g], Rule 17), Relating to Word Limits in Papers Filed With the Court

Description of proposal: <http://nycourts.gov/rules/comments/PDF/CDRule17WordLimitsA.pdf>

March 12, 2018: Proposed New Rule 9-a of the Rules of the Commercial Division (22 NYCRR §202.71[g], Rule 9-a), Relating to the Encouragement of Use of CPLR Provisions Permitting Immediate Trial or Pretrial Evidentiary Hearing on a Material Issue of Fact

Description of proposal: <http://nycourts.gov/rules/comments/PDF/CDRule9-a.pdf>

April 10, 2017: Proposal to Amend E-filing Rules to Require an Opportunity to Correct a Failure to Provide Working Copies of Motion Papers

Description of proposal: <http://nycourts.gov/rules/comments/PDF/Efile-WorkingCopiesA.pdf>

October 12, 2016: Proposed Amendment to Commercial Division Rules—Sealing of Court Records

Description of proposal: <http://nycourts.gov/rules/comments/PDF/RequestPublicComment-Commercial%20Division-Sealing.pdf>

October 6, 2016: Proposed Amendment to Commercial Division Rules—Hyperlinking

Description of proposal: <http://nycourts.gov/rules/comments/PDF/RPC-Commercial-Division-Hyperlinking.pdf>

September 16, 2016: Proposed Amendments to the Rules Governing Electronic Filing

Description of proposal: <http://nycourts.gov/rules/comments/PDF/Request-Public-Comment-E-Filing.pdf>

Public Comments: <http://nycourts.gov/rules/comments/PDF/received/ElectronicFilingRules-Comment.pdf>

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Committees serve as the laboratory for much of the Section's greatest work: reports, comments on pending legislation or rule changes, continuing education of the bench and bar, and receptions with leading figures in a practice area or in the judiciary.

Commercial and Federal Litigation Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

- Antitrust (FED1300)
- Appellate Practice (FED1400)
- Alternative Dispute Resolution (FED1200)
- Civil Practice Law and Rules (FED1900)
- Civil Prosecution (FED2000)
- Commercial Division (FED5200)
- Continuing Legal Education (FED1020)
- Corporate Litigation Counsel (FED6600)
- Creditors' Rights and Bankruptcy Litigation (FED2700)
- Diversity and Inclusion (FED6100)
- Electronic Discovery (FED6400)
- Employment and Labor Relations (FED3000)
- Ethics and Professionalism (FED4300)
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- Federal Procedure (FED3300)
- Hedge Fund and Capital Markets Litigation (FED7600)
- International Litigation (FED3600)
- Internet and Cyber Security (FED6900)
- Legislative and Judicial Initiatives (FED7400)
- Securities Litigation and Arbitration (FED4600)
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Upcoming Commercial and Federal Litigation Events

Privacy Law: Developments Impacting Social Media Presence Management for Businesses

Wednesday, September 26th | 12:00 p.m. - 1:30 p.m. | Webinar

Imagining the Internet of Things: Regulatory and Legal Challenges to Integrating our Society

Tuesday, October 30th | 9:00 a.m. – 12:00 p.m. | Live Program | Dentons | 1221 Sixth Avenue | NYC

“Out With the Old”: How to Properly Dispose of Unnecessary, Obsolete, Unreliable or Inaccessible Electronic Data

Tuesday, October 30th | 1:00 p.m. – 4:00 p.m. | Live Program | Dentons | 1221 Sixth Avenue | NYC

Legal Ethics in the Digital Age

Thursday, November 1st | 9:00 a.m. – 1:00 p.m. | Live Program | Dentons | 1221 Sixth Avenue | NYC

The GDPR Comes to America

Thursday, November 1st | 2:00 p.m. – 4:00 p.m. | Live Program | Dentons | 1221 Sixth Avenue | NYC

How to Deal With New Technology - Practical Guidance for Companies and their Lawyers

Friday, November 2nd | 9:00 a.m. – 1:00 p.m. | Live Program | Dentons | 1221 Sixth Avenue | NYC

The “Electronic Employee”: Challenges Posed by Social Media and Other Electronic Data

Friday, November 2nd | 1:00 p.m. – 4:00 p.m. | Live Program | Dentons | 1221 Sixth Avenue | NYC

NYLitigator Invites Submissions

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MCLE credit may also be earned for legal-based writing directed to an attorney audience upon application to the CLE Board.

If you have written an article and would like to have it considered for publication in the *NYLitigator*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information to its Editor:

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Authors' Guidelines are available under the “Article Submission” tab on the Section’s Web site: www.nysba.org/NYLitigator.

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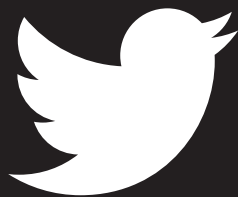
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