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Commercial and Federal Litigation Section Newsletter

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

Message from the Chair

Mentoring in our profession is certainly alive, but is it really well?

"Tell me and I forget, teach me and I may remember, involve me and I learn."

—Benjamin Franklin

James M. Wicks

There has been much discussion and debate about "mentoring" young or junior lawyers: what it is, what it means, and how best to do it. Many law firms and bar associations—including our Section—have developed and implemented successful formal mentoring programs. Indeed, the ABA maintains a state-by-state list of mentoring programs that can be found at http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/mentoring.html. Some courts, such as the Illinois Supreme Court, through its Commission on Professionalism, have even developed detailed guidelines, with forms outlining best practices to mentoring. *See Mentoring Plan for New Lawyers and Mentors* (Ill. Sup. Ct. rev. ed. 2014); *see also Lawyer to Lawyer Mentoring Program* (Sup. Ct. Ohio).

With such focus on *formal* mentoring programs that often assign pairings and dictate what should be done, we should not lose sight of the critical importance of one-on-one informal mentoring. That is, seasoned lawyers connecting with junior lawyers—teaching, guiding, and developing our next generation of practitioners outside of formal programs.

The benefits redound to all.

Mentoring is far more than strict compliance with Rule 5.1 of the Rules of Professional Conduct mandating that a lawyer who has direct supervisory authority "adequately supervise the work of the other lawyer." That's the floor, so to speak.

Working one-on-one with a junior lawyer means not only developing a "Socrates-Plato"-type relationship

Inside

providing guidance and wisdom, but also offering professional opportunities and helping to develop the mentee's ability to make sound judgment calls and refine his or her ethical compass.

Mentors benefit, too. Working with junior lawyers keeps one "current" and helps the firm or other organization by personalizing training and continued grooming of its single most important resource: its next generation of lawyers.

A recent blog made an interesting observation about senior lawyers' possible preoccupation with the impact that mentoring might have on one's own practice, and thus urged junior lawyers to "demand it." Ashby Jones, *If Law Firm Mentoring Is Gone, What's a Young Lawyer to Do?* WSJ Business Law Blog (July 26, 2010).[1] In other words, junior lawyers should look to "hitch their wagon" to a successful seasoned lawyer to learn the trade. Athletes do it, as do other professionals. Lawyers should, too.

Our Section continues to encourage young lawyers to join our Section, get active, and develop relationships with the more seasoned practitioners. We are working with the Young Lawyers Section to involve their members in our projects. Encouraging young lawyers to engage actively in bar associations is only one aspect of mentoring, albeit an important one. But we, as a bar, can do more by trying to identify and work with a junior lawyer to develop him or her as a professional. It helps all involved, including our profession as a whole.

James M. Wicks

Endnote

1. Available at http://blogs.wsj.com/law/2010/07/26/if-law-firm-mentoring-is-gone-whats-a-young-lawyer-to-do/. The author writes, "Associates, you've got to demand it…It's like this: You've got a choice. You can either sit and bemoan the lack of formal (or easy) mentoring opportunities, or you can knock off the self-pity and go grab it for yourself."

The Commercial and Federal Litigation Section Makes Stop in Jamaica to Discuss Impact of New Commercial Division Rules on Queens County Bar

By Matthew D. Donovan

The Commercial and Federal Litigation Section of the New York State Bar Association continued its workshop tour concerning the new Commercial Division Rules at the Queens County Bar Association in Jamaica, New York, on June 30, 2015. Program Chairs Samuel B. Freed of Farrell Fritz, P.C. and John A. Mitchell of Mitchell & Incantalupo organized the panel discussion. Keynote speaker, Hon. Marguerite A. Grays of the Queens County Commercial Division, was introduced by Section Chair, James M. Wicks of Farrell Fritz, P.C. Matthew D. Donovan also of Farrell Fritz, P.C., moderated the discussion. Approximately 35 Queens County practitioners were in attendance.

Panelists: Hon. Marguerite A. Grays, Presiding Justice Commercial Division Queens County, and Matthew D. Donovan, Esq., of Farrell Fritz, P.C.

As with similar programs sponsored by the Nassau, Suffolk, and Westchester County Bar Associations, the purpose of the Queens County panel discussion was twofold: to provide an opportunity to educate practitioners about the new Commercial Division Rules, as well as provide some insight into best practices in the Queens County Commercial Division. And who better to educate and provide insight to Queens County practitioners than the Presiding Justice of the Commercial Division herself, Justice Grays?

Justice Grays opened with some brief remarks concerning the history of the Commercial Division, particularly in Queens County, followed by a comprehensive overview of the new and proposed Commercial Division Rules. Among the new rules singled out for discussion by the moderator and Justice Grays were those concerning mandatory mediation and the resolution of discovery disputes.

An outspoken advocate of the Queens County Commercial Division's ADR Program, Justice Grays encouraged practitioners to make use of mediation early and often, stating that she frequently directs newly assigned cases on her docket to mandatory mediation. She praised the Mandatory Mediation Pilot Program in New York County, by which every fifth case filed in the Commercial Division automatically is assigned to mandatory mediation, and made a point of stating that she would be receptive to an expansion of the program in Queens County. In response to the moderator's questions concerning the unfortunate tendency of some practitioners to exploit the mediation process as a litigation tactic—*e.g.*, as an opportunity for free discovery and stalling—Justice Grays pointed to the new Preamble to the Rules, which makes reference to the "frustration" all too often expressed by clients and attorneys alike "with adversaries who engage in dilatory tactics" and highlights the authority of the court to impose sanctions "as is warranted by the circumstances."

Praising the efforts of her esteemed law secretary, Nicole McGregor, who also was on hand for the panel discussion, Justice Grays noted that the new rules not only have behind them a spirit of efficiency and cost-effectiveness, but that they were designed to make good use of court resources as well. New Commercial Division Rule 14, for example, provides for the resolution of discovery disputes by way of limited letter briefing and teleconferencing with the judges' law secretaries so as to avoid the costs and delays associated with unnecessary and extensive filings in connection with motions to compel or for protective orders. Justice Grays remarked that Ms. McGregor's assistance in this regard has been indispensable in providing much-needed relief to an already overburdened motion docket. Rule 14 also has had the effect of allowing Justice Grays to focus on some of the more substantive disputes underlying her overall caseload.

In short, the Section's June 30 stop in Queens was both successful and productive. Practitioners in attendance no doubt left the program better versed on the new Commercial Division Rules in general and better equipped to navigate the particularities of their respective practices in the Queens County Commercial Division.

Matthew D. Donovan is Counsel to Farrell Fritz, P.C.

Westchester County Commercial Division Justices Discuss Amendments to Commercial Division Rules

By Courtney R. Rockett

On June 30, 2015, the New York State Bar Association's Commercial and Federal Litigation Section, the Westchester County Bar Association, and the Westchester Women's Bar Association sponsored a "Bench and Bar Forum" with the Westchester County Commercial Division bench regarding recent and proposed changes to the N.Y. Commercial Division Rules. Justice Linda S. Jamieson, Justice Alan D. Scheinkman, and Justice Scheinkman's court attorney Gretchen Walsh were the featured panelists. Patrick J. Rohan and P. Daniel Hollis, III moderated the event, which took place at the law offices of Boies, Schiller & Flexner LLP in Armonk, New York.

(L to r) Gretchen Walsh, Law Secretary to Justice Scheinkman; Chair-Elect Mark A. Berman; Justice Linda S. Jamieson; Justice Alan D. Scheinkman; Claire Gutekunst, President-elect, New York State Bar Association

The conversation opened with reflection upon potential or proposed amendments to the N.Y. Commercial Division Rules. Panelists considered whether Westchester County's Commercial Division monetary threshold (currently $100,000) should be increased, in line with New York and Nassau Counties' recent respective threshold increases to $500,000 and $200,000, and opined that the $100,000 threshold should remain. The panel also opined on the application of monetary thresholds to various applications (to stay or compel arbitration; to confirm or disaffirm awards) and on issues of case eligibility definition in the Division. Considerations of judicial efficiency and the Commercial Division's objectives played a prominent role throughout the discussion.

Questions moved to the Advisory Council's new proposed rule concerning entity depositions patterned on Federal Rule of Civil Procedure 30(b)(6). The proposed amendment would permit the requesting party to specify topics and would require the disclosing party to designate one or more individuals to testify in response on its behalf. The judges were hopeful that the new rule would reduce occurrences of a designated deponent lacking sufficient knowledge of relevant issues. Also discussed was the viability of designating deponents no longer affiliated with the entity and the reality that in many cases former employees are the most knowledgeable witnesses.

The panel concluded with commentary on an array of recent amendments to the New York Commercial Division Rules and the ways in which these changes might contribute to running an efficient docket. For example, in 2013 Rule 13 was amended to provide for an expert discovery phase at the conclusion of fact discovery, including the exchange of expert reports and depositions of testifying experts. Panelists felt that further clarification of the rule would be useful in guiding attorneys who have frequently sought advice from the court. Audience members took part in a conversation regarding expert testimony, its relevance for summary judgment motions, and whether it should be exchanged prior to a dispositive motion. Rule 8(a)'s amendment, effective September 2014, requires counsel to discuss in advance of the preliminary or compliance conference any voluntary or informal exchange of information that may aid in early resolution of discovery disputes or even case settlement. The judges were encouraged that the amendment incentivizes attorneys to cooperate to shorten the discovery phase. None of the justices has yet had experience with new Rule 9 (effective June 2014), which allows parties to consent to an accelerated adjudication, with streamlined discovery, a 9-month limit on pretrial proceedings, and waiver of jury trial and interlocutory appeals. Justice Scheinkman emphasized that having avenues for streamlining commercial disputes is imperative to New York's reception as a suitable forum by foreign parties, who tend not to view New York as a rocket docket.

The judges had varying preferences and opinions regarding topics like letter briefs addressing discovery disputes, categorical as opposed to document-by-document privilege logs, and staggered time slots for court appearances. But both agreed, in discussing the context of new Rule 11-e (effective April 2015, which requires specificity when objecting to discovery requests), that document objections are too boilerplate and that the committee should consider rules limiting them.

The panel followed a cocktail hour sponsored by the New York State Bar Association's Commercial and Federal Litigation Section.

Courtney R. Rockett is a partner of the firm of Boies, Schiller & Flexner LLP.

Onondaga County Bench-Bar Forum

By Jonathan Fellows

On October 6, 2015, the New York State Bar Association's Commercial and Federal Litigation Section presented the "Onondaga County Commercial Division Bench-Bar Forum." The CLE event took place at the Conference Center at Bond, Schoeneck & King, PLLC's Syracuse office. Over sixty practitioners from Central New York attended the event, filling the room to capacity.

(L to r): Jonathan B. Fellows, Member, Bond Schoeneck & King, PLLC; Hon. Deborah H. Karalunas, Presiding Justice of the Supreme Court, Commercial Division, Onondaga County; Hon. Donald A. Greenwood, Justice of the Supreme Court, Commercial Division, Onondaga County

Both of Onondaga County's Commercial Division Justices, Deborah H. Karalunas and Donald A. Greenwood, participated in the Forum. Jonathan B. Fellows, of Bond, Schoeneck & King, who is the Section's District Leader for the Commercial Division in the Fifth Judicial District, organized the event and served as Moderator. Mitchell J. Katz, Section Vice-Chair, and Teresa Bennett, Co-Chair of the Section's Committee on the Commercial Division, both of Menter, Rudin & Trivelpiece P.C., attended and helped to organize the event.

The program was one of several Bench-Bar Forums on the Commercial Division being held around the state in light of the promulgation of new rules for the Commercial Division and the 20th Anniversary of the establishment of the Commercial Division.

Onondaga County's Commercial Division is one of the ten Commercial Divisions that have been established across the state. Justice Karalunas was appointed Presiding Justice of the Commercial Division in Onondaga County in 2007. Justice Greenwood was appointed to hear cases in the Commercial Division in 2011. In addition to serving on commercial cases, Justice Greenwood handles the bulk of Onondaga County's tax certiorari cases. This was the second CLE this year organized by the Section in which Justices Karalunas and Greenwood served as panelists. In March they were panelists in the Section's "Social Media Legal Ethics: Litigating Commercial Cases and Marketing Your Practice," which Jonathan Fellows also chaired and in which Section Chair-Elect Mark Berman participated as a panelist.

Jonathan Fellows opened the Forum with a history of the Commercial Division and a discussion of the vision of Chief Judge Kaye and Chief Judge Lippman to create and maintain a world class forum for the adjudication of commercial disputes in New York Supreme Court. He then outlined the new rules for the Commercial Division, including the new language in the preamble to the Commercial Division rules regarding proportionality in discovery, which the Chief Administrative Judge had announced the day before the event.

Justice Karalunas then led the practitioners through her new Preliminary Conference Stipulation and Order for commercial cases, which has been drafted to implement the new rules, and discussed the New York City Bar Association's model Stipulation and Order for the Production and Exchange of Confidential Information, which she has referenced in her form Stipulation. Both Justices asked the practitioners for input and suggestions on the form Stipulation.

The Forum then proceeded with questions to the Justices from the audience, as well as questions from the Justices to the attorneys. In addition to the new rules, the Forum discussed whether a mediation program for commercial cases should be established in Onondaga County, expert witness discovery, and the preferences of chambers for resolving discovery disputes. The Forum was well received by both the Bench and the Bar, and the Section greatly appreciated the time that Justices Karalunas and Greenwood devoted to the Forum.

Jonathan Fellows is a member of Bond Schoeneck & King, PLLC.

Preparing for Successful Mediations: A Guide for Litigators

By Richard S. Weil

Litigators know how to prepare for trial. Preparing for mediation is similar with one key difference: the goal in trial is to win, while the goal in mediation is getting the other side to say "yes." So how you present your case to the opponent's attorney and decision-maker is critical. Here are some suggestions you might find helpful.

Preparing Yourself

- Learn the names of the people who will attend the mediation, including the mediator, and find out something about them.
- Review the file to gain command of the facts and relevant law. It's embarrassing to your client and obvious to the adversary when you fumble.
- Analyze the strengths, weaknesses, and risks of your case and strategize how you will address them.
- Analyze the strengths, weaknesses, and risks of the opponent's case and strategize how you will address them.
- Decide who will attend the mediation.
  - Ideally, the ultimate decision-maker: the person with authority to bind a party, who has the ability and clout to make an independent decision to settle and to understand and evaluate the case as it develops during mediation. If that person cannot be present, the person who attends should have access to and the respect of the person who will make the decision. The decision-maker should be available by phone.
  - Fact witnesses: They are generally unnecessary. Although facts are discussed in mediation, it is not a fact-finding process. The presence of fact witnesses may lead to counter-productive efforts to determine "the truth," and persons involved in the dispute may add facts but be so intent on justifying their actions that resolution is blocked.
  - Other lawyers: the fewer the better.
  - Experts: they are expensive and their presence is generally not essential to settle a case. If one side brings an expert, so will the other, and they will probably disagree. Use their reports, however
- Select the documents to bring: key factual documents, demonstrative exhibits, summaries, and analyses of potential damages. In addition, if you have the case file on your computer, bring the computer so you can access additional documents if needed.
- Meet with your client to develop your strategy and goals.
- Prepare your mediation statement. Many litigators prefer to send their statements only to the mediator and not to the opposing counsel. They are missing a golden opportunity. Since the goal in mediation is getting the other side to say "yes," your most important audience is the opponent's attorney and decision-maker. By outlining the strengths of your case and adopting a cooperative tone, you are much more likely to achieve an acceptable outcome. Exchanging mediation statements is especially helpful when the opponent's decision-maker will not attend the mediation, as is often the case with large companies, government entities, and insurance carriers. If there is information you do not wish to share with the opponent, just put it in a separate statement sent only to the mediator.
- Prepare the content and tone of your opening statement. If there are going to be opening statements (a decision that should be made in advance jointly by counsel and the mediator), they should be tailored to present your case and your client's interests in the best possible light without antagonizing your opponent. Attorneys intent on putting on a show for their clients or trying to intimidate the opponent do not advance their client's interest in settlement.

Preparing Your Client

Preparing clients is important, especially when they played a key role in the case, and their testimony, demeanor, credibility, and level of interest in settling will be gauged by the opponent.

- Explain the process, including the mediator's role, caucuses, and confidentiality. Explain how mediation differs from litigation, with which the client may be familiar from experience or television.
- Explain what the client should expect:
  - The adversary's personal attacks and belittling of his/her case.
  - The mediator acting as devil's advocate, pointing our weaknesses in your case.
  - The presentation of new facts or new ways of seeing facts that affect your perception of the case.
  - Disappointment with the other side's initial demand or offer.

- Impasse, and the mediator's techniques for breaking it.
- Prepare for a long day. Bring reading material and snacks.

- Spend time with your client to understand her real concerns, goals, wants, needs, and interests. Telling the mediator about your client's concerns may help the mediator suggest a solution.
- Discuss the strengths and weaknesses of your case, both to give the client a realistic picture and to prevent confusion and alarm when the mediator or opposing counsel brings them up.
- Decide whether and when the client will speak. Some lawyers instruct their clients not to speak in joint session, afraid they might damage the case. But giving the client an opportunity to speak, whether in joint session or caucus, provides them with "a day in court," a chance to tell their story as well as to "vent." Letting the client speak may increase the chances of success by giving him or her a role in the process. In some cases, it is especially effective to let the client apologize or acknowledge how the other person was affected by the client's actions.
- Analyze possible remedies, including damages and non-economic elements, such as transfer to another job, time payments, or a joint press release.
- Set your initial offer or demand. It will affect your opponent's perception of your good faith and willingness to settle and may set a starting point that will steer the negotiation. But don't set a bottom line. Parties and counsel must be flexible in responding to new information, positions, and arguments that arise during the mediation and to change a point of view if contrary facts and explanations appear.
- Be sure the client is focused on an acceptable resolution rather than an ideal outcome.
- Explain the risks and costs of litigation (and possibly collection) and the benefits of settling, including the fact that 90-95% of civil cases settle eventually.
- Be prepared to stay until the case is settled or until one or both parties or the mediator says impasse has been reached for the moment.
- Explain that mediation may have benefits even if it does not result in immediate settlement. It may help you understand the viewpoint, passion, and determination of the other side, give you the opinion of a neutral on the merits of your case, and keep channels open for future settlement discussions.

Richard S. Weil mediates commercial and employment cases in his private practice, for federal and state courts in New York and New Jersey and for AAA and CPR. His articles about mediation have been published in the ABA *Dispute Resolution Journal*, the *New York Law Journal*, and CPR's magazine *Alternatives*. See weilmediation.com for more information.

The Section's District Leaders

County (District)	District Leader	Firm
Albany (3rd)	Jim Potter	Hinman Straub P.C.
Erie (8th)	Sheldon Smith	Nixon Peabody LLP
Kings (2nd)	Richard Klass	Richard Klass, Esq.
Nassau/Suffolk (10th)	Laurel Kretzing	Jaspan Schlesinger, LLP
Onondaga (5th)	Jonathan Fellows	Bond Schoeneck & King PLLC
Monroe (7th)	Jeff Harradine	Ward Greenberg Heller & Reidy LLP
New York (1st)	Joseph Drayton	Cooley LLP
Queens (11th)	John Mitchell	Mitchell & Incantalupo
Queens (11th)	Samuel Freed	Farrell Fritz, P.C.
Westchester (9th)	Courtney Rockett Patrick Rohan	Boies, Schiller & Flexner LLP

NYLitigator Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article published in the *NYLitigator* is a great way to get your name out in the legal community and advertise your knowledge. Our authors are respected statewide for their legal expertise in such areas as ADR, settlements, depositions, discovery, and corporate liability.

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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CPLR Amendments: 2015 Legislative Session

(2015 N.Y. Laws ch. 1-516)

CPLR §	Chapter (Part) (Subpart, §)	Change	Eff. Date
212(e)	368(31)	Adds a new subdivision (e) providing a ten-year statute of limitations and a tolling period for certain actions brought by victims of sex trafficking, compelling prostitution, or labor trafficking	1/19/16
1101(f)	55(B)(16)	Extends expiration of CPLR 1101(f) until Sept. 1, 2017	4/13/15
Art. 21-A	237(2)	Adds a new Article 21-A regulating filing of papers in courts by fax and electronic means, including § 2110 (definitions), § 2111 (filing of papers in trial courts by fax and electronic means), § 2112 (filing of papers in appellate division by electronic means)	8/31/15
3016(i)	76(2)	Adds provision on privacy of names in certain legal challenges to college/university disciplinary findings	10/5/15
8604	439	Changes the filer (Dept. of Law) and recipients (temporary president instead of majoirty leader) of the annual report	11/20/15

2015 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 1-20 of 2015)

22 NYCRR §	Court	Subject (Change)
202.6(b)	Sup.	Deletes application for default judgment in consumer credit matter pursuant to 202.27-a
202.70(g)	Sup.	Adds preamble on dilatory practices
202.70(g), Rule 8(b)	Sup.	Adds need to vary presumptive number and duration of depositions set forth in Rule 11-d as matter to be considered by counsel in regard to e-discovery issues prior to preliminary conference
202.70(g), Rule 11(c)	Sup.	Adds consideration by court of appropriateness of altering presumptive limitations on depositions set forth in Rule 11-d
202.70(g), Rule 11-d	Sup.	Adopts new rule governing limitations on depositions; amends rule to treat entity as single deposition
202.70(g), Rule 11-e	Sup.	Adds rule on response and objections to document requests
202.70(g), Rule 11-f	Sup.	Adds rule on depositions of entities and identification of matters for deposition
202.70(g), Rule 14	Sup.	Amends rule on resolution of discovery disputes
202.71	Sup.	Establishes procedure for recognition of tribal court judgments, decrees, and orders
520.2(a)	Ct. App.	Adds cross reference to 520.17
520.3(b), (c), (d), (e)	Ct. App.	Amends definition of approved law school, instructional requirements, course of study, and credit for law study in foreign country
520.6(b)	Ct. App.	Amends educational requirements for legal education in study of law in foreign country

Notes: The court rules published on the Office of Court Administration's website include up-to-date amendments to those rules: http://www.nycourts.gov/rules/trialcourts/index.shtml.

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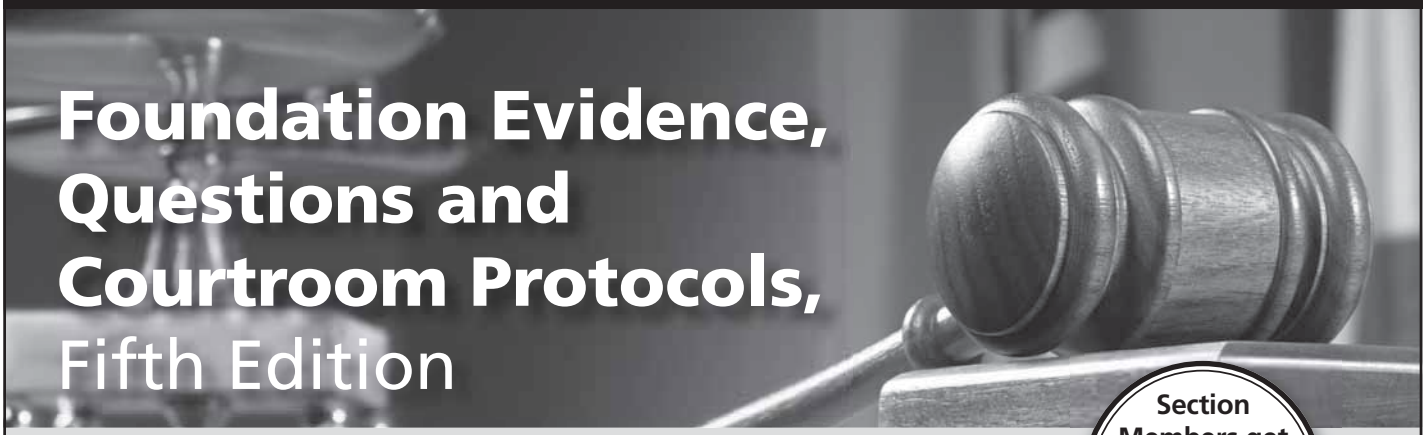

Foundation Evidence, Questions and Courtroom Protocols, Fifth Edition

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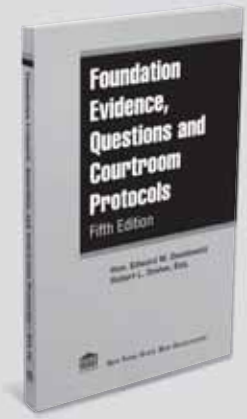

Foundation Evidence, Questions and Courtroom Protocols has long been the go-to book to help attorneys prepare the appropriate foundation testimony for the introduction of evidence and examination of witnesses.

This edition has been completely reorganized to better follow the process of a trial and the sections on Direct, Re-direct and Cross Examination have been greatly expanded, adding more sample questions and examples from the cross-examination of Hermann Goering.

Written by Hon. Edward M. Davidowitz and Robert L. Dreher, Executive Assistant District Attorney and Chief Trial Counsel at the Bronx District Attorney's Office, this edition of *Foundation Evidence* is an indispensable addition to your trial library.

Also available as a downloadable PDF.

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Notes of the Section's Executive Committee Meeting

June 9, 2015

Guest speaker, Hon. Peter Moulton, Administrative Judge for the First Judicial District, Supreme Court of the State of New York, discussed the Commercial Division and entertained questions from Executive Committee members. The Chair presented the Chair's Public Service Award to Justice Andrea Masley of the Supreme Court, New York County.

The Executive Committee approved the Commercial Division Committee *Report on the Commercial Division Advisory Council's Proposal Concerning Eligibility Criteria for Matters That May Be Heard in the Commercial Division*. The Executive Committee also discussed and approved the Social Media Committee's *2015 Updated Social Media Ethics Guidelines*, as well as the Ethics Committee's report on a proposed amendment to New York Rule of Professional Conduct 8.4 on Supervising Investigations.

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Upcoming Executive Committee Meetings

January 13 February 9	March 9 April 5	May 4 June 7

Note: All meetings will be held at the offices of Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York City.

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