NYSBA FALL/WINTER 2014 | NO. 65

Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

Message from the Chair: Trial Lawyers in Motion

Greetings to my fellow trial lawyers:

The Trial Lawyers Section had a busy schedule these past few months, and I want to take this opportunity to highlight these events for our TLS members.

The TLS Summer Meeting in Sonoma, California in late July was well-attended and a smashing success. MacArthur Place Inn and Spa, nestled in beautiful wine country was the perfect setting for our members to meet, network and relax. The program chair, Peter C. Kopff, put together a wonderful CLE program which included excellent speakers such as NYSBA President-Elect David Miranda, Hon. Lewis J. Lubell, Neil S. Kornfeld, and Professor Patrick M. Connors. In addition to the CLE and TLS meetings, the 2014 Summer Meeting included a wine tasting tour, a round of golf at the Silverado Golf Club with our Section's resident golf pro, Daniel Ecker, and an amazing dinner in a cave amidst oak wine barrels at the Benziger Winery. Thank you, Catheryn Teeter of the NYSBA, for helping to coordinate yet another successful TLS Summer Meeting. The 2015 Summer Meeting will take placee July 26-29, 2015 in Newport, Rhode Island, and I encourage you to join us.

On Saturday, October 18, 2014, our Section hosted an "open meeting" at NYU Law School's Furman Hall, followed by a CLE on trial ethics entitled "Are You Crossing the Line or Going Too Far?" The CLE, co-sponsored by the Metropolitan Black Bar Association, the Puerto Rican Bar Association, and the Trial Lawyers Section Diversity Committee, was stimulating and thought provoking. The program co-chairs, Betty Lugo and Charles J. Siegel, put together a blue-ribbon panel of speakers, including Hon. Luis A. Gonzalez (Presiding Justice, App. Div., 1st Dept.), Hon. Yvonne Lewis (Kings County Supreme Court), Hon. Francois A. Rivera (Kings County Supreme Court), Hon. George J. Silver (New York County Supreme Court), Hon. Evelyn Laporte (NYC Criminal Court), Hon. Theresa M. Ciccotto (Richmond County Civil Court), Hon. James E. d'Auguste (New York County Civil Court), Maria Matos (Chief Counsel of the Committee on Character and Fitness, App. Div. 1st Dept.), Daniel G. Ecker, Andrew S. Garson, Mark A. Longo, Cory J. Rosenbaum, and Violet E. Samuels.

The October TLS CLE session was well-attended, and the speakers were simply dynamic. It was the first CLE I have ever attended where the program ran 40 minutes past schedule—and not a single person left. I am convinced that the CLE attendees remained in their seats more out of interest in the program than any fear that they might be sanctioned on a Saturday morning in Greenwich Village by the esteemed members of the judiciary on the panel. It was a terrific CLE program, a proud moment for the Trial Lawyers Section and a credit to the co-chairs, Betty Lugo and Charlie Siegel. We are so grateful to the speakers and members of the judiciary for donating their valuable time and energy to this TLS event.

On November 1, 2014, the TLS proudly co-sponsored the Rochester Black Bar Association Gala, celebrating its 20 years, commitment to the Rochester community and the legal profession. This event, coordinated by T. Andrew

Inside

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Brown, included a keynote speech by Hon. Sheila Abdus-Salaam, Associate Judge of the New York Court of Appeals, as well as local musical talent and special presentations recognizing pioneers and leaders in the greater Rochester community.

On November 5, 2014, the TLS Diversity Committee, led by Noreen Grimmick, held a program entitled "Pointers on Courtroom Conduct for Students and Newly Admitted Attorneys" at Brooklyn Law School. The panelists included Hon. Ramon E. Reyes, Jr. (U.S. Magistrate Judge, EDNY), Hon. Joanne Quinones (Criminal Court, NYC), Cara Mia Hart, Betty Lugo, Manuel A. Romero and Cory Rosenbaum. This program follows TLS' continuous sponsorship of trial-related programs throughout New York State. In March 2013, Mark J. Moretti coordinated a similar program in Buffalo entitled "Trial Lawyers Section Pointers on Courtroom Conduct for Students and Newer Attorneys," which included such panelists as Hon. Erin M. Peradotto (App. Div. 4th Dept.) and Hon. Sharon S. Townsend (Erie County).

Looking ahead to the NYSBA Annual Meeting in late January, Charlie Siegel is working with the TICL Section to co-host a joint CLE session on the topics of products liability, evaluating and proving future damages, an update on evidence, trial attorney professional conduct and trial practice. The TLS/TICL CLE sessions are typically well-attended, and we look forward to another invigorating program in January. In addition, we hope you can join us at the TLS/TICL Annual Dinner. This Annual Dinner is another highlight for the Trial Lawyers Section—a night where lawyers can mix with the numerous members of the judiciary who attend. Information on the Annual Dinner will be forthcoming, so please plan ahead to book a seat (or a table) at this fabulous event.

In closing, I want to take this opportunity to thank all the members of the Trial Lawyers Section for allowing me to serve as your Chair this past year. It was an absolute honor, and I am so proud of all the various programs and activities our vibrant Trial Lawyers Section has been involved in. I am particularly grateful for the support and dedication of my fellow members of the TLS Executive Committee, and NYSBA staff members. This year marks my 25th year as a trial lawyer. I began trying cases as a prosecutor in Manhattan in 1989, several months before my admission to the Bar, and for the past 25 years, and I have had the honor of advocating before patient and dedicated state and federal Jurists, against worthy and capable adversaries, and to decent and hard-working juries. Along the way I have had great mentors and even greater comrades. It has been a blessed career, and I hope the next 25 years I can give back as much as I have received.

Michael Furman

A Primer on the Basic Rules and Guidelines for Defending Depositions

By Andrew S. Kowlowitz and Alex T. Paradiso

A deposition is often the single most important discovery device. Depositions provide each side the opportunity to evaluate the credibility of a witness and the merits of a case. The deposition has several practical applications: the testimony may be used in support of a motion for summary judgment, may preserve the testimony of a witness who may be unavailable for trial, and/or maybe used to impeach a witness at trial. The deposition is also often used to "lock" a party into a story, or version of events.

Although much attention is given to strategy and tactics for taking depositions, ethical and effective defense of depositions can be equally important. Moreover, a strong understanding of the rules governing a defending attorney's conduct can be equally beneficial to the questioning attorney. As most experienced practitioners are all too familiar, some defending attorneys may use excessive objections and other interruptions as a means for disrupting the questioning attorney's examination and subtly (or not so subtly) influencing the witness' testimony. Understanding the limits placed on defending attorneys will better equip those taking depositions to challenge defending attorney's objections and proceed to gather the broad discovery that they are entitled to.

What follows is a primer on the basic rules and guidelines for defending depositions, which should be equally helpful for defending and examining attorneys alike.

Scope of Allowable Questions at Deposition

New York adheres to a philosophy of broad discovery. However, not all discoverable material will be admissible at trial. Accordingly, the range of permissible questions at a deposition is more expansive than questions or evidence that may be admissible evidence at trial. In short, "all questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant."[1]

In *Hertz Corp. v. Avis, Inc.*,[2] the First Department articulated the parameters of deposition questioning, stating:

> [A]t an examination before trial, questions should be freely permitted and answered, unless violative of a witness' constitutional rights or a privilege recognized in law, or are palpably irrelevant, since all objections other than as to form are preserved for trial and may be raised at that time. Implicit in this formulation is the recognition that questions answered at an examination before trial, even though not "palpably" improper or irrelevant, may still appropriately be excluded upon timely objection, in the exercise of discretion. The true test is one of usefulness and reason. Thus, even information "reasonably calculated to lead to relevant evidence may be beyond the scope of disclosure because it is more trouble to gather than it is worth."

Understanding and asserting proper, timely objections is a critical component of the defending attorney's role at the deposition.

Objections under CLPR 3115

CPLR 3115 provides that, with certain exceptions, objections other than as to form are preserved for trial, without the necessity of interposing an objection at the deposition. The preservation rule is generally incorporated into the "usual stipulations," which the parties ordinarily agree to at the beginning of the deposition. While the "usual stipulations" ordinarily preserves the parties right to object at trial, certain objections to form will be waived if not interposed at the deposition.

A. Objections and the Immediate Cure

CPLR 3115(b) addresses objections at the deposition that can be immediately cured, such as objections to form that may be cured by rephrasing or narrowing the question, or the order in which depositions will be conducted. Any objection to form or other irregularity that may be immediately cured must be made at the deposition, or it will be waived.

Proper Objections to form include:

- Questions which are ambiguous/do not make sense
- Questions which are argumentative
- Questions which assume facts
- The mischaracterization of prior testimony
- Compound questions
- Harassing/vexatious questions
- Questions which have been asked and answered

B. No "Speaking Objections"

The Uniform Rules for the Conduct of Depositions, enacted in 2006 (often, informally referred to as the "New

Rules"),[3] do not permit the defending attorney to make "speaking objections." In other words, if any objection to form is made, the objection must be succinctly stated and framed "so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement of as to any defect…"

Specifically, Section 221.1 of the "new rules" provides:

(a) **Objections in general.** No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer, before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR.

(b) **Speaking objections restricted**. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

Along the same lines, Section 221.3 of the "new rules" provides restrictions on when an attorney may communicate with a deponent while a question is pending. Specifically, Section 221.3 provides:

> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

In light of the amendment to the rules, the defending attorney must be judicious in making speaking objections. While making speaking objections is technically inappropriate, it may be tolerated if done sparingly. However, making an excessive number of speaking objections may be construed as coaching the witness. The restriction on speaking objections makes witness preparation all that more important, as the defending attorney is limited in her ability to vocalize her objection to a question.

Objections under Federal Rules

The Federal Rules of Civil Procedure contain similar restrictions on objections in depositions. The commentary to the Federal Rules provides:

> Objections must be stated in a non-suggestive manner. Some objections to questions must be raised at the time of the deposition or they are waived, others are reserved until trial. The way to determine whether an objection must be made is to determine whether the examiner could rephrase the question to cure the objection. Thus, parties must object to leading questions in order to give the examiner an opportunity to ask the question in a non-leading fashion. Conversely, parties do not need to raise objections such as relevancy or competency that cannot be cured.

The Federal Rules (Federal Rule Civ. Pro. 30 (d)) commentary provides further instruction on the scope and method of objections:

> **Stating Objections**: Objections must be stated in a non-suggestive manner. Attorneys should not use an objection to instruct the witnesses how to answer (or not to answer) a question. However, the specific nature of the objection should be stated so that the court later can rule on the objections (i.e., "objection, leading" or "objection, lack of foundation").
>
> **Instruction Not to Answer**: Directions to a witness not to answer a question are only allowed in three narrow circumstances: to claim a privilege (i.e., attorney client communication); to enforce a court directive limiting the scope or length of the deposition; or to suspend the deposition for purposes of a motion under Rule 30(d)(4) relating to improper harassing conduct. Thus, it is inappropriate for counsel to instruct a witness not to answer a question on the basis of relevance, on the basis that the question has been asked and answered, is harassing, or on the basis that the question is outside the areas of inquiry identified in the notice of deposition for a Rule 30(b)(6) deposition of a party representative.

Instances When a Witness Should Be Instructed Not to Answer

Practically speaking, a witness should be instructed not to answer in four instances: (1) to assert the attorney-client privilege; (2) to assert the doctor-patient privilege; (3) to assert the Fifth Amendment privilege; or (4) when a question is palpably irrelevant or unduly burdensome.

1. Attorney-Client Privilege

The attorney-client privilege attaches "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection is waived." Privileged material is given absolute immunity to discovery. The party claiming the privilege bears the burden of establishing the right, the protection must be narrowly construed, and its application must be consistent with the purposes underlying the immunity.[4]

2. Doctor-Patient

CPLR 4504 provides that "unless the patient waives the privilege, a person authorized to practice medicine… shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."[5] While the question of privilege may be "raised by any party to the action," as with the attorney-client privilege, the party asserting the privilege has the burden to show the existence of circumstances justifying its recognition.[6] To meet this burden it must be established that (1) the person whose testimony sought to be excluded was authorized to practice medicine or dentistry or was a registered professional or licensed practical nurse, (2) the information to be excluded was acquired by such person while attending the patient in a professional capacity, (3) the information was necessary to enable such person to act in that capacity, and (4) the information was intended to be confidential.[7] Also like the attorney-client privilege, the doctor-patient privilege belongs to the patient and applies unless waived in some manner. *See* CPLR 4504(a). A person waives the doctor-patient privilege when he commences an action in which his physical condition is in controversy.

3. Fifth Amendment Right

In general, the Fifth Amendment privilege against self-incrimination "may only be asserted where there is reasonable cause to apprehend danger from a direct answer" and "a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances."[8] Moreover, "[w]hile the witness is generally the best judge of whether an answer may tend to be incriminating…when the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate."[9] In such a case, "in order to effectively invoke the protections of the Fifth Amendment, a party must make a particularized objection to each discovery request."[10]

4. Palpably Irrelevant/Unduly Burdensome

As previously addressed, generally a deposed witness is required to answer all questions posed unless the question is palpably irrelevant or improper.[11] Information is palpably irrelevant when it does not directly relate to the opposing party's claim.[12] Likewise, discovery is improper when a party's request is overly broad and unduly burdensome.[13]

Improper Conduct in Depositions

New York Jurisprudence[14] provides that a lawyer may be subject to sanction for engaging in improper conduct during depositions. Such sanctionable conduct includes *inter alia* ordering a client not to respond to questioning in areas which counsel unilaterally deems irrelevant, continually objecting to matters other than form, failing to turn over documents requested during a deposition, filing unnecessary motions to compel depositions, and using disruptive behavior or improper language towards opposing counsel during the deposition.

New Developments in Rules for Non-Party Depositions

In 2013, the Fourth Department in *Scia v. Surgical Association*[15] affirmed its prior holding in *Thompson v. Mather*[16] establishing that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition." The decisions, which were based on a "plain reading" of CPLR 3113(c),[17] were widely criticized for causing inconsistencies among the Departments of the Appellate Divisions, and for consigning the role of non-party counsel in a deposition to that of a "potted plant."

In response to the Fourth Department's decisions, the Legislature recently enacted (and the Governor signed into law on September 23, 2014) "[a]n act to amend the civil practice law and rules, in relation to conduct of the examination before trial." The new law specifically overrules the Fourth Department's holdings in *Scia* and *Thompson* by amending CPLR § 3113(c) to provide that that "examination of deponents shall proceed as permitted in the trial of actions in open court, *EXCEPT THAT A NON-PARTY DEPONENT'S COUNSEL MAY PARTICIPATE IN THE DEPOSITION AND MAKE OBJECTIONS ON BEHALF OF HIS OR HER CLIENT IN THE SAME MANNER AS COUNSEL FOR A PARTY*."

The new law took effect immediately (i.e., on September 23, 2014) and "shall apply to all actions pending on such effective date or commenced on or after such effective date."

Endnotes

1. *Tardibuono v. County of Nassau*, 181 A.D.2d 879, 881, 581 N.Y.S.2d 443, 445 (2d Dept. 1992).
2. 106 A.D.2d 246, 249, 485 N.Y.S.2d 51 (1st Dept. 1985).
3. 22 NYCRR § 221.1–221.3.
4. *See generally United States v. Bein*, 728 F.2d 107, 112 (2d Cir. 1984); *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809 (1991); CPLR 3101(b).
5. *Mayer v. Albany Medical Center Hospital*, 56 Misc.2d 239, 288 N.Y.S.2d 771 (Sup. Ct. Albany Co. 1968).
6. *Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969).
7. CPLR 4504(4).
8. *Chase Manhattan Bank, Natl. Assn. v. Federal Chandros,* 148 A.D.2d 567, 568, 539 N.Y.S.2d 36 (2d Dept. 1989).
9. *State of New York v. Carey Resources, Inc.*, 97 A.D.2d 508, 509, 467 N.Y.S.2d 876 (2d Dept. 1983).
10. *Chase Manhattan Bank Natl. Assn.*, 148 A.D.2d at 568, 539 N.Y.S.2d at 37.
11. *Mora v. Saint Vincent's Catholic Med. Ctr.,* 8 Misc.3d 868, 800 N.Y.S.2d 298 (Sup. Ct. N.Y. Co. 2005).
12. *Hertz Corp. v. Avis*, 106 A.D.2d 246, 485 N.Y.S.2d 485 (1st Dept. 1985) (erred in requiring a large corporation to compile and reveal confidential financial documents in the absence of a claim that defendant's alleged misappropriation of plaintiff's trade secrets by recruiting plaintiff's management personnel resulted in a loss of profits to plaintiff).
13. *Brandes v. North Shore Univ. Hosp.*, 1 A.D.3d 550, 767 N.Y.S.2d 666 (2d Dept. 2003) (plaintiff's demands for bylaws of the hospital and its medical staff, as well as the rules, regulations, policies, and procedures for nine separate departments is overly broad and unduly burdensome).
14. 24 N.Y. Jur.2d Costs in Civil Actions § 76.
15. 104 A.D.3d 1256, 961 N.Y.S.2d 640 (4th Dept. 2013).
16. 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dept. 2010).
17. CPLR 3113(c) provides that that questioning in pre-trial examinations "shall proceed as permitted in the trial of action in open court."

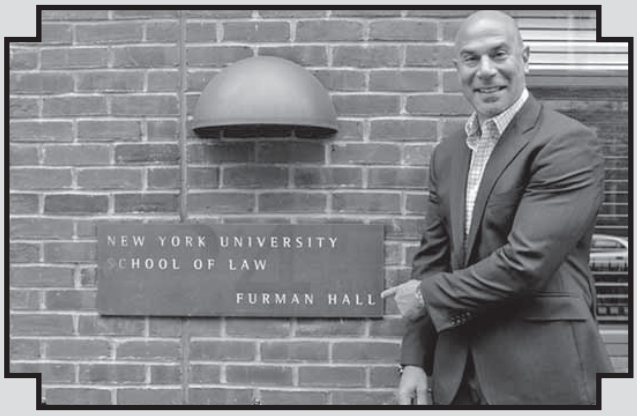
Andrew S. Kowlowitz is partner with Furman Kornfeld & Brennan, and Alex T. Paradiso is an associate with the Firm. Both Andrew and Alex concentrate their practice on the defense of lawyers and other professionals.

Scenes from the Trial Lawyers Section

Are You Crossing the Line or Going Too Far?

What you need to know to properly and ethically represent your client

NYU Law School • October 18, 2014



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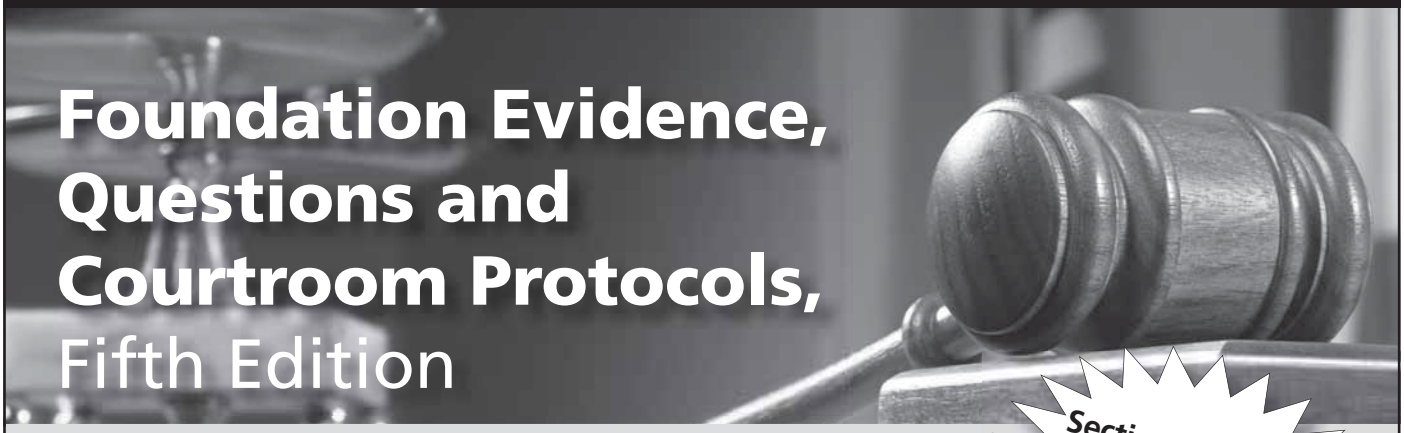

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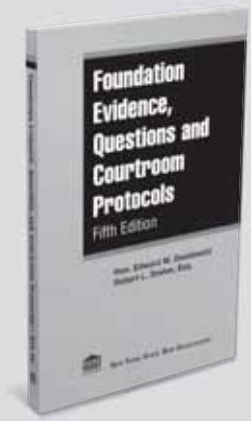

Foundation Evidence, Questions and Courtroom Protocols has long been the go-to book to help attorneys prepare the appropriate foundation testimony for the introduction of evidence and examination of witnesses.

This new 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, the new edition of Foundation Evidence is an indispensable addition to your trial library.

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Book Review

Reviewed by Mark J. Moretti, Esq. and Sean C. McPhee, Esq.

The Third Edition of *Business and Commercial Litigation in Federal Courts* not only updates the first two editions, it expands the already extensive treatise by 3 volumes, adding 34 new chapters to the previous 96. Among the emerging topics covered by these new chapters are information technology, internal investigations, consumer protection, international arbitration, and money laundering, just to name a few. The Third Edition also includes a comparison to commercial litigation in state courts and contains an appendix with jury instructions, forms, federal laws, federal rules and cases that are cited within. As one would expect, there are updated chapters on the various stages of every litigation (commercial or otherwise) such as jury selection, opening, and direct, as well as 63 substantive chapters on virtually every type of case likely to be encountered by commercial litigators.

For example, Chapter 84 discusses the key consumer protection statutes most frequently litigated in the federal courts including the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act and the Fair Credit Reporting Act. This Chapter begins with summaries of these statutes and, because claims under them can be brought in both federal and state courts, the authors then offer insight on issues that plaintiff's counsel should consider when choosing where to bring their action, as well as considerations for defendant's counsel concerning removal. Examples include differences regarding discovery and the length of time it may take for the case to reach trial. Elements of the causes of actions, answers and defenses are then examined followed by discovery suggestions and trial strategy. The Chapter concludes with sample pleadings and a checklist of allegations for complaints and answers.

Chapter 123 focuses on Construction Litigation and Construction with a thorough and practical explanation of the dynamics of the construction project and process. There is analysis of the strategic considerations of the forum selection, and analysis of the types of disputes typically encountered. There is a good discussion of the types of claims that owners, general contractors, subcontractors and architects may have against each other, together with checklists of practical considerations for the plaintiff and defendants, as well as sample pleadings, interrogatories and other discovery requests for prospective plaintiffs and defendants.

Notably, this treatise is appropriate for all attorneys regardless of their level of experience. For those commercial litigators new to the practice, the Third Edition provides in-depth mentoring on all components of federal commercial practice (both theoretical and practical) that he or she will undoubtedly face and almost certainly did not learn in law school. For the more seasoned litigator, it provides a thoughtful review of the strategic considerations we address every day. Regardless of the level of expertise of the reader, nuggets of useful information and insights are literally at your fingertips, making it a valuable asset to all.

The Third Edition is edited by Robert L. Haig and authored by 22 distinguished Judges and 229 of the leading federal practitioners in the nation. In a day and age where much is available electronically, this comprehensive treatise remains a truly valuable resource that every commercial litigator should have on his or her bookshelf.

Mark J. Moretti is a partner at Phillips Lytle LLP and is a former Chairman of the Trial Lawyers Section of the NYSBA. Sean C. McPhee, Esq. is a partner at Phillips Lytle LLP.

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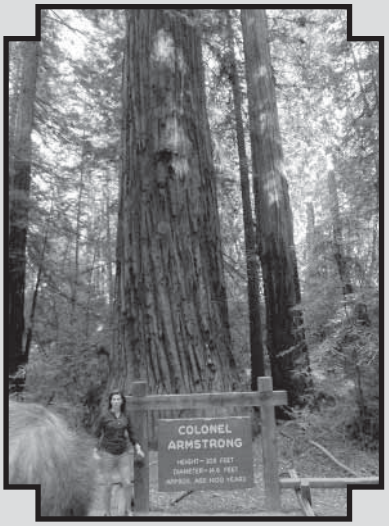
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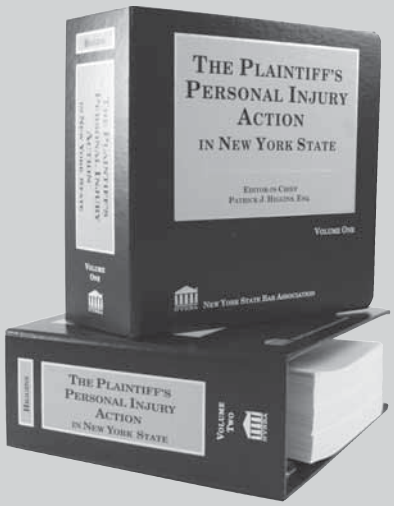

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