

# Trial Lawyers Section Digest



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

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# Message from the Chair

## Break Out of Your Office and Flourish in Your Profession!

What does it mean to “practice law”? If you think it’s the job you have, the office you are lucky enough to be sitting in, or the billable hours you have accumulated that reflect your potential for an end of year bonus and partnership, then you are missing the point. I personally know what it is like to carry a load of debt from an educational investment while struggling to raise a young family, so I am not dismissing the importance of having steady employment and a sense of financial stability so you can cross the finish line—at least with respect to paying off burdensome school loans.

But practicing law is a profession. Never lose sight of that and what it means. You have to plant roots so you can grow in this profession, just like you plant roots in your community. Think about that—how are you planting roots in our profession?

This year, the Trial Lawyers Section of the New York State Bar Association held its annual summer meeting and continuing education event in Hershey, PA. As Section Chair, I was happy to join other litigators and not only earn CLE credits for a few hours each morning, but also connect with litigators both outside and inside my own firm and find out what is on their minds.

I want to know what they see from their vantage points throughout our state. What experiences have they had in courts in different parts of our state that concern them or that have inspired them? How have they addressed discovery issues in an ever evolving complex technologically centered world? What legislative initiatives have grabbed their attention and how should members of our profession respond in their view? Our bar association and our connection to our Section provide a great opportunity to break out of the office and connect with others on a wide range of subjects that affect all of us, as well as the future of our profession and society as a whole. The ultimate experience for a true professional is to contribute to the advancement of our society as a whole through active and meaningful engagement in our own profession.

Our recent trip to Hershey, Pennsylvania, was infused with a powerful educational component. Professor Patrick Connors, who is an authority on New York civil practice, provided updates on civil practice and ethics that alone were worth the expense of a trip to this beautiful venue.

In addition, our CLE program included valuable information on the use of the internet during jury selection and how courts and lawyers on both sides of civil cases

are employing social media in the courtroom. Robert Gibson provided this presentation and it was an eye-opener that led to a discussion about ethical concerns among attendees.

Insight on appellate practice was provided by the Hon. Victoria Graffeo, Seth Weinberg and Jacqueline Mouquin.



**Noreen DeWire Grimmick**

I was invited to speak on employment law issues that employers in our own profession need to be mindful of. Again, this topic brought about a good deal of discussion among attendees both inside and outside of class.

The attorneys who came to our summer event enjoyed family time with their children, spouses, significant others and friends on the beautiful grounds of Hotel Hershey and surrounding areas. Having participated in the Trial Lawyers Section for a number of years now, the camaraderie I have with members of this Section across the state has enriched my professional and personal life.

We also hosted a networking event that took place at the New York State Bar Association in Albany on the evening of October 13, 2017, followed the next morning by a CLE at Albany Law School on the topic of depositions.

Currently taking place are the 2017 Deposition Boot Camps, co-sponsored by the Trial Lawyers Section and the Committee on Continuing Legal Education. This program is being held in multiple locations into early December.

Section member or not—if you are a litigator or even “dabble” in litigation—please join us at Section events. We value your participation and contribution. Grab onto the opportunity to break out of your office and plant some roots in your profession! There will be more events scheduled soon—so stay tuned!

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Thank you

*As a New York State Bar Association member you recognize  
the value and relevance of NYSBA membership.*

*For that, we say thank you.*

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Sharon Stern Gerstman  
*President*

Pamela McDevitt  
*Executive Director*





# Message from the Editor

While I wasn't exactly looking for a new role to put on my plate, I do want to thank our Chair, Noreen Grimmick, for entrusting in me the opportunity to serve as the new editor of the *Trial Lawyers Digest*. Admittedly, my only real qualification for the job is my commitment to our Section.

My mission as the editor is quite simple: To turn out a quality edition with each publication. Each edition will provide articles of interest to Section members. The *Digest* will continue to highlight our seasoned lawyers, but in addition will feature younger and more diverse lawyers. This edition features five younger lawyers of diverse backgrounds with tremendous talents and promise to become bright stars of the future.

One of our featured articles is by one of our most promising younger lawyers, Clotelle Drakeford. She provides us with helpful insights to trial practice through an interview with former United States Magistrate Judge Randolph F. Treece. Hon. Magistrate Treece was the first African-American to be appointed to the federal judiciary in the Northern District of New York and the first person of color to be appointed or elected to the judiciary at any level, state or federal, in 104 years in eastern, up-state New York.

The *Digest* will not only serve as a source of helpful information to us as trial lawyers, but it will also showcase activities of the Section. This edition features a layout on our Summer Meeting that took place in Hershey, Pennsylvania. It also contains two articles by younger lawyers who attended the Trial Academy that takes place at Cornell Law School each Spring, sponsored by our Section over the years and at which many of our Section members have served as teaching faculty, including me.

Future editions will feature book and movie reviews, major court rulings, updates in the law, member highlights and other content of interest to our Section members. And if you have other ideas about what should be included in future editions of the *Digest*, please let me know.

Lastly, I call upon each of you reading this edition of the *Digest* to send me articles for inclusion in future editions. Think about recent novel issues, or a funny incident that happened in one of your cases, an update on the law or a significant court ruling that you are familiar with. Without question, every single one of you is working on something right now out of which an article could flow. It can be a very short article or a longer piece. I, and NYSBA publications staff member Simone Smith, who is assigned to our Section, can assist you with any formatting or other questions you may have. This is your opportunity—if not your obligation—to share and contribute to the continued success of our Section. So start writing!



**T. Andrew Brown**

## NEW YORK STATE BAR ASSOCIATION



If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor-in-Chief:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

## REQUEST FOR ARTICLES



# Bridging the Gap: What a New Lawyer Hopes to Gain from the Trial Lawyers Section

By Dorian Simmons

Picture a group of athletes who train religiously. They have dreams of becoming professionals. They know that in order to be successful, they must have a combination of speed, strength, endurance, intelligence, and mental fortitude. So they study their sport, run laps, and lift weights. Then the day comes when it is time to play. They quickly discover that playing is different from training. Anticipating their opponent is difficult in real time. Running on hardwood does not feel the same as running on the treadmill. Lifting heavier weights does not necessarily mean they can throw the ball with greater accuracy. That one person who seemed to know everything before is not the best player in the game. Go figure.



Dorian Simmons

Yet, becoming a successful professional will require more than listening to stories. It will also require repetition: repeating movements until I am able to replicate them in real time. Before I go through jury selection I want the opportunity of walking through the process with people who have selected a jury. Before I make a closing argument I want to deliver my own in front of those who have argued in court. We have all seen players who have walked onto the basketball court before their time, missing a shot so badly that the crowd chants “air ball.” Thankfully judges cannot (will not?) boo you for your performance. Chide maybe. But, you get the point. Practice is an important ingredient to success in any career. The Trial Lawyers Section offers the opportunity to prepare.

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*“In the same way that I listened with the hopes of turning their hindsight into my foresight, I joined the Trial Lawyers Section to learn from the experiences of seasoned trial attorneys.”*

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As a new lawyer, I joined the Trial Lawyers Section to bridge the gap between training and playing—law school and practice. Law school served as a gym where we exercised our minds and developed habits with the dream of putting our skills into play. Then we graduated and learned that there is so much more to practicing than we ever thought. The Trial Lawyers Section is an opportunity to engage with experienced trial lawyers and develop skills and knowledge required to transition from student to attorney.

Some of my favorite memories of law school are of professors and practitioners sharing their experiences. They told stories of collaborating with their clients, developing critical case strategies, and arguing in court.

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*“Practice is an important ingredient to success in any career.”*

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In the same way that I listened with the hopes of turning their hindsight into my foresight, I joined the Trial Lawyers Section to learn from the experiences of seasoned trial attorneys.

And it will come full circle. One day I will have my own experiences to share with and advice to give to new attorneys. At that time I will be able to give to someone else what I hope to gain as a new lawyer in the Trial Lawyers Section: the opportunity to learn and grow into the professional that I knew I would become even before I played my first game.

Dorian Simmons is an associate in Weil, Gotshal & Manges LLP’s Complex Commercial Litigation practice. He focuses on litigating a wide range of complex commercial, intellectual property, and restructuring-related disputes in courts around the country.

Prior to joining Weil, Mr. Simmons worked as an elementary school educator at a charter school in Harlem, New York. Later, he interned for the Honorable Robert P. Patterson, Jr. of the United States District Court for the Southern District of New York.

Mr. Simmons received his J.D. from the University of Pennsylvania Law School, where he served as Head Executive Editor of the *Journal of International Law* and received a Certificate in Business Economics and Public Policy from the Wharton School at the University of Pennsylvania. He received his M.S. in Education from Hunter College’s School of Education, and his B.A. in Sociology from Georgetown University.

# MEET THE SCHOLARSHIP RECIPIENTS OF THE YOUNG LAWYERS TRIAL ACADEMY

## Trial Academy: Putting the Practical into Practice

By James Healy

The first time I appeared in court, other than as an intern, I had been an admitted lawyer for about a month. My boss had asked me to handle a routine criminal court appearance for a client who had been accused of misdemeanor criminal assault. My supervisor reassured me that nothing really was going to happen other than the ADA handling the calendar would be giving me the supporting deposition and making an offer on the record, which we were declining. I just needed to have the case put over so that we could try to work out a better plea offer.

I met with my client outside the courtroom and discussed what was going to happen. I explained what it meant for a case to be “on for conversion,” and what our overall case strategy was going to be. Because law was a second career for me, I imagine I look more “seasoned” than many of the young attorneys handling cases in the misdemeanor part; I am sure my client had no idea that I had never set foot in that courtroom before. I would like to think he felt confident that his case was being handled by an experienced, highly competent attorney.



James Healy

When I told him, no, my client was in the courtroom, he looked puzzled and asked me what time I had signed in. Signed in?

I had, by almost any measure, a very successful law school career. I had graduated near the top of my class; had been on the National Moot Court team, the International Criminal Court team, two mock trial teams, had internships with the U.S. Attorney’s Office and the Manhattan District Attorney. I had, I suppose, been taught to think like a lawyer. Yet no one in law school ever told me that in AP5 you have to sign in.

When I decided I wanted to practice law, I never questioned that I wanted to be an advocate; I wanted to stand in front of a jury or panel of judges and make a compelling argument on behalf of someone who could not do that for themselves. I have been lucky enough to find a place in small firm that has allowed me to pursue this through a criminal defense and personal injury practice. I have never had any reticence about standing in front of judge or a jury and presenting an argument, and I have been given the opportunity in my short career to have argued motions, made bail applications, even argued an appeal and conducted a summary jury trial.<sup>1</sup> So the question might present itself, why would I apply for a scholarship for the New York Bar Association Young Lawyers Division Trial Academy?

Either by statute, rule or convention a large part of what we do as lawyers is procedural. Before you can ever stand up in front of a jury and convince those people that a piece of evidence is significant, that evidence has to be admitted. Before you make a compelling opening argument, that argument has to be crafted in a way that is not objectionable. Before you can eviscerate a witness on cross examination with a prior inconsistent statement, you have to be able to lay the foundation for that state-

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*“Either by statute, rule or convention a large part of what we do as lawyers is procedural.”*

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I told him to find a seat in courtroom and listen for his name to be called. I went in and took a seat in the front row, the row reserved for people like me—licensed, admitted attorneys—and we waited. Case after case was called. Over an hour and a half passed. Attorneys came in, sat next to me, appeared before the judge and left, but my case was never called. Finally, one of the court officers came over and asked me if I was waiting for my client.



ment. Before you can stand up to defend an accused in AP5, you have to sign in. I did not want to attend Trial Academy because I was anxious about speaking in front of a judge or jury, I wanted to attend the Trial Academy to alleviate my unease concerning all of the varied, moving parts that surround getting to the point of making an argument.

The format of the program was particularly well designed to be beneficial to the concerns faced by many of us young lawyers (young in terms of practice not actual age). The first half of each day was a teaching component, conducted by individuals who were mostly highly experienced practitioners and judges. The information covered was not theoretical, although it was based in the law, but practical. The second half of the day was experiential. It consisted of breaking into small groups, approximately 10-15 students, where each individual was called on to put into practice what had been covered in the teaching section. The presentations were made in courtroom-like conditions with a presiding judge and objections allowed and made. Each student was digitally recorded and received analysis from four to six instructors assigned to the group. Following the group critique, the student reviewed the recording with an individual instructor who offered a detailed evaluation of the exercise.

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*"Simply put, her message was that good trial practice was to acknowledge when you did not know something, and then ask."*

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The program centered around two fact patterns, a civil and a criminal case, and students rotated between fact patterns, as well as between prosecution/plaintiff and defense. In addition, the five-day program followed the logical chronology of a trial starting with jury selection and ending with closing argument. This allowed each day to build on the information from the previous day(s), and fostered developing a theory of the case and highlighted the need to adjust and revise that theory as the course/trial progressed. Over the five days, it was inspiring to watch the subtle, and sometimes substantial, change in the members of my group. Newly minted lawyers, several of whom had never stated an appearance for the record, overcame a natural and understandable timidity to become more assertive and confident. Lawyers who had only practiced in one field, civil defense or family law as examples, had to step outside what they knew and were already good at, to apply the concepts they were learning in a new and unfamiliar practice area.

For me, there were many things I got out of the program, some very practical and a number of which were unexpected. But regarding my initial impetus for applying for the scholarship, two things stand out. The first occurred during one of the "lecture" parts of the program. An attorney who had been practicing for decades talked

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James is currently an associate attorney at Sullivan & Brill, LLP, concentrating on criminal defense, civil rights and complex personal injury matters. He regularly defends clients in criminal cases and drafts and argues substantive motions, in both state and federal court. He serves as second-chair in significant trials, and perfects and argues appeals in the First and Second Department and the First and Second Circuit.

James earned his J.D. with summa cum laude honors from Pace University School of Law. While in law school, James was Executive Articles Editor for PACE Law Review; a member of the National Moot Court team, where he was awarded best oralist in the Northeast region; and captain of the International Criminal Moot Court Team, which placed second in North America. In 2012, James was the winner of the Westchester County Above the Bar award, which recognized him as the most promising law student. He was also a winner of the Dean's Award for outstanding achievement. Prior to attending law school, James received his B.A. from Columbia University.

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about trying a case in upstate New York, out of her geographical area. She recounted being totally unaware of the policies and practices of that county, and told us how she went up in advance to talk to the court personnel, explain her lack of experience in that venue and find out exactly what was expected.

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*"Despite my pessimism, I received a phone call before the end of the day and over half an hour of the lawyer's time."*

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Certainly, in her case this had nothing to do with being callow or a young lawyer, and her reporting of the process made it clear that there was no shame or shortcoming in being inexperienced about a particular topic. Simply put, her message was that good trial practice was to acknowledge when you did not know something, and then ask. Translated to my concern about my limited experience: Walk up to the court officer or clerk, introduce myself and say, "I've never been in this part before, what is the procedure?"

The second edification, which was tangentially related to the first, occurred during the group session on cross-examination. I was attempting to impeach my witness by using his prior deposition testimony. I had the witness commit to all of the things we had covered in the instructional session (under oath, closer in time to the event, chance to review and revise etc.), and then requested that the court admit the transcript into evidence.



One of the instructors objected, and the judge for the exercise, an actual judge, ruled that the transcript was in evidence. Another instructor, also a practicing judge, had a different opinion. For the next 15 minutes my cross-examination stopped, and there was a lively debate between the two judges and the four practicing attorneys about whether the transcript would or should be allowed into evidence. What was so enlightening to me was not the actual, practical answer to the question,<sup>2</sup> but the fact that both sides of the question were being hashed out by really intelligent and practiced lawyers/judges. Or put another way, there was no single correct answer to this procedural question that I did not know because I was a “young lawyer.”

Finally, a truly added benefit of the program to me was that as a young lawyer that I am engaged in perhaps the most collegial adversarial system there is: Outside of a particular case, lawyers help one another. The instructors made an effort to engage with us outside of the presentations and classroom. They genuinely and willingly offered advice and encouragement both at the program and going forward. In fact, two weeks after the academy I had a question regarding an area of law that seemed devilishly unanswered on Westlaw. I shot off an email to one of the instructors who was expert in the field, thinking

that if I were lucky I would get an email back in several days, but preparing myself for no response at all. Despite my pessimism, I received a phone call before the end of the day and over half an hour of the lawyer’s time. The lesson? That we can rely on the no-longer-young-lawyers for those times that our questions feel overwhelming, and the unspoken imperative to pay this forward when we are no longer young in our careers.

## Endnotes

1. In my opinion, the summary jury program in NYC should be the model by which all law schools teach trial advocacy. Summary jury trials are means by which cases can be tried more quickly and with less expense, often based on an agreed-upon limitation of the damages, yet allow the parties the full benefits of a jury trial. As an example, a description of the program in the Bronx can be found at <https://www.nycourts.gov/courts/12jd/BRONX/Civil/pdfs/THE%20SUMMARY%20JURY%20TRIAL%20PROCESS.pdf>.
2. The consensus, and practical learning point, was that once the witness committed to the fact surrounding the deposition, there would no strategic reason to enter the transcript into evidence, where the opposing attorney could then read any part he chose to the jury. Simply by reading the parts on which I wanted to impeach him (“Isn’t true you were asked this question and gave this answer?”), they became part of the record and could be read back to the jury in closing.

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# Five Days...Four Presentations...Two Fact Patterns...One Awesome Experience!!!

By Glinnesa D. Gailliard

In April, I attended the NYSBA Trial Lawyers Section 2017 Trial Academy. I can sum up the experience in two words...overwhelmingly awesome!!! I know that this is not proper legal terminology, but how else can you describe an experience where you are learning essential trial advocacy skills and techniques from the best judges and litigators in New York State? How else can you describe the experience of networking with people proven to be the best in their craft? It is not an opportunity that comes along every day.

My background is in civil litigation. I joined this program because I wanted to sharpen my litigation skills. The skills learned were invaluable. The course was in two parts. The first was lectures on the different sections of a trial and how to prepare for them. The second was the presentations...where you presented your legal argument based upon the fact pattern provided. This program taught me how to analyze and persuasively argue both sides of both a criminal and civil case and also honed my public speaking skills. I learned how to pinpoint the important aspects of my case and how to handle weak and bad facts to better assist my client. Let’s be clear—it

was a lot of hard work and late nights preparing for my presentation. The reward for all that hard work was instant and honest feedback that made me a better litigator. Coming from this intensive course, I felt more confident in my litigating skills and know what areas I need to improve. Thank you to the NYSBA Trial Lawyers Section for such a great experience!



Glinnesa D. Gailliard

Glinnesa Gailliard, a 2007 graduate of Albany Law School, is Legal Counsel at Capital District Physician’s Health Plan, Inc. She previously worked as Investigative Counsel at the New York State Office of the Inspector General in the Office of the Workers’ Compensation Inspector General.



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# Top 10 Things New Litigation Attorneys Should Know to Survive Their First Day in the Courtroom

By Shannon Howley

Stepping into the courtroom presents new attorneys with an opportunity to build their most valuable asset: their reputation. However, there are several things new litigation attorneys should know before walking into court to maximize their potential for growth and avoid some common mistakes.



Shannon Howley

1. Obtain a Secure Pass ID: Be sure to get one prior to your first court appearance. Applicants must pay a \$50 processing fee and undergo a thorough application process. However, obtaining one is crucial, as it allows holders to enter New York State courthouses without having to wait in long lines and pass through magnetometers.
2. Parking: Give yourself enough time to find parking and get to the courthouse before your case is called. Some courthouses in Upstate New York are known to have free parking lots adjacent to the courthouse with plenty of open spaces. On the other hand, off-street parking may be non-existent around other courthouses or may require you to walk several blocks from a parking garage down the street. If that is the case, perhaps you should plan to take an Uber/Lyft or at least pack sensible shoes for the trek.
3. Sign In: Once you've finally made it into the courthouse, make sure you sign in with the correct court deputy. Don't just take a seat in the lobby and wait for your case to get called. You won't be called unless the deputy knows you are present for the case.
4. Be Prepared to Wait: After you've run across several blocks to get to the courthouse on time, you may find that your case isn't called for another 45 minutes. Use your time wisely—whether that means meeting with your client, trying to work out a deal with opposing counsel, or bringing other cases to review. You will probably have plenty of time to wait for your case to be called, so make sure you are prepared.
5. Block off Time for Court: Along the same lines as the tip above, make sure you don't schedule anything else immediately after your court appearance. Your case may not only be called late, but it could take a bit longer in court as well. Perhaps the judge will ask the parties to step out to try to reach a resolution on their own, then report back to the judge in a half hour. If possible, try not to schedule any appointments that could end up conflicting with your court appearance.

6. Calendaring: Calendaring motion due dates can be a daunting task. Calculating the wrong due date can lead to missed deadlines. Beware of differences between federal and state court deadlines as well.
7. Know the Local Court Rules: Take some time to read and familiarize yourself with the local court rules. Do not assume that all local courts across the state operate the same way. Some judges require that you send them a hard copy of anything that has been e-filed; other judicial districts have a not implemented e-filing yet.
8. Judges Are Human: Not everyone's going to be nice to you or even professional 100 percent of the time. Just be prepared. As a new litigation attorney, the first impression you leave can be a lasting one, especially if you act unprofessionally in someone else's courtroom. Try not to take anything personally, and do not be rude.
9. Proofread: Proofread everything carefully—from motion papers to letters to opposing counsel—before submission. Do not trust Microsoft Word or some other program to do it for you. Be sure to always "Shepardize" or "key cite" your cases before using them. Poor grammar can make you seem like a sloppy lawyer, and citing bad law can be damaging to your client.
10. Ask Questions: Often. Asking questions indicates that you are committed to being the best lawyer you can be. Also, it's better to learn now—the easy way—than to learn the hard way by making a mistake that could cost your client.

New litigation attorneys should always behave professionally toward their colleagues, act with diligence, and implement the highest ethical standards.

Shannon Howley has been an associate attorney at Brown Hutchinson LLP since April 2016. She works at Brown Hutchinson's main office in Rochester, New York, where she focuses primarily on matrimonial and family law, personal injury, and other matters affecting individuals and families. Ms. Howley was admitted to the New York State Bar in January 2016, after graduating among the first class of Pro Bono Scholars from SUNY Buffalo Law School in 2015. She also received her Master's in Social Work through SUNY Buffalo's JD/MSW program. Prior to this, Ms. Howley completed Niagara University's Honors Program and graduated *summa cum laude* with a degree in Political Science. In her free time, she enjoys playing with her two dogs, Max and Monstar.

# Book Review: *Business and Commercial Litigation in Federal Courts, Fourth Edition*

Edited by Robert L. Haig

Reviewed by William G. Bauer



*Business and Commercial Litigation in Federal Courts* edited by Robert L. Haig, Editor in Chief, was first published in 1998 and has recently published its fourth edition. I dusted off the original on my bookshelf and a quick comparison reveals the latest version is now comprised of 14 volumes with 153 chapters, all of which are crucial to understanding and practicing commercial litigation law in Federal Courts. No commercial litigator should be without this indispensable resource. It provides a comprehensive reference for attorneys in all stages of their careers.

The addition of 25 new chapters in this edition makes this reference source even more valuable. For instance, the treatise keeps pace with time in that it addresses the effect that technology has on litigation. There are chapters devoted to Federal E-Discovery Law and Social Media. Of particular interest to me are the chapters on “Negotiations” and “Mediation.” Recognizing the number of commercial disputes that are resolved by settlements, these chapters offer keen advice and information about the procedural and ethical aspects of meaningful settlement negotiations and mediation.

This edition also builds on the wealth of information contained in the Third Edition. Practitioners can easily familiarize themselves with information about common and uncommon issues in commercial litigation and receive valuable insight as to strategic and tactical decisions necessary to vigorously and successfully represent your clients. Each chapter contains practice aids such as checklists, research references, and sample forms that are monumentally helpful. The ready availability of current case law, rule changes, statutes, checklists and practice guidance saves time and offers a clear and direct path to attack commercial law cases.

I urge you to take a few moments to review the invaluable information assembled by noted practitioners, legal scholars and judges under Robert Haig’s skilled editing and organizational skills. You will not regret a single minute and you will add an incredibly valuable asset to your litigation library.

*Business and Commercial Litigation in Federal Courts, Fourth Edition*, is a joint venture between Thomson Reuters and the American Bar Association Section of Litigation.

**William G. Bauer is a Partner at Woods Oviatt Gilman LLP’s Labor & Employment and Litigation Departments. He concentrates his practice in general business and civil litigation, including corporate/partnership disputes, employment law, intellectual property, securities and federal court litigation. He is also active in court-sponsored and private alternate dispute resolution, including arbitration and mediation.**

**Mr. Bauer also served four years as a United States Magistrate Judge for the Western District of New York. As a United States Magistrate Judge, he presided over pre-trial proceedings in civil and criminal cases. He was also extensively involved in pre-trial settlement and mediation. Prior to joining the bench, Mr. Bauer had considerable trial experience in both state and federal court and handled appeals before the New York State Court of Appeals and the United States Court of Appeals for the Second Circuit.**



## TRIAL LAWYERS SECTION

Visit us at [www.nysba.org/Trial](http://www.nysba.org/Trial)



# *Trial Lawyers Section Summer Meeting*



NYSBA President-Elect  
Michael Miller



Former Trial Lawyers Section  
Chair Peter C. Kopff



Trial Lawyers Section Chair  
Noreen DeWire Grimmick



NYSBA Secretary Sherry Levin Wallach,  
Victoria Graffeo and Violet Samuels









☐ I am a Section member — please consider me for appointment to committees marked.

Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

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# Trial and Error— Pearls of Wisdom from the Hon. Randolph F. Treece, Retired, for Young Lawyers to Improve Their Advocacy Skills and Avoid Making Mistakes at Trial

By Clotelle L. Drakeford

On October 16, 2015, I had the distinct honor and privilege of sitting down with recently retired Federal Magistrate Judge Randolph (“Randy”) Treece of the Northern District of New York to discuss various aspects of his career, as well as eliciting specific information from him to help young attorneys become effective trial lawyers. During my interview, Judge Treece took the time to address every part of a trial to identify the critical foundations of trial advocacy. He also gave sage advice for avoiding mistakes and improving upon these basic skills.

On April 26, 2001 Judge Treece was appointed Magistrate Judge to the U.S. District Court for the Northern District of New York. After a combined total of nearly 40 years in the practice of law and dedicated service on the bench, Judge Treece opted to retire on September 25, 2015.

Judge Treece is the first African-American to be appointed to the federal judiciary in the Northern District of New York and the first person of color to be appointed or elected to the judiciary at any level, state or federal, in 104 years in eastern, upstate New York. James Campbell Matthews, an African-American, served as a judge to the Recorder Court (now known as City Court) for Albany in the 1890s.

Prior to his appointment as Magistrate Judge, Mr. Treece served as Counsel to the Office of the State Comptroller in H. Carl McCall’s administration and directed and coordinated all aspects of the Division of Legal Services in accordance with the Comptroller’s overall goals, objectives and philosophy. Before he was appointed as Counsel in February 1999, Mr. Treece served as First Deputy Capital Defender of the New York State Capital Defender Office, appointed in September 1995 to manage the Albany office and to provide trial level representation to those accused of murder in the first degree who may face the sentence of death.

Judge Randy Treece was born and raised in Troy, New York, the oldest of three children of Marguerite Smith and John Treece. He attended schools in the Lansingburgh School District, graduating from Lansingburgh High School with a Regents Diploma and as a member of the



Clotelle L. Drakeford

Honor Society. Judge Treece graduated from Siena College in 1970 with a B.B.A. in Accounting.

After graduation, he worked with the big eight accounting firm of Peat, Marwick and Mitchell until he entered Albany Law School in 1973. He earned a Juris Doctorate from Albany Law School in 1976 and promptly commenced a private practice, focusing on criminal law and litigation. Judge Treece maintained this private practice for 11 years. While in private practice, he also served as an Assistant Public Defender for Rensselaer County and taught at two area junior colleges. During his stint as Assistant Public Defender, he handled hundreds of cases in all of the trial courts and served as lead trial counsel on several high profile criminal cases. In 1987 Judge Treece joined the New York State Department of Law as an Assistant Attorney General, practicing civil litigation until September 1995. There he handled many voluminous and complex tort cases filed against the state.

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*“When your colleagues refer cases to you to be tried or judges make similar assignments, then you may consider yourself a trial lawyer.’ This also includes that when you are in the ‘throes of a trial, and you have a pain in your gut and yet, you still love it, you may be becoming a trial lawyer.”*

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In 1989, Judge Treece was appointed an adjunct professor at Albany Law School, a post he held until 2003. In addition to teaching trial tactics, Judge Treece has instructed a public defender criminal law clinic, conducted legal educational seminars, and occasionally is asked to be a guest lecturer in other law school classes as well as at other law schools and colleges.

Judge Treece possesses a strong commitment to his community and has served on countless community boards of directors. He is a member of the Board of Trustees of Albany Law School, and a former Board

of Trustee of the Capital District YMCA, Hudson Valley Community College, and Siena College. He has served on three committees of the New York State Bar Association and as a former delegate to the House of Delegates. He has served on the Board of Directors of the New York Bar Foundation as Treasurer for more than a decade. He has also served on the Board of Directors of the Albany County Bar Association for approximately 10 years, serving as treasurer of this association, as Chair of the ByLaws Committee and the Association's Minority Lawyers Subcommittee, and is the author of this Association's Minority Hiring Project and Diversity Internship Fellowship Program. He served as Board Member, Executive Vice-Chair and Acting Chair in 1996 of the Urban League of Northeastern New York, Inc. Further, he has served on the Honorary Board of the Women's Law Project, Advisory Board of Albany Law School's Government Law Center, as a founder and Advisory Board member of NAACP Legal Assistance Program, former President of the Capital District Black Bar Association, now the Capital District Black and Hispanic Bar Association, as well as former President of the National Bar Association Region II Bar Foundation.

The late Chief Judge appointed Judge Treece to serve on the Jury Project that recommended many significant improvements to New York State's jury system. Many of these recommendations were made into law. This appointment came after the Capital District Black Bar Association report on minorities and juries, principally written by Judge Treece, received the Root/Stimson Award, and is cited as an authority on the subject matter by other jurisdictions. He also sat on the New York State Bar Association's Judicial Selection Committee and for five years served in a similar capacity for the City of Albany.

Judge Treece has been the recipient of an array of honors and awards. In January of 1996, he was awarded the Thurgood Marshall Justice Award from the Albany Chapter of the NAACP. On October 20, 1997, the New York Chapter of American Civil Liberties Union bestowed its Roland J. Smith Award for exemplary legal service upon him. In April 1998, the Urban League of Northeastern New York presented him with its McNamee Award for outstanding services as a board member. In April 1999, the Albany Law School Alumni Association bestowed its Distinguished Service Award upon Judge Treece. The Albany County Bar Association in 2000 bestowed its 1999 President's Award and in the same year the Troy Boys and Girls Club inducted him into its Hall of Fame. On September 21, 2001, Judge Treece's high school inducted him into its Hall of Fame. That same year Omega Phi Psi named him its 2001 Citizen of the Year. The Center for Law and Justice bestowed its Frederick Douglas Award upon Judge Treece in 2002. Also in 2002, the New York State Franklin H. Williams Judicial Commission on Minorities presented him with its Millennium Award. In March of 2004, Albany Law School bestowed its Distinguished Alumni in Government Award; in April, the Capital

District Black and Hispanic Bar Association presented him with an award for Distinguished Service to Attorneys of Color; and on October 15, the Troy Chapter of the NAACP presented him with its Outstanding Leadership Award. In 2014, the Albany Chapter of the NAACP bestowed upon him the Medgar Evers's Courage in Freedom Award. In 2015, Albany Law School named him the first recipient of the Legal Profession Leadership Award.

Over the years, Judge Treece has been active in many school and community discussions and presentations to students of all ages and grades. He coauthored an interdisciplinary education project for elementary schools entitled, "The Crime on a Sesame Seed Bun." Judge Treece has assisted the Albany YMCA with its youth basketball league, coached youth basketball teams and has given tennis instructions. Judge Treece has delivered speeches in the community on a variety of legal topics and has served as a panelist on many community and legal forums.

Judge Treece remains an active athlete. He continues his competitive interest in tennis and fitness. A jazz aficionado, he pursues this art and its artists with loving devotion. To that end, he writes a jazz review for a local jazz society.

He has one child, Shani Anasa Treece, who graduated from Hampton University with honors. He is the proud grandfather of Nzinga Anasa Braswell born May 3, 1999. He is married to Deborah Day Treece.

## Proper Preparation Prevents a Poor Performance at Trial

From the outset of my interview with Judge Treece, he made it clear that "assiduous preparation" was required for conducting trials. He reiterated that there is "no substitution for preparation." Judge Treece further indicated that attorneys' pre-trial submissions to the court reveal who is more prepared to present their case at trial. Tellingly, the quality of the advocacy, at hand, can be readily assessed by the manner in which attorneys prepare their trial briefs to lay out the issues to be determined; provide the court with a list of witnesses and a synopsis of their anticipated testimony; present the court with proposed jury instructions; gather and organize their exhibits, and make Motions *in Limine*.

Hence, Judge Treece recommends that young lawyers take the time to thoroughly prepare for trial and that they write a brief for every trial, irrespective of whether they are conducting it in state or federal court. He then pointed out that attorneys should know how the assigned judge presides over trials. Finally, "attorneys should also know the judge's predilections" concerning certain matters as part of their preparation for trial.

## Good Tips for Effectively Conducting *Voir Dire*

Although in Federal Court judges conduct the *voir dire* of the *venire*, or jury pool, Judge Treece advised that

attorneys have an opportunity to present proposed *voir dire* questions for the court's consideration during pre-trial conferences. Judge Treece found that he and his former colleagues tended to give attorneys more leeway to address issues with the court in preparation for jury selection.

On the other hand, when attorneys are conducting *voir dire* in state court, Judge Treece advised that they must ask open-ended questions and get the potential jurors to speak. Examples of such questions were as follows: "How do you feel about the ...?" "What are your feelings about this?"

Judge Treece stated it is a "big mistake" to ask close ended and leading questions of the *venire* when conducting *voir dire*. He further counseled against giving a mini opening statement during *voir dire*. Moreover, he noted that "seasoned trial lawyers ingratiate themselves and their clients with the prospective jurors." "You never get a second chance to make a good impression."

### **Best Practices for Presenting an Opening Statement**

Regarding both the opening statement and the summation, Judge Treece opined that "trial advocacy is the art of persuasion, not oration." Judge Treece stated that the opening statement is simply "telling your client's story." "[But,] it should be strong and palpable." Therefore, he suggested that attorneys "start with [an attention] grabber" that is roughly three to four sentences. "This should outline the theme of the case."

Judge Treece was careful to convey that an attorney's "theme [of the case is for] the jury [and their] theory [of the case is for] the judge." He further stated that a theme can be a "common story, metaphor, allegories, similes, something that a juror can relate to from his or her personal experience."

From here, Judge Treece does not recommend relying upon the "the evidence will show...." Rather, attorneys should "tell the jury a very linear story about the client that will support the elements of the cause of action or their perception of the facts." However, the attorney's role is to be "a great story teller eschewing theatrics." In telling the story, the attorney "should have a conversation with the jury and yet, remain professional."

However, he further suggests that attorneys actually use demonstrative evidence during their opening statement if it has already been stipulated beforehand to be admitted at trial. Judge Treece finds that it is truly a "lost moment" for attorneys who do not use demonstrative evidence during their opening statement.

Judge Treece further advised that young attorneys must understand the concepts of "primacy and recency" during trial in order to effectively persuade the jury.

Lastly, attorneys should avoid getting into argumentation during their opening statement or providing the jury with instructions on the law, as this is improper.

### **Powerful Information for Conducting a Direct Examination**

Judge Treece initially stated that this is when the attorney asks questions of a witness as to "How," "What," "When," and "Where." When he presided over trials, Judge Treece described having observed that many young lawyers failed to control a witness' testimony during a direct examination by not "looping" the witness' prior testimony within the series of questions that were to follow. His example of "looping" was, "Now, you testified that [state a fact]" and then the attorney would proceed to ask another open-ended question of the witness stemming from that topic from there. Judge Treece made sure to note that by "looping" that the attorney is controlling the witness, without leading the witness, which would be improper during direct examination.

Additionally, Judge Treece indicated that really skilled attorneys have learned how to not only control the direct examination, but how to also "paint pictures" in the minds of the jury as to what happened or occurred. Lastly, Judge Treece pointed out that if your client has the burden of proof, then it is during the direct examination that the elements of the cause of action must be established.

### **Great Advice for Using, Organizing and Handling Exhibits**

Judge Treece reminds us that we retain more by what we see and hear at the same time, adding tremendous values to demonstrative evidence. Judge Treece then described having observed many young attorneys handle exhibits in an awkward manner, along with their failure to project confidence with the use of exhibits. He finds that this caused these exhibits "not to be displayed in the best light." Further, young attorneys also had a tendency to not give photos to the jury for them to directly examine, or if they did, they would hand them out one at a time, as opposed to simply giving the jury the series of photos collectively to view and compare.

However, when available, Judge Treece opined that it is "absolutely better to use a projector." He stated that young attorneys should learn how to use the court's equipment and apparatuses before trial. Additionally, attorneys should get a demonstration of how to use the equipment with the assistance of the court's staff as needed.

From here, Judge Treece noted that "organization is key," and he recommended the use of notebooks and binders for documentary evidence. "This permits immediate access to the exhibits," and they can be placed in a manner that corresponds to the areas of inquiry of a wit-



ness. Moreover, all exhibits should be identified, tagged and placed in a separate file so that time is not wasted looking for things. Judge Treece further urged the use of laptops, notepads or ipads as appropriate to organize the presentation of exhibits and demonstrative evidence.

Finally, young attorneys should be aware that stipulating to the use of evidence at trial occurs frequently, and they should tell the presiding judge what evidence needs a foundation in advance of the trial. “A trial lawyer must always remain mindful that court efficiency is paramount.”

## **Instructive Guide to Carrying Out a Thorough Cross Examination**

Judge Treece indicated that cross examination “is an art.” In his experience, “there are more suicides than homicides” during cross examination. When I asked, “Why is this the case?” Judge Treece stated a few obvious mistakes:

- a. They ask the wrong question or they ask a question without knowing the probable answer;
- b. They ask too many questions;
- c. They ask a question to get a conclusion;
- d. They ask an open-ended question; and
- e. They don’t know when to sit down.

With cross examination, attorneys should be leading the witness to “get them to agree or disagree” with the question or proposition presented. “The witness should not be given a chance to explain.” Additionally, the inferences that are drawn from a witness’ testimony should be argued during summation—not during their cross examination. This is where it is critical to know when to “sit down.”

Judge Treece indicated that “a good cross examination should not exceed thirty to forty-five minutes.” “Hit your relevant points and then sit down even when you are tempted to ask one more question.” Although attorneys must prepare their questions in advance, they should try not to read their questions to the witness. Judge Treece found that by reading the questions, attorneys “lose their rhythm” during the examination.

As it relates to impeachment, Judge Treece stated that “good lawyers know how to impeach a witness, but it can be learned through study.”

## **Helpful Ways to Give a Closing Argument**

In Judge Treece’s view, attorneys have a tendency to “put too much stock in their summation and not enough on their opening statement.” “You must remain mindful of the concept of primacy and regency.” He then stated that “sometimes the facts lend themselves to convey emotion, but it is good to present logical, linear argu-

ments.” Judge Treece further feels that the “more extemporaneous the arguments are, the more persuasive they are to the jury.” Moreover, he finds that if attorneys rely solely upon an outline or some other written materials, then they lose eye contact with the jury. While he recognized that some people are more “blessed” than others to be able to make an “extemporaneous speech” during summation, he insisted that if young attorneys know the facts of their case and are prepared, then it is easier to be extemporaneous. Finally, Judge Treece advised that it is a “good time to use [admitted] exhibits and demonstrative evidence during summation.”

## **Insightful Instructions for Understanding Etiquette and Other Aspects of Trial**

When I inquired of Judge Treece as to the best way to handle unfavorable evidentiary or other rulings during trial, he admonished young lawyers from arguing with the judge. Rather, they should “always remember to respectfully object to the ruling in order to make a record and then move on.”

I then asked Judge Treece to describe how an attorney may find himself or herself being reprimanded by the presiding judge during a trial. Judge Treece indicated that this can happen when an attorney has “gone into an area [during an examination, etc.] where they should not have; the attorney has stated or done something that offends the court; the attorney has not followed the judge’s instructions; the lawyer has attempted to sneak trial evidence into [the proceeding that has not been admitted]; and [trial counsel has begun to] yell at a witness or their adversary.”

Judge Treece made it a point to note that it is certainly appropriate to be forceful, assertive and perhaps even flippant at trial. However, he maintained that yelling or making denigrating remarks to a witness or opposing counsel is never appropriate.

Judge Treece then pointed out that charge conferences are another aspect of a trial wherein young attorneys need to be prepared. He explained that in Federal Court most judges will conduct a charge conference with the attorneys typically before closing arguments. However, this is not always the case and some judges may not hold them at all. During a charge conference, proposed instructions to charge to the jury as to how they should deliberate concerning the case, based on the elements of the cause of action, are discussed.

In his experience, Judge Treece has found that some young lawyers have not reviewed recent case law pertaining to the issues to be considered and submitted for the jury instructions. Finally, if there is an objection to the court’s instruction, Judge Treece noted that young attorneys must be prepared to make a record of the objection during the conference.



## When You Can Truly Consider Yourself a “Trial Lawyer”

As the current Young Lawyers Section Liaison to the Trial Lawyers Section of the New York State Bar Association, I was curious to learn if there is a litmus test for when a young attorney can truly consider his or herself a “trial lawyer.” I asked Judge Treece, “When can those of us, who are passionate about trial work, but have limited experience due to our budding careers, consider ourselves to be trial lawyers? Recalling the sentiment shared with him by a seasoned lawyer, he concurred that you must conduct 10 to 12 trials before you can honestly say that you are a trial lawyer. In addition to serving as lead counsel in the aforesaid number of trials, Judge Treece advised that you should learn:

- a. How to paint pictures and images in the minds of the jury and judge;
- b. How to project an air of confidence and control when things are not going well; and
- c. How to address the court.

“When your colleagues refer cases to you to be tried or judges make similar assignments, then you may consider yourself a trial lawyer.” This also includes that when you are in the “throes of a trial, and you have a pain in your gut and yet, you still love it, you may be becoming a trial lawyer.”

From here, Judge Treece was gracious enough to share recommendations for developing our trial advocacy skills based on what he did early in his career as follows:

- a. Make it a point to attend trial-related CLEs with the best and most respected practitioners who will be serving as the lecturer;
- b. Observe as many trials as you can;
- c. Spend time with seasoned trial lawyers;
- d. Seek advice from trial lawyers when you are preparing for and during trial;
- e. Discuss practices and processes with other trial lawyers; and
- f. Read about the art of advocacy and trial lawyers. Be inspired.

## Some Final Remarks and Words of Encouragement to Young Lawyers from Judge Treece

At this point, Judge Treece shared words of encouragement for young attorneys as follows:

There is value in your education and experience. Don’t give it away. Don’t give away your experience to placate family and friends. [If you are a solo practitioner] and unless you get paid up front,

you don’t have to do the legal work for the sake of the experience]. However, if you get a pro bono case, you should prepare to deliver your best as if you received an advanced fee.

[When it comes to trial work], losing hurts, but, you need to get over it as quickly as you can and move on to the next mission. It is nice to have thick skin... [Remember,] the practice of law is never perfect. Hopefully, you can get the best results for your clients. Be true to yourself. Be honest with yourself. You should then be able to accept the outcome.

One style does not fit all. Be authentic and genuine. Be respectful of the intelligence and commonsense of the jury. 99.9 percent of the time, they are going to get it correct. Understand humanity and human foils. Be curious and remain a student of life. Understand the commonality of themes as opposed to legal theory.

There is an art of persuasion. There is an art of cross examination. Some attorneys are more blessed than others. Some are more gifted with extemporaneous speech than others. Some have better intuition about human nature than others. Some can convey their perception about the facts of the case better than others.

Trial work is an art. And yet, with hard work and constant study of well-honed trial principles, one can be developed into a capable trial advocate.

My interview of Judge Treece was thereby concluded

**Clotelle L. Drakeford is an attorney and counselor-at-law at Coldwell Banker Prime Properties. She is a 2011 graduate of Albany Law School and holds a Bachelor of Science degree from North Carolina Central University.**



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<input type="checkbox"/> Entertainment, Arts & Sports Law*	35.	<input type="checkbox"/> Tax*	25.
<input type="checkbox"/> Environmental & Energy Law*	35.	<input type="checkbox"/> Torts, Insurance, & Compensation Law**	40.
<input type="checkbox"/> Family Law*	35.	<input type="checkbox"/> Trial Lawyers****	40.
<input type="checkbox"/> Food, Drug & Cosmetic Law*	25.	<input type="checkbox"/> Trusts & Estates Law**	40.
<input type="checkbox"/> General Practice**	25.	<input type="checkbox"/> Young Lawyers	20.
<input type="checkbox"/> Health Law**	30.	<i>(Law Students, and attorneys admitted less than 10 years)</i>	
<input type="checkbox"/> Intellectual Property Law*	30.		
<input type="checkbox"/> International†	35.		

Section Dues Total \$ \_\_\_\_\_

\* Law Student Rate: half price\*\* Law Student Rate: \$5 \*\*\* Law Student Rate: \$10

\*\*\*\* Law Student Rate: \$15 † Law Student Rate: \$12.50 †† Law Student Rate: FREE

# Automated Installment Plan (AIP) Enrollment Form

## Save Time with AIP

Now New York State Bar Association (NYSBA) members can save time with direct dues payment. An alternative to writing checks and mailing your membership dues, with AIP you can authorize NYSBA to withdraw payments electronically from your credit card account. Go to [www.nysba.org/AIP](http://www.nysba.org/AIP) for more information. You can conveniently sign up for AIP on the enrollment form below. It's safe, easy and convenient!

**AUTOMATED INSTALLMENT PLAN (AIP) ENROLLMENT AUTHORIZATION** I hereby authorize NYSBA to instruct my financial institution to deduct directly from my account the amount necessary for my annual membership, per the payment schedule selected below: 1, 2, 3 or 4 payments on or about the 25th of the relative month(s). **All installment payments must be completed by April 30, 2018.** Those opting into the installment payment program in Dec, Jan, Feb or March of the current dues billing year may have their payments consolidated and accelerated to meet this requirement. By selecting the AIP method **I understand this agreement will remain in effect for future membership years, unless I request cancellation in writing to:** NYSBA, Dues Processing, One Elk Street, Albany, NY 12207.

Total to be debited: \$

Signature: \_\_\_\_\_ Date: \_\_\_\_\_ 6/17

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Address: \_\_\_\_\_

Address: \_\_\_\_\_

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Phone Number: \_\_\_\_\_ E-mail: \_\_\_\_\_

## Payment Schedule

☐ 1 Full Payment    ☐ 2 Payments    ☐ 3 Payments    ☐ 4 Payments

☐ **AIP — Credit/Debit Card Authorization**

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**Please return this form to: NYSBA, Member Resource Center, One Elk Street, Albany, NY 12207**  
**Phone 800.582.2452/518.463.3200 FAX 518.463.5993**  
**E-mail [mrc@nysba.org](mailto:mrc@nysba.org)**

**IMPORTANT NOTICE:** Membership dues to the New York State Bar Association are not tax deductible as charitable contributions for income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses subject to restrictions imposed as a result of association lobbying activities. The NYSBA estimates that the non-deductible portion of your 2018 dues which is allocated to lobbying is approximately 2.0%. Portions of your dues payment are allocated toward the annual publication subscriptions for the following: *NYSBA Journal*, \$14.75; *New York State Law Digest* \$6.25; *State Bar News* \$7.25.



# The Trial Lawyers Section Welcomes New Members

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## TRIAL LAWYERS SECTION DIGEST

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The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted electronically (preferably in Microsoft Word) along with two printed originals. Please submit articles to:

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## State Bar and Foundation Seek Donations to Help Hurricane Harvey Victims Obtain Legal Aid

The State Bar Association and The New York Bar Foundation are seeking donations to a relief fund for victims of Hurricane Harvey who need legal assistance.

As the flood waters recede, residents of Texas will face numerous legal issues including dealing with lost documents, insurance questions, consumer protection issues and applying for federal disaster relief funds.

Nonprofit legal services providers in Texas will be inundated with calls for help.

Tax-deductible donations may be sent to **The New York Bar Foundation, 1 Elk Street, Albany, NY, 12207**. Checks should be made with the notation, "Disaster Relief Fund." Donors also can contribute by visiting [www.tnybf.org/donation/](http://www.tnybf.org/donation/) click on restricted fund, then Disaster Relief Fund.



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