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Trial Lawyers Section Digest

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When Expert Qualifications Do Not Qualify: A Review of New York Case Law on the Disqualification of Expert Witnesses

By Harold L. Schwab

Introduction

Over the past decade the hot expert witness topic has been the application of the general acceptance standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), approved in *People v. Wesley*, 83 N.Y.2d 422, 611 N.Y.S.2d 97 (1994), and the potential inroad of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993) with its multiple non-exclusive reliability criteria. Articles in professional journals and case decisions abound on these issues. Interestingly, it does not appear that anyone has written an article exclusively devoted to the New York case law on expert witness preclusion based upon an absence of necessary qualifications. This is a subject which should be of particular interest to all trial attorneys, regardless of their persuasion, as well as to the judiciary. The following review of state law on this limited subject area hopefully will fill this void.

I have attempted to present the cases by occupational categorization, although at times not very successfully. Citations are given immediately following each case summary which, concededly not in scholarly law review fashion at the conclusion of the article, are probably more easily manageable for trial lawyers, at least such has been my experience. I trust that the following will assist attorneys at trial in the preparation of their legal briefs and arguments on the subject of expert witness qualifications and serve as a reminder that generic expertise may not suffice.

The Criteria for Expert Witness Qualification

"Generally speaking, a predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of the facts. Moreover, the expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matot v. Ward*, 48 N.Y.2d 455, 459, 423 N.Y.S.2d 645, 647 (1979).

Qualifications can be established through long observation and actual experience. *Price v. New York City Housing Authority*, 92 N.Y.2d 553, 684 N.Y.S.2d 143 (1998).

An engineer, although not a designer of ball-joints and never having worked for an automobile manufacturer, was qualified to give expert testimony on the design of a ball-joint because of his practical experience. *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 436 N.Y.S.2d 251 (1981), *reargument denied*, 52 N.Y.2d 1073, 438 N.Y.S.2d 1029 (1981).

An expert with a degree in astronomy who had not taken any mechanical engineering courses, but had taught engineering, taken courses in mathematics, and co-authored peer reviewed publications on the stability and maneuverability problems with ATV's (all terrain vehicles) was qualified to give his opinion regarding the

claimed dangerous center of gravity of an ATV. *Wahl v. American Honda Motor Co.*, 181 Misc. 2d 396, 693 N.Y.S.2d 875 (Sup. Ct., Suffolk Co. 1999).

Engineers

The opinion of a civil engineer who does not detail any expertise in the specific discipline of structural engineering must be rejected. *Beeley v. Spencer*, 309 A.D.2d 1303, 765 N.Y.S.2d 815 (4th Dep't 2003).

Testimony of a mechanical engineer with extensive experience in safety engineering of vehicles but no expertise in the design or development of golf courses and recreational areas was properly excluded. *Hong v. County of Nassau*, 139 A.D.2d 566, 527 N.Y.S.2d 66 (2d Dep't 1988).

A consulting engineer with degrees in metallurgy and materials engineering who testified that a tent was dangerous and defective because of high electrical conductivity and the failure to affix warnings of inherent dangers during an electrical storm had rendered opinions beyond the knowledge and area of his expertise. *Kelly v. Academy Broadway Corp.*, 206 A.D.2d 794, 615 N.Y.S.2d 123 (3d Dep't 1994).

An expert who had taken mechanical engineering courses in college and had familiarity with construction of vehicles but no training in the design of vehicles or their individual parts was not qualified to testify as to a door-locking mechanism on a track loader. *Lessard v. Caterpillar, Inc.*, 291 A.D.2d 825, 737 N.Y.S.2d 191 (4th Dep't 2002), *lv. app. denied*, 98 N.Y.2d 603, 745 N.Y.S.2d 502 (2002).

A licensed engineer without further information was not qualified to render an opinion regarding the safety of a retail store's shelving and stocking practices. *Hofman v. Toys-R-Us*, 272 A.D.2d 296, 707 N.Y.S.2d 641 (2d Dep't 2000).

A biomechanical engineer lacked training and experience to testify that plaintiff did not sustain serious injuries in the automobile accident. *Clemente v. Blumenberg*, 183 Misc. 2d 923, 705 N.Y.S.2d 792 (Sup. Ct., Richmond Co. 1999).

A licensed engineer who had no specialized knowledge, experience, training or education with regard to tanning equipment was not qualified to testify regarding safety of a tanning machine. *Rosen v. Tanning Loft*, 16 A.D.3d 480, 791 N.Y.S.2d 641 (2d Dep't 2005).

The engineer lacked experience in the design of a cross-country running course or in the area of physical education instruction and was therefore properly limited in testifying in a case involving an 8th grade student who slipped while running. *Mariano v. Schuylerville Central School District*, 309 A.D.2d 1116, 706 N.Y.S.2d 388 (3d Dep't 2003).

Architects

An architectural engineer who had never seen or designed a loading platform of the type in question could not testify that the use of a subway grating platform was contrary to good engineering practice. *Dillon v. Socony Mobil Oil Co.*, 9 A.D.2d 835, 192 N.Y.S.2d 818 (3d Dep't 1959).

An architect whose primary concern was to ensure compliance by building contractors with architectural specifications was not qualified to testify regarding the accepted standard for temporary lighting on a construction site since his expertise did not embrace daily maintenance of lighting systems. *Molinari v. Conforti & Eisele, Inc.*, 54 A.D.2d 1113, 388 N.Y.S.2d 782 (4th Dep't 1976).

The architect, although possessing 40 years of experience and a degree in civil engineering, was not qualified since he did not claim specific expertise or experience with engineering, procurement installation, maintenance or repair of any kind, much less of a cantilever gate. *Timmins v. Tishman Constr. Corp.*, 9 A.D.3d 62, 777 N.Y.S.2d 458 (1st Dep't 2004).

Accident Reconstruction

The accident reconstruction expert was not permitted to testify since he did not inspect the intersection until three years after the accident and was not familiar through other sources with the condition of the intersection at the time of the accident. *Dulin v. Maher*, 200 A.D.2d 707, 607 N.Y.S.2d 67 (2d Dep't 1994).

A professional engineer who was not certified or licensed in accident reconstruction was unqualified to testify as to the cause of the vehicle rolling down the side of a hill. *Martin v. State*, 305 A.D.2d 784, 759 N.Y.S.2d 802 (3d Dep't 2003), *lv. app. denied*, 100 N.Y.2d 512, 766 N.Y.S.2d 166 (2003).

The reconstruction expert lacked skill, training, education and knowledge to testify regarding the brakes on a vehicle. *Beeley v. Spencer*, 309 A.D.2d 1303, 765 N.Y.S.2d 725 (4th Dep't 2003).

An expert qualified in physical metallurgy was not competent to testify regarding dynamics and forces and was not permitted to give opinions whether the guardrail pulled the wheel off at impact or what caused the wheel to fall off. *Hileman v. Schmitt's Garage*, 58 A.D.2d 1029, 397 N.Y.S.2d 501 (4th Dep't 1977).

A consulting engineer with a few months' training in technical and scientific reconstruction of automobile accidents was not qualified to testify as to the speed of

an automobile at impact based on analysis of photographs, positions of vehicles post-accident, damage to the vehicles, and other scientific formulae. *Lombard v. Dobson*, 16 A.D.2d 1031, 230 N.Y.S.2d 47 (4th Dep't 1962).

The trial court did not abuse its discretion in excluding from evidence testimony proffered by a witness whose qualifications were not such as would substantiate his status as an expert in the field of accident reconstruction. *Medina v. New York City Transit Authority*, 57 A.D.2d 946, 395 N.Y.S.2d 89 (2d Dep't 1977).

The proffered expert witness was not competent to testify regarding skid marks since he was not qualified to testify about accident reconstruction and additionally there was no proof that the skid marks were made by any of the vehicles involved in the collision. *Coffey v. Callichio*, 136 A.D.2d 673, 523 N.Y.S.2d 1011 (2d Dep't 1988).

There was no proof that the police officer was qualified to conduct post-incident expert analysis and render an opinion as to the cause of the accident. *Casey v. Tierno*, 127 A.D.2d 727, 512 N.Y.S.2d 123 (2d Dep't 1987).

Physicians

A physician with no education, experience or special training in hematology, toxicology or industrial hygiene was not qualified to testify that decedent's aplastic anemia resulted from exposure to creosote in railroad ties. *Corsetti v. Koppers, Inc.*, 26 A.D.2d 205, 640 N.Y.S.2d 556 (1st Dep't 1996), *lv. app. denied*, 88 N.Y.2d 810, 649 N.Y.S.2d 377 (1996).

Treating surgeons without training or experience in the work assessment or physical therapy profession were not qualified to testify regarding the standards of care in that profession. *Kirker v. Nicolla*, 256 A.D.2d 865, 681 N.Y.S.2d 689 (3d Dep't 1998).

The testimony of medical doctors with limited knowledge of chiropractics did not constitute competent trial evidence in an alleged malpractice action against a chiropractor. *Taormina v. Goodman*, 63 A.D.2d 1018, 406 N.Y.S.2d 350 (2d Dep't 1978).

The doctor was not qualified as an expert in psychiatry and the report failed to show he conducted a proper examination. *Carrozzo v. Carrozzo*, 202 A.D.2d 1070, 609 N.Y.S.2d 123 (4th Dep't 1994).

A doctor who specialized in general surgery was not qualified to testify as to a podiatrist's standard of care since podiatry is not a branch of medicine. *Darby v. Cohen*, 101 Misc. 2d 516, 421 N.Y.S.2d 337 (Sup. Ct., N.Y. Co. 1979).

A physician and a hospital employee were not qualified to testify that ethylene oxide was used by the drape manufacturer to sterilize pre-packaged drapes put under patient during surgery. *Matthews v. New York City Health & Hospitals Corp.*, 200 A.D.2d 399, 606 N.Y.S.2d 206 (1st Dep't 1994).

A physician specializing in neurology was not qualified to give an opinion based upon hospital records whether the defendant was intoxicated at the time of the accident. *People v. Peeso*, 266 A.D.2d 716, 699 N.Y.S.2d 136 (3d Dep't 1999).

Forensic Pathologists

A doctor specializing in forensic pathology was not qualified to correlate a driver's blood alcohol content to visible signs of intoxication. *Sorensen v. Denny Nash, Inc.*, 249 A.D.2d 745, 671 N.Y.S.2d 559 (3d Dep't 1998).

A forensic pathologist whose specialty was performing autopsies was not qualified to render an opinion whether an individual showed visible signs of intoxication. *Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997).

A forensic pathologist who lacked expertise as to psychological and social aspects of an infant's death was not qualified to testify about parental confessions. *People v. Hofmann*, 238 A.D.2d 716, 656 N.Y.S.2d 481 (3d Dep't 1997).

Psychologist

A licensed psychologist is not competent to testify regarding alleged departure from good and accepted medical and psychiatric practice. *McDonnell v. County of Nassau*, 129 Misc. 2d 228, 492 N.Y.S.2d 699 (Sup. Ct., Nassau Co. 1985).

The psychologist was not qualified to testify as to the effectiveness or ineffectiveness of biofeedback treatment for back pain. *Queens Boulevard Medical P.C. v. Travelers Indemnity Co.*, 3 Misc. 3d 643, 775 N.Y.S.2d 481 (Civil Ct., Queens Co. 2004).

Miscellaneous Medical Experts

A Ph.D. in pharmacology with an impressive C.V. was not competent to give opinion testimony as to the course of medical treatment that should have been undertaken. *Jordan v. Glens Falls Hospital*, 261 A.D.2d 666, 689 N.Y.S.2d 538 (3d Dep't 1999).

An anesthesiologist/pharmacologist was not qualified to testify whether a surgeon and gastroenterologist properly diagnosed and treated the patient. *Postlethwaite v. United Health Services Hospital, Inc.*, 5 A.D.3d 892, 773 N.Y.S.2d 480 (3d Dep't 2004).

Quasi-Medical Experts

A therapist was incompetent to testify as to the standard of care of physicians. *Kamhi v. Tay*, 244 A.D.2d 266, 664 N.Y.S.2d 288 (1st Dep't 1997).

Plaintiff's pastor was not qualified as a medical expert to testify regarding psychological injury. *Young v. New York City Transit Authority*, 143 A.D.2d 656, 533 N.Y.S.2d 18 (2d Dep't 1988), *mt. for lv. to app. dismissed*, 73 N.Y.2d 871, 537 N.Y.S.2d 495 (1989).

A handwriting expert was not competent to testify about the testator's mental capacity based upon analysis of his signature. *In re Palmentiere*, 171 A.D.2d 871, 567 N.Y.S.2d 797 (2d Dep't 1991).

The witness was not qualified to testify as an expert on the subject of the syndrome of child prostitution since she had not studied the area and did not have necessary academic and scientific credentials even though she had vast experience in working on the streets with child prostitutes. *People v. Falzone*, 150 A.D.2d 249, 541 N.Y.S.2d 415 (1st Dep't 1989).

A certified social worker was not qualified to give an opinion whether the defendant was suffering from a mental disease or defect during the commission of a crime. *People v. Zavaro*, 138 A.D.2d 430, 525 N.Y.S.2d 713 (2d Dep't 1988).

Vocational Rehabilitation

The vocational rehabilitation specialist was not qualified to testify as to past and future loss of earnings, household services, and future medical expenses. *Smith v. M.V. Woods Construction Co.*, 309 A.D.2d 1155, 764 N.Y.S.2d 749, *appeal after new trial*, 2 A.D.3d 1488, 768 N.Y.S.2d 904 (4th Dep't 2003).

The vocational rehabilitation specialist who examined records was not competent to give testimony since he did not examine the plaintiff and provided no facts to support the conclusion that plaintiff would have been employable or how development of the disease would have a negative impact on plaintiff's future employability. *Cillo v. Resjefal Corp.*, 16 A.D.3d 339, 792 N.Y.S.2d 428 (1st Dep't 2005).

Evaluation of Services and Property

Witness who lacked knowledge as to the refinements of electrical work and the cost of electrical work was not qualified to testify concerning the value of services performed and materials provided. *A.C. Electric Co., Inc. v. Bellino*, 135 A.D.2d 678, 522 N.Y.S.2d 578 (2d Dep't 1987).

A witness who had never valued a law practice and had valued only one professional practice—an accounting practice—was not qualified to testify as to the value of a law practice for purposes of equitable distribution. *Wells v. Wells*, 177 A.D.2d 779, 576 N.Y.S.2d 390 (3d Dep't 1991).

The certified public accountant was unqualified to testify regarding the value of legal services. Defendant's private attorney was not properly qualified as an expert to render opinions as to the excluded testimony. *Cadwalader, Wickersham & Taft v. Spinale*, 197 A.D.2d 403, 602 N.Y.S.2d 139 (1st Dep't 1993).

A real estate appraiser who is neither an architect, engineer, nor builder was not qualified to testify as to the reproduction cost approach at a proceeding to reduce tax assessment. *Northville Industries v. Board of Assessors of Town of Riverhead*, 143 A.D.2d 135, 531 N.Y.S.2d 592 (2d Dep't 1988).

A real estate developer was not qualified to testify about land value in an eminent domain proceeding. *Town of Webb v. Sisters Realty North Corp.*, 229 A.D.2d 942, 645 N.Y.S.2d 233 (4th Dep't 1996).

The proffered expert who had familiarity with property auctions and general familiarity with sold items in question was not qualified to testify as to value of items sold in an action by the bailor versus the bailee. *Strach v. Doin*, 288 A.D.2d 640, 733 N.Y.S.2d 273 (3d Dep't 2001).

An assistant district attorney was not qualified to testify as to the value of used computer equipment since he lacked formal training and actual experience as to value. *People v. Burt*, 270 A.D.2d 516, 705 N.Y.S.2d 90 (3d Dep't 2000).

Contractor/Construction

The installer of siding was unqualified to testify as to the negligent application of sealant on the defendant's deck. *Pignataro v. Galarzia*, 303 A.D.2d 667, 757 N.Y.S.2d 76 (2d Dep't 2003).

Experience in the construction field as foreman and building superintendent was insufficient to permit the witness to give an opinion as to road's location or any encroachment by analyzing deeds and surveys. *Moore v. County of Rensselaer*, 156 A.D.2d 784, 549 N.Y.S.2d 828 (3d Dep't 1989).

Expert did not have necessary qualifications to testify as to the design, installation and maintenance of the air-conditioning system. *Franklin v. Jaros, Baum & Bolles, Inc.*, 257 A.D.2d 600, 684 N.Y.S.2d 282 (2d Dep't 1999), *lv. to app. denied*, 93 N.Y.2d 811, 694 N.Y.S.2d 633 (1999).

Athletic Instructors

A basketball coach was not qualified to testify as to the safety and design of a basketball court since there was no showing that he had ever rendered advice about basketball court construction or aided in the designing or planning of gymnasiums or recreation areas. *McGovern v. Riverdale Country School Realty Co.*, 51 A.D.2d 894, 380 N.Y.S.2d 687 (1st Dep't 1976).

A roller-skating instructor with a Ph.D. in physical education was not qualified to give an opinion as to the cause of the roller skater's injuries. *Doukas v. American On Wheels*, 124 A.D.2d 778, 508 N.Y.S.2d 496 (2d Dep't 1986), *app. after remand*, 154 A.D.2d 426, 545 N.Y.S.2d 928 (2d Dep't 1989).

Requirement of Specific Knowledge: Miscellaneous Cases

Plaintiff failed to present any evidence that his expert had practical experience or personal knowledge in the design of banding tools. *Rutherford v. Signod Corporation*, 11 A.D.3d 922, 783 N.Y.S.2d 735 (4th Dep't 2004), *lv. to app. denied*, 4 N.Y.3d 702, 790 N.Y.S.2d 649 (2005).

A correction officer did not have education or training to opine that the inmate could cause a major incident on the floor at any time. *Dizak v. State*, 124 A.D.2d 329, 508 N.Y.S.2d 290 (3d Dep't 1986).

The proffered expert was not qualified to testify on the issue of constructive knowledge of a hazard on the floor since he had not worked in the supermarket industry for the last eight years, was not familiar with supermarket safety practices and had never visited the site of the accident. *Rojas v. Supermarkets General Corp.*, 238 A.D.2d 393, 656 N.Y.S.2d 346 (2d Dep't 1997), *lv. to app. denied*, 91 N.Y.2d 814, 676 N.Y.S.2d 127 (1998).

In a case involving a mentally retarded adult being sexually assaulted by a bus driver, plaintiff's proffered expert who had a doctorate in Educational Administration and Supervision and Masters Degrees in Special Education and Education Law was precluded from rendering opinions as to:

1. The hiring, screening, training, supervision or retention of bus drivers who transport mentally retarded adults;
2. The duty of an agency such as AHRC to monitor a transportation contractor that transports mentally retarded adults;
3. The safety and supervision of mentally retarded adults on buses;
4. Whether an aide or matron should be placed on a bus transporting mentally retarded adults; and
5. The capabilities and vulnerabilities of mentally retarded adults with respect to sexual abuse.

Giangrosso v. Association for the Help of Retarded Children, 2001 N.Y. Slip Op. 40073, 2001 WL 914258 (Sup. Ct., Suffolk Co. 2001) (legal commentators have referred to this decision by the late Justice Alan Oshrin as *Giangross II)*.

Statutes/Codes

Expert's testimony regarding the meaning and applicability of statutes was beyond the scope of the witnesses' expertise, usurped the function of the court and was reversible error. *Rodriguez v. New York City Housing Authority*, 209 A.D.2d 260, 618 N.Y.S.2d 352 (1st Dep't 1994).

The opinion of an expert regarding violations of a code that are erroneous must be rejected. *Marquart v. Yeshiva Machezikel Torah D'Chaisdel Belz*, 53 A.D.2d 688, 385 N.Y.S.2d 319 (2d Dep't 1976).

Conclusion

The lesson to be learned from these cases is that trial attorneys for both plaintiffs and defendants cannot rely merely upon generic qualifications of an expert. Being an engineer does not make the witness an expert for all seasons. Consideration must be given to the nature and extent of expertise required for a particular discipline or case fact pattern. Qualification caution must be the watchword for all attorneys. Anything less than that may result not only in embarrassment, an adverse result and an unhappy client, but also a need for counsel to check the limits of his or her professional liability policy of insurance. If this article has heightened awareness of the need for caution in the retention of experts it will have served a worthwhile purpose.

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Book Review

Commercial Litigation in New York State Courts, Second Edition

Robert L. Haig, Esq., Editor-in-Chief. Thomson-West, Eagan, Minn., five volumes, 6,444 pages

Reviewed by Justice Herman Cahn and Louis L. Nock

The Commercial Division of the New York State Supreme Court was founded in 1995 as a specialty court, devoted to the adjudication of complex commercial and corporate matters. Since its founding, the Division has served the litigation needs of, perhaps, the most sophisticated commercial and corporate Bar in the country. Because it is a specialty court, its procedures and rules have been tailored to the needs of commercial litigants. Starting in 1995 with six presiding Justices in two counties, the Division now operates in eight counties, with 15 Justices.

The Division's Individual Rules of Practice, similar in many respects to the Federal Rules of Civil Procedure, cater to the Division's primary purpose of skillful and expeditious disposition of complex commercial matters. Recently proposed changes to the Rules, prompted by suggestions from the commercial Bar and the realities of practice in a computerized world, make the Second Edition of this superb treatise an absolute necessity for the commercial practitioner.

The First Edition was published in 1995, shortly after the founding of the Commercial Division. It fast became a mainstay of commercial practitioners due to its comprehensive overview of the practice, as well as practical advice on areas ranging from deposition practice to settlement negotiation. As valuable as the First Edition was, and continues to be; the Second is, by far, even more so.

As with the First Edition, the Second Edition begins each chapter with scope notes apprising the reader of its content. Each chapter is compartmentalized into subheadings for ease of reference and contains a thorough discussion of the subject matter, appending footnoted references to supporting legal authorities. Forms and jury charges are included. The treatise provides legal analyses and strategies essential to commercial practitioners.

The Second Edition covers the entire procedural scope of commercial litigation, updating the matters covered in the First Edition's 68 chapters, and providing important advice on areas ranging from investigation of the client's case through trial, appeal, and enforcement of judgment. The Second Edition contains 20 new chapters covering the topics which have become more relevant and fashionable since 1995, including: Case Evaluation; Suing or Representing Foreign Companies; Referees and Special Masters; Court Awarded Attorneys' Fees; Techniques for Streamlining Litigation; Corporate Litigation Management; Secured Transactions; Partnerships; Products Liability; Mergers and Acquisitions; Securities Litigation; Shareholder Derivative Practice; Director and Officer Liability; Broker-Dealer Litigation and Arbitration; Professional Liability; Franchising; Intellectual Property; Commercial Disparagement; and Government Entity Litigation. Importantly, the Second Edition contains an entire chapter devoted to an area of burgeoning concern in our practice: E-Discovery, authored by noted practitioners Gerald G. Paul, Esq., and Wolfgang A. Dase, Esq. Their astute effort keeps perfect time with recently proposed changes to our Individual Rules of Practice, containing specific requirements for the devising of e-discovery plans, and similar rules addressing litigation needs arising from a quickly evolving method of information storage engulfing the world stage.

The Second Edition also dedicates an entire chapter to "Practice Before the Commercial Division." This much-needed chapter sets forth crucial procedural information about Division practice, including Guidelines for Assignment of Cases to the Division; Justices' Individual Rules of Practice; and E-Filing of Papers. The chapter clarifies procedural nuances peculiar to Division practice, such as the pre-conference requirement on TRO applications, and the continuation of discovery during the pendency of dispositive motion practice—a subject which has aroused robust discussion and debate among members of our commercial Bar.

A word about the very distinguished editorial and substantive contributors to this scholarly work. Editor-in-Chief Robert L. Haig, Esq., is a noted expert and lecturer in the area of commercial litigation, as well as products liability and other civil practice areas. He co-chairs the State's Commercial Courts Task Force, which took part in the effort to create the Commercial Division. Apart from his own expertise, Haig marshals an impressive host of principal author/contributors—121 in all, including the original 63 contributors to the First Edition—who skillfully mold the work's substantive chapters in accordance with their own particular areas of expertise. Among them are nine outstanding chapters on trial practice, authored by renowned trial

expert Stephen R. Kaye, Esq. The expanded authorship reflected in the Second Edition has also expanded its text, adding an additional two volumes to the First Edition's three.

The authors include a variety of Jurists from throughout the state, beginning with Hon. Judith S. Kaye, Chief Judge of the New York State Court of Appeals. The Chief Judge opens the treatise with a splendid history of commercial practice in New York, giving the reader a rare glimpse at the professional lives of Hamilton, Burr, Cardozo, and Llewellyn—all New York commercial litigators.

The work is a tribute to the more than ten years of jurisprudence of the Commercial Division and the joint efforts of the Bench and Bar who toil there. Each chapter concludes with concise practice checklists, enabling the reader to summarize the vital concepts and strategies expounded upon within the substantive discussion. Familiar and unfamiliar allegations for the prosecution and defense of actions are provided and explained, allowing the reader to understand the essential elements of causes of action and affirmative defenses common to commercial practice.

The treatise is of great value to both the seasoned litigator and the novice. The work contains vital procedural guidance useful to all litigators—commercial and non-commercial alike. Justice Oliver Wendell Holmes, Jr., once wrote, in connection with the Law of Contracts: "It has been so ably discussed that there is less room here elsewhere for essentially new analysis." (Holmes, *The Common Law*, Lecture VII.) Nonetheless, as Justice Holmes accomplished in *his* classic work, Robert Haig and his colleagues have done a remarkable job of demonstrating the newness of the law, even within the context of well-known legal principles.

We would be remiss not to recognize that the entire project was undertaken *pro bono publico*. Royalty proceeds are payable to the New York County Lawyers' Association, once chaired by Mr. Haig. Thus, the Second Edition of *Commercial Litigation in New York State Courts* is not just a triumph of legal scholarship; it is a testament to the finest traditions of public service exemplified by our profession since time immemorial. We recommend this work to any practitioner who is serious about mastering the knowledge necessary for effective civil litigation practice in general, and in our Commercial Division in particular.

Justice Cahn is a Justice of the Supreme Court of the State of New York, New York County, Commercial Division.

Mr. Nock is Justice Cahn's Principal Law Clerk.

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Publication of Articles

The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted on a 3½" diskette (preferably in WordPerfect or Microsoft Word) along with two laser-printed originals. Please submit articles to Steven B. Prystowsky, Esq., 120 Broadway, New York, NY 10271.

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