

Commercial and Federal Litigation Section Newsletter



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



Upcoming Commercial and Federal Litigation Section Events and Co-Sponsored Events

Tuesday, August 8, 2017

Legal Ethics In The Digital Age: Practical Strategies For Using Technology Ethically In Your Practice Video Replay

CLE Summer 2017 Video Replay | 10:00 a.m.—2:00 p.m. | 4.0 MCLE Credits in Ethics

NYSBA Members: \$100 | Non-Members: \$200

The New York State Bar Association Commercial and Federal Litigation Section is pleased to present an MCLE program on Legal Ethics in the Digital Age: Practical Strategies for Using Technology Ethically in Your Practice. Co-sponsored by the Committee on Continuing Legal Education and the Law Practice Management Committee, this program carries 4.0 credits in ethics and is approved for all attorneys, including those newly admitted. Featuring renowned speakers on ethics, social media and electronic discovery, register for this program and learn the ins and outs of for protecting privilege in electronic communications. Speakers will also cover managing records in the cloud and organizing client files. A panel discussion on the do's and don'ts of attorney social media use and advice to clients will also be included.

Friday, September 15, 2017

Ethical Issues in Litigation Finance

Live CLE Program and Webcast | 12:00 p.m. - 1:00 p.m. | 1.0 MCLE Credits in Ethics

New York Society of Security Analysis | 1540 Broadway, Suite 1010 | New York, NY 10036

In this program, participants will learn how to use litigation funding to access the resources they need to pursue meritorious commercial litigation claims. The discussion will focus on the intersection of litigation finance and the applicable Rules of Professional Responsibility, as well as the basic principles of litigation funding.

Members: \$75.00 | Non-Members: \$175.00 | Commercial & Federal Litigation Section Member: \$63.75

Friday, October 13, 2017

"Criminal ESI:" Electronic Information in Criminal Investigations & Proceedings

Live CLE Program and Webcast | 9:00 a.m.—1:00 p.m.

New York Society of Security Analysts | 1540 Broadway – Suite 1010 | New York City

More information coming soon.

Wednesday, October 25, 2017

Legal Ethics in the Digital Age Fall 2017

Live CLE Program and Webcast | 9:00 a.m.—1:00 p.m. | 4.0 MCLE Credits in Ethics

New York Society of Security Analysts | 1540 Broadway | Suite 1010 | New York City

Who Should Attend: Attorneys seeking more information on legal ethics in the digital age. This program is transitional and is approved for all attorneys.

Not Able to Attend in Person? A Live Webcast Option Is Available!*

*Note: Newly admitted attorneys (less than twenty-four months) can attend the program via webcast to receive New York MCLE credit but the ethics portion must be viewed on the same day of the webcast.

This program is co-sponsored by the Commercial and Federal Litigation Section, the Committee on Continuing Legal Education and the Law Practice Management Committee.

Members: \$135.00 | Non-Members: \$235.00 | Commercial & Federal Litigation Section Member: \$114.75 | Students: \$45.00

Wednesday, November 15, 2017

Shira A. Scheindlin Award for Excellence in the Courtroom

The Shira A. Scheindlin Award for Excellence in the Courtroom was created by the Commercial and Federal Litigation Section in honor of the Section's former Chair, who served as a United States District Judge for the Southern District of New York from September 1994 through April 2016. Prior to serving as a United States District Judge, Judge Scheindlin served as a Magistrate Judge for the Eastern District of New York, an Assistant United States Attorney for the Eastern District of New York, the general counsel for the New York City Department of Investigation and a commercial litigator in private practice.

The Scheindlin Award will be presented in November, on or around the date when women received the right to vote in New York State in 1917. The Award will be given to a female litigator who has distinguished herself in the courtroom in either the Federal or State courts in New York and who has shown a commitment to mentoring young attorneys in the legal community.

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NYLitigator Invites Submissions

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

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

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

Daniel K. Wiig, Esq.
Municipal Credit Union
Legal Department
22 Cortlandt Street
New York, NY 10007
dwiig@nymcu.org

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

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Message from the Chair



Mitchell J. Katz

I am honored to write this message as Chair of the Commercial and Federal Litigation Section. If you see Mark Berman, please thank him for his many years of service culminating in this last year as Chair of the Section; he did great work on our behalf.

A material part of the value proposition in a membership organization like ours, in my mind, is in the active engagement of its members. While Section membership is a bargain at \$40, there are too many of you who only appreciate our *NYLitigator* magazine (thanks to Dan Wiig) and our *Newsletter* (thanks to Mark Davies), occasionally attend a CLE program or maybe a social function. I get it; we all have careers, families, hobbies, faith commitments, and are volunteers with our favorite charities. The strength of our community and thus the value of membership is increased through meaningful participation; we become stronger, more informed, and become better at what we do when we expand our connections and relationships.

The Section is built upon volunteerism and service. Many of our volunteers have made friendships through their active engagement with the Section and, I dare say, have had some fun doing it. We have expanded our professional community; we know who to call when a client needs help that we cannot provide and it is a wonderful feeling indeed to be able to tell a client that you know a high-quality professional in the community

where that client needs help and make that recommendation without hesitation. We have been privileged to get to know many of our state and federal judges, and through this active engagement with the judiciary we have been able to work collaboratively to make our commercial litigation matters faster, cheaper and smarter. We have learned about new commercial cases and have been alerted by new decisions, legislation, and rules. The world within which we work is bigger than where we live and where our offices are located. Opportunities abound through collaboration with others in the profession.

Please go to the NYSBA webpage and check out the information about the Section and sign up on the “Communities” page to get emails from your leadership and other Section members. Please follow us on Twitter at @NYSBACOMFED; you do not have to “tweet” but you will receive very useful and timely information. If you are on a committee, contact your committee chairs and ask how you can help. If you are not on a committee, please join one and make your presence known to the chairs. Volunteer to write an article for the *NYLitigator* or the *Newsletter*. Attend the Annual Meeting in January; join us for the Spring Meeting at The Sagamore on May 4, 5, and 6, 2018. Participate—technology allows us to be anywhere and participate; I live in Syracuse and have participated in many meetings by video and telephone conference.

This is your Section. Robert Holtzman, Sandra Rampersaud, Laurel Kretzing, and Jamie Sinclair are part of your new leadership team. Please let us know your ideas and tell us how we can make your membership in our Section have more meaning and provide more value.

Have you used the Commercial and Federal Litigation Section member community?

What Are Member Communities?

The member communities are private, online professional networks, built on the concept of listserves that offer enhanced features such as collaboration tools and document libraries. They offer you a variety of tools to help you connect, network and work collaboratively with fellow NYSBA members.

Find us at www.nysba.org/comfedcommunity.

Cross-Fertilization of Best Practices Recommendations to Improve Resolution of Commercial Disputes in the Courts and in Arbitration

By Clara Flebus

Earlier this year, the NYSBA Commercial and Federal Litigation (“ComFed”) and Dispute Resolution (“DR”) Sections joined forces to offer a groundbreaking CLE program entitled “Cross-Fertilization of Best Practices Recommendations by the ComFed and the DR Sections for Improving Dispute Resolution in the Courts and in Arbitration.” The seminar, held at Fordham Law School on March 13, 2017, stands unique in its character as a pioneer effort in bringing together professionals from both the litigation and arbitration worlds to discuss innovative initiatives, legal developments, and recent trends for improving the resolution of commercial disputes in both types of forum.

Attended by over 100 lawyers, the joint program was conceptualized and co-chaired by Charles J. Moxley, Jr., a mediator and arbitrator with Moxley ADR LLC, and Jeffrey T. Zaino, Vice President of the Commercial Division of the American Arbitration Association, both Co-Chairs of the ComFed’s Committee on Arbitration and ADR; Rekha Rangachari, Director of ADR Services at the American Arbitration Association, and Steven Skulnik, a mediator and arbitrator, both Co-Chairs of the DR Section’s Committee on Domestic Arbitration. The International Litigation Committee of ComFed co-sponsored the event.

The all-day program began with welcoming remarks given by then-NYSBA President Claire P. Gutekunst, who is a longtime member of both Sections. Ms. Gutekunst praised the Sections’ effort to discuss important common areas of interest for commercial litigators and ADR practitioners and help attendees gain a better understanding of the differences and similarities of the processes. She observed that this novel and timely seminar—focusing not only on existing practices, but also on how to improve them—is on the cutting edge of CLE programming and provides great value to NYSBA members.

“Speakers examined the rules themselves and commented on their practical application in court proceedings and in arbitration generally.”

The program featured six outstanding panels comprising seasoned commercial litigators, arbitrators, and mediators (including several retired Judges), and representatives from the courts and arbitral institutions.

The first panel, entitled “What the Litigation World Has Been Doing to Improve the Courts—and What the

Arbitration World Can Learn from Those Efforts,” examined recent ComFed and other NYSBA reports addressing innovations aimed at increasing efficiency in the resolution of business disputes in the courts. The discussion then focused on what the arbitration operators could learn from those efforts to improve the administration of justice in arbitration. This panel was moderated by Charles Moxley and included: Jonathan D.



Clara Flebus

Lupkin, the founder of Lupkin & Associates PLLC and a past Chair of ComFed; Paul D. Sarkozi, a Partner at Tannenbaum Helpert Syracuse & Hirschtritt LLP and a past Chair of ComFed; David H. Tennant, a Partner at Nixon Peabody LLP and a past Chair of ComFed; William L.D. Barrett, Of Counsel at Fulton Vittoria LLP; Sasha A. Carbone, Associate General Counsel for the American Arbitration Association; and Abigail Pessen, a mediator and arbitrator at Dispute Resolution Services and Chair of the DR Section.

The second panel, in turn, explored “What the Arbitration World Has Been Doing to Improve Arbitration—and What the Courts Can Learn From Those Efforts.” Panelists discussed various reports and efforts of the DR Section, and the arbitration world generally, to improve commercial arbitration by making it more expeditious and economical, and then addressed what the courts could learn from those efforts to help promote efficiency in handling complex commercial litigation in the courts. Jeffrey Zaino moderated this panel, which consisted of Hon. Ariel E. Belen, former Associate Justice of the Appellate Division, Second Department and now a mediator and arbitrator at JAMS; Edna Sussman, a mediator and arbitrator at SussmanADR LLC and a past Chair of the DR Section; John H. Wilkinson, Of Counsel at Fulton, Rowe & Hart and a past Chair of the DR Section; Steven C. Bennett, a Partner at Park Jensen Bennett LLP; Ignatius Grande, Senior Discovery Attorney at Hughes Hubbard & Reed LLP; and James M. Wicks, a Partner at Farrell Fritz, P.C. and a past Chair of ComFed.

The third panel focused on “Electronic Discovery—The Current State of Play as to the Scope of Electronic

Discovery in the Courts and in Arbitration: What the Rules Say and What Is Actually Happening.” Speakers examined the rules themselves and commented on their practical application in court proceedings and in arbitration generally. This panel was moderated by Steven Skulnik and featured as speakers Hon. Shira A. Scheindlin, former United States District Court Judge for the Southern District of New York, currently Of Counsel at Stroock & Stroock & Lavan LLP and a past Chair of ComFed; Maura R. Grossman, Research Professor at the University of Waterloo (Ontario); Hon. Ira B. Warshawsky, former Commercial Division Justice of the New York Supreme Court and now Of Counsel at Meyer, Suozzi, English & Klein, P.C.; Sherman Kahn, a mediator and arbitrator with Mauriel Kapouytian Woods LLP and a past Chair of the DR Section; Daniel F. Kolb, Senior Counsel at Davis Polk & Wardwell LLP and Chair-Elect of the DR Section; and Richard L. Mattiaccio, a Partner at Squire Patton Boggs LLP.



(left to right): Rekha Rangachari, Steven Skulnik, Clara Flebus, Jeffrey Zaino, and Charles Moxley.

The fourth panel picked up where the previous discussion left off. This portion of the program was entitled “Search for a Solution—How the Arbitration World and the Courts Can Keep ESI [i.e., Electronically Stored Information] Within the Limits of Proportionality, Efficiency and Economy.” Panelists addressed practical aspects of how courts and arbitrators currently handle electronic discovery, and then explored ways and methods to improve oversight of electronic discovery so that, in the future, commercial cases may be resolved more expeditiously and economically in both fora. Moderator Charles Moxley led a lively and stimulating discussion among distinguished panelists including Hon. Carolyn E. Demarest, former Commercial Division Justice of the New York Supreme Court and now a mediator and arbitrator at JAMS; Hon. Ronald J. Hedges, former United States Magistrate Judge for the District of New Jersey and currently a mediator and arbitrator at Ronald J. Hedges LLC; Hon. Frank Maas, former United States Magistrate Judge for the Southern District of New York and now a mediator and arbitrator at JAMS; Carla M. Miller, Vice President of Business and Legal Affairs and litigation counsel for Universal Music Group; and Anibal Sabater, a Partner at Chaffetz Lindsey LLP.

The fifth panel, entitled “What the Institutions Can Do to Foster the Objective of Expeditious and Economical Dispute Resolution in Arbitration and in the Courts,”

offered the perspective of arbitration providers and the courts as to what steps may be taken to provide quicker and less expensive commercial trials and hearings in both types of forum. This panel, moderated by Rekha Rangachari, featured Marek Krasula, Deputy Counsel at the International Chambers of Commerce—Sicana Inc.; Helena Tavares Erickson, Senior Vice President at CPR International Institute for Conflict Prevention & Resolution; Luis M. Martinez, Vice President of the International Center for Dispute Resolution; Matthew York, a General Manager at JAMS; and Clara Flebus, author of this article, who is an Appellate Court Attorney at New York Supreme Court and Chair of the ComFed’s Committee on International Litigation.

Finally, the sixth panel summed up key issues, critical considerations, and interesting proposals that emerged throughout the day. Moderator Gregory K. Arenson (Partner at Kaplan Fox & Kilsheimer LLP and a past Chair of ComFed), and speakers Rekha Rangachari, Steven Skulnik, and Mark C. Zauderer (Partner at Flemming Zulack Williamson Zauderer LLP and a past Chair of ComFed) offered their perspectives on the best practices and recommendations to make commercial litigation and arbitration faster, cheaper, and more effective.

By all measures, the event was a resounding success. “This was a necessary and enriching program,” commented Ms. Gutekunst. “Professionals from the litigation and arbitration worlds can learn so much from each other.” Following the panels, attendees had the opportunity to network at a wine and cheese reception and exchange views on the various themes discussed. Both ComFed and DR Sections are thankful to the numerous and distinguished panelists who made this novel joint seminar uniquely informative and thought-provoking.

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



Business and Commercial Litigation in Federal Courts: An Essential Guide for the Successful Business Litigator

Robert L. Haig, Editor-in-Chief

Reviewed by Paul D. Sarkozi

(4th Edition, Published by Thomson Reuters)

There are few business litigators in New York who have garnered the respect among judges, outside counsel, and inside counsel as Bob Haig. Haig played a critical leadership role in the creation of both NYSBA's Commercial and Federal Litigation Section and New York's Commercial Division, the nation's premier business court. When New York's Chief Judge needed someone to lead the Commercial Division Advisory Council, Haig was the logical choice.

In this leadership role, Haig consistently has found ways to prod prominent lawyers and judges to put their egos aside, roll up their sleeves, and deliver well-researched proposals for effective court rules to streamline business disputes. On each proposal, Haig is centrally involved: He pushes for work product that is well-considered and clear, and he reviews that work product to offer his own suggestions. I know that this is Haig's process because I am a member of the Advisory Council.

"With 25 new chapters and an additional 4,400 pages, the fourth edition is almost 33 percent larger than the third edition, comprising 14 volumes and 153 chapters."

Similarly, I know that Haig brings the same commitment to excellence and practical solutions to his multivolume treatises. I know because I once served as a contributing author to Haig's treatise on *Commercial Litigation in New York State Courts*. Haig reviews outlines for the chapters, makes suggestions for materials to include—both subjects to be discussed and forms that would benefit practitioners—and then reads and comments on drafts as if he were editing a brief for the New York Court of Appeals or the Second Circuit. The results are treasured resources for business litigators.

Haig's latest offering, the fourth edition of *Business and Commercial Litigation in Federal Courts*, is a multivolume set that no commercial litigator should be without. Indeed, when I find myself litigating a new area, my first step is to open the relevant Haig treatise and begin to flip



through the appropriate chapter. With the Haig treatise as a resource, I can draw on the thoughts of lawyers from top national and international law firms and judges of the U.S. District Courts and Courts of Appeals to make sure I focus on the issues and arguments that are most likely to be case dispositive.

Having the fourth edition of *Business and Commercial Litigation in Federal Courts* on your shelf is like having ready access to the dream team faculty for a CLE that every business litigator would want to take. For example, Second Circuit Judge Richard C. Wesley joins the head of Nixon Peabody's appellate practice, David Tennant, in writing about "Appeals to the Court of Appeals." Judge Shira A. Scheindlin, who wrote some of the most cited and formative decisions on federal e-discovery law, is a co-author of the chapter on "Discovery of Electronically Stored Information." Judge Daniel H. Weinstein, a founder of JAMS, is a co-author of the chapter on "Mediation." Karen Patton Seymour, the former Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York and former Co-Managing Partner of Sullivan & Cromwell's Litigation Group, wrote the chapter on "Money Laundering."

"As helpful as these procedural guides are, the substantive scope of the treatise is breathtaking. One would be hard-pressed to imagine a type of litigation that is not discussed."

The fourth edition of *Business and Commercial Litigation in Federal Courts* builds upon prior editions by offering an even greater breadth of coverage and depth of discussion on critical business litigation subjects. With 25 new chapters and an additional 4,400 pages, the fourth edition is almost 33 percent larger than the third edition,

comprising 14 volumes and 153 chapters. Yet, because each chapter is the product of a different distinguished set of authors, each chapter maintains pedagogical and practical focus.

“Each topic contains discussions that help general commercial litigators quickly acclimate to an unfamiliar type of litigation or industry.”

Procedurally, *Business and Commercial Litigation in Federal Courts* provides insight on a broad range of forum issues—domestic and international arbitration, multidistrict litigation, and cross border litigation. The treatise gives in-depth treatment to each stage of a case—from case evaluation to pleadings, from discovery to motion practice, from trial practice to post judgment enforcement and appeals. Special types of cases (class actions and derivative actions) and remedies (provisional relief, punitive damages, etc.) each get their own chapter. And each chapter contains key case law, highlights recent rule changes, offers strategic and tactical considerations from the perspective of plaintiff and defendant, and includes useful forms and checklists to make sure the practitioner gives due consideration to all issues necessary to represent a client.

As helpful as these procedural guides are, the substantive scope of the treatise is breathtaking. One would be hard-pressed to imagine a type of litigation that is not discussed. The following list represents only a small sample of the areas of disputes the treatise explores: anti-trust, securities, and derivatives; health care institutions, medical malpractice, and professional liability; insurance and reinsurance; food and drug; the broad range of intellectual property disputes; labor law and executive compensation; commercial defamation and fiduciary duty litigation; sale of goods and commercial real estate; money laundering and false claims; sports and entertainment and fashion; e-commerce, construction, project finance, and environmental claims.

Each topic contains discussions that help general commercial litigators quickly acclimate to an unfamiliar type of litigation or industry. For example, whether representing brick and mortar or online retailers, a litigator can readily add value by reading the new chapter on “Fashion and Retail” for an overview of how intellectual property, employment, privacy, and Americans with Disability Act compliance impact a client. The new chapter on “Cross-Border Litigation” provides specific suggestions about data privacy requirements, anti-suit injunctions, and the advantages and disadvantages of various

Paul D. Sarkozi, the Co-Chair of the Litigation and Dispute Resolution Department at Tannenbaum Helpert Syracuse & Hirschtritt LLP, is a former Chair of the Commercial and Federal Litigation Section. Paul’s colleague Richard Trotter assisted with the preparation of this article.

international business venues. The chapter on “Social Media” offers specific document requests and deposition questions for pursuing social media through discovery, provides suggestions as to how to overcome evidentiary objections to the admission of Facebook posts, and identifies the contours of permissible use of social media to research and select jurors.

“Though associates and partners are tempted these days to search the internet or commercial databases for quick answers to their legal questions, I would submit that practitioners will save themselves more time and equip themselves with much better answers by turning first to this exceptional treatise.”

Finally, the treatise recognizes aspects of modern business litigation practice that extend beyond the confines of the courthouse, and even the cases themselves. There are chapters on litigation avoidance, crisis management, and internal investigations, as well as chapters on how to resolve matters through negotiations and mediation. There are also chapters that discuss litigation technology, litigation management by law firms and corporations, marketing to potential business clients, and even how to teach litigation skills.

In sum, every business litigator who practices in the federal court should have *Business and Commercial Litigation in Federal Courts* in his or her library, if not at ready access in his or her office. Though associates and partners are tempted these days to search the internet or commercial databases for quick answers to their legal questions, I would submit that practitioners will save themselves more time and equip themselves with much better answers by turning first to this exceptional treatise. While there is no shortcut to success, I can’t think of a better way for a litigator to get a head start on that path than by reaching for *Business and Commercial Litigation in Federal Courts*.

Lesley Rosenthal, Past Chair of the Commercial and Federal Litigation Section, Receives the 2017 Root/Stimson Award

By Patrick Leavy

On June 18, 2017, State Bar President Sharon Stern Gerstman presented Lesley Rosenthal, the executive vice president and general counsel of the Lincoln Center for the Performing Arts in New York City, with the New York State Bar Association's 2017 Root/Stimson Award.

The Root/Stimson Award, named after Elihu Root and Henry Stimson, honors a lawyer who has demonstrated outstanding commitment to community and volunteer service and to the improvement of the justice system. The award recognizes members of the legal profession who have given unstintingly of their time through community service activities. Elihu Root and Henry Stimson both dedicated their careers to public service, and between them, they held five cabinet posts, served as senator and U.S. Attorney, founded the Council on Foreign Relations, and won a Nobel Peace Prize. Indeed, New York lawyers have a grand tradition of public service, which has been gracefully carried on by Lesley Rosenthal.

Throughout her career, Rosenthal has exemplified her commitment to public service by giving back to her community through countless volunteer efforts. Early in her life, Rosenthal was debating whether to pursue a career as a violinist or a lawyer. She visited with her elementary school music teacher, who advised her that "you can always be a lawyer and play the violin on the side, but you can't do it the other way around." She heeded the advice and attended Harvard Law School, wanting to pursue a career in public interest work.

Upon graduating from law school, Rosenthal clerked for the Honorable Shirley Wohl Kram, United States District Court for the Southern District of New York. Rosenthal planned to complete her clerkship and then pursue public interest work. However, Judge Kram counseled her about the benefits of working for a law firm coming off a clerkship. Specifically, law firms provide excellent training for young lawyers, and the salary also helps pay off student loans.

During the term of her clerkship, Rosenthal noticed one firm that repeatedly appeared before Judge Kram on important commercial matters and pro bono matters. The firm was Paul, Weiss. She applied for and accepted a position with Paul, Weiss after her clerkship. In addition to offering training and the ability to pay student loans, Paul, Weiss was extremely supportive of several opportu-

nities for Rosenthal to provide pro bono services. While working at the firm, she became the general counsel for her college roommate's modern dance company on a pro bono basis, which was her first exposure to being a general counsel to a nonprofit. The firm also had her take over as outside pro bono general counsel to Child Care Action Campaign, which was a much larger advocacy organization. Her 13 years at Paul, Weiss allowed her to gain the necessary training to excel at the practice of law, as well as fulfill her passion of giving back to her community through the numerous pro bono matters she handled.

After working for Paul, Weiss, Rosenthal became general counsel to the Lincoln Center. In her first year, she pioneered a new initiative to procure pro bono counsel to reduce outside legal costs for the Center. The program was widely successful and reduced outside legal spending by about 90 percent. The Lincoln Center now receives millions of dollars worth of pro bono counsel every year. This initiative led to Rosenthal helping to start Charity Corps, which was a project through the State Bar and state Attorney General's office that helped match nonprofits with lawyers that would provide their services on a pro bono basis.

She also is actively involved in the New York State Bar Association. Most notably, she served as Chair of our Section, the Commercial and Federal Litigation Section, from 2006-2007. As Chair, she cofounded Smooth Moves, which is a diversity program designed to enhance opportunities for attorneys of color. Smooth Moves provides a yearly CLE program, awards a Pioneer Award named after former Court of Appeals Judge George Bundy Smith, and also provides a fellowship for a diverse New York state law student to intern for a commercial judge in Manhattan.

Recently, Rosenthal founded a charity called Friends of Afghanistan National Institute of Music. This charity partners with the Afghanistan National Institute of Music, which is a coed music school in Kabul, Afghanistan, and provides high quality academic and music education to children in the country. The charity works with people across the globe to provide funding and support for the school to assist in preserving the cultural heritage of Afghanistan, as well as teaching western music.

In addition to these activities, Rosenthal also is the chair of the New York State Bar Association's Bylaws Committee and serves as the vice president of the New York State Bar Foundation, the charitable arm of the Association. The Foundation gives away nearly a million dollars a year to worthy law-related causes across New York State.

During her acceptance speech, Rosenthal urged lawyers to "reflect upon [their] own public service activities." She asked us to think strategically about community service, and said "[t]hat means focusing your energies, setting personal goals, allocating regular time, financial and other resources to fulfill your commitments, and hold yourself up to a measurable standard." In the interview she gave for this article, Rosenthal noted that one's values drive one's passion and one's passion drives one's community work. She urged lawyers, and especially younger lawyers, to follow their personal convictions and get involved in their communities.

Rosenthal has now undertaken a new project where she and her husband, Ted Rosenthal, organize participatory workshops where artists, lawyers, and others come together to better understand Rule of Law concepts. She said that the Rule of Law is "foundational to our democracy, that even in these fractious political times, it is one thing that we lawyers can all agree upon." She is also piloting a law school course called Advocating for the Rule of Law: A Practical Approach.

Lesley Rosenthal is a model lawyer who gives back to her community and the State Bar, and we congratulate our past chair on receiving the 2017 Root/Stimson Award.

Patrick Leavy is an Assistant Editor for the Commercial and Federal Litigation Section Publications Committee and a first year associate at Rupp Baase Pfalzgraf Cunningham, LLC in Buffalo, New York.

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer or loved one can be made through a memorial contribution to The New York Bar Foundation...

This meaningful gesture on the part of friends and associates will be appreciated by the family of the deceased. The family will be notified that a contribution has been made and by whom, although the contribution amount will not be specified.

Memorial contributions are listed in the Foundation Memorial Book at the New York Bar Center in Albany. Inscribed bronze plaques are also available to be displayed in the distinguished Memorial Hall.

To make your contribution call **The Foundation** at **(518) 487-5650** or visit our website at **www.tnybf.org**

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Third Annual Evening with the Commercial Division Justices

By Beth Gazes

On June 14, 2017, the NYSBA Commercial and Federal Litigation Section presented its Third Annual “Evening with the Commercial Division Justices.” Hosted at the Rubie Corporate Plaza in Melville, Long Island, attendees enjoyed an informal hour of food and conversation with justices of the Commercial Division of the 10th Judicial District, followed by a panel discussion on topics from the judges’ perspective, including new and proposed Commercial Division Rules, as well as other current subjects of interest pertaining to commercial litigation. This distinguished panel was comprised of Justices from Suffolk and Nassau counties. Present were Hon. Elizabeth Hazlitt Emerson, Suffolk County;¹ Hon. James C. Hudson, Suffolk County; Hon. Jerry Garguilo, Suffolk County; and Hon. Stephen A. Bucaria, Nassau County. Also present was Hon. Leonard B. Austin, Associate Justice, Appellate Division, Second Department. Presiding over the discussion were Harvey B. Besunder of Bracken, Margolin, Besunder LLP, and Kevin Schlosser of Meyer, Suozzi, English & Klein, P.C.

“For example, in some cases, depending on the timing, ADR should not be immediately considered if only a minimal set of facts is apparent at the outset.”

The Honorable A. Gail Prudenti, former Chief Administrative Judge of the New York Courts, kicked off the evening’s discussion. During opening remarks, Judge Prudenti noted that “The Commercial Division brings great honor to the New York Unified Court System.” She continued, “Long Island is a place where big business can flourish, and disputes can be resolved quickly.” Judge Prudenti also reminded attendees of the debt of gratitude owed to Judges Kaye and Lippman for their vision and implementation of this highly regarded Commercial Division.

The moderators asked the panel whether the Justices feel that, in light of *Chanko v. Am. Broad. Companies Inc.*, 27 N.Y.3d 46 (2016), today’s pleadings rules encourage abuse of litigation in the state courts. The panel noted that attorneys can expect that justices will be scrutinizing the pleadings from the onset of litigation in order to drill down to the exact issues in dispute as early as possible. While it is generally the defendant’s responsibility to dispute the merit of plaintiff’s pleadings, the panel reminded attendees that concisely and narrowly pleaded causes of action are appreciated not just by the court but by clients as well.

Currently, the Rules of Practice for the Commercial Division provide parties the right to “seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation.”² Proposed changes to this rule include the requirement that attorneys must certify to the court at the preliminary conference and each conference thereafter “that they have discussed with their clients the availability of alternative dispute resolution options in their case.”³ Generally, each Part has its own perspective on alternative dispute resolution and each case is approached differently when consideration is given to any benefit ADR may confer. For example, in some cases, depending on the timing, ADR should not be immediately considered if only a minimal set of facts is apparent at the outset. In other instances, cases may be ripe for ADR intervention. With respect specifically to the proposed change in the ADR rule, while acknowledging that ADR is part of the DNA of the Commercial Division, the general sentiment of the Justices questioned the need to impose a rigid rule requiring certification. One suggestion from the panel is to improve the RJ1 form to include some inquiry regarding ADR in lieu of the attorney certification required under the proposed new rule.

Rule 30(c) of the Rules of the Commercial Division,⁴ effective as of May 1, 2017, authorizes the court to “direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts’ anticipated testimony that are not in dispute.” Although it is a strategic decision whether to stipulate to certain expert testimony, because most matters in the Commercial Division are heard as bench trials, it is helpful, in the panel’s opinion, when parties and experts sit with the court early in the litigation process in order to stipulate to expert facts.

“The justices addressed some rules pertaining to e-filing, including the mandate that all matters before the Commercial Division shall be electronically filed and that working copies of motions and proposed orders are required for e-filed motions and proposed orders.”

Focusing on Rules of Professional Conduct 1.2(e), 3.3, and 3.4, the following question of professional conduct among attorneys was put forth to the panel: With regard to civility among litigators, or a possible lack thereof, how do the justices manage unruly attorneys or attorney

behavior? The justices agree that the tone of the proceedings—both in chambers and in the courtroom—is set by the Judge. Justice Bucaria noted that those practicing in the Commercial Division do so with a high degree of professionalism, adding that this positive behavior is a reversal from what was once a deterioration of mutual respect among adversaries.⁵ Courtesy in the form of preparedness, according to the Justices, goes a long way, as does professional consideration among attorneys. It is well worth noting that discourteous or harassing conduct between adversaries may lead to admonishment by the court.

The justices addressed some rules pertaining to e-filing, including the mandate that all matters before the Commercial Division shall be electronically filed and that working copies of motions and proposed orders are required for e-filed motions and proposed orders.⁶ Practitioners should assume that the court's e-filing system is not monitored by judicial staff for new filings. It is the responsibility of counsel to ensure that any document requiring a judge's signature is presented in paper form.⁷ Also, orders to show cause still need to be presented in person. Finally, attorneys are encouraged to check Part rules for requirements specific to each Judge. With regard to the proposed change to Rule 6,⁸ which will allow individual Trial Parts to require hyperlinks to cited authorities within e-filed documents, practitioners should note that since most Parts still review motions in hard copy, this proposed requirement, if adopted, may not be utilized by many justices.

Finally, Mr. Schlosser presented to all justices, "Inquiring minds want to know: How much authority is

given to each judge's law secretary when dealing with ongoing matters?" All justices agree: Law secretaries play a vital role in chambers. While it is important for judges to make themselves available to the parties, the team approach works well, especially given the diverse talent and expertise of each Part's staff.

Endnotes

1. Justice Emerson was the first Justice appointed to Suffolk's Commercial Division at its inception in 2002. See http://www.nycourts.gov/courts/comdiv/suffolk_bio_emerson.shtml.
2. 22 NYCRR § 202.70, Rule 3(a).
3. New York State Unified Court System, Office of Court Administration, Request for Public Comment on Proposed Amendment of Commercial Division Practice Rules 10 and 11 to Address Alternative Dispute Resolution (April 10, 2017), <http://www.nycourts.gov/rules/comments/PDF/CommDiv-ADR-A.pdf>.
4. 22 NYCRR § 202.70, Rule 30(c).
5. Justice Bucaria received his J.D. from Hofstra University in 1976. See https://www.nycourts.gov/courts/comdiv/nassau_bio_bucaria.shtml.
6. 22 NYCRR § 202.5.
7. *Id.*
8. New York State Unified Court System, Office of Court Administration, Request for Public Comment on a Proposed Amendment to Rule 6 of the Rules of the Commercial Division to Permit the Court to Require Hyperlinking In Electronically-Filed Documents (October 6, 2016), <http://www.nycourts.gov/rules/comments/PDF/RPC-Commercial-Division-Hyperlinking.pdf>.

Beth Gazes is a rising 3L at Touro College Jacob D. Fuchsberg Law Center in Central Islip and a law student member of the NYSBA Commercial and Federal Litigation Section Publications Committee.



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Text of 2017 Amendments to the Rules of the Commercial Division

Text of 2017 Amendments to the Rules of the Commercial Division

Additions are **boldfaced and underlined**; deletions are [**~~boldfaced, bracketed, and struck out~~**]

(I) Amendment to 22 NYCRR § 202.70(d) and Addition of Appendix C, eff. July 1, 2017 (West N.Y. Order 0011)

(d) Assignment to the Commercial Division.

(1) Within 90 days following service of the complaint, any party may seek assignment of a case to the Commercial Division by filing a Request for Judicial Intervention (RJI) that attaches a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for Commercial Division assignment set forth in subdivisions (a), (b) and (c) of this section. Except as provided in subdivision (e) below, failure to file an RJI pursuant to this subdivision precludes a party from seeking assignment of the case to the Commercial Division.

(2) **Subject to meeting the jurisdictional requirements of subdivisions (a), (b) and (c) of this section and filing an RJI in compliance with subsection (d)(1) above, the parties to a contract may consent to the exclusive jurisdiction of the Commercial Division of the Supreme Court by including such consent in their contract. A sample choice of forum provision can be found at Appendix C to these Rules of the Commercial Division. Alternatively, subject to meeting the jurisdictional and procedural requirements applicable to the Commercial Division and the federal courts, the parties to a contract may consent to the exclusive jurisdiction of either the Commercial Division of the Supreme Court or the federal courts in New York State by including such consent in their contract. An alternative sample choice of forum provision to that effect can also be found at Appendix C to these Rules of the Commercial Division.**

APPENDIX C. COMMERCIAL DIVISION SAMPLE CHOICE OF FORUM CLAUSES

Purpose

The purpose of these sample forum-selection provisions is to offer contracting parties streamlined, convenient tools in expressing their consent to confer jurisdiction on the Commercial Division or to proceed in the federal courts in New York State.

These sample provisions are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules"), the Uniform Civil Rules for the Supreme Court (the "Uniform Civil Rules"), the New York Civil Practice Law and Rules (the "CPLR"), the Federal Rules of Civil Procedure, or

any other applicable rules or regulations pertaining to the New York State Unified Court System or the federal courts in New York. These sample provisions should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, the Federal Rules of Civil Procedure, and any other applicable rules and regulations. Parties which use these sample provisions must satisfy all jurisdictional, procedural, and other requirements of the courts specified in the provisions.

The Sample Forum Selection Provision

To express their consent to the exclusive jurisdiction of the Commercial Division, parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF."

Alternatively, in the event that parties wish to express their consent to the exclusive jurisdiction of either the Commercial Division or the federal courts in New York State, the parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, OR THE FEDERAL COURTS IN NEW YORK STATE, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSEY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCMENT OR TERMINATION THEREOF."

(II) Amendment to 22 NYCRR § 202.70(g), Rule 20, eff. July 1, 2017 (West N.Y. Order 0009)

Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will

be significant prejudice by reason of giving notice, a temporary restraining order will not be issued *ex parte*. The applicant must give notice, **including copies of all supporting papers**, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

(III) Amendment to 22 NYCRR § 202.70(g), Rule 26, eff.
July 1, 2017
(West N.Y. Order 0009)

Rule 26. [Estimated] Length of Trial. At least ten days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. **If requested by the Court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours as justice may require.**

(IV) Addition of 22 NYCRR § 202.70(g), Rule 30(c), eff.
May 1, 2017
(West N.Y. Order 0006)

Rule 30(c). Consultation Regarding Expert Testimony. **The court may direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.**

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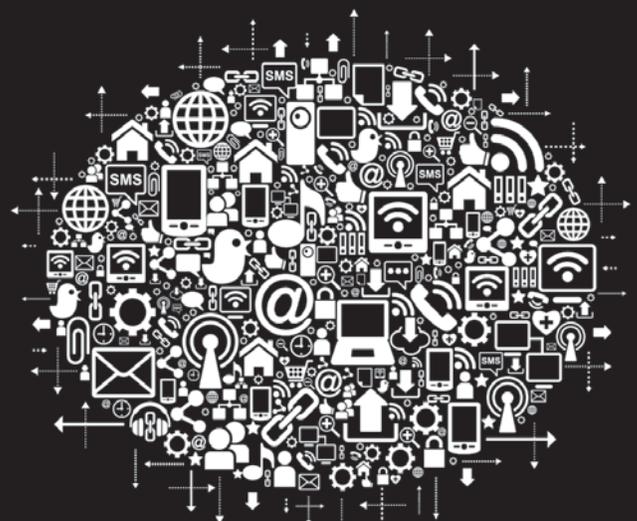
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Update: International Litigation Committee

By Clara Flebus

The Committee on International Litigation continues its mission to educate foreign judges, lawyers, and law students on U.S. law and procedure and the practice of law generally in the United States. In this regard, our work involves developing programs and materials aimed at improving familiarity with the U.S. legal system, increasing the attractiveness of New York as a forum for international litigation and arbitration, and promoting the dialogue among jurists across borders. We also work to inform the bar on recent developments in international litigation and arbitration in New York through continuing legal education programs and discussion forums. The Committee is chaired by Clara Flebus, who is a Court Attorney in New York Supreme Court focusing on commercial matters and assisting in the disposition of international arbitration-related cases before the International Arbitration Part of the Commercial Division.

In June 2017, the Committee organized an educational program for a delegation of Chinese lawyers visiting New York City under the auspices of the U.S.-China Legal Exchange Foundation. The event was held at the law firm of Foley & Lardner LLP, in a spectacular office with breathtaking views of the Empire State Building. The Chinese delegation comprised 16 senior law firm partners practicing in the areas of corporate, securities, finance, investment, construction, real estate, and commercial law at one of the top law firms in the Zhejiang Province—a geographic region south of Shanghai that is undergoing rapid economic growth and development, and is home to the Chinese e-commerce giant Alibaba.

The program featured NYSBA President-Elect Michael Miller, Peter N. Wang (partner at Foley & Lardner LLP), and Mark A. Berman (partner at Ganfer & Shore LLP and immediate past Chair of the ComFed Section), and was conducted by the author of this article. Association President-Elect Miller welcomed the delegation. He explained that the NYSBA's mission is to enhance professional competence and ethics, improve the law and the justice system, and facilitate access to justice for all. Mr. Miller emphasized the importance of promoting communication and cooperation among legal professionals around the world in the pursuit of justice, fairness, and mutual understanding. He concluded by remarking, "What binds all lawyers together, despite different legal structures and legal codes, is our commitment to the rule of law, and that makes us all members of a very special worldwide community."

The delegation was interested in learning about legal training and development of young lawyers in the United States. Peter Wang provided an overview of the career path in a large firm, from law school recruitment to partnership. He explained that associates are often assigned a mentor to help guide them early in their career. The mentor's job is to cover basic issues such as billing procedures, client relationships, working with support staff, and time management techniques, so that an associate can learn how to be efficient and productive in a law firm environment. Typically, associates grow professionally by working closely with more senior lawyers in small

Delegation of Chinese lawyers hosted by the Section's International Litigation Committee



practice groups in a firm's main departments. Large firms also provide access to programs designed to improve concrete skills, such as taking depositions, and to training academies offered by nationwide organizations, or special trainers who come to the firm. This model is different from that of most mid-size or small firms, which may prefer to recruit attorneys who already have experience and a well-developed skill set.

Next, Mark Berman spoke about ethics in social media and e-discovery—typically, both these topics spark great interest and curiosity among lawyers educated outside the United States. Mr. Berman was Chair of the Com-Fed Section which authored the “2017 Social Media Ethics Guidelines.” He discussed how ethics rules play a role in attorneys’ use of social media, and explained how ethical issues arising in this context are resolved differently in different jurisdictions. For example, in New York an attorney can contact an unrepresented person on Facebook provided the attorney uses her real name, which must be associated with an accurate online profile. However, other states have stricter requirements. An attorney may be required in certain jurisdictions to reveal that she is, in fact, a lawyer, the reason why she is contacting the person, or even the name of the client she represents.

Mr. Berman also discussed jurors’ use of social media. A lawyer, while being absolutely prohibited from contacting a juror, can observe public postings made by jurors on social media, and can use that information to his

advantage at trial. However, if the attorney discovers that a juror engaged in misconduct, for example, by performing independent research on issues presented during the trial, in New York there is an ethical obligation to report that misconduct to the judge. This rule is different from the rules adopted by the ABA, which provide that only a juror’s criminal or fraudulent conduct must be reported.

Lastly, Mr. Berman, who periodically authors a column on electronic discovery in the *New York Law Journal*, spoke about the duty to preserve electronically stored information when there is reasonable anticipation that litigation will ensue. He emphasized that electronic discovery is pervasive in U.S. commercial litigation, and the failure to preserve electronic evidence, whether intentional or negligent, can lead to penalties and sanctions. Mr. Berman observed that the amount of discoverable electronic documents, including emails, can be substantial in U.S. litigation and the cost of collecting e-discovery sometimes in certain instances can be greater than the amount at stake in a dispute.

The program for the Chinese delegation was well received and concluded with a reception. We wish to thank all the speakers for welcoming these foreign lawyers and for making our event a success. The Committee looks forward to hosting other foreign delegations in the future, and welcomes new members who are interested in participating in our activities.

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Mandatory Mediation of Certain Non-Commercial Division Commercial Cases in New York County

On April 20, 2017, Supreme Court, New York County, announced the implementation, on a pilot basis, of mandatory mediation in certain non-Commercial Division commercial cases. The announcement is reproduced below and may be found at http://nycourts.gov/courts/1jd/suptctmanh/news_&_announcements.shtml.

The Announcement Follows:

Starting May 1, 2017, a pilot project in alternative dispute resolution (“the Pilot Project”) will begin operation in a category of commercial actions in the Supreme Court, Civil Branch, New York County. Before deciding to institute the Pilot Project, the court reached out to interested Bar groups and solicited comments and suggestions. The responses received were favorable to the proposed plan for this project.

Beginning in May 2016, Hon. Peter H. Moulton, Administrative Judge of the court, issued two Administrative Orders in which he authorized Justices not assigned to the Commercial Division who carry commercial inventories to refer commercial cases to the Alternative Dispute Resolution Program of the Commercial Division (“the ADR Program”). The justices so designated may refer such cases to the ADR Program in their discretion.

“Counsel and parties in cases so designated shall proceed to mediation as provided in the Order and the ADR Rules and Procedures and shall adhere to those Rules and Procedures in all respects applicable, including the deadlines set out therein.”

In addition to such means of referral, Justice Moulton has issued a further Administrative Order, dated April 19, 2017, establishing the Pilot Project. This Order is accessible on the website of the court at www.nycourts.gov/suptctmanh (under “Court Resources”).

In the Pilot Project, certain commercial cases shall be automatically referred to mandatory mediation in the ADR Program in accordance with the Rules and Procedures thereof. The matters that shall proceed to mandatory mediation in the Pilot Project are any and all newly filed commercial cases that are not assigned to the Commercial Division and in which, upon the filing of a Request for Judicial Intervention (“RJI”), the filer has designated the case on the RJI as a “Contract” matter and has requested a preliminary conference.

The staff of the court shall identify all such cases at the time of the filing of the RJI and assignment of the case to a justice. In each such case, the staff of the court shall transmit to counsel through the New York State Courts Electronic Filing System (NYSCEF) a Notice of Referral to Mandatory Mediation together with a copy of the Administrative Order directing the parties to proceed to mandatory mediation in accordance therewith and with the procedures set forth in the applicable rule of the ADR Program. The Notice will also inform the parties of the date of the scheduled preliminary conference. The ADR Rules are available on the website of the Commercial Division at the following address: http://www.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml.

“Such tailored discovery might include a limited exchange of information on a schedule consistent with the mediation process.”

Counsel and parties in cases so designated shall proceed to mediation as provided in the Order and the ADR Rules and Procedures and shall adhere to those Rules and Procedures in all respects applicable, including the deadlines set out therein.

As an element of this Project, the court shall establish a centralized Preliminary Conference Part for all Contract cases covered by this Order and a single Justice of the court shall be assigned to that Part. Hon. Anil C. Singh, who has extensive familiarity with commercial litigation, has been designated to undertake this assignment at the outset of the Pilot Project. The Part in question shall be Part PC-CNCD (located in Room 218 at 60 Centre Street (Phone 646-386-3306)). The preliminary conference shall be scheduled in that Part for the earliest date available.

In advance of the preliminary conference, counsel shall discuss with one another all discovery issues in the case, including the possible provision of discovery tailored to the mediation directed by the Administrative Order that will assist in making the mediation as efficient and productive as possible.

A party seeking an exemption shall apply therefor at the preliminary conference. Failure to seek an exemption in this manner shall constitute a waiver of any objection to the mediation.

Such tailored discovery might include a limited exchange of information on a schedule consistent with the mediation process. Counsel shall discuss all discovery matters with Justice Singh at the conference.

Any such tailored or limited discovery as may be agreed upon or directed by the court in connection with the mediation would be without prejudice to a full discovery process for purposes of the litigation. Justice Singh will issue a Preliminary Conference Order addressing all discovery issues outstanding in the case and providing for comprehensive discovery for the litigation, as well as any tailored discovery that may be appropriate for the mediation, and suitable schedules therefor. Counsel shall, within four business days after the preliminary conference, consult one another and submit an Initiation Form to the ADR Coordinator as provided in the ADR Rules and Procedures, and shall thereafter proceed to mediation as provided in the Rules.

All court proceedings in these cases other than the preliminary conference shall be conducted by the Justice to whom the case was assigned upon the filing of the RJJ.

A case otherwise subject to mandatory mediation in the Pilot Project may be exempted from such mediation upon a satisfactory showing that an applying party would be subjected to unreasonable hardship or burden by participation in the mediation. A party seeking an exemption shall apply therefor at the preliminary conference. Failure to seek an exemption in this manner shall constitute a waiver of any objection to the mediation.

Failure to comply with the Administrative Order or with the ADR Rules and Procedures may subject the party or counsel in question to sanctions.

First-ever Kings County Commercial Division Event

Section members had a great night for the Section's first-ever Kings County event on April 19, 2017, at Brooklyn Law School. Fifty-four people attended, and the Section achieved its goal of putting together Brooklyn's Commercial Division Justices and commercial litigators. Attendees learned about joining NYSBA and the Section with all of its committees and programs. The benefits of litigating before the Commercial Division were highlighted and how Brooklyn's commercial practice is growing with its own "Silicon Valley." The Advisory Committee's video was discussed, as was the need to forward it to clients to promote the Commercial Division. Attendees were interested in a reprise—next time with a CLE program discussing the new additions to the Commercial Division rules.



Proposed Rules of Interest to Civil Litigators (<http://nycourts.gov/rules/comments/index.shtml>)

June 28, 2017: Proposed Model Status Conference Stipulation and Order Form for Use in the Commercial Division

Description of proposal: <http://nycourts.gov/rules/comments/PDF/ModelStatusConfForm.pdf>
Email to: rulecomments@nycourts.gov by August 25, 2017

June 28, 2017: Proposed Amendment of the Rules of the Commercial Division to Include a Sample Choice of Law Clause

Description of proposal: <http://nycourts.gov/rules/comments/PDF/SampleChoiceOfLawClause.pdf>
Email to: rulecomments@nycourts.gov by August 25, 2017

June 8, 2017: Proposed Establishment of a Large Complex Case List in the Commercial Division of Supreme Court

Description of proposal: <http://nycourts.gov/rules/comments/PDF/CommercialDivisionComplexCaseList.pdf>
Email to: rulecomments@nycourts.gov by July 25, 2017

June 1, 2017: Proposed Rules for Electronic Filing in the Appellate Division of Supreme Court

Description of proposal: <http://nycourts.gov/rules/comments/PDF/Request-AppDivEfiling.pdf>
Email to: rulecomments@nycourts.gov by July 24, 2017

May 25, 2017: Proposed Statewide Practice Rules of the Appellate Division

Description of proposal: <http://nycourts.gov/rules/comments/PDF/Appellate-Division-Rules.pdf>
Email to: rulecomments@nycourts.gov by August 23, 2017

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

Description of proposal: <http://nycourts.gov/rules/comments/PDF/Efile-WorkingCopiesA.pdf>
Email to: rulecomments@nycourts.gov by June 5, 2017

April 10, 2017: Proposed Amendments of Commercial Division Practice Rules 10 and 11 to Address Alternative Dispute Resolution

Description of proposal: <http://nycourts.gov/rules/comments/PDF/CommDiv-ADR-A.pdf>
Email to: rulecomments@nycourts.gov by June 5, 2017

March 30, 2017: Proposed Commercial Division Model Compliance Conference Stipulation and Order Form

Description of proposal: <http://nycourts.gov/rules/comments/PDF/CommercialDivisionModelComplianceConferenceStipulation.pdf>
Email to: rulecomments@nycourts.gov by May 30, 2017

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

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

Email to: rulecomments@nycourts.gov by December 15, 2016

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

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

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

Email to: rulecomments@nycourts.gov by December 5, 2016

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

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

Email to: rulecomments@nycourts.gov by November 15, 2016

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

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Ex-New Yorker Explains California's Far-Reaching Unfair Competition Law

By Robert M. Bodzin

In my 25-years of practice, there are few laws that have caused clients as much uncertainty and stress as California Business & Professions Code § 17200 et seq. (known as the "UCL"). When I moved to California in 1999, I was stunned to learn that someone with no injury and no connection to a business could sue the company and cause it to suffer great economic harm. As I just celebrated my 18th year as a California attorney, I thought I would share my insight into this important law, how I achieved several defense verdicts on these cases, and advice on navigating this unpredictable and often misused statute.

What Is the UCL?

The statute protects business competitors and consumers from unfair, unlawful, or fraudulent business and trade practices in California. It is important to understand that these categories are in the *disjunctive*, which means that a business practice need not be illegal to be found to violate the UCL.¹ The UCL's scope is sweeping and embraces anything that can be considered a business practice.²

Who Can Sue and Be Sued?

California government attorneys, including the Attorney General, local district attorneys, and city attorneys from large counties have the right to prosecute UCL cases. Private parties also have the right to pursue these matters. Up until 2004, the UCL had the dubious distinction of featuring a "no standing, standing" rule for private litigants. This meant that anyone—persons, businesses, consumer groups, or lobby groups—could prosecute a UCL lawsuit to remedy an alleged wrongful business practice without needing to show a connection to the target of the lawsuit or the alleged harm.

"Plaintiff's claim was based in part on the fact that several former trainers on his ranch were now giving riding lessons on our client's ranch."

In November 2004, California voters passed Proposition 64, which eliminated this loophole and required a private plaintiff to have an actual injury in fact. California Business & Professions Code § 17204 now requires a plaintiff to have a real connection to the alleged harm as a pre-requisite for filing a UCL lawsuit.

Businesses based out of state can be sued under the UCL in California when the alleged unfair, improper, or unlawful business practices take place within the state or affect people working in the state.³ Where the actions of a California employer impact non-resident employees or workers, a UCL suit will generally not be permitted.⁴



Robert M. Bodzin

Real Success Stories from the UCL Trenches: From the Wine Country to Hong Kong

When a UCL suit is filed and prosecuted, it has been my experience that the highest monetary demands come from plaintiffs asserting that my clients made significant money on the alleged improper business practice and, as such, plaintiff is entitled to recover the alleged "ill-gotten gains." During a two-month bench trial in the Wine Country, my partner Tom Downey and I defended a multi-million dollar claim against a small horse ranch that was alleged to have committed improper acts that violated the UCL.

"We then won the trial by obtaining a defense verdict on the remaining claims of breach of contract and fraud. The UCL dismissal and the defense verdict were upheld by the Ninth Circuit Court of Appeal."

The plaintiff was a large commercial horse ranch that hosted top-rated equestrian events on a regular basis. Our client operated a much smaller facility that provided riding lessons, but not the luxury-style events of the neighboring plaintiff. Plaintiff's claim was based in part on the fact that several former trainers on his ranch were now giving riding lessons on our client's ranch. We defeated the claim by proving that not only were the two facilities not comparable but that every trainer who ended up on our client's ranch did so after being kicked out of the plaintiff's operation. Our judge plainly told the plaintiff

that he could not recover restitution for horse trainers who were cast out of his own facility and whom he did not want.

In a commercial litigation case that took my partner John Verber and me to Hong Kong for depositions, we obtained a pre-trial dismissal of a UCL claim worth \$8 million. The \$8 million claim was allegedly based on monies our client earned because of its unfair business practices directed toward plaintiff, who was a former exclusive distributor of product in Asia. The UCL claim was dismissed by our trial judge on a motion shortly before the start of the San Francisco federal court trial. In this case, plaintiff improperly sought *non-restitutionary disgorgement* by asserting his right to money earned by our client when plaintiff offered no proof the money belonged to him. The judge noted that plaintiff did seek “disgorgement of profits” but never proved such monies rightfully belonged to or should have been earned by him. The judge also dismissed the UCL claim because plaintiff had never even sought or alleged a right to *injunctive relief* under the UCL. We then won the trial by obtaining a defense verdict on the remaining claims of breach of contract and fraud. The UCL dismissal and the defense verdict were upheld by the Ninth Circuit Court of Appeal.

Clarifying a Big Misconception: Can a UCL Plaintiff Collect a Money Judgment?

It is my experience in almost every single UCL case I handle that the plaintiff asks the judge for “all money earned and received as a result of the business’s alleged wrongful conduct.” Even at trial, experienced plaintiffs’ attorneys make this request even when the law clearly *prohibits* such requests. Money damages are not recoverable on a UCL claim.⁵ Money and property that falls into the category of *restitution* does fall into the category of permissible recovery.⁶

“The ability of a judge to grant even a preliminary injunction against a business can have catastrophic results.”

The California Supreme Court limits such recovery to “money or property that defendants took directly from plaintiffs” or “money or property in which [plaintiff] has a vested interest.”⁷ Money or property that falls outside of this category is considered to be *non-restitutionary disgorgement* and is strictly forbidden as recovery in a UCL action.⁸

Robert M. Bodzin, a member of the Section, is a partner/trial attorney at the law firm of Burnham Brown in Oakland, California, and is admitted to practice law in New York, New Jersey, and California. He has litigated numerous UCL cases, both individually and in the class action context, and served as Chair of the Litigation Section of the California State Bar from 2013-2014. He can be reached at 510-835-6833 and rbodzin@burnhambrown.com.

Beware the Longer Statute of Limitations, Civil Penalties on Government Actions, and Real Injunctive Relief Claims

Given that a UCL plaintiff has four years to file suit, the statute is attractive because it can add extra years to other claims, prosecuted either individually or as class actions. For example, while the statutes of limitations for many violations of California’s wage and hour laws are three years, class actions in this area routinely assert the UCL to get an additional year for recovery.

On UCL claims prosecuted by the government, civil penalties in the amount of \$2,500 per violation can be imposed.⁹

Additionally, courts have significant discretion and latitude in fashioning injunctions when UCL violations are found. The ability of a judge to grant even a preliminary injunction against a business can have catastrophic results. The fact that an out-of-state business can be subject to a UCL injunction by a California judge raises the stakes in such litigation. As such, it is extremely important to mount an aggressive response and defense to any UCL claim.

Endnotes

1. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999).
2. *Id.* at 180.
3. *Mazza v. American Honda*, 666 F.3d 581, 594-595 (9th Cir. 2012); *Sullivan v. Oracle*, 51 Cal. 4th 1191, 1206 (2011); and *Application Group v. Hunter Group*, 61 Cal. App. 4th 881 (1998).
4. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011).
5. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266 (1992).
6. *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 338-339 (1998).
7. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146-47 (2003).
8. *Id.* at 1150-51.
9. Business & Professions Code § 17206(a).

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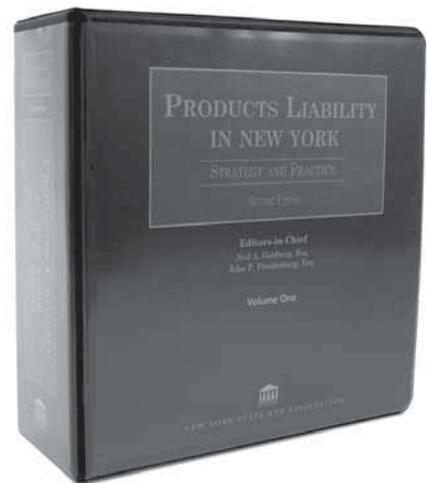
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CPLR Amendments: 2017 Legislative Session

(2017 N.Y. Laws ch. 1-88)

| CPLR § | Chapter (Part) (Subpart, §) | Change | Eff. Date |
|--------|-----------------------------|---|-------------------------------|
| 3408 | 58 (FF, 2) | Add exception for certain reverse mortgages | 4/20/17 (until 2/13/20) |

Notes: The expiration of CPLR 1101(f) and the amendment to CPLR 1101(d), as enacted by 1999 N.Y. Laws ch. 412, Prat D, § 4, as amended, was extended from Sept. 1, 2017 to Sept. 1, 2019. 2017 N.Y. Laws ch. 55, Part A, § 16.

2017 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's N.Y. Orders 1-11)

A copy of these rules changes is available on the Section's website at http://www.nysba.org/Sections/Commercial_Federal_Litigation/Commercial_and_Federal_Litigation_Section.html under the New Rules tab.

| 22 NYCRR § | Court | Subject (Change) | Eff. Date |
|-----------------------|-------|---|-----------|
| 130-1.1-a(b)(ii) | All | Corrects cross-reference to Rules of Professional Conduct | 4/5/17 |
| 202.70(d)(2) | Sup. | Adds (1) a provision on forum selection clauses consenting to the exclusive jurisdiction of the Commercial Division and (2) sample forum selection clauses (App. C) | 7/1/17 |
| 202.70(g), Rule 20 | Sup. | Requires that notices of TRO include copies of all supporting papers | 7/1/17 |
| 202.70(g), Rule 26 | Sup. | Court may require that estimate of trial length contain total number of anticipated hours for trial, on which court may rule | 7/1/17 |
| 202.70(g), Rule 30(c) | Sup. | Adds a requirement for consultation regarding expert testimony | 5/1/17 |

The Section's District Leaders

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|-----------------------|--|--|
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New CLE Requirements for Diversity, Inclusion, and Elimination of Bias

(Rules changes are bold and underlined)

I. Categories of CLE Credit as Defined in the Program Rules 22 NYCRR 1500.2(c)-(g)

(c) Ethics and Professionalism may include, among other things, the following: the norms relating to lawyers' professional obligations to clients (including the obligation to provide legal assistance to those in need, confidentiality, competence, conflicts of interest, the allocation of decision making, and zealous advocacy and its limits); the norms relating to lawyers' professional relations with prospective clients, courts and other legal institutions, and third parties (including the lawyers' fiduciary, accounting and record-keeping obligations when entrusted with law client and escrow monies, as well as the norms relating to civility); the sources of lawyers' professional obligations (including disciplinary rules, judicial decisions, and relevant constitutional and statutory provisions); recognition and resolution of ethical dilemmas; the mechanisms for enforcing professional norms; substance abuse control; and professional values (including professional development, improving the profession, and the promotion of fairness, justice and morality).

(d) Skills must relate to the practice of law and may include, among other things, problem solving, legal analysis and reasoning, legal research and writing, drafting documents, factual investigation (as taught in courses on areas of professional practice), communication, counseling, negotiation, mediation, arbitration, organization and trial advocacy.

(e) Law Practice Management must relate to the practice of law and may encompass, among other things, office management, applications of technology, state and federal court procedures, stress management, management of legal work and avoiding malpractice and litigation.

(f) Areas of Professional Practice may include, among other things, corporations, wills/trusts, elder law, estate planning/administration, real estate, commercial law, civil litigation, criminal litigation, family law, labor and employment law, administrative law, securities, tort/insurance practice, bankruptcy, taxation, compensation, intellectual property, municipal law, landlord/tenant, environmental law, entertainment law, international law, social security and other government benefits, and alternative dispute resolution procedures.

(g) Diversity, Inclusion and Elimination of Bias courses, programs and activities must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of

the public, judges, jurors, litigants, attorneys and court personnel. [effective January 1, 2018].

New Frequently Asked Question

Q] Can you please provide additional information on what may be addressed in diversity, inclusion and elimination of bias programs?

A] These programs may include, among other things, diversity, inclusion and elimination of bias based on, for example, race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability.

Source: Office of Court Administration, <http://www.nycourts.gov/attorneys/cle/Eff-010118-NewCategoryCLE-Credit.pdf>.

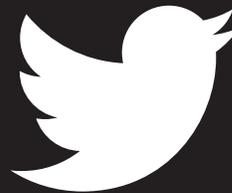
II. CLE Program Rule §1500.22 Minimum Requirements

(a) Credit Hours. Each attorney shall complete a minimum of 24 credit hours of accredited continuing legal education each biennial reporting cycle in ethics and professionalism, skills, law practice management, areas of professional practice, or diversity, inclusion and elimination of bias, at least four (4) credit hours of which shall be in ethics and professionalism **and at least one (1) credit hour of which shall be in diversity, inclusion and elimination of bias.** Ethics and professionalism, skills, law practice management, areas of professional practice, and diversity, inclusion and elimination of bias are defined in §1500.2. The ethics and professionalism and diversity, inclusion and elimination of bias components may be intertwined with other courses. [effective July 1, 2018]

Attorneys due to re-register on or after July 1, 2018 must meet this requirement.

Source: Office of Court Administration, <http://www.nycourts.gov/attorneys/cle/Eff070118-ChangeExpAtty-CLE-Req.pdf>.

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Commercial and Federal Litigation Committees

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

- ___ Antitrust (FED1300)
- ___ Appellate Practice (FED1400)
- ___ Alternative Dispute Resolution (FED1200)
- ___ Civil Practice Law and Rules (FED1900)
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- ___ Social Media (FED7500)
- ___ State Court Counsel (FED5700)
- ___ White Collar Criminal Litigation (FED6800)



Notes of the Section's Executive Committee Meetings

February 15, 2017

Guest speaker Hon. Cathy Seibel, U.S. District Judge for the Southern District of New York, discussed the role of mediation in the Southern District, including two pilot mediation programs under way in the White Plains courthouse.

The Executive Committee discussed the upcoming Spring Meeting, the House of Delegates meeting, upcoming CLE events and the Commercial Litigation Academy, and an event at Brooklyn Law School with Kings County Commercial Division Justices.

March 7, 2017

Guest speaker Hon. Lawrence Knipel, Supreme Court, Kings County, discussed the Commercial Division rules, the overall caseload of the Commercial Division in Kings County, and his approach to discovery disputes.

The Executive Committee discussed the upcoming Spring Meeting, Smooth Moves, the Commercial Litigation Academy, Section sponsorship of American Bar Association events, upcoming law school events, and upcoming CLEs and Section reports. The Executive Committee also discussed and approved a proposal to form a Publications Committee.

April 4, 2017

Guest Speaker Robert L. Haig, Chair of the Commercial Division Advisory Council, discussed the new Commercial Division video and provided background on the history of the Advisory Council and its procedures regarding developing proposed Commercial Division rules.

The Executive Committee discussed the upcoming Spring Meeting, Smooth Moves, the Commercial Liti-



gation Academy, an upcoming federal law clerks meet and greet, the Long Island Commercial Division Justices Annual Program with Practitioners, a Kings County Commercial Division Justices meet and greet at Brooklyn Law School, and upcoming Section CLEs. The Executive Committee also approved a report of the Section's Federal Procedure Committee on the ABA Proposal to Amend the Diversity Jurisdiction Statute.

May 10, 2017

Guest speaker Michael A. Cardozo, a Partner at Proskauer and former Corporation Counsel of the City of New York, shared events from his career as a former Corporation Counsel and discussed diversity, unconscious bias, and the introduction of diverse middle school students to the legal industry to combat the "pipeline" problem.

The Executive Committee approved three reports: (1) the Social Media Committee's Legal Ethics Guidelines Report; (2) a Report on the Proposed Amendment of Commercial Division Practice Rules 10 and 11 to Address Alternative Dispute Resolution; and (3) a Report on the Proposed Revised Model Compliance Conference Stipulation and Order Form for Use in the Commercial Division.

The Executive Committee also discussed the upcoming Spring Meeting, the meet and greet for Federal Law Clerks in Manhattan and Brooklyn, the Long Island Commercial Division Justices annual program with practitioners, and upcoming CLE programs.

June 8, 2017

The Executive Committee adopted the Section's Comments on Report and Recommendation of the NYSBA Committee on the New York State Constitution.

***NYLitigator* Preview: Women's Task Force Report**

The Section has released a report prepared by its Task Force on Women's Initiatives entitled, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*. The full 43-page report, including three appendices containing the text of surveys tracking the gender of attorneys in court and ADR appearances, a summary of the findings of those surveys, and a summary of the Section's recommendations, will be published online and in an upcoming *NYLitigator*.

The report sets out a literature review of women in litigation and ADR, an analysis of the surveys' methodology and findings, and suggested solutions to the gender imbalance revealed in the literature and the surveys.

The members of the Task Force on Women's Initiatives were the Hon. Shira A. Scheindlin (ret.), JAMS and Strook & Strook & Lavan; Carrie H. Cohen, Morrison & Foerster LLP; Tracee E. Davis, Zeichner Ellman & Krause LLP; Bernice K. Leber, Arent Fox; Sharon M. Porcellio, Bond Schoeneck & King, PLLC; Lesley F. Rosenthal, Lincoln Center for the Performing Arts; and Lauren J. Wachtler, Mitchell Silberberg & Knupp LLP.

Watch for your copy of the *NYLitigator* for the full text of this cutting-edge report.

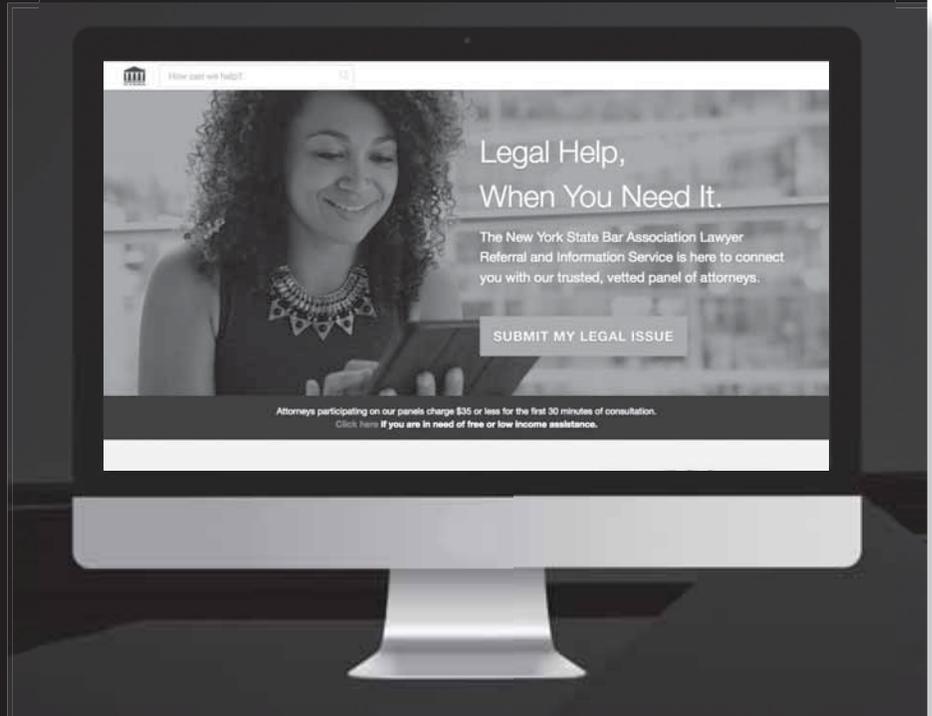
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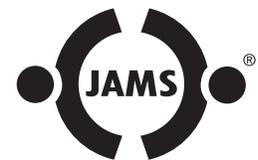
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October 3
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November 1
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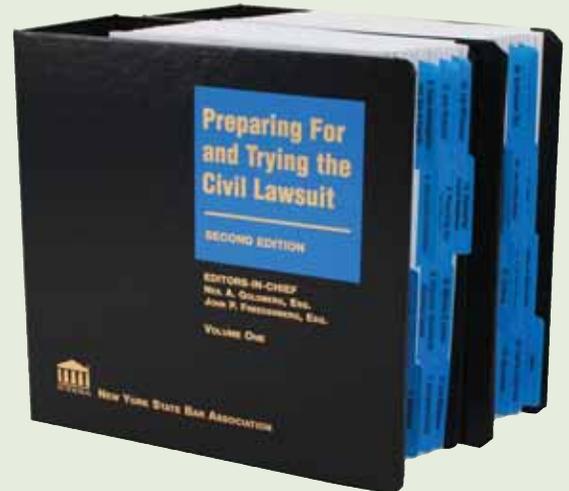
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