BENCH-BAR FORUM

ADMINISTRATIVE JUDGE JACQUELINE W. SILBERMANN
and
THE COMMERCIAL DIVISION ADVISORY COMMITTEE
SUPREME COURT, CIVIL BRANCH, NEW YORK COUNTY

PRESENT:

IN THE COMMERCIAL DIVISION-
FOUR CRITICAL AREAS OF PRETRIAL PRACTICE

WEDNESDAY, MAY 8, 2008
5:30 P.M. to 7:45 P.M.
ROTUNDA, NEW YORK COUNTY COURTHOUSE
60 CENTRE STREET, NEW YORK, NEW YORK

PANELISTS:

Hon. Eileen Bransten, Hon. Herman Cahn,
Hon. Helen E. Freedman, Hon. Bernard J. Fried, Hon. Ira Gammerman,
Hon. Richard B. Lowe III, Hon. Charles E. Ramos

Jay G. Safer, Esq. (Moderator), Lewis M. Smoley, Esq., Richard P. Swanson, Esq.
Vincent J. Syracuse, Esq., Lauren J. Wachtler, Esq.,
Stephen P. Younger, Esq., Mark C. Zauderer, Esq.

TOPICS:

CONFERENCING CASES
PRELIMINARY INJUNCTIONS
COMMERCIAL DIVISION ADR PROGRAM
SEALING ORDERS AND CONFIDENTIALITY ORDERS

CLE:

Two and one half (2.5) transitional and non-transitional credits

(NO PARTIAL CREDITS WILL BE AWARDED)

SPACE BY RESERVATION

IN THE COMMERCIAL DIVISION - FOUR CRITICAL AREAS OF PRETRIAL PRACTICE

Table of Contents

Bench-Bar Forum
Thursday May 8, 2008

IN THE COMMERCIAL DIVISION - FOUR CRITICAL AREAS OF PRETRIAL PRACTICE

PROGRAM SUMMARY

Conferencing Cases

Conferences are an important means both to keep the court informed on the status of a case and to give the attorneys a chance to resolve problems that might be dealt with more efficiently without motion practice. Recently, initial conferences have been used to discuss and set standards for E-discovery, particularly significant in commercial cases. Conferences can also serve as a means for dealing with pending motions and/or for discussing settlement. It is important for the commercial Bar to know what the Justices expect from counsel at conferences and how the Justices view their significance as a means for addressing and resolving intermediary problems. (Presenters: Lewis M. Smoley, Esq., Vincent J. Syracuse, Esq. and Lauren J. Wachtler, Esq.)

Preliminary Injunctions and Temporary Restraining Orders

Applications for temporary restraining orders (TROs) and preliminary injunctions (PIs) are often the most important stages of litigation. Changes in practice have occurred in the Commercial Division and elsewhere in the past few years, including the disfavoring of *ex parte* TROs and a change in the traditional rule that required denial of PIs if material facts were in dispute, because the movant had not shown a "clear right to relief." The Commercial Division Judges have their own practices with regard to addressing TROs and requirements for PIs. The Panel will explore their views with reference to particular factual scenarios and will provide tips to practitioners either

seeking or opposing these forms of preliminary relief. (Presenters: Richard P. Swanson, Esq., Vincent J. Syracuse, Esq. and Mark Zauderer, Esq.)

Commercial Division ADR Program

In 1996, the court established an Alternative Dispute Resolution (ADR) Program within the Commercial Division to expedite settlements in suitable commercial cases in a context with potential for minimized expense and inconvenience. The Court's ADR Program is mandatory for those cases referred and is confidential. The predominant mechanism is mediation, in which a mediator attempts to facilitate settlement by conferring informally with the parties, jointly and in separate "caucuses," and by focusing on practical concerns and needs as well as the merits of each side's position on the issues. The skills that an attorney calls upon in trial litigation overlap with skills needed to represent parties well in mediation, but real differences exist, too. This section of the Forum will show how the ADR Program's basic rules and guidelines, and mediators with extensive backgrounds in commercial law, set the stage for effective practice in mediation. Panelists with extensive mediation experience will discuss approaches on an attorney's part likely to foster a resolution satisfactory to the client and share their views on the particular attributes that make a case likely to succeed in mediation. (Presenters: Vincent J. Syracuse, Esq. and Stephen P. Younger Esq.)

Sealing Orders and Confidentiality Orders

The area of confidentiality orders and sealing orders presents important legal and practical considerations, particularly relevant in sophisticated commercial litigation. In Federal Court, a confidentiality stipulation and order frequently governs discovery, but there may be some different

considerations that apply in the context of practice in the Commercial Division. Attention will be given by the presenters to the elements that are likely to make a confidentiality stipulation and order effective and workable, for the Justice, the parties, and the court. With respect to sealing, Part 216 of the Uniform Rules for the New York State Trial Courts of course applies, seeking to balance legitimate confidentiality needs against the broader public interest in open access to court records. Attention will be given to the factors a lawyer should consider in building a strong argument that a sealing order be signed. Practical realities in the County Clerk's Office and the court's back offices will be of interest here. Presenters will outline some of the more common difficulties attorneys confront as they navigate this area and the Panel will suggest approaches to successfully managing some of the complexities. (Presenters: Richard P. Swanson, Esq. and Stephen P. Younger, Esq.)

PROGRAM AGENDA

IN THE COMMERCIAL DIVISION - FOUR CRITICAL AREAS OF PRETRIAL PRACTICE

(Hon. Eileen Bransten, Hon. Herman Cahn, Hon. Helen E. Freedman, Hon. Bernard J. Fried, Hon. Ira Gammerman, Hon. Richard B. Lowe III and Hon. Charles E. Ramos will participate in each topic.)

5:30-5:35
Welcome and Introduction by Hon. Jacqueline W. Silbermann

5:35-5:40
Introduction to Topics by Jay G. Safer, Esq.

5:40-6:20
Conferencing Cases – Lewis M. Smoley, Esq., Vincent J. Syracuse, Esq. and Lauren J. Wachtler, Esq.

6:20-6:55
Preliminary Injunctions and Temporary Restraining Orders – Richard P. Swanson, Esq., Vincent J. Syracuse, Esq. and Mark C. Zauderer, Esq.

6:55-7:25
Commercial Division ADR Program - Vincent J. Syracuse, Esq. and Stephen P. Younger, Esq.

7:20-7:45
Sealing Orders and Confidentiality Orders - Richard P. Swanson, Esq. and Stephen P. Younger, Esq.

BENCH-BAR FORUM

HOW THE NEW COMMERCIAL DIVISION RULES WORK IN PRACTICE

THURSDAY, MAY 8, 2008
5:30 PM to 7:40 PM
NEW YORK COUNTY COURTHOUSE
60 CENTRE STREET, ROTUNDA

THE FORUM IS PRESENTED BY
HON. JACQUELINE W. SILBERMANN,
ADMINISTRATIVE JUDGE
AND THE
COMMERCIAL DIVISION ADVISORY COMMITTEE
SUPREME COURT, CIVIL BRANCH, NEW YORK COUNTY

BIOGRAPHIES OF THE PARTICIPANTS

HON. JACQUELINE W. SILBERMANN: Justice Silbermann is the Administrative Judge of Supreme Court, Civil Branch, New York County. She also serves as the Deputy Chief Administrative Judge for Matrimonial Matters. She is a former Administrative Judge of the Civil Court of the City of New York.

HON. EILEEN BRANSTEN, HON. HERMAN CAHN, HON. HELEN E. FREEDMAN, HON. BERNARD J. FRIED, HON. IRA GAMMERMAN, HON. RICHARD B. LOWE III, and HON. CHARLES E. RAMOS: Justice Ira Gammerman is a former Justice of the Commercial Division of the Supreme Court, Civil Branch, New York County, and currently serves as a Judicial Hearing Officer in the Commercial Division there. The other Justices are Justices of the Commercial Division in New York County.

JAY G. SAFER, ESQ., Moderator: Mr. Safer is a member of the firm of Lord, Bissell & Brook LLP. He is a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association and is a member of the Commercial Division Advisory Committee of the Supreme Court, Civil Branch, New York County.

LEWIS M. SMOLEY, ESQ.: Mr. Smoley is an attorney in private practice. He is a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association and a former Chair of its Commercial Division Committee. He is a member of the Office of Court Administration's Statewide Commercial Division Discussion Group and of the Commercial Division Advisory Committee of the Supreme Court, Civil Branch, New York County.

RICHARD P. SWANSON, ESQ.: Mr. Swanson is a member of the firm of Arnold & Porter LLP. He is a former Co-Chair of the Committee on the Supreme Court of the New York County Lawyers' Association and is a member of the Commercial Division Advisory Committee of the Supreme Court, Civil Branch, New York County.

VINCENT J. SYRACUSE, ESQ.: Mr. Syracuse is a member of the firm of Tannenbaum Helpern Syracuse & Hirschtritt LLP. He is the Chair-Elect of the Commercial and Federal Litigation Section of the New York State Bar Association and Co-Chair of its Commercial Division Committee. He is a member of the Commercial Division Advisory Committee of the Supreme Court, Civil Branch, New York County, and the Office of Court Administration's Statewide Commercial Division Discussion Group.

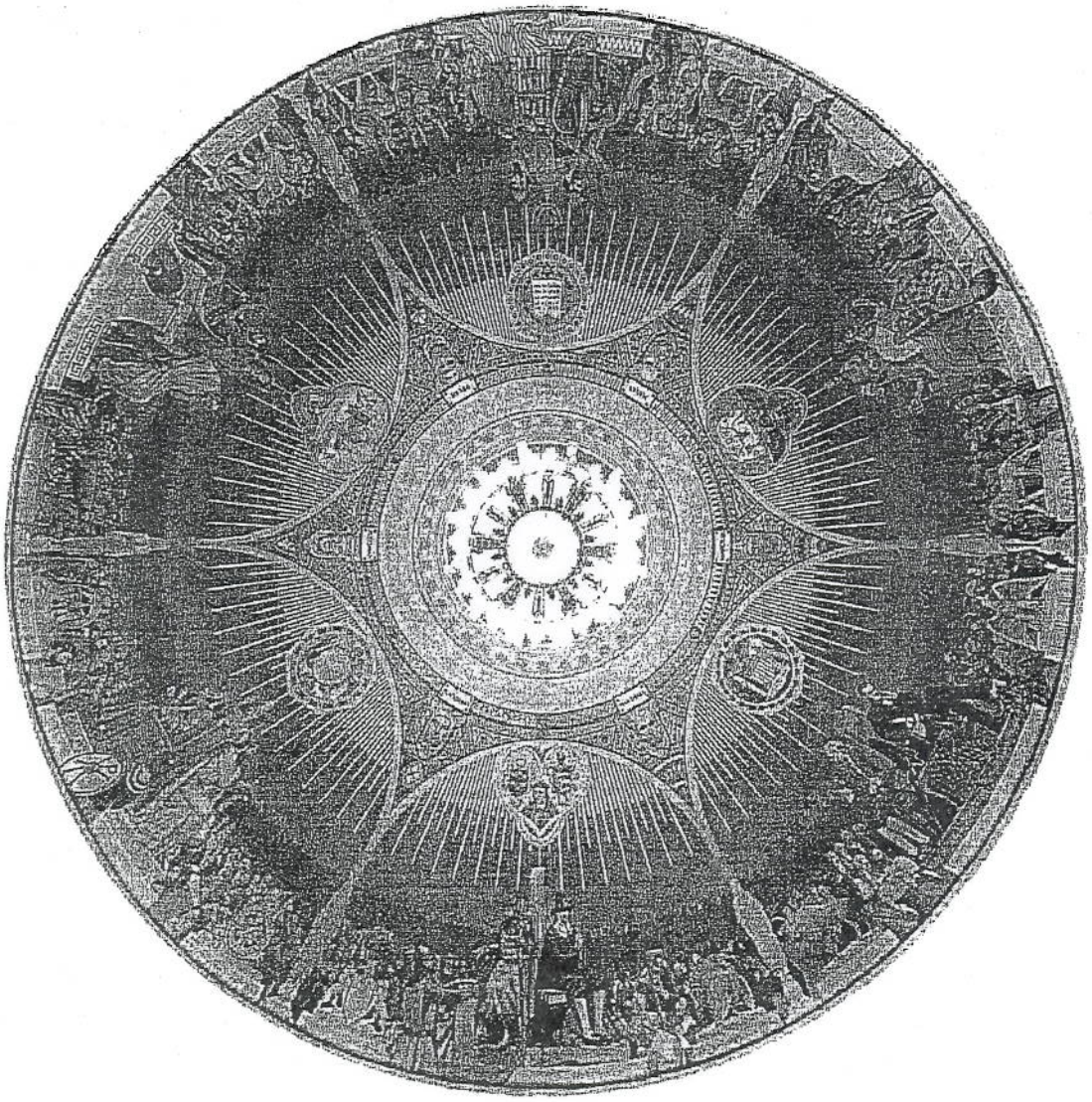
LAUREN J. WACHTLER, ESQ.: Ms. Wachtler is a member of the firm of Montclare & Wachtler. She is a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association and is a member of the Commercial Division Advisory Committee of the Supreme Court, Civil Branch, New York County.

STEPHEN P. YOUNGER, ESQ.: Mr. Younger is a member of the firm of Patterson Belknap Webb & Tyler LLP. He is a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association and is a member of the Commercial Division Advisory Committee of the Supreme Court, Civil Branch, New York County.

MARK C. ZAUDERER, ESQ.: Mr. Zauderer is a member of the firm of Flemming Zulack Williamson Zauderer LLP. A current President of the Federal Bar Council, he served on the Chief Judge's Commercial Courts Task Force, which implemented establishment of New York State Court System's Commercial Division, and is a past Chair of the Commercial and Federal Litigation Section of the New York State Bar Association, of the Association's Steering Committee on Commerce and Industry, and of New York's Commission on the Jury. Mr. Zauderer is a current member of the Chief Administrative Judge's Advisory Committee on Civil Practice.

Report of the Office of Court Administration *to the* Chief Judge *on the* Commercial Division Focus Groups

JULY 2006



THE COMMERCIAL DIVISION *of the* SUPREME COURT
of the STATE *of* NEW YORK

I

EXECUTIVE SUMMARY

The Commercial Division is functioning well and provides many practices and innovations worthy of consideration for use in other parts of the New York State court system. That is the clear-cut conclusion of this Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups.*

The Focus Groups, conducted in five locations throughout the State between December 2005 and February 2006, brought together current and retired judges, prominent commercial litigators and in-house counsel of major corporations for a meaningful dialogue about the Commercial Division. Their discussions generated a list of ideas that might work well elsewhere. This was not the only purpose of the Focus Groups. Consistent with their charge, they also identified areas of the Commercial Division and commercial practice in New York State that could be improved.

The Focus Groups additionally demonstrated that they are a good tool for the court system to gather and analyze information. Thus, one recommendation of this Report is to expand the focus group information-gathering model to other areas in the court system.

The Focus Groups identified a dozen features of the Commercial Division that might be useful in other courts, including:

- require notice of applications for temporary restraining orders ("TROs"), except in extraordinary circumstances;
- address electronic discovery issues at an early conference;
- encourage judges to exercise discretion whether or not to stay discovery, in whole or in part, on the making of a dispositive motion;
- encourage more proactive involvement of judges in settlement and alternative dispute resolution ("ADR");
- improve support for use of outside technology in courtrooms;
- encourage proactive, hands on, but adaptable case management;
- give courts discretion to require a statement of uncontroverted material facts in support of (or in opposition to) a motion for summary judgment;
- impose page limits on motion papers;
- establish uniform rules for other courts;
- increase the use of *in limine* motions;
- increase the use of e-filing; and
- require pre-motion conferences prior to the filing of discovery motions.

These twelve items are the subject of Part V of this Report. The Focus Groups' ideas targeted more specifically at improving the Commercial Division and commercial practice generally in New York State are treated in Part VI of this Report.

---

* *For the preparation of this report we are especially grateful to Robert L. Haig, Esq. of Kelley Drye & Warren LLP, and Jeremy R. Feinberg, Esq. and Gretchen Walsh, Esq. of the Office of Court Administration.*

II

A BRIEF HISTORY OF THE COMMERCIAL DIVISION

The Commercial Division evolved from an experiment that began on January 1, 1993, when four Justices of the Supreme Court were assigned to hear commercial cases in New York County. Their courtrooms were called Commercial Parts and the Justices were assigned cases involving contracts, corporations, insurance, the Uniform Commercial Code, business torts, bank transactions, complex real estate matters and other commercial law issues.

This experiment involved significant collaboration between the Bench and Bar. Indeed, the idea behind a permanent Commercial Division came from the State Bar Association's Commercial and Federal Litigation Section. Its comprehensive 1995 report studied the Commercial Parts initiative, deemed it highly successful and recommended that it be institutionalized Statewide. The 1995 report advanced several reasons supporting the creation of a separate division to handle commercial matters, including New York's role as a center of commerce, which the Section believed a commercial court would enhance, and the unique attributes and complexity of commercial cases, which warrant specialized judicial treatment. Such a court could combat a disturbing trend: businesses were increasingly resorting to other forums such as Federal District Court, Delaware Chancery Court and private ADR methods to avoid what had been perceived as New York's overburdened state court system.

In response to the 1995 report, Chief Judge Judith S. Kaye created the Commercial Courts Task Force, co-chaired by Hon. E. Leo Milonas and Robert L. Haig, Esq., to examine the Section's report and develop a blueprint for its implementation. The Task Force called for establishing a Commercial Division of the Supreme Court in areas of the State with significant commercial litigation. On November 6, 1995, the Commercial Division officially opened its doors in New York and Monroe Counties. Since then, the Division has expanded to Albany, Erie, Kings, Nassau, Queens, Suffolk and Westchester Counties, and throughout the Seventh Judicial District. Current Justices of the Division are listed in Appendix A to this Report. The *Commercial Division Law Report*, issued four times per year in hard copy and electronically on the Commercial Division website, contains summaries of recent leading opinions of the Commercial Division Justices. The Commercial Division website can be found at www.nycourts.gov/comdiv.

The State's business community, the commercial bar as a whole, and the Commercial and Federal Litigation Section in particular, have all responded enthusiastically to the Commercial Division. The Section referred to the Division as "a case study in successful judicial administration." Business and legal publications throughout the United States have commented favorably on the Commercial Division. At the time of its inception, the Wall Street Journal stated "[w]hile several other States have been pushing for trial courts devoted exclusively to business litigation, New York is the first in which a general trial court has implemented such a program." The National Law Journal touted the Commercial Division Justices for their rigorous management of cases through "rapid disposition of motion practice, realistic and practical scheduling, and [the early setting of] trial dates...to promote efficiency." The Division has also received excellent reviews from business leaders and groups like the New York State Business Council. For example, in 1999, Peter I. Bijur, Chairman of The Business Council of New York State, remarked "We have now gone in four years' time from a court system that often evoked frustration among businesses, to a business court that is the envy of other states."

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend, effective January 17, 2006, Part 202 of the Uniform Civil Rules of the Supreme and County Courts, to add the attached new section 202.70, relating to the Commercial Division of the Supreme Court.

Chief Administrative Judge of the Courts

Dated: December 29, 2005

AO/518/05

V

§202.70 Rules of the Commercial Division of the Supreme Court

(a) Monetary thresholds

Except as set forth in subdivision (b), the monetary thresholds of the Commercial Division, exclusive of punitive damages, interests, costs, disbursements and counsel fees claimed, is established as follows:

Albany County	$25,000
Erie County	$25,000
Kings County	$50,000
Nassau County	$75,000
New York County	$100,000
Queens County	$50,000
Seventh Judicial District	$25,000
Suffolk County	$25,000
Westchester County	$100,000

(b) Commercial cases

Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought:

(1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements; trade secrets; restrictive covenants;

and employment agreements not including claims that principally involve alleged discriminatory practices);

(2) Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual cooperative or condominium units);

(3) Transactions involving commercial real property, including Yellowstone injunctions and excluding actions for the payment of rent only;

(4) Shareholder derivative actions -- without consideration of the monetary threshold;

(5) Commercial class actions -- without consideration of the monetary threshold;

(6) Business transactions involving or arising out of dealings with commercial banks and other financial institutions;

(7) Internal affairs of business organizations;

(8) Malpractice by accountants or actuaries, and legal malpractice arising out of representation in commercial matters;

(9) Environmental insurance coverage;

(10) Commercial insurance coverage (e.g. directors and officers, errors and omissions, and business interruption coverage);

(11) Dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures -- without consideration of the monetary threshold; and

(12) Applications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75 involving any of the foregoing enumerated commercial issues -- without consideration of the monetary threshold.

(c) **Non-commercial cases**

The following will not be heard in the Commercial Division even if the monetary threshold is met:

(1) Suits to collect professional fees;

(2) Cases seeking a declaratory judgment as to insurance coverage for personal injury or property damage;

(3) Residential real estate disputes, including landlord-tenant matters, and commercial real estate disputes involving the payment of rent only;

(4) Proceedings to enforce a judgment regardless of the nature of the underlying case;

(5) First-party insurance claims and actions by insurers to collect premiums or rescind non-commercial policies; and

(6) Attorney malpractice actions except as otherwise provided in paragraph (b)(8).

(d) **Assignment to the Commercial Division**

(1) A party seeking assignment of a case to the Commercial Division shall indicate on the Request for Judicial Intervention (RJI) that the case is "commercial." A party seeking a designation of a special proceeding as a commercial case shall check the "other commercial" box on the RJI, not the "special proceedings" box.

(2) The party shall submit with the RJI a brief signed statement justifying the Commercial Division designation, together with a copy of the proceedings.

(e) **Transfer into the Commercial Division**

If a case is assigned to a non-commercial part because the filing party did not designate the case as "commercial" on the RJI, any other party may apply by letter application (with a copy to all parties) to the

Administrative Judge, within ten days after receipt of a copy of the RJI, for a transfer of the case into the Commercial Division. The determination of the Administrative Judge shall be final and subject to no further administrative review or appeal.

(f) Transfer from the Commercial Division

(1) In the discretion of the Commercial Division justice assigned, if a case does not fall within the jurisdiction of the Commercial Division as set forth in this section, it shall be transferred to a non-commercial part of the court.

(2) Any party aggrieved by a transfer of a case to a non-commercial part may seek review by letter application (with a copy to all parties) to the Administrative Judge within ten days of receipt of the designation of the case to a non-commercial part. The determination of the Administrative Judge shall be final and subject to no further administrative review or appeal.

(g) Rules of practice for the Commercial Division

Unless these rules of practice for the Commercial Division provide specifically to the contrary, the rules of Part 202 also shall apply to the Commercial Division, except that Rules 7 through 15 shall supersede section 202.12 (Preliminary Conference) and Rules 16 through 24 shall supersede section 202.8 (Motion Procedure).

Rule 1. Appearance by Counsel with Knowledge and Authority. Counsel who appear in the Commercial Division must be fully familiar with the case in regard to which they appear and fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients. Counsel should also be prepared to discuss any motions that have been submitted and are outstanding. Failure to comply with this rule may be regarded as a default and dealt with appropriately. See Rule 12. It is important that counsel be on time for all scheduled appearances.

Rule 2. Settlements and Discontinuances. If an action is settled, discontinued, or otherwise disposed of, counsel shall immediately inform the court by submission of a copy of the stipulation or a letter directed to the clerk of the part along with notice to chambers via telephone or e-mail. This notification shall be made in addition to the filing of a stipulation with the County Clerk.

Rule 3. Alternative Dispute Resolution (ADR). At any stage of the matter, the court may direct or counsel may 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.

Rule 4. Electronic Submission of Papers.

(a) Papers and correspondence by fax. Papers and correspondence filed by fax should comply with the requirements of section 202.5-a except that papers shall not be submitted to the court by fax without advance approval of the justice assigned. Correspondence sent by fax should not be followed by hard copy unless requested.

(b) Papers submitted in digital format. In cases not pending in the court's Filing by Electronic Means System, the court may permit counsel to communicate with the court and each other by e-mail. In the court's discretion, counsel may be requested to submit memoranda of law by e-mail or on a computer disk along with an original and courtesy copy.

Rule 5. (This rule shall apply only in the First and Second Judicial Departments) Information on Cases. Information on future court appearances can be found at the court system's future appearance site (www.nycourts.gov/ecourts). Decisions can be found on the Commercial Division home page of the Unified Court System's internet website: www.courts.state.ny.us/comdiv or in the New York Law Journal. The clerk of the part can also provide information about scheduling in the part (trials, conferences, and arguments on motions). Where circumstances require exceptional notice, it will be furnished directly by chambers.

Rule 6. Form of Papers. All papers submitted to the Commercial Division shall comply with CPLR 2101 and section 202.5(a). Papers shall be double-spaced and contain print no smaller than twelve-point, or 8½ x 11 inch paper, bearing margins no smaller than one inch. The print size of footnotes shall be no smaller than ten-point. Papers also shall comply with Part 130 of the Rules of the Chief Administrator.

Rule 7. Preliminary Conference; Request. A preliminary conference shall be held within 45 days of assignment of the case to a Commercial Division justice, or as soon thereafter as is practicable. Except for good cause shown, no preliminary conference shall be adjourned more than once or for more than 30 days. If a Request for Judicial Intervention is accompanied by a dispositive motion, the preliminary conference shall take place within 30 days following the decision of such motion (if not rendered moot) or at

such earlier date as scheduled by the justice presiding. Notice of the preliminary conference date will be sent by the court at least five days prior thereto.

Rule 8. Consultation prior to Preliminary and Compliance Conferences.

(a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference; and (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

(b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts.

Rule 9. (Reserved)

Rule 10. Submission of Information. At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commenced and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case.

Rule 11. Discovery

(a) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.

(b) The order will also contain a comprehensive disclosure schedule, including dates for the service of third-party pleadings, discovery, motion practice, a compliance conference, if needed, a date for filing the note of issue, a date for a pre-trial conference and a trial date.

(c) The preliminary conference order may provide for such limitations of interrogatories and other discovery as may be necessary to the circumstances of the case.

(d) The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.

Rule 12. Non-Appearance at Conference. The failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction.

Rule 13. Adherence to Discovery Schedule

(a) Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders. Such deadlines, however, may be modified upon the consent of all parties, provided that all discovery shall be completed by the discovery cutoff date set forth in the preliminary conference order. Applications for extension of a discovery deadline shall be made as soon as practicable and prior to the expiration of such deadline. Non-compliance with such an order may result in the imposition of an appropriate sanction against that party pursuant to CPLR 3126.

(b) If a party seeks documents as a condition precedent to a deposition and the documents are not produced by the date fixed, the party seeking disclosure may ask the court to preclude the non-producing party from introducing such demanded documents at trial.

Rule 14. Disclosure Disputes. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See section 202.7. Except as provided in Rule 24 hereof, if counsel are unable to resolve any disclosure dispute in this fashion, the aggrieved party shall contact the court to arrange a conference as soon as practicable to avoid exceeding the discovery cutoff date. Counsel should request a conference by telephone if that would be more convenient and efficient than an appearance in court.

Rule 15. Adjournments of Conferences. Adjournments on consent are permitted with the approval of the court for good cause where notice of the request is given to all parties. Adjournment of a conference will not change any subsequent date in the preliminary conference order, unless otherwise directed by the court.

Rule 16. Motions in General.

(a) Form of Motion Papers. The movant shall specify in the notice of motion, order to show cause, and in a concluding section of a memorandum of law, the exact relief sought. Counsel must attach copies of all pleadings and other documents as required by the CPLR and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212). Counsel should use tabs when submitting papers containing exhibits. Copies must be legible. If a document to be annexed to an affidavit or affirmation is voluminous and only discrete portions are relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately. Documents in a foreign language shall be properly translated. CPLR 2101(b). Whenever reliance is placed upon a decision or other authority not readily available to the court, a copy of the case or of pertinent portions of the authority shall be submitted with the motion papers.

(b) Proposed Orders. When appropriate, proposed orders should be submitted with motions, e.g., motions to be relieved, pro hac vice admissions, open commissions, etc. No proposed order should be submitted with motion papers on a dispositive motion.

(c) Adjournment of Motions. Dispositive motions (made pursuant to CPLR 3211, 3212 or 3213) may be adjourned only with the court's consent. Non-dispositive motions may be adjourned on consent no more than three times for a total of no more than 60 days unless otherwise directed by the court.

Rule 17. Length of Papers. Unless otherwise permitted by the court: (i) briefs or memoranda of law shall be limited to 25 pages each; (ii) reply memoranda shall be no more than 15 pages and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief; (iii) affidavits and affirmations shall be limited to 25 pages each.

Rule 18. Sur-Reply and Post-Submission Papers. Absent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or

considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind.

Rule 19. Orders to Show Cause. Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding. See Rule 20. Absent advance permission, reply papers shall not be submitted on orders to show cause.

Rule 19-a. Motions for Summary Judgment; Statements of Material Facts.

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b). In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

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. The applicant must give notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

Rule 21. Courtesy Copies. Courtesy copies should not be submitted unless requested or as herein provided. However, courtesy copies of all motion papers and proposed orders shall be submitted in cases in the court's Filing by Electronic Means System.

Rule 22. Oral Argument. Any party may request oral argument on the face of its papers or in an accompanying letter. Except in cases before justices who require oral argument on all motions, the court will determine, on a case-by-case basis, whether oral argument will be heard and, if so, when counsel shall appear. Notice of the date selected by the court shall be given, if practicable, at least 14 days before the scheduled oral argument. At that time, counsel shall be prepared to argue the motion, discuss resolution of the issue(s) presented and/or schedule a trial or hearing.

Rule 23. 60-Day Rule. If 60 days have elapsed after a motion has been finally submitted or oral argument held, whichever was later, and no decision has been issued by the court, counsel for the movant shall send the court a letter alerting it to this fact with copies to all parties to the motion.

Rule 24. Advance Notice of Motions

(a) Nothing in this rule shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interests. However, in order to permit the court the opportunity to resolve issues before motion practice ensues, and to control its calendar in the context of the discovery and trial schedule, pre-motion conferences in accordance herewith must be held. The failure of counsel to comply with this rule may result in the motion being held in abeyance until the court has an opportunity to conference the matter.

(b) This rule shall not apply to disclosure disputes covered by Rule 14 nor to dispositive motions pursuant to CPLR 3211, 3212 or 3213 made at the time of the filing of the Request for Judicial Intervention or after discovery is complete. Nor shall the rule apply to motions to be relieved as counsel, for pro hac vice admission, for reargument or in limine.

(c) Prior to the making or filing of a motion, counsel for the moving party shall advise the Court in writing (no more than two pages) on notice to opposing counsel outlining the issue(s) in dispute and requesting a telephone conference. If a cross-motion is contemplated, a similar motion notice letter shall be forwarded to the court and counsel. Such correspondence shall not be considered by the court in reaching its decision on the merits of the motion.

(d) Upon review of the motion notice letter, the court will schedule a telephone or in-court conference with counsel. Counsel fully familiar with the matter and with authority to bind their client must be available to participate in the conference. The

unavailability of counsel for the scheduled conference, except for good cause shown, may result in granting of the application without opposition and/or the imposition of sanctions.

(e) If the matter can be resolved during the conference, an order consistent with such resolution may be issued or counsel will be directed to forward a letter confirming the resolution to be "so ordered." At the discretion of the court, the conference may be held on the record.

(f) If the matter cannot be resolved, the parties shall set a briefing schedule for the motion which shall be approved by the court. Except for good cause shown, the failure to comply with the briefing schedule may result in the submission of the motion unopposed or the dismissal of the motion, as may be appropriate.

(g) On the face of all notices of motion and orders to show cause, there shall be a statement that there has been compliance with this rule.

(h) Where a motion must be made within a certain time pursuant to the CPLR, the submission of a motion notice letter, as provided in subdivision (a), within the prescribed time shall be deemed the timely making of the motion. This subdivision shall not be construed to extend any jurisdictional limitations period.

Rule 25. Trial Schedule. Counsel are expected to be ready to proceed either to select a jury or to begin presentation of proof on the scheduled trial date. Once a trial date is set, counsel shall immediately determine the availability of witnesses. If, for any reason, counsel are not prepared to proceed on the scheduled date, the court is to be notified within ten days of the date on which counsel are given the trial date or, in extraordinary circumstances, as soon as reasonably practicable. Failure of counsel to provide such notification will be deemed a waiver of any application to adjourn the trial because of the unavailability of a witness. Witnesses are to be scheduled so that trials proceed without interruption. Trials shall commence each court day promptly at such times as the court directs. Failure of counsel to attend the trial at the time scheduled without good cause shall constitute a waiver of the right of that attorney and his or her client to participate in the trial for the period of counsel's absence. There shall be no adjournment of a trial except for good cause shown. With respect to trials scheduled more than 60 days in advance, section 125.1(g) of the Rules of the Chief Administrator shall apply and the actual engagement of trial counsel in another matter will not be recognized as an acceptable basis for an adjournment of the trial.

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.

Rule 27. Motions in Limine. The parties shall make all motions in limine no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pre-trial conference, unless otherwise directed by the court.

Rule 28. Pre-Marking of Exhibits. Counsel for the parties shall consult prior to the pre-trial conference and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objection. At the pre-trial conference date, each side shall then mark its exhibits into evidence as to those to which no objection has been made. All exhibits not consented to shall be marked for identification only. If the trial exhibits are voluminous, counsel shall consult the clerk of the part for guidance. The court will rule upon the objections to the contested exhibits at the earliest possible time. Exhibits not previously demanded which are to be used solely for credibility or rebuttal need not be pre-marked.

Rule 29. Identification of Deposition Testimony. Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the portions of deposition testimony to be offered into evidence without objection. The parties shall delete from the testimony to be read questions and answers that are irrelevant to the point for which the deposition testimony is offered. Each party shall prepare a list of deposition testimony to be offered by it as to which objection has not been made and, identified separately, a list of deposition testimony as to which objection has been made. At least ten days prior to trial or such other time as the court may set, each party shall submit its list to the court and other counsel, together with a copy of the portions of the deposition testimony as to which objection has been made. The court will rule upon the objections at the earliest possible time after consultation with counsel.

Rule 30. Settlement and Pretrial Conferences.

(a) Settlement Conference. At the time of certification of the matter as ready for trial or at any time after the discovery cut-off date, the court may schedule a settlement conference which shall be attended by counsel and the parties, who are expected to be fully prepared to discuss the settlement of the matter.

(b) Pre-trial Conference. Prior to the pretrial conference, counsel shall confer in a good faith effort to identify matters not in contention, resolve disputed questions without need for court intervention and further discuss settlement of the case. At the pre-trial conference, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties, including those identified in Rules 27-29, and settlement of the matter. At or before the pre-trial conference, the court may require the parties to prepare a written stipulation of undisputed facts.

Rule 31. Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions

(a) Counsel shall submit pre-trial memoranda at the pre-trial conference, or such other time as the court may set. Counsel shall comply with CPLR 2103(e). A single memorandum no longer than 25 pages shall be submitted by each side. No memoranda in response shall be submitted.

(b) At the pre-trial conference or at such other time as the court may set, counsel shall submit an indexed binder or notebook of trial exhibits for the court's use. A copy for each attorney on trial and the originals in a similar binder or notebook for the witnesses shall be prepared and submitted. Plaintiff's exhibits shall be numerically tabbed and defendant's exhibits shall be tabbed alphabetically.

(c) Where the trial is by jury, counsel shall, on the pre-trial conference date or such other time as the court may set, provide the court with case-specific requests to charge and proposed jury interrogatories. Where the requested charge is from the New York Pattern Jury Instructions - Civil, a reference to the PJI number will suffice. Submissions should be by hard copy and disk or e-mail attachment in WordPerfect 12 format, as directed by the court.

Rule 32. Scheduling of witnesses. At the pre-trial conference or at such time as the court may direct, each party shall identify in writing for the court the witnesses it intends to call, the order in which they shall testify and the estimated length of their testimony, and shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court only a list of the witnesses who may be called solely for rebuttal or with regard to credibility.

Rule 33. Preclusion. Failure to comply with Rules 28, 29, 31 and 32 may result in preclusion pursuant to CPLR 3126.

SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY

STATEMENT OF THE ADMINISTRATIVE JUDGE REGARDING IMPLEMENTATION OF CERTAIN RULES OF THE COMMERCIAL DIVISION

This Statement is issued to inform the Bar about the way in which certain Rules of the Commercial Division (Section 202.70 of the Uniform Rules for the Trial Courts) will, until further notice, be implemented in this county.

1) **Rule 11:** All Justices of the Commercial Division require that, unless otherwise directed in a particular case, the number of interrogatories shall be limited to 25, including subparts.

2) **Rule 16 (a):** On motions to dismiss or for summary judgment pursuant to CPLR 3211, 3212 and 3213 and motions for a preliminary injunction, all memoranda of law shall contain a table of contents and a table of authorities and shall be bound separately from other papers submitted.

3) **Rule 16 (c):** All Justices of the Commercial Division waive the requirement that they be afforded an opportunity to approve adjournments of motions returnable in the Motion Support Office Courtroom (Room 130), provided that the adjournments do not exceed three for a total of no more than 60 days. Adjournments of motions returnable in any Commercial Division Part shall be governed by the procedures of the Part.

4) **Rule 19-a:** All Justices in the New York County Commercial Division require compliance with this Rule.

5) **Rule 27:** All motions *in limine* shall be made by order to show cause returnable in the Part on the date set forth in the Rule.

Dated: June 8, 2007

Jacqueline W. Silbermann
Administrative Judge

6/6/07

VI

Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 www.pbwt.com

ELIGIBILITY OF CASES FOR THE COMMERCIAL DIVISION

By: Stephen P. Younger*

I. Introduction

The statewide Uniform Rules for the Commercial Division of the Supreme Court became effective January 17, 2006. These rules go a long way toward standardizing practices throughout the state in determining what cases are appropriate for Commercial Division treatment and in helping lawyers predict what cases will be eligible to be heard in the Commercial Division. However, as with any rules, there are some gray areas concerning the Commercial Division's jurisdiction. Determinations of the Administrative Judge, pursuant to Rule 202.70(e) & (f) , have resolved several of those gray areas.

- The New York County Administrative Judge's rulings can be viewed on the Commercial Division's page of the New York State Unified Court System website. From the Commercial Division page, click on the "New York" County page. The link to the rulings is item "V." The webpage address is: http://www.nycourts.gov/comdiv/TransferApplications%20link%20page%202.htm.

II. Retroactivity of the New Rules

- Although "[t]he Uniform Rule does not indicate whether it is to be applied retroactively, that is, to RJIs that were filed prior to January 17, 2006," the Administrative Judge in New York County has ruled that "the most orderly approach is to apply the Rule to RJIs filed on January 17 or thereafter." Bistate Oil Management Co. v. US Skyline Realty Ltd., N.Y. County, Index No. 117022-2005.

- The Administrative Judge has not specifically ruled whether the new rules apply to cases that were commenced before January 17, 2006, but where the RJI was not filed until after that date. However, the

* Stephen P. Younger is a partner at Patterson Belknap Webb & Tyler LLP. Norman Kee of Patterson Belknap assisted in preparing this outline.

Administrative Judge has considered transfer applications for actions with 2005 index numbers, so it appears that it is the date of the RJI that is determinative for retroactivity purposes.

III. Procedural Issues

Practitioners should beware, as the following matters are jurisdictional:

A. The Statement Justifying Commercial Division Designation

- The Uniform Rules require the filing of a brief signed statement setting forth the basis for jurisdiction in the Commercial Division. Rule 202.70(d)(2)

- The failure to include the "statement justifying the Commercial Division designation" at the time a party submits an RJI, as required in Rule 202.70(d)(2), will result in assigning the case out of the Commercial Division. See Gettinger v. Solaris Capital Advisors, LLC, N.Y. County, Index No. 601246/06.

- Moreover, the statement must be submitted together with the RJI; no late submissions are allowed. See Trinity Bui v. Industrial Enters. of America, Inc., N.Y. County, Index No. 117290/2005.

- However, as long as the statement was filed with the RJI, it may be served on other parties after the service of the RJI. See International Flavors & Fragrance Inc. v. Insurance Co. of the State of Pennsylvania, N.Y. County, Index No. 604469/2005 (excusing one day delay).

B. The 10-Day Time Limit to Seek Transfer In or Out

- Pursuant to Rule 202.70(e) & (f), a party seeking to transfer into or out of the Commercial Division must apply by letter application to the Administrative Judge, with a copy to all parties, within ten days of receiving a copy of the RJI or the designation of the case to a non-commercial part.

- Service of the RJI by mail adds five days to the time other parties have to request a transfer. See NYTech, Inc. v. Kreisler Borg Florman Gen. Constr. Co., N.Y. County, Index No. 400300/2006.

- Parties seeking transfer need not wait until they receive actual notice of the case's Commercial Division designation. See Wachovia Sec., LLC v. Joseph, N.Y. County, Index No. 104326/2006.

- An early determination, Ace Fire Underwriters Ins. Co. v. ITT Indus., Inc., N.Y. County, Index No. 600133/2006, seemed to suggest that the

untimeliness of an application might be deemed an affirmative defense that needs to be raised by the opposing party. That determination noted that "[i]t is not asserted that this application is untimely" and did not discuss further the timing details.

- Subsequent cases make it clear that failure to comply with the 10-day time limit is jurisdictional, and may be raised by the Administrative Judge sua sponte. See City of New York v. Barney Skanska Constr., N.Y. County, Index No. 403612/04.

- Moreover, the recusal of a judge does not re-start the time to apply for a transfer. See Delmarva Online, LLC v. AT&T Corp., N.Y. County, Index No. 111175/2006.

C. Failure to Object to an Assignment May Waive Right to Seek Transfer

- In Northbrook Contracting Corp. v. Centennial Ins. Co., N.Y. County, Index No. 402064/2005, the first RJI filed sought a change in venue from Westchester County to New York County, and the matter was assigned to a non-Commercial Division Justice. After a subsequent RJI was filed, the defendant sought to have the action reassigned to the Commercial Division. The Administrative Judge determined that the action was untimely, but stated that, furthermore, the defendant did not assert or offer proof that it had objected to the assignment outside of the Commercial Division at the time the first RJI was filed.

IV. The Decisions of the Administrative Judge Are Final

- Parties seeking review of whether a case assigned to the Commercial Division is related to an earlier filed case currently before a Commercial Division Justice should first seek review from that Justice before addressing the matter with the Administrative Judge. See JPMorgan Chase & Co. v. Travelers Indem. Co., N.Y. County, Index No. 600674/06.

- Pursuant to Rule 202.70(f), the Administrative Judge may review another Justice's determination that the Commercial Division does not have jurisdiction. See Tilcon New York Inc. v. Pile Foundation Const. Co., Inc., N.Y. County, Index No. 404064/06.

- Pursuant to Rule 202.70(e) and (f), the decision of the Administrative Judge regarding transfer of a case in or out of the Commercial Division "shall be final and subject to no further administrative review or appeal.

- The Administrative Judge is hesitant to grant transfers into the Commercial Division where it could interfere with ongoing

proceedings or waste judicial resources. See Morgan Stanley DW Inc. v. McLoughlin, N.Y. County, Index No. 113596/06 (expressing concern about transferring a special proceeding to the Commercial Division where a TRO had been issued, a hearing had been set for the injunction application, and the TRO mandated an expedited evidentiary hearing in a NASD arbitration).

V. Monetary Threshold

A. The monetary thresholds for Commercial Division treatment, "exclusive of punitive damages, interests, costs, disbursements and counsel fees claimed," are set forth in Rule 202.70(a) and vary by county and range from $25,000 to $100,000.

B. The monetary thresholds are as follows:

- New York & Westchester Counties - $100,000
- Nassau County - $75,000
- Kings & Queens Counties - $50,000
- Albany, Erie & Suffolk Counties and the 7th Judicial District - $25,000

C. Even if plaintiffs' claimed damage figure is below the threshold amount, it appears that a counterclaim above that threshold level will bring the action, if otherwise appropriate, within the jurisdiction of the Commercial Division. See Virtual Clip Exchange USA v. Motorola, Inc., N.Y. County, Index No. 111707/2005.

D. However, if a plaintiff brings an action for breach of an insurance contract in an amount and of a type of action which is within the jurisdiction of the Commercial Division (Rule 202.70[b][1]), and the defendant raises a counterclaim for a declaratory judgment of insurance coverage of personal injury or property damage, which is not within the Commercial Division's jurisdiction (Rule 202.70[c][2]), the plaintiff's claim controls jurisdiction. See International Flavors & Fragrance Inc. v. Insurance Co. of the State of Pennsylvania, N.Y. County, Index No. 604469/2005.

VI. Subject Matter

A. The subject matters that are within the jurisdiction of the Commercial Division are set forth in Rule 202.70(b). A list of subject matters that lie outside the Commercial Division's jurisdiction is set forth in 202.70(c). A number of the Administrative Judge's determinations address this issue.

B. Under Rule 202.70(b), the following types of cases may be heard in the Commercial Division if (1) the monetary threshold is met, or (2) equitable or declaratory relief is sought:

- Breach of contract or fiduciary duty, fraud, misrepresentation, business tort, or statutory or common law violation where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities; corporate restructurings; partnership, shareholder, joint venture, and other business arrangements; trade secrets; restrictive covenants; and employment agreements not including claims principally alleging discrimination);
- Transactions governed by the UCC (exclusive of those concerning individual coop or condo units);
- Commercial real property transactions, including Yellowstone injunctions but excluding actions for the payment of rent only;
- Shareholder derivative actions – without consideration of monetary threshold;
- Commercial class actions – without consideration of monetary threshold;
- Business transactions involving or arising out of dealings with commercial banks or other financial institutions;
- Internal affairs of business organizations;
- Malpractice by accountants or actuaries, and legal malpractice arising out of commercial matters;
- Environmental insurance coverage;

- Commercial insurance coverage (D & O, E & O, business interruption);

- Dissolution of corporations, partnerships, LLCs, LLPs and joint ventures – without consideration of the monetary threshold;

- Applications to stay or compel arbitration, affirm or disaffirm arbitration awards, and related injunctive relief under CPLR Article 75, involving any of the above enumerated commercial issues – without consideration of the monetary threshold.

C. Per Rule 202.70(c), the following types of cases may not be heard in the Commercial Division:

- Suits to collect professional fees;

- Declaratory judgment of insurance coverage for personal injury or property damage (but see Ace Fire Underwriters Ins. Co. v. ITT Indus., Inc., discussed in paragraph D below);

- Residential real estate disputes, including landlord-tenant matters, and commercial real estate disputes involving the payment of rent only;

- Proceedings to enforce a judgment, regardless of the nature of the underlying case;

- First party insurance claims and actions by insurers to collect premiums or rescind non-commercial policies;

- Attorney malpractice actions, unless the claim arose out of representation in commercial matters.

D. Among the cases that have been held to be within the Commercial Division's jurisdiction are:

- A suit for specific performance of a lease or, in the alternative, for money damages was determined not to be a claim for payment of rent, a subject matter which is outside the Commercial Division's jurisdiction per Rule 202.70(c)(2). As a result, the case was transferred to the Commercial Division. See 57th Street Arts, LLC v. Calvary Baptist Church, N.Y. County, Index No. 602317/2006.

- A declaratory judgment action as to insurance coverage for personal injury due to exposure to silica would, strictly speaking, seem to fall under Rule 202.70(c)(2), which states that "[c]ases seeking a

declaratory judgment as to insurance coverage for personal injury" are outside the Commercial Division's jurisdiction. However, the Administrative Judge indicated that the rule applied to "routine" declaratory judgments, not the type at issue, which involved great sums of money and was of an "extraordinary scale and complexity" that "concern[ed] commercial insurance provided to major commercial enterprises nationwide." The Administrative Judge thus concluded that "[t]he standards for assignment of cases . . . should not be construed with the strictness that a court might apply to contractual or statutory provisions affecting the substantive rights of parties." Ace Fire Underwriters Ins. Co. v. ITT Indus., Inc., N.Y. County, Index No. 600133/2006.

E. Among the cases that have been held to be outside the Commercial Division's jurisdiction are:

- A suit seeking to recover business losses caused by the New York City transit strike was determined to be, at its core, about the strike's legality, and the Taylor Law does not regulate business dealings. As a result, the case was held not to qualify for commercial treatment. See Russian Samovar, Inc. v. Transit Worker's Union of America, N.Y. County, Index No. 117705/2005.

- Although a suit alleged breach of contract and fraud claims, the action principally concerned engineering malpractice, which is not within the Commercial Division's jurisdiction, and so was not within the Division's jurisdiction. See Cherokee Owners Corp. v. DNA Contracting, LLC, N.Y. County, Index No. 601210/05.

February 6, 2007

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

Second Edition

Volume 3

ROBERT L. HAIG
Editor-in-Chief

Chapter 22 to Chapter 41

2007-2008 Supplement
Issued in September 2007

New York County Lawyers' Association

THOMSON
WEST

For Customer Assistance Call 1-800-328-4880

Mat #40566786

IT-002

Chapter 31

Practice before the commercial division *[New]*

by Brian M. Cogan and Alan M. Klinger***

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

I. INTRODUCTION

§ 31:1 Scope Note

One of the threshold questions confronting any litigator at the outset of a case, whether representing a plaintiff or a defendant, is forum selection. The first part of that inquiry usually requires an examination into the availability of a federal forum. The creation of the specialized Commercial Division of the New York State Supreme Court, however, has altered the balance of considerations by providing a more commercially experienced bench, expedited procedures, and personal case attention that, in New York, were previously the nearly exclusive province of the federal courts.

In 1995, the New York State Unified Court System established the Commercial Division, a specialized court created to resolve complicated commercial disputes.[1] Founded on the premise that New York has long been the epicenter of the commercial world, its stated purpose was and is to serve the business community by offering litigants high quality judicial resources and expertise with predictable applications of commercial law and basic busi-

---

*United States District Judge, Eastern District of New York.

**Co-Managing Partner, Stroock & Stroock & Lavan LLP. The assistance of Jeremy S. Rosof and Michael L. Fox, litigation associates at Stroock, in the preparation of this Chapter is greatly appreciated.

[Section 31:1]

[1]A Brief History of the Commercial Division, the New York Unified Court System official website at http://www.nycourts.gov/comdiv/Brief_History_of_CD.htm.

ness principles to complicated facts, all in an expedited process. In the Commercial Division, the designated Justices hear all the commercial cases that meet eligibility requirements. These Commercial Division Justices take an early and active role in the commercial cases before them, often exerting tight control with strict deadlines for discovery, motions, and trial dates.

Since its establishment with branches in Monroe and New York counties, the Commercial Division has been widely praised and thus far expanded to eight more counties in Albany, Erie, Kings, Nassau, Onondaga,[2] Queens, Suffolk, and Westchester.[3] Additionally, the Monroe County branch has been extended to include the entire Seventh Judicial District.[4] While each branch originally had its own set of rules and guidelines for assignment of cases, on January 17, 2006, statewide uniform rules went into effect.[5] Nevertheless, certain local distinctions remain which will be treated herein.

There are several practical questions that arise when practicing in the Commercial Division throughout New York. First, why would a party desire assignment to the Commercial Division? What are the risks and strategy considerations associated with a case in the Commercial Division? How does a party get its case assigned to the Commercial Division—or transferred out, if that is the desire? And, finally, what are the statewide rules of the Commercial Division and how do they differ from other rules? This chapter will help answer those questions.

II. STANDARDS FOR ASSIGNMENT OF CASES TO THE COMMERCIAL DIVISION

§ 31:2 Generally

Since January 17, 2006, statewide standards have been in effect, governing the assignment of cases to the Commercial Division. These have superseded the original rules and guidelines of the several branches of the Commercial Division of the Supreme Court. The Standards for Assignment of Cases to the

---

[2]2007_2a.shtml (March 9, 2007 press release announcing the opening of the new Commercial Division part in Onondaga County).

[3]Commercial Division, General Information, the New York Unified Court System official website at http://www.nycourts.gov/comdiv/general_information.htm (providing, among other things, the counties in which Commercial Division parts have been established).

[4]The Seventh Judicial District is comprised of Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates Counties.

[5]Standards for Assignment of Cases to the Commercial Division of the Supreme Court and Rules of Practice of the Division (Rule 202.70 of the Uniform Rules), the New York Unified Court System official website at http://www.nycourts.gov/comdiv/Statewide_Standards_and_Rules.htm.

Commercial Division of the Supreme Court and Rules of Practice of the Division, 22 N.Y.C.R.R. § 202.70 ("Rule 202.70"), are most easily accessible online at http://www.nycourts.gov/comdiv/Statewide_Standards_and_Rules.htm. For convenience and to give an overview, the Statewide Standards and Rules (the "Standards and Rules") are described below. However, these Standards are subject to review, and may change. Parties practicing before the Commercial Division are wise to check the website or contact the relevant Clerk's Office for updates.

§ 31:3 Monetary Thresholds

Pursuant to Rule 202.70(a), the monetary thresholds of the Commercial Division, exclusive of punitive damages, interests, costs, disbursements and counsel fees claims, are as follows: Albany County - $25,000; Erie County - $25,000; Kings County - $75,000; Nassau County - $75,000; New York County - $100,000; Onondaga County - $25,000; Queens County - $50,000; Seventh Judicial District (Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates Counties) - $25,000; Suffolk County - $25,000; and Westchester County - $75,000.[1]

However, according to Rule 202.70(b), these monetary thresholds do not apply when equitable or declaratory relief is sought.

Additionally, Rule 202.70(b) provides that there is no monetary threshold for shareholder derivative actions, commercial class actions, or "[a]pplications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75" if they involve issues properly the subject of a commercial case.[2]

§ 31:4 Commercial and Non-Commercial Cases

The new Statewide Standards have contributed to both a standardization and expansion of the jurisdiction of the Commercial Division. Rule 202.70(b) defines as "commercial cases":

> [a]ctions in which the principal claims involve or consist of the fol-

---

[Section 31:3]

[1]Pursuant to an Administrative Order of Chief Administrative Judge Lippman, dated March 26, 2007, the monetary thresholds in Rule 202.70(a) were amended such that Kings County's threshold was raised from $50,000 to $75,000, and Westchester County's threshold was lowered from $100,000 to $75,000. A threshold of $25,000 was also established for Onondaga County. *See* http://www.courts.state.ny.us/comdiv/news_and_announcements.htm.

[2]Article 78 proceedings are not counted amongst those "presumptively commercial" in nature under Rule 202.70(b). See *In the Matter of the Application of Rocco Agostino Landscape & Gen. Contractor Corp., N.Y. County Index No. 104280/2007* ("Article 78 proceedings are not among the list of matters deemed presumptively commercial in nature in Uniform Rule 202.70(b). Thus, it is not enough that the bids exceed the $100,000 monetary threshold for New York County or that equitable or declaratory relief is sought.").

lowing . . . provided that the monetary threshold is met or equitable or declaratory relief is sought:

(1) breach of contract or fiduciary duty, fraud, misrepresentation, business tort (*e.g.*, unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings (*e.g.*, sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements; trade secrets; restrictive covenants; and employment agreements not including claims that principally involve alleged discriminatory practices);[1] (2) transactions governed by the Uniform Commercial Code (exclusive of those concerning individual cooperative or condominium units);

(3) transactions involving commercial real property, including Yellowstone injunctions and excluding actions for the payment of rent only;[2](4) shareholder derivative actions—without consideration of the monetary threshold;

(5) commercial class actions—without consideration of the monetary threshold;[3]

(6) business transactions involving or arising out of dealings with commercial banks and other financial institutions;

(7) internal affairs of business organizations;

(8) malpractice by accountants or actuaries, and legal malpractice arising out of representation in commercial matters;

(9) environmental insurance coverage;

(10) commercial insurance coverage (*e.g.* directors and officers, errors and omissions, and business interruption coverage);

(11) dissolution of corporations, partnerships, limited liability

---

[Section 31:4]

[1]*See, e.g., UBS Real Estate Sec., Inc. v. Fairmont Funding, Ltd., N.Y. County Index No. 600698/2007* (ordering reassignment to the Commercial Division, New York County, after finding that "[t]here is no question that this action meets the standards for assignment . . . because the complaint alleges claims for breach of contract, breach of fiduciary duty, and fraudulent conveyances under the Debtor & Creditor Law . . . and plaintiff seeks over $974,000 in damages").

[2]*See, e.g., 595 Eleventh LLC v. Hampshire Hotel & Resorts LLC, N.Y. County Index No. 604446/2006* (stating, *inter alia*, that "[t]ransactions involving commercial real property are also presumptively within the jurisdiction of the Commercial Division;" upon consideration of the case and factors under Rule 202.70 (b)(1) & (3), and given that the monetary threshold of $100,000 was surpassed in the relief sought, re-assignment to Commercial Division was ordered).

[3]*See Horgan v. HIP Health Plan of New York, N.Y. County Index No. 604503/2005* (discussing dual standards that commercial class actions are heard in the Commercial Division without regard to monetary limits (pursuant to Rule 202.70(b)(5)), and that relief sought for statutory violations arising from business dealings are heard in the Commercial Division (pursuant to Rule 202.70(b)(1)); reassignment to Commercial Division ordered).

companies, limited liability partnerships and joint ventures—without consideration of the monetary threshold; and

(12) applications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75 involving any of the foregoing enumerated commercial issues—without consideration of the monetary threshold.[4]

Notably, according to Rule 202.70(c),

the following ["non-commercial cases"] will not be heard in the Commercial Division, even if the monetary threshold is met:

(1) suits to collect professional fees;

(2) cases seeking a declaratory judgment as to insurance coverage for personal injury or property damage;

(3) residential real estate disputes, including landlord-tenant matters, and commercial real estate disputes involving the payment of rent only;

(4) proceedings to enforce a judgment regardless of the nature of the underlying case;

(5) first-party insurance claims and actions by insurers to collect premiums or rescind non-commercial policies; and

(6) attorney malpractice actions except [where the legal malpractice arises out of representation in commercial matters.]

§ 31:5 Assignment to the Commercial Division

A party seeking assignment of an action to the Commercial Division must indicate on its Request for Judicial Intervention (RJI) that the case is "commercial."[1] A party seeking designation of a special proceeding as a commercial case or proceeding must check the "other commercial" box on the RJI, and not the box on the form labeled "special proceedings."

---

[4]Categories (3), (8), (11) and (12) represent an expansion of the Commercial Division's classification of commercial cases under prior guidelines. *See also People of the State of New York v. Coventry First LLC, N.Y. County Index No. 404620/06* (evaluating factors under Rule 202.70(b)(1) & (12), and granting plaintiff's request for order reviewing Justice's transfer of case from Commercial Division; case ordered re-assigned back to the Commercial Division).

[Section 31:5]

[1]Parties should take special care when filling out and filing their forms. For example, if a plaintiff checks an incorrect box (such as "Torts-Malpractice") and assignment is made to a non-commercial part, at least one court has held that same party cannot later request transfer, under Uniform Rule 202.70, to the Commercial Division on the grounds of mistake in the original designation. *See Filberto v. Goldberg, Scuderi, Lindenberg & Block, P.C., N.Y. County Index No. 118797/2006* ("Nothing in the Uniform Rule allows the party who filed the RJI to request a transfer on the ground that the original designation of the case was a mistake, especially more than 10 days after a non-commercial justice has been assigned.").

In conjunction with its RJI, the party seeking assignment of the case to the Commercial Division must include a signed statement justifying the Commercial Division designation, together with a copy of the proceedings.[2]

The failure to include the signed statement constitutes a jurisdictional defect sufficient to result in the assignment of the case out of the Commercial Division.[3] The court does not allow late submissions.[4] But the statement may be served on the other parties after service of the RJI, so long as the serving party made sure that the statement was filed at the same time as the RJI.[5]

§ 31:6 Transfer into the Commercial Division

In the event that a case is assigned to a non-commercial part because the filing party did not designate the case as "commercial" on the RJI, any other party may apply by letter application (with a copy to all parties) to the Administrative Judge,[1] within ten days[2] after receipt of a copy of the RJI, for a transfer of the case into the Commercial Division. Indeed, the parties seek-

---

[2]Rule 202.70(d)(2). Examples of forms satisfying the signed statement requirement can be obtained online. *See* Statement in Support of Request for Assignment to Commercial Division, the New York Unified Court System official website at http://www.nycourts.gov/comdiv/NY%20ReqAssmt.pdf (New York County); Attorney's Statement in Support of Request for Assignment to Commercial Division, the New York Unified Court System official website at http://www.nycourts.gov/comdiv/onan_ATTORNEYSTATEMENT.pdf (Onondaga County).

[3]*See Gettinger v. Solaris Capital Advisors, LLC, N.Y. County Index No. 601246/06. See also Seelbrede v. Cole, N.Y. County Index No. 603154/2006* (assignment made to non-commercial part; "the original assignment was correct in that plaintiff's counsel failed to submit with the RJI the requisite forms for assignment of cases to the Commercial Division (see Uniform Rule 202.70[d][2]).").

[4]*See Trinity Bui v. Indus. Enters. of Am., Inc., N.Y. County Index No. 117290/05.*

[5]*See Int'l Flavors & Fragrance Inc. v. Ins. Co. of the State of Pa., N.Y. County Index No. 604469/05* (the court excused a one-day delay in service of statement, because statement was filed with the RJI).

[Section 31:6]

[1]A party seeking transfer should take care to direct the application to the proper Administrative Judge. In the case of *National Promotions Associates, LLC v. Goposter LLC, N.Y. County Index No. 116916/2006*, the party seeking transfer misdirected its request to the Chief Administrative Judge of the State of New York as opposed to the proper judicial officer, the Administrative Judge of New York County, costing the party valuable time and ultimately contributing to the denial of the request for transfer into the Commercial Division.

[2]The ten-day time limit is measured from the time the opposing party/party seeking transfer to the Commercial Division receives the RJI. *See* Rule 202.70 (e); *Assouline Ritz 1 LLC v. Edward I. Mills & Assoc., N.Y. County Index No. 602552/2006*; *Viscern Holding Corp. v. Hefton, N.Y. County Index No. 600575/2007* (RJI filed by defendant in connection with motion to dismiss; defendant

ing transfer into the Commercial Division must be careful if they wish to rely on the provisions of CPLR 2103(b)(2), following the service of an RJI. The Administrative Judge of New York County, in a decision dated March 20, 2007, held that CPLR 2103(b)(2) "only applies where a period of time prescribed by law is measured from the service of a paper and service is made by mail. Here, Uniform Rule 202.70(e) is clear that the application must be made within 10 days of the party's 'receipt' of the RJI, thus C.P.L.R. [2103(b)(2)] is inapplicable."[3] In the case just cited, the requesting party did not specify when the RJI was received, and the Administrative Judge assumed that the application was, therefore, untimely.[4] Importantly, the determination of the

---

checked improper box, and matter assigned to non-commercial part; plaintiff received the motion and RJI on March 8, 2007, meaning that plaintiff had until March 18, 2007, to request transfer into the Commercial Division; plaintiff's request was dated March 20, 2007, and the Administrative Judge held that the application was untimely). *See also Seelbrede v. Cole, N.Y. County Index No. 603154/2006* ("time to challenge the failure of the clerk's office to assign this case to the Commercial Division, as had been requested on the RJI, was within ten (10) days of plaintiff's counsel's knowledge that the case had been assigned to a non-commercial part (*see* Uniform Rule 202.70[f][2]);" furthermore, the RJI in this case was filed November 2, 2006, and plaintiff's request for transfer was dated February 6, 2007; the request was denied as untimely).

[3]*Nat'l Promotions Assoc., LLC v. Goposter LLC, N.Y. County Index No. 116916/2006* (although the court discussed application of CPLR 2101(b)(2), it is presumed the court intended to apply CPLR 2103(b)(2)).

[4]Litigants should be wary, however, as some may argue there is apparent inconsistency in the New York County Administrative Judge's rulings on this point. National Promotions is the most recent jurisprudence on the matter. But, in the case of *Nytech, Inc. v. Kreisler Borg Florman General Construction Co., Inc., N.Y. County Index No. 400300/2006*, no date of receipt of the RJI was provided in the request by the party seeking transfer. In *Nytech*, the Administrative Judge stated that "[p]laintiff's counsel also claims that her application for a transfer is timely pursuant to Uniform Rule 202.70(e), because the request is being made within 10 days from her receipt of the . . . RJI, although she does not state when the RJI was served, how it was served and when exactly it was received. According to the affidavit of service attached to the defendant's moving papers, the RJI was served by regular U.S. mail on June 13, 2006. Adding five (5) days for service by mail (*see* CPLR 2103[b][2]), plaintiff had until June 28, 2006 to make this application. Therefore, the Court finds that plaintiff's application [dated June 30, 2006] is untimely." Because the Nytech court made reference to the application of CPLR 2103, that case could be seen to be at odds with National Promotions. But, one read of Nytech is that the court simply utilized CPLR 2103 as a measuring stick, in effect, to establish a presumptive date of receipt of the RJI absent other evidence, and the court still found the application for transfer to be untimely. Again, National Promotions is the more recent decision and is the clear and current stance of the court. CPLR 2103(b)(2) is inapplicable when measuring the 10-day time limit under Uniform Rule 202.70 (e). But, caution is urged that litigants make themselves aware of the most recent decisions. Litigants also should be cognizant that the burden is on the

Administrative Judge as to a request for transfer is final and not subject to further administrative review or appeal.

§ 31:7 Transfer from the Commercial Division

In the discretion of the Commercial Division justice assigned, if a case does not fall within the jurisdiction of the Commercial Division, it "shall" be transferred to a non-commercial part of the court. However, any party aggrieved by such transfer may seek review by letter application (with a copy to all parties) to the Administrative Judge within ten days of receipt of the designation of the case to the non-commercial part.[1] The determination of the Administrative Judge is final and not subject to further administrative review or appeal.

§ 31:8 Determinations of the Administrative Judge on Applications for Transfer into and out of the Commercial Division

The Standards have given rise to an emerging body of case law providing precedents upon which the advocate may rely in support of the classification of cases as either commercial or non-commercial, as desired. The New York County Commercial Division has published the determinations of its Administrative Judge on applications for transfer into and out of the Commercial Division online at http://www.nycourts.gov/comdiv/Orders%20In2006.htm. Among others, the following decisions have attracted notice:

In *57th Street Arts, LLC v. Calvary Baptist Church, N.Y. County Index No. 602317/06*, the Administrative Judge determined that a suit for specific performance of a lease or for money damages is not a claim for payment of rent under Rule 202.70(c)(2), and is therefore eligible to be heard in the Commercial Division.

Ace Fire Underwriters Insurance Co. v. ITT Industries, Inc., N.Y. County Index No. 600133/06, featured an insurance coverage dispute over coverage for silica exposure. Although the controversy appeared to fall under Rule 202.70(c)(2), which, as discussed above,[1] provides that "[c]ases seeking a declaratory judgment as to insurance coverage for personal injury" are of a "non-commercial" nature and will not be heard in the Commercial Division, the Administrative Judge nevertheless found jurisdic-

---

party seeking transfer to the Commercial Division to demonstrate that the request is made within the appropriate time from receipt of the RJI.

[Section 31:7]

[1]*See, e.g., People of the State of New York v. Coventry First LLC, N.Y. County Index No. 404620/06* (citing Uniform Rule 202.70(f)(2)).

[Section 31:8]

[1]*See* § 31.5.

tion based upon the non-routine nature of the case, specifically, its "extraordinary scale and complexity" and that it "concern[ed] commercial insurance provided to major commercial enterprises nationwide." The Administrative Judge stated that 202.70(c)(2) should "be interpreted as applying to the garden variety DJ action." Significantly, the Administrative Judge also held that "[t]he standards for assignment of cases . . . should not be construed with the strictness that a court might apply to contractual or statutory provisions affecting the substantive rights of parties."

The *Ace* case demonstrates that there is some flexibility in the application of the Standards to large-scale, complex cases that would not otherwise be heard in the Commercial Division.[2]

In *Yang v. Herman, N.Y. County Index No. 118728/2006*, a case in which both parties sought transfer to the Commercial Division, the Administrative Judge acknowledged that the requests were timely, and that the principal claim was a shareholders derivative action claiming breaches of fiduciary duty by the president and board managers of the condominium association—which falls under the jurisdiction of the Commercial Division without regard to a monetary threshold under Rule 202.70(b)(4). However, the Administrative Judge went on to find that the matter at issue had been assigned to the non-commercial part because other related matters were already pending there—which defense counsel admitted. The RJI listed the other matters that were pending. The court found that "[d]efendants' counsel represented to this court on the RJI that both actions are related because they have similar parties and 'arise out of the same occurrences within the subject Building.' " The Complaint in the matter at issue before the Administrative Judge referenced the matter pending, and alleged that the prior litigation "partially form[ed] the basis of the alleged breaches of fiduciary duty of which defendant . . . is charged." In the end the Administrative Judge held that judicial economy would not be served by transferring the action away from the part familiar with the parties and the dispute. The request for transfer to the Commercial Division was denied—despite the fact that the claim at issue fell squarely under Rule 202.70(b)(4).

Thus, *Yang* further illustrates the discretion vested in the Administrative Judge, as well as the fact that decisions addressing transfers into and out of the Commercial Division are not

---

[2]*But see Russian Samovar, Inc. v. Transit Worker's Union of Am., New York County Index No. 117705/2005* (suit to recover business losses caused by illegal transit strike not commercial case, because Taylor Law not business-related, and main issues of case concerned application of Taylor Law); *Cherokee Owners Corp. v. DNA Contracting, LLC, New York County Index No. 601210/05* (engineering malpractice lawsuit, despite claims for breach of contract and fraud having been made, not commercial case).

always based solely on the cold form of compliance with the terms of Rule 202.70, but rather the substance of the claims at issue, and related proceedings, may have an impact on the ultimate decision, as well.

§ 31:9 Cases Assigned to a Judicial Hearing Officer (JHO)

A person who formerly served as a judge or justice of a court of record of the Unified Court System may continue to serve in a judicial capacity as a Judicial Hearing Officer or "JHO."[1]

In the Commercial Division, while a JHO may, like the justices, receive commercial case assignments at random, he or she may only hear and determine a case provided that the parties consent.

As soon as possible following the assignment of a JHO, the parties should submit a stipulation consenting to the JHO's jurisdiction, or if any party does not consent, so inform the court so that the case can be reassigned at random to another Justice of the Commercial Division.[2]

III. RULES OF PRACTICE

§ 31:10 Generally

Just as uniform Statewide Standards have replaced each county's version of "Guidelines for Assignment of Cases," statewide rules have now replaced each county's former rules. These statewide rules are similar to federal district court local rules and individual judges' rules. Although the new rules have brought a large measure of uniformity, a certain overlay of distinctions from county to county continues,[1] and some Justices may even add special individualized rules, such as the rule in

---

[Section 31:9]

[1]In New York County, the Honorable Ira Gammerman is currently serving as a JHO.

[2]A form of stipulation may be available. In the case of Justice Gammerman, a form is available in his Part and in Room 148 of the New York County Courthouse.

[Section 31:10]

[1]*See, e.g.,* Kings County Commercial Division Rules, at http://www.nycourts.gov/comdiv/Kings_CD_Rules.pdf; Onondaga County Commercial Division Rules (rules of Justice Deborah Karalunas), at http://www.nycourts.gov/comdiv/onan_DHK%20Personal%20Commercial%20Rules.pdf; Seventh Judicial District Rules, at http://www.nycourts.gov/comdiv/7th%20JD/7th_SO-2-06.pdf.

New York County Part 53 (Justice Charles Edward Ramos), that parties must call chambers before sending a Rule 24 letter.[2]

§ 31:11 Statewide Rules of Practice for the Commercial Division

Given the premise that the Commercial Division operates with strong judicial oversight and authority to control the speed at which a case proceeds, it is not surprising that as a foundation the Rules of Practice for the Commercial Division ("Rules") explicitly require that any attorney practicing before the Commercial Division must be on time for all scheduled appointments, be fully familiar with the case, be fully authorized to enter into agreements—both substantive and procedural—and be prepared to discuss any motions that have been submitted and are outstanding.[1] The Rules grant wide discretionary power to the Commercial Division Justices to sanction those who fail to comply with any of these basic appearance and preparedness rules.[2]

The Rules prescribe that once a case has been assigned to the Commercial Division, "[a] preliminary conference shall be held within 45 days . . ., or as soon thereafter as is practicable . . . . If a [RJI] is accompanied by a dispositive motion, the preliminary conference shall take place within 30 days following the decision of such motion (if not rendered moot) or at such earlier date as scheduled by the justice presiding."[3]

The purpose of the preliminary conference is to review the matter, set up a pre-trial schedule and trial date by court order, and induce the parties to identify the issues in the case. Prior to the preliminary conference, counsel for the parties are required to consult in a good faith effort to reach agreement about resolution of the case; discovery and other issues; and the use of alternative dispute resolution. Significantly, as in federal court, counsel must now also confer with regard to anticipated electronic discovery issues.[4]

The Commercial Division Justices aim for high-speed

---

[2]*See, e.g.*, Regarding Rule 24 (requiring a letter before a motion is filed), Part 53, New York County, at http://www.nycourts.gov/comdiv/NY%20Cty.%20R.%2024.htm.

[Section 31:11]

[1]*See* Rule 1.

[2]*See* Rule 12 ("The failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction.").

[3]*See* Rule 7; *compare* Fed. R. Civ. P. 16(b) and 26(f).

[4]*See* Rule 8. Among the electronic and other discovery issues to be covered are: "(i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of

resolutions. They do not want to waste valuable court time discussing matters that could have been resolved between the parties, such as a schedule for discovery, depositions, motions and trial date. Additionally, the court will be looking for a tight schedule, so if, for whatever reason, a party seeks to delay the schedule, it should be prepared to explain its reasons in significant detail. Even then, the court is not likely to extend discovery time periods for very long. And in those instances where discovery may be lengthy, the court will often schedule compliance conferences to require the parties to report on their progress and compliance with the scheduling order. The preliminary conference is an attorney's first opportunity to appear before the judge and make an impression, good or bad. Being prepared and having stipulated with adversaries regarding the litigation timetable is a good start.[5]

As explained, Commercial Division preliminary conferences generally result in a detailed order containing a "comprehensive disclosure schedule, including dates for the service of third-party pleadings, discovery, motion practice, a compliance conference, if needed, a date for filing the note of issue, a date for a pre-trial conference and a trial date."[6] Furthermore, "[t]he preliminary conference order may provide for such limitations of interrogatories and other discovery as may be necessary to the circumstances of the case."[7][8] And, "[w]here appropriate, the order will contain

---

data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts." *Id. Compare* Fed. R. Civ. P. 16, 26, 34.

[5]Preparation starts with the little things: "At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commenced and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case." *See* Rule 10.

[6]*See* Rule 11.

[7]*See* Rule 11.

[8]On June 8, 2007, the Administrative Judge of the Supreme Court, Civil Branch, New York County, issued a Statement of the Administrative Judge Regarding Implementation of Certain Rules of the Commercial Division, which provides guidance on, among other Rules, Rule 11: "All Justices of the Commercial Division require that, unless otherwise directed in a particular case, the number of interrogatories shall be limited to 25, including subparts." The Statement is available on-line at http://www.nycourts.gov/courts/comdiv/PDFs/Rules_202-7.pdf.

specific provisions for means of early disposition of the case."[9] Discovery orders are strictly enforced; sanctions for disobedience may include prohibiting the party from using particular evidence or making particular arguments, striking pleadings in whole or in part and/or dismissing the action.[10]

The Rules on adjournments exemplify the pressure brought to minimize delay. While adjournments of conferences on consent are permitted, they require the court's approval for good cause shown.[11] Similarly, dispositive motions may be adjourned only with the court's consent[12] and non-dispositive motions may be adjourned on consent no more than three times for a total of no more than 60 days unless otherwise directed by the court.[13]

In yet another example of the court-imposed pressure in the Commercial Division, the Rules specify that counsel should try to avoid the necessity of court intervention by consulting with one another in a good faith effort to resolve all disputes about disclosure.[14]

The Rules cover specifics relating to motion practice, including form, submission of proposed orders, length, submission procedures (including whether courtesy copies are required or permitted), oral argument and advance notice of motions.[15][16] And the Rules also affirm that "sur-reply papers, including correspon-

---

[9]These may include, *e.g.*, "(i) directions for submission to the alternative dispute resolution program; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure." *See id.*

[10]*See* Rule 13. *See also* N.Y. C.P.L.R. 3126.

[11]*See* Rule 15.

[12]The requirement of court consent has proved impractical in counties like New York, where motions are submitted in a motion submission part, rather than in the IAS Part. The Administrative Judge's recent Statement (*see* note 8 *supra*) has brought clarity on this issue in New York County: "All Justices of the Commercial Division waive the requirement that they be afforded an opportunity to approve adjournments of motions returnable in the Motion Support Office Courtroom (Room 130), provided that adjournments do not exceed three for a total of no more than 60 days. Adjournments of motions returnable in any Commercial Division Part shall be governed by the procedures of the Part.

[13]*See* Rule 16.

[14]*See* Rule 14. *See also* N.Y. Comp. Codes R. & Regs. tit. 22, § 202.7.

[15]*See* Rules 6, 16 through 18, 21, 22 and 24. The requirement of advance notice of motions does not apply to: (a) "disclosure disputes covered by Rule 14;" (b) "dispositive motions pursuant to CPLR 3211, 3212 or 3213 made at the time of the filing of the RJI or after discovery is complete;" or (c) "motions to be relieved as counsel, for pro hac vice admission, for reargument or in limine." *See* Rule 24. Counsel practicing in New York County should take note of that venue's local standing rule that "[a]ll motions *in limine* shall be made by order to show cause returnable in the Part on the date set forth in [Rule 27]." *See* June 8, 2007 Statement of the Administrative Judge Regarding the Implementation of Certain Rules of the Commercial Division.

dence, addressing the merits of a motion are not permitted" without express court permission.[17]

Additionally, the Rules describe required trial procedures, specifically designed to control the manner in which the trial proceeds—with an eye towards efficient use of the court and jury's time.[18] These Rules dictate when and how pre-trial conferences are conducted (including the possibility that the court may schedule a pre-trial settlement conference); when parties must submit trial memoranda; and when and how parties must exchange witness lists (including the order in which a party intends to call each witness and the estimated length of time each witness will testify). The Rules also require the parties to pre-determine the portions of any deposition testimony that will be offered into evidence, pre-mark exhibits, stipulate to unopposed evidence and prepare an indexed binder or notebook of trial exhibits for the court's use. Importantly, "[f]ailure of counsel to attend the trial at the time scheduled without good cause shall constitute a waiver of the right of that attorney and his or her client to participate in the trial for the period of counsel's absence."[19]

The trial Rule with the most punch may be the "Preclusion Rule," which states that "[f]ailure to comply with Rules 28, 29, 31 and 32 may result in preclusion pursuant to CPLR 3126." The root of this particular Rule is nothing new in trial practice—parties often attempt to spring new evidence on their adversaries during trial. What is new is the shift in burden. Outside the Commercial Division, it is generally the burden of the adversary to argue preclusion of new evidence based on prejudice. With this Rule prejudice is presumed, and the burden shifts to the offering party to show good cause for its previous non-disclosure. Simply put, there is little room in the Commercial Division for trial

---

[16]In this as in other areas, counsel would also be well advised to consult any local or Part rules. Thus, for example, in New York County, the Administrative Judge has issued a Statement providing the following guidance on the implementation of Rule 16(a): "On motions to dismiss or for summary judgment pursuant to CPLR 3211, 3212 and 3213 and motions for preliminary injunction, all memoranda of law shall contain a table of contents and a table of authorities and shall be bound separately from other papers submitted." *See* June 8, 2007 Statement of the Administrative Judge Regarding Implementation of Certain Rules of the Commercial Division.

[17]*See* Rule 18. A narrow exception permits counsel to "inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues." *Id.*

[18]*See* Rules 25 through 33.

[19]*See* Rule 25. The Rule further underscores the importance of adherence to the trial date as follows: "There shall be no adjournment of a trial except for good cause shown. With respect to trials scheduled no more than 60 days in advance, section 125.1(g) of the Rules of the Chief Administrator shall apply and the actual engagement of trial counsel in another matter will not be recognized as an acceptable basis for an adjournment of the trial." *See id.*

strategies that include surprise witnesses or evidence. To play such a game is to risk preclusion of the evidence. If a party has any intention of presenting a certain witness or exhibit, it should be disclosed at the proper pre-trial time, as dictated by the Rules.[20]

Finally, counsel should be mindful of the Rules concerning electronic submission of papers.[21]

§ 31:12 Rule 11(d): Automatic Stay of Discovery

One Rule that has given some commercial litigators pause is Rule 12 of the former Rules of the Justices of the Commercial Division, Supreme Court, New York County, which has been superseded by the current statewide Rule 11(d). Contrary to the CPLR, New York Rule 12 stated that a motion to dismiss or for summary judgment "shall not stay disclosure unless the Justice directs."[1] CPLR 3214(b), in contrast, states that a motion to dismiss or for summary judgment "stays disclosure until determination of the motion unless the court orders otherwise." Essentially, under the former rule, the New York Commercial Division shifted the burden to the movant to show why discovery should be stayed, rather than to the opponent to show why it should not.

Some argued that Rule 12 improperly usurped the Legislature's allocation of the burden of seeking such a discovery stay and thus violated the separation of powers under the New York State Constitution.[2] By enacting CPLR 3214(b), the Legislature clearly expressed its desire that the opponent would have the burden of showing why discovery should proceed. Instead of a case-by-case determination of whether to lift the discovery stay, as the Legislature intended, Rule 12 amounted to an across-the-board exercise of discretion in favor of proceeding with discovery.[3]

Current statewide Rule 11(d) is intended to restore consonance with CPLR 3214(b): "The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion."[4] There nevertheless remains inherent in the new rule a consider-

---

[20]*See also* Chapter 35, "Trials" (§§ 35:1 et seq.), for a more detailed discussion of commercial trial practice.

[21]*See* Rule 4.

[Section 31:12]

[1]Justice Herman Cahn adopted a slightly different version for his Part: such motions "shall not stay the production of documents" and all discovery during pendency of the motion will be handled on a case-by-case basis." New York Rule 12.

[2]N.Y. Const. art. III, § 1; art. IV, § 1.

[3]*See* Daniel J. Kornstein, *Commercial Division v. CPLR*, N.Y. L.J., Mar. 6, 2002, at 2.

[4]*See* Rule 11(d).

able reservoir of judicial discretion. Justices in the Commercial Division will evaluate applications to lift the automatic statutory stay on a case-by-case basis.[5]

§ 31:13 Statements of Material Facts

In an effort to induce litigants to narrow the issues in a precise and concise manner and to weed out meritless summary judgment motions, Rule 19-a, as is typical in federal court, provides that upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court "may direct"[1] that there be annexed to the notice of motion "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried."[2] Opposing papers must also include such a statement of the material facts "as to which it is contended that there exists a genuine issue to be tried."[3] The opposing party should be aware that unless controverted, the material facts in the moving party's statement would be deemed admitted.[4]

Since failure to include these statements may be grounds for denial of the motion, and failure to respond to them may form the basis for granting it, this is a crucial change in motion practice in the Supreme Court.[5]

§ 31:14 Applications for Temporary Restraining Orders Require Notice

Unlike the former general practice under the CPLR, whereby

---

[5]In New York County, a pattern or practice can be discerned among some of the Justices of permitting document discovery to continue at least until the court reviews the motion; by contrast, depositions are suspended pending the court's ruling on the application to lift the stay. Thus, something of former Rule 12 remains.

[Section 31:13]

[1]Although statements of material facts are not mandatory unless directed by the court, some courts have adopted a standing local rule requiring such statements. Thus, according to the Statement issued by that county's Administrative Judge, "[a]ll Justices in the New York County Commercial Division require compliance with [Rule 19-a]." Other justices feel differently. In the Seventh Judicial District, by standing order, "the court will not direct that motions for summary judgment include a Rule 19-a statement." *See* http://www.nycourts.gov/comdiv/7th%20JD/7th_SO-2-06.pdf. Outside of New York County and the Seventh Judicial District, counsel may want to inquire concerning the preferences of their particular assigned judge.

[2]*See* Rule 19-a. *Compare* Local Rule 56.1 of the United States District Courts for the Southern and Eastern Districts of New York; Local Rule 7.1(a)(3) of the United States District Court for the Northern District of New York.

[3]*See id.*

[4]*See id.*

[5]*See* Chapters 27, "Motion Practice" (§§ 27:1 et seq.) and 28, Summary Judgment" (§§ 28:1 et seq.), for a more detailed discussion.

temporary restraining orders ("TROs") were usually obtained *ex parte* and then served on opposing parties with notice of hearing for a preliminary injunction,[1] the Rules of Practice for the Commercial Division, adopting another device borrowed from federal court, require notice to the opposing party *prior* to an application "[u]nless the moving party can demonstrate that there will be significant prejudice by reason of giving notice."[2] Specifically, the Rules state: "The applicant must give notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application."[3]

Matters before the Commercial Division are, by design, complex business disputes and usually involve sophisticated corporations, highly knowledgeable about both the facts of their case and their legal rights. This Rule encourages those most knowledgeable—the parties—to resolve disputes prior to seeking court intervention. While it may be the case that a commercial party has a particular issue that demands immediate attention or action, *ex parte* TROs often are used as a litigation strategy—to strong-arm an adversary by obtaining a court order before real negotiations begin. This Rule discourages such strategy by refusing to issue such orders absent notice to an adversary. It eliminates the element of surprise and allows the court to hear both sides prior to issuing a TRO.[4]

§ 31:15 Mandatory Alternative Dispute Resolution (ADR)

The Commercial Division has elected to encourage its litigants to utilize various alternatives to court intervention by authoriz-

---

[Section 31:14]

[1]N.Y. C.P.L.R. 6313. *But see* Section 202.7(f), which took effect on October 1, 2006, and adopted a rule generally requiring notice, similar to the practice in the Commercial Division. In this and other areas, such as electronic discovery (*see supra* § 31:11), the Commercial Division has served as a laboratory for change in the trial courts of New York; *see also* "Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups," July 2006, at 8–19, *available at* http://www.nycourts.gov/comdiv/ (Commercial Division Focus Group Report link) (listing in total twelve ideas for exportation to other parts of New York's court system).

[2]*See* Rule 20.

[3]*See id.*

[4]*See* Chapter 15, "Provisional Remedies" (§§ 15:1 et seq.), for a more detailed discussion of temporary restraining orders and their role in commercial litigation.

ing the Commercial Courts to direct parties to submit to ADR.[1] The overall purpose of ADR is to offer litigants the potential opportunity to settle a lawsuit and end matters without a waste of significant time and money in court prior to an eventual settlement later down that road.[2] It also offers a benefit for courts themselves, with a concomitant potential for reduction in their chronically abundant caseloads. By encouraging—or demanding—that commercial litigants first engage in mediation or other ADR process, the Commercial Division may avoid unnecessary court proceedings.[3]

IV. NEW INNOVATIONS IN THE COMMERCIAL DIVISION

§ 31:16 E-filing

Electronic technology is transforming the world, including the courthouse. Currently, the Legislature and e-filing regulations have authorized electronic filing in, among other actions, "commercial cases" (not necessarily brought in the Commercial Division), which could be filed in the following counties—among others—that contain Commercial Divisions: Albany, Erie, Kings, Monroe, Nassau, New York, Onondaga, Queens, Suffolk and Westchester Counties.[1] Modeled after the Southern District of New York Bankruptcy Court's system, the Filing by Electronic Means (FBEM) System is not difficult to learn.[2] As incentive for parties to utilize the system, the New York County Commercial Division reduced the monetary threshold for Commercial Divi-

---

[Section 31:15]

[1]*See* Rule 3 ("At any stage of the matter, the court may direct or counsel may 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."). *See also* http://www.nycourts.gov/comdiv/alternative_dispute_resolution_program.htm.

[2]*See* Chapter 46, "Alternative Dispute Resolution" (§§ 46:1 et seq.), for a more detailed discussion of the forms, benefits and process of ADR.

[3]*See* id. (§ 46:14 specifically discusses ADR in the Commercial Division).

[Section 31:16]

[1]*See* https://iapps.courts.state.ny.us/fbem/mainframe.html; *see also* http://www.nycourts.gov/comdiv/e_filing.htm; N.Y. Comp. Codes R. & Regs. tit. 22, § 202.5-b. However, again, litigants are encouraged to contact the Clerk's Office of the relevant Commercial Division to ensure that the court accepts e-filing of cases.

[2]The court has created a helpline. Users can email questions to the E-Filing Resource Center at mailto:Efile@courts.state.ny.us, or may telephone the FBEM Resource Center at (646) 386-3033. Mr. Jeffrey Carucci is the Statewide Coordinator for Electronic Filing. For more information on e-filing, *see* http://www.nycourts.gov/comdiv/e_filing.htm. The e-filing website may be accessed at www.nycourts.gov/efile.

sion assignment and indicated that such filings would be looked at favorably in connection with transfer applications.[3]

Electronic filing is strictly voluntary.[4] However, for those litigants who want to join the new paperless world, it offers an easier, faster, and safer filing system. It allows filing at any time and deems filing to have occurred when lodged with the system, saving time and money by eliminating the need for duplicating, mailing or utilizing a messenger service to file documents at the Clerk's Office. If there are any defects with the papers, the system returns an automatic, prompt notice of the defect, again saving time and money retrieving the defective papers only to re-file them after the defect has been cured. For those with confidentiality issues, those documents may be sealed electronically, saving the worry of multiple hard copies in the court files. The system also offers an electronic docket, which has both search and access capabilities, and automatically notifies the parties of any filings or court actions in a pending case. This allows attorneys easily to monitor their cases or review filings in similar cases. Even filing fees may be paid electronically by credit card. And finally, electronic filing offers a more convenient and protected mechanism for record keeping, especially in light of post-September 11 concerns about disaster recovery.[5]

The FBEM system is the wave of the future. Although natural to be adverse to change, it is wise to take advantage of electronic filing and its conveniences sooner rather than later.[6] For example, as federal practitioners are well aware, in the New York federal courts filing of documents by means of a district's CM/ECF system is deemed service on other registered counsel (with exception for the summons and complaint)—with all counsel of record who are admitted to the bar of the district being required to register on the CM/ECF system, and, generally, with all district judges and magistrate judges requiring electronic filing absent applicability of an explicit exception as contained in the rules of the respective

---

[3]As of March 1, 2004, and until further notice, the Commercial Division in New York County suspended its monetary threshold and "commercial" definition for cases filed electronically which are properly designated for the Commercial Division by an RJI marked "commercial" (except those which are "manifestly not commercial in character"). *See also* Commercial Division, Electronic Filing Overview, the New York Unified Court System official website at http://www.nycourts.gov/comdiv/e_filing.htm.

[4]While not compulsory, Justice Bernard Fried, Part 60, in New York County, requests e-filing. Justice Karla Moskowitz, Part 3, in New York County, has stated that she favors e-filing, as well.

[5]Jay B. Kasner and Scott D. Musoff, *Commercial Division Roundup-New Court Developments*, N.Y. L.J., June 13, 2002, at 5.

[6]Already, in some Commercial Parts, electronically filed motions are receiving priority on congested court calendars.

court.[7] As in the federal system, it is likely only a matter of time before e-filing becomes mandatory in the state courts of New York, as well.[8]

§ 31:17 Telephonic Appearances and Information on Future Court Appearances

In an effort to aid attorneys who have spent long hours commuting to and from the New York County Supreme Court at 60 Centre Street for a ten-minute conference with the judge, New York County in 2004 initiated a pilot program, "CourtCall," which allows attorneys to make certain court appearances by telephone in participating Parts.[1] In the Commercial Division, Justice Ramos, Part 53, has been a participating Justice and Mediator Michael Tempesta also uses "CourtCall."[2] Justice Karla Moskowitz, Part 3, also permits telephonic appearances at times.[3] Although not yet widespread and still a work-in-progress, "CourtCall" and other modes of appearing telephonically have the potential to alleviate many burdens on counsel.

Information on future court appearances is available on the

---

[7]*See, e.g., Procedures for Electronic Case Filing* and *Guidelines for Electronic Case Filing* of the United States District Court for the Southern District of New York, *available at* http://www1.nysd.uscourts.gov/ecf_filing.php; *Attorney Registration Statement* and Administrative Order 2004-08 of the United States District Court for the Eastern District of New York, *available at* http://www.nyed.uscourts.gov/CM_ECF/cm_ecf.html; Local Civil Rule 5.2 of the United States District Courts for the Southern and Eastern Districts of New York; February 2004 Administrative Order of the United States District Court for the Western District of New York, *available at* http://www.nywd.uscourts.gov/cmecf/index.php; General Order #22 of the United States District Court for the Northern District of New York, *available at* http://www.nynd.uscourts.gov/cmecf/.

[8]However, at this time, the New York state courts' less defined, non-mandatory electronic system is less user friendly. Filing and service by electronic means can only be accomplished with consent by opposing counsel. And, under the FBEM, there is no automatic notification of filing with a direct link to the filing as in the federal CM/ECF. Instead, the filing party must provide a notice with information, and the party that is served must access the Unified Court System website to obtain a copy of the paper(s) filed. The party that is served must also provide to the serving party or counsel electronic confirmation, within 24 hours, that electronic service was effected. *See, e.g.,* N.Y. C.P.L.R. 2103(b)(7), (f); N.Y. Comp. Codes R. & Regs. tit. 22, § 202.5-b(g).

[Section 31:17]

[1]*See* http://www.nycourts.gov/comdiv for News and Announcements relating to this and other innovative programs.

[2]For up-to-date information on participating courts, it may be helpful to consult the vendor's website, at http://www.courtcall.com/ccallp/LinksPage_Public.

[3]An example of the fruitful use of telephonic conferences and appearances is presented by consumer fraud class actions, in which objectants can call in and voice their objections for the record.

court system's Future Court Appearance Site (www.nycourts.gov/ecourts).

§ 31:18 Availability of Commercial Division Decisions Online

"WebCivil" provides online access to information about cases in Civil Supreme Court in all 62 counties of New York State.[1] Users may search for cases by index number or the name of the plaintiff or defendant, look up cases by attorney or firm name, and view calendars for each court. WebCivil is provided as a free public service by the New York State Unified Court System.

In the Seventh Judicial District, selected "Decisions of Interest" are available and archived online.[2]

V. STRATEGY AND RISK ASSESSMENT

§ 31:19 Generally

The accusation of "forum shopping" in removal, forum non conveniens, and venue motions and proceedings usually falls on deaf judicial ears. Experienced judges and practitioners understand that a plaintiff's lawyer engages in forum shopping every time she files a case, and a defendant's lawyer does the same every time he removes a case from state to federal court or seeks to transfer or dismiss a case in favor of another forum. Unless there is no basis for the lawyer's choice of forum, there is nothing wrong with this tactic. Lawyers are responsible to seek out the fora they believe, for whatever reason, will be most beneficial to their clients. The issue in forum selection litigation will usually not turn on motive, but on consideration of legal availability and fundamental fairness.

By establishing the Commercial Division, the Office of Court Administration has substantially leveled the playing field between state and federal court. The institution of active case management and emulation of various federal practice rules noted above has made the state forum more inviting to practitioners who are accustomed to federal court.[1] Practitioners no longer likely will automatically remove cases to federal court whenever jurisdictional grounds are present. Rather, like any forum inquiry, the particular judge and the particular case have to be measured against the available alternatives.

This treatise examines elsewhere the distinctions between state

---

[Section 31:18]

[1]*See* http://iapps.courts.state.ny.us/webcivil/FCASMain.

[2]*See* http://www.nycourts.gov/comdiv/7th%20Judicial%20District.htm.

[Section 31:19]

[1]*See, e.g.*, §§ 31:11, 31:13, 31:14, *supra*.

and federal practice generally in terms of choosing a forum, and those considerations will not be repeated here. There remain, however, a number of strategic issues and consideration that either a plaintiff's or defendant's lawyer will face that are unique to the Commercial Division. These are set forth below.

§ 31:20 Background of the Judges

There are many excellent judges in the New York State Unified Court System, but it is fair to say that assignment to the Commercial Division is sought-after, made to those judges who are perceived as able to handle sophisticated commercial matters. Although this has narrowed the difference in determining whether to opt for state or federal court, it remains the case that even most branches of the Commercial Division rarely have judges with large-firm, private practice backgrounds in complex commercial litigation. Like most judges in the New York State Unified Court System, Commercial Division judges generally come to the bench with public service, legislative, or judicial backgrounds, or at times, small firm practices. In contrast, there are a number of judges in the federal court with backgrounds that included litigation of complex, high profile commercial cases at major law firms.

This difference is somewhat ameliorated by the fact that many of the Commercial Division Justices have considerable judicial experience that includes commercial cases, if not commercial private practice experience. It is also the case that even in any federal court, many of the judges have public service or non-commercial backgrounds.

§ 31:21 Discovery Stays

As noted above,[1] Rule 11 recognizes that, pursuant to CPLR 3214(b), unless determined otherwise by the court upon application of counsel, there is a stay of discovery pending the determination of any dispositive motion.[2] However, in practice, applying Rule 11, the Commercial Division Justices, in the exercise of their discretion, may and certain Justices often do lift the stay, at least with respect to document discovery, prior to ruling on the pending motion.

Prior to the establishment of the Commercial Division, a practitioner might have waived the right to remove a case to federal court because the federal court would likely require discovery during the pendency of a motion to dismiss, whereas

---

[Section 31:21]

[1]*See* § 31:12, *supra*.

[2]N.Y. C.P.L.R. 3214(b).

the state court, bound by CPLR 3214(b),[3] would not. That calculus is no longer a safe bet, and if a practitioner would rather have the case in federal court, the avoidance of discovery is not a ground to waive removal.

§ 31:22 Expert Discovery

One significant continuing area of difference between the Commercial Division and civil litigation in federal court is in the area of expert discovery. Article 31 of the CPLR does not provide nearly the same liberality of expert disclosure as the Federal Rules of Civil Procedure contemplate.[1] Indeed, most federal practitioners are surprised to discover how truly limiting the CPLR is when compared with federal practice and procedure in this area, and thus attorneys should become familiar with the distinctions between practice in the state and federal courts, as differences may have an effect on the decision regarding the forum in which to commence an action.[2]

§ 31:23 Interlocutory Appeals

Another important distinction between the federal and state fora, including the Commercial Division, is the wide availability of interlocutory appeals in state but not federal cases.

§ 31:24 Limits of the Commercial Division

Some practitioners are surprised to learn that many commercial cases do not qualify for Commercial Division assignment. Practitioners must take care to consult the Standards for Assignment of Cases to the Commercial Division.

Having said this, notwithstanding the Standards, the assignment of cases to the Commercial Division is often, to some extent, a function of "Clerk's law;" that is different counties and indeed different clerks in a Commercial Division may or may not accept a request for Commercial Division status. If the litigator therefore wants assignment to a Commercial Division, it is worth requesting.

---

[3]N.Y. C.P.L.R. 3214(b).

[Section 31:22]

[1]*Compare* N.Y. C.P.L.R. 3101(d)(1) *with* Fed. R. Civ. P. 26(a)(2).

[2]*See* Chapter 26, "Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony," for more on this issue. *See also* "Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups," July 2006, at 19, *available at* http://www.nycourts.gov/comdiv/ (Commercial Division Focus Group Report link) (mentioning expert discovery, and the state versus federal dichotomy).