



Outside Counsel

Expert Analysis

Advantages and Pitfalls Of the Commercial Division

As a former justice in the Commercial Division of New York state courts, I found that a surprising number of attorneys did not understand the procedures, expectations of judges, or the culture of the court, which differ in some respects from federal courts or non-commercial parts of the state system. This article offers suggestions to legal practitioners who, by all rights, should take better advantage of the division.

In the early 1990s, the business community complained that New York state courts were not handling commercial matters in an expeditious manner. Attorneys generally preferred to commence such matters in the federal courts when possible. At that time, commercial matters were placed on general calendars in New York courts, sharing those calendars with all types of cases. Judges were often flooded by personal injury and negligence matters, and many lacked both the experience and the inclination to devote much time to commercial cases.

In response, in 1993 Chief Judge Judith S. Kaye created four “commercial parts” in New York county, which were dedicated to hearing commercial cases only. The assigned judges were all volunteers who had some expertise, and much interest, in commercial litigation. Complex commercial actions then pending in other parts were transferred to the newly formed commercial parts.

By 1995, it was clear that the experiment had worked and a more formal “division” was established, which also now exists in other counties, both upstate and downstate. This article focuses mainly on the Commercial Division in New York County.

At the urging of the commercial bar, the judges of the Commercial Division adopted statewide rules and, inevitably, many of the larger counties adopted some additional rules. The division’s rules can be found at Section 202.70 of the Uniform Rules for Trial Courts. However, each judge may apply the rules in a

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way that is unique to that judge. In advance of appearing in court, a practitioner is well-advised to become familiar with the rules and

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practices of the specific judge before whom an action is pending. Advice on the rules of individual judges and different counties can be obtained from the part clerk and the clerk of the division.

The rules indicate which types of cases will be accepted and rejected. Matters in which less than \$150,000 is at issue are not generally accepted into the Division in Manhattan (the monetary threshold for Manhattan was recently raised to this amount from \$100,000). The amount differs in each county.

However, even if a case fits the rules for assignment to the Commercial Division, that does not mean the division is the right place for it. The court has a number of distinctive characteristics, and an attorney deciding whether or not to opt for it should consider the following.

Will the client benefit from a judge who is “hands-on”? Commercial Division judges generally keep close tabs on the progress of an action and tend to push discovery and other facets of pretrial proceedings. One of Judge Kaye’s original goals was a court system that could handle commercial matters expeditiously.

That continues to be the goal of the division today. The judges there tend to be very cognizant of the interest of the public, as well as of the bar and litigants, in having matters handled quickly. As a result, they tend to be more aggressive than counterparts in the non-commercial parts when it comes to scheduling and enforcing scheduling orders, and are more reluctant to agree to adjournments simply because the adjournments are agreed upon by attorneys for their own convenience. The “bottom line” is that if attorneys want more time to litigate, they should have a good reason for adjournment other than their own workload.

Commercial Division judges are generally expert litigators and well-versed in commercial law. Their expertise is not limited to the U.C.C., but to the broad range of matters that constitute commercial legal practice in our complex society. Moreover, because of a close working relationship between some members of the Law Department of the New York County Supreme Court and Commercial Division justices, a cadre of experts in complex commercial law has developed. Thus, if practitioners choose the route of the Commercial Division for a legal action, they must be prepared for active judicial participation. By the same token, when compared with counterparts elsewhere in the court system, the division’s judges tend to be more insistent that attorneys be well-prepared.

For example, soon after an action has been assigned, a preliminary conference with counsel is scheduled. The conference is important for a number of reasons, and attorneys treat it lightly at their peril. Initial impressions are important and the court’s first impression of the action and the attorneys are often formed at the preliminary conference. Therefore, counsel should not leave the conference in the hands of an inexperienced lawyer. It should be handled by someone who is conversant with all aspects of the action, the claim and the defense.

Most Commercial Division judges feel that they are well within their rights to ask any question about the claim or the action at the conference. For example: Are any of the claims covered by insurance? If so, what are

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the details of the policy; what efforts have been made to bring the carrier in? Are there any unusual problems involved in the discovery or trial? If so, what are they and how can they be resolved? What defense does defendant have to the claim? Would the parties be ready to mediate the dispute? When is the best time to start mediation? A party that cannot answer these questions starts off on the wrong foot.

Similarly, attorneys should be prepared to make detailed oral arguments when they make motions, such as a motion for a Temporary Restraining Order (TRO). Commercial Division judges are generally prepared for such arguments and will be a "hot bench." Counsel should be prepared to discuss not only the points raised in the motion papers, but anything else relating to the action. Thus, realistically, the oral argument may turn into another preliminary conference, with all sorts of procedural issues being decided from the bench, as well as the motion itself.

Attorneys should also be prepared for procedural requirements that are distinctive to the division, such as those that apply to TROs. When dealing with a TRO, judges in the division require that, except in extremely unusual circumstances, the movant must notify the adversary of the time and place where the application will be heard in order to afford the adversary the chance to be heard. Further, the justices generally insist that the adversary be given the opportunity to read the papers before the argument. Yet, it is not rare for a movant to refuse to show the adversary the papers until after the court rules on the application. Inevitably, the application is denied in such cases.

Is it advantageous to expedite discovery? When evaluating whether the Commercial Division is the best forum for a case, practitioners should consider whether they want more discovery, or, to put it another way, whether they want their adversaries to have the ability to have more discovery? When it comes to discovery, there are some real differences between the federal procedures and those generally followed in the division.

The practice in the Commercial Division is to direct that discovery proceed while motions are sub judice. Before this practice was adopted, the court found that in many actions pre-answer motions were made, and discovery ground to a halt while a motion was being considered. This often unduly delayed discovery. A similar problem arose when motions for summary judgment were made during discovery.

In order to prevent discovery from being unduly delayed, the division's judges adopted the practice of routinely lifting the stay of discovery before ruling on a motion to dismiss or for summary judgment, thus allowing discovery to proceed. The extent of discovery permitted at this stage will vary from part to part and from case to case. A judge might limit pre-answer discovery to document discovery while the motion to dismiss is pending.

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After a decision on a motion has been rendered, a party often seeks a stay of discovery pending appeal. Be aware that such applications are more often than not denied in the Commercial Division. They can, of course, also be made in the Appellate Division.

Are you and your client ready and willing to use ADR? While Alternative Dispute Resolution has become an important component of our entire judicial system, the division places special emphasis on non-binding mediation. Rule 3 of the Rules of the Commercial Division, §202.70(g)(3) of the Uniform Rules for Trial Courts, specifically grants the justices of the division the authority

to direct the appointment of a mediator, "at any stage of the matter." As a practical matter, almost every action will be ordered to mediation at some point.

It has been the experience of the Commercial Division that approximately 50 percent-60 percent of the actions that are mediated settle during or shortly after mediation. Moreover, even in those actions which do not settle during mediation, the parties are brought much closer together. This makes it possible to settle the action prior to trial, or in any event, it often narrows the issues to be tried.

Obviously, not all clients are amenable to or interested in getting closer to their adversaries or in narrowing the issues that are being contested. So, when deciding whether or not to opt for the Commercial Division, it is important for attorneys to inform clients of the importance of ADR in its culture.

The court maintains a panel of volunteers who are available to mediate, as well as a clerk who will handle the administrative details of the mediation. If the mediator is to be a member of the panel, the mediation clerk will select the mediator. The parties can, and indeed are encouraged to, select a mediator on their own.

In conclusion, the Commercial Division has its own rules and its own culture. The rules are geared to resolving cases quickly and efficiently. Basically, the purpose of the Commercial Division is to be "user friendly" for litigants and attorneys. The justices of the division regularly hold meetings amongst themselves and with committees of the bar, in order to improve their practices and procedures, and to discuss suggestions for improving the division's practices.

It is an experiment that has worked, and more well-informed attorneys who understand how it works would make it even better.

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