

# Table of Contents

## CHAPTER 1. COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 1:7 The Commercial Division today and in the future
- § 1:8 Closing thoughts

## CHAPTER 2. JURISDICTION

### II. SUBJECT MATTER JURISDICTION

- § 2:6 Bases for subject matter jurisdiction—Supreme Court
- § 2:11 Bases for subject matter jurisdiction—Court of Claims
- § 2:13 Avoiding the Supreme Court’s subject matter jurisdiction—  
*Forum non conveniens*
- § 2:14 Avoiding the Supreme Court’s subject matter jurisdiction—  
*Forum non conveniens* in the federal courts
- § 2:16 Avoiding the Supreme Court’s subject matter jurisdiction—The  
internal affairs doctrine

### III. PERSONAL JURISDICTION

- § 2:20 Basic principles
- § 2:21 General jurisdiction
- § 2:22 Specific jurisdiction
- § 2:23 Specific jurisdiction—Transacting business in New York
- § 2:24 Specific jurisdiction—Tortious act committed in New York
- § 2:25 Specific jurisdiction—Tortious act committed outside New York
- § 2:27 Specific jurisdiction—Conspiracy jurisdiction
- § 2:28 Specific jurisdiction—Ownership, use or possession of real  
property
- § 2:29 Specific jurisdiction—Federal due process
- § 2:30 Jurisdiction by consent/waiver
- § 2:31 Jurisdiction and the Internet
- § 2:32 In rem jurisdiction
- § 2:34 Enforcement of arbitral awards and foreign court judgments
- § 2:35 Objecting to jurisdiction

### IV. SERVICE

- § 2:37 Service of process—What must be served
- § 2:38 Service of process—Timing and filing proof of service
- § 2:41 Methods of service—Personal service by mail
- § 2:44 Methods of service—Service on individuals and partnerships—  
Deliver and mail service

- § 2:46 Methods of service—Service on individuals and partnerships—  
Affix and mail service
- § 2:47 Methods of service—Service on individuals and partnerships—  
Alternative methods of service
- § 2:48 Methods of service—Service on corporations
- § 2:49 Methods of service—Service by publication
- § 2:50 Service outside New York
- § 2:51 Immunities from process
- § 2:52 Objecting to improper service

## **V. FEDERAL ISSUES**

- § 2:53 Basic principles
- § 2:54 Jurisdiction under the Federal Rules of Civil Procedure

## **CHAPTER 3. VENUE**

- § 3:3 General strategy
- § 3:4 Contractual venue provisions
- § 3:5 Venue based on residence
- § 3:6 Venue based on residence—Residence defined
- § 3:8 Venue based on residence—Corporations
- § 3:9 Venue based on residence—Unincorporated association,  
partnership or individually-owned business
- § 3:12 Municipalities
- § 3:16 Real property
- § 3:19 Standards for changing venue—Where venue is improper
- § 3:20 Standards for changing venue—Inability to obtain impartial  
trial
- § 3:21 Standards for changing venue—Convenience of witnesses and  
ends of justice
- § 3:24 Procedure for changing venue and waiver—Where venue is  
improper
- § 3:25 Procedure for changing venue and waiver—Transfer under  
CPLR 510(2) or 510(3)

## **CHAPTER 4. INVESTIGATION OF THE CASE**

### **II. STRATEGY, OBJECTIVES, AND PRELIMINARY CONSIDERATIONS**

- § 4:3 Reasons to conduct an investigation—Greater value
- § 4:4 Reasons to conduct an investigation—Greater speed
- § 4:5 Reasons to conduct an investigation—Minimizing interference of  
the opposing lawyer
- § 4:6 Reasons to conduct an investigation—Minimizing the risk of  
revealing theories
- § 4:7 Reasons to conduct an investigation—Avoiding damaging  
testimony

### **III. LAW AND PROCEDURE**

- § 4:8 Reasonable investigations—A requirement of law

## TABLE OF CONTENTS

### **IV. RESOURCES AND TECHNIQUES**

- § 4:10 The client
- § 4:11 The client—Application of the attorney-client privilege to a corporate client
- § 4:12 The client—Investigating during regulatory inquiries
- § 4:13 The client—Practical tips
- § 4:14 Nonparty witnesses
- § 4:15 Nonparty witnesses—Practical tips
- § 4:16 Nonparty witnesses—Work-product doctrine
- § 4:17 Use of a current or former employee
- § 4:18 Retaining investigators and experts
- § 4:19 Learning about the industry and the parties

### **CHAPTER 5. INTERNAL INVESTIGATIONS**

#### **I. INTRODUCTION**

- § 5:1 Scope note
- § 5:2 How internal investigations arise

#### **II. STRATEGY, OBJECTIVES, AND PRELIMINARY CONSIDERATIONS**

- § 5:7 Identifying the appropriate client

#### **III. CONDUCTING THE INVESTIGATION**

##### **A. PRELIMINARY STEPS**

- § 5:11 Notifying employees of an investigation

##### **C. WITNESS INTERVIEWS**

- § 5:16 Witness interviews—Providing counsel

#### **IV. REPORTING THE RESULTS**

- § 5:20 Reporting to the client
- § 5:21 Reporting to the client—Privilege considerations
- § 5:22 Disclosure to the government

### **CHAPTER 6. CASE EVALUATION**

#### **I. INTRODUCTION**

- § 6:2 Need for and objectives of case evaluation at every stage of a litigation
- § 6:3 Need for and objectives of case evaluation at every stage of a litigation—Initial evaluation
- § 6:4 Need for and objectives of case evaluation at every stage of a litigation—Evaluation regarding motions

- § 6:5 Need for and objectives of case evaluation at every stage of a litigation—Evaluation regarding settlement
- § 6:6 Need for and objectives of case evaluation at every stage of a litigation—Evaluation regarding trial and post-trial appeals

## **II. ESSENTIALS OF CASE EVALUATION**

- § 6:8 How to evaluate a case at the outset
- § 6:11 How to evaluate a case at the outset—Which court will handle the case?
- § 6:12 Understand the client's goals
- § 6:13 Consider the opposing party's goals
- § 6:14 Existence of insurance coverage
- § 6:17 Need for a thorough factual investigation—Gather and review critical documents
- § 6:19 Need for a thorough factual investigation—Informal versus formal discovery
- § 6:23 Identification of strengths and weaknesses of case including assessment of potential damages
- § 6:26 Consideration of provisional remedies
- § 6:27 Cost-benefit analysis, generally
- § 6:30 Development of litigation plan based on cost-benefit analysis—Consider the implications of litigation funding or finance arrangements on the cost-benefit analysis
- § 6:31 Development of litigation plan based on cost-benefit analysis—Are motions cost-effective?
- § 6:32 Development of litigation plan based on cost-benefit analysis—What discovery approach will be most efficient?
- § 6:33 Development of litigation plan based on cost-benefit analysis—What is the most cost-effective way of achieving the desired objective?
- § 6:35 Consideration of alternative dispute resolution procedures
- § 6:37 Consideration of alternative dispute resolution procedures—Court annexed or other form of mediation
- § 6:37.50 Consideration of using referees in lieu of judges *[New]*

## **III. EVALUATING LIKELIHOOD OF DISMISSAL BASED ON CPLR 3211 MOTION IN RESPONSE TO THE COMPLAINT**

- § 6:39 Significance of the CPLR 3211 motion to an early evaluation of the case
- § 6:42 Significance of interlocutory appeal procedures

## **IV. EVALUATING LIKELIHOOD OF DISMISSAL BASED ON MOTION FOR SUMMARY JUDGMENT**

- § 6:45 Does the case lend itself to summary judgment prior to discovery?

TABLE OF CONTENTS

**V. EVALUATING THE CASE FOR SETTLEMENT**

§ 6:51 Ongoing process from commencement of the case—Changing evaluation as the case progresses

**VI. EVALUATING THE CASE IN THE CONTEXT OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES**

§ 6:61 Cost-benefit and other considerations

§ 6:63 Cost-benefit and other considerations—Mediation

**VII. EVALUATING THE CASE BEFORE AND AFTER TRIAL**

§ 6:67 Cost-benefit analysis of going to trial—Jury pool

§ 6:70 Cost-benefit analysis of going to trial—Where the judge is the trier of fact

§ 6:71 Cost-benefit analysis of going to trial—Use of legal analytics

§ 6:75 Cost-benefit analysis of appeal after trial to verdict—Chances of having a successful appeal to the Court of Appeals

**VIII. PRACTICE AIDS**

§ 6:76 Case evaluation checklist

**CHAPTER 7. THE COMPLAINT**

**I. INTRODUCTION**

§ 7:1 Scope note

**II. PRACTICAL CONSIDERATIONS APPLICABLE TO EVERY COMPLAINT**

**A. HAVING ARRIVED AT THE DECISION TO FILE A COMPLAINT, WHAT NEXT?**

§ 7:2 Technical aspects applicable to every complaint

§ 7:3 Request for judicial intervention

**B. WHAT DOES THE CPLR REQUIRE FOR A COMPLAINT?**

§ 7:6 Particularity as to specific matters

**VII. PRACTICE AIDS**

**B. ILLUSTRATIVE CLAUSES**

**1. Clauses to Plead Specific Causes of Action**

§ 7:31 Pleading fraud

**D. FORMS**

- § 7:36 Request for judicial intervention
- § 7:37 Commercial Division addendum

**CHAPTER 8. RESPONSES TO COMPLAINTS**

**I. INTRODUCTION**

- § 8:1.50 E-filing-required in most cases *[New]*

**II. PRE-JOINDER OF ISSUE MOTIONS AND RELATED MATTERS**

**A. PLAINTIFF’S BREACH OF ITS PRE-SERVICE OBLIGATIONS IN ACTIONS NOT SUBJECT TO E-FILING REQUIREMENTS *[Retitled]***

- § 8:2 Plaintiff’s hard copy filing requirements *[Retitled]*
- § 8:3 Plaintiff’s failure to comply with its hard copy filing requirements *[Retitled]*
- § 8:5 Plaintiff’s failure to place the index number, and other required information, on hard copy of the summons
- § 8:6 Plaintiff’s failure to comply with its hard copy filing fee obligation *[Retitled]*
- § 8:7 Defendant’s failure to comply with service by mail requirements
- § 8:8 Plaintiff’s failure to timely serve process
- § 8:9 Plaintiff’s failure to timely serve process—Extending the 120-day service deadline
- § 8:10 Plaintiff’s failure to timely serve process—Extending the 120-day service deadline—The “good cause” standard for an extension
- § 8:11 Plaintiff’s failure to timely serve process—Extending the 120-day service deadline—The “interest of justice” standard for an extension

**B. SUMMONS WITH NOTICE**

- § 8:13 Motion to dismiss summons with notice
- § 8:14 Response to summons with notice

**C. PLAINTIFF’S FAILURE TO TIMELY SERVE A COMPLAINT**

- § 8:15 Plaintiff’s default
- § 8:18 When plaintiff belatedly serves its complaint

**D. MOTIONS TO CORRECT PLEADINGS**

- § 8:19 For a more definite statement
- § 8:23 To strike scandalous or prejudicial matter

**E. MOTIONS TO DISMISS UNDER CPLR 3211**

## TABLE OF CONTENTS

- § 8:25 Whether motion to dismiss should be made
- § 8:26 Timing of a motion to dismiss
- § 8:27 Grounds for motion to dismiss causes of action
- § 8:28 Local and commercial court rules
- § 8:29 Single motion rule
- § 8:30 Waiver of affirmative defenses if not raised by motion to dismiss
- § 8:31 Defendant's notice of motion
- § 8:32 Necessary exhibits
- § 8:33 Evidence permitted on motion
- § 8:34 Evidence permitted on motion—Affidavits
- § 8:35 Evidence permitted on motion—Affidavits—The oath-taking
- § 8:36 Evidence permitted on motion—Affidavits—The oath-taking—  
Certificates of conformity and authentication as well as  
affidavits sworn to outside New York State
- § 8:37 Evidence permitted on motion—Affirmations
- § 8:38 Evidence permitted on motion—Affirmations—Executed outside  
the geographic boundaries of the United States
- § 8:39 Evidence permitted on motion—Foreign language affidavits or  
exhibits
- § 8:40 Signature and certification by attorney
- § 8:41 Adjournments
- § 8:42 Plaintiff's responses to the motion to dismiss
- § 8:43 Plaintiff's responses to the motion to dismiss—Cross-motions
- § 8:44 Plaintiff's responses to the motion to dismiss—Requests for  
discovery
- § 8:45 Automatic stay of discovery pending decision on motion
- § 8:46 Motion to dismiss on documentary evidence
- § 8:47 Motion to dismiss for lack of personal jurisdiction: the 60-day  
limitation
- § 8:50 Motion to dismiss for failure to state cause of action
- § 8:52 Selected causes of action that may be subject to a motion to  
dismiss for failure to adequately plead—Fraud
- § 8:53 Selected causes of action that may be subject to a motion to  
dismiss for failure to adequately plead—Fraud—Aiding and  
abetting
- § 8:54 Selected causes of action that may be subject to a motion to  
dismiss for failure to adequately plead—Fraud—Violation of  
Judiciary Law § 487
- § 8:55 Selected causes of action that may be subject to a motion to  
dismiss for failure to adequately plead—Fraud, or only  
breach of contract
- § 8:56 Selected causes of action that may be subject to a motion to  
dismiss for failure to adequately plead—Breach of fiduciary  
duty
- § 8:57 Selected causes of action that may be subject to a motion to  
dismiss for failure to adequately plead—Breach of fiduciary  
duty—Aiding and abetting
- § 8:58 Selected causes of action that may be subject to a motion to  
dismiss for failure to adequately plead—Breach of fiduciary  
duty—Aiding and abetting, or only breach of contract

## COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 8:59 Selected causes of action that may be subject to a motion to dismiss for failure to adequately plead—Shareholder derivative actions
- § 8:60 Selected causes of action that may be subject to a motion to dismiss for failure to adequately plead—Defamation
- § 8:61 Selected causes of action that may be subject to a motion to dismiss for failure to adequately plead—Actions dependent on foreign law
- § 8:63 Selected affirmative defenses that, under CPLR 3211(a), are proper bases for a pre-answer motion to dismiss—Lack of legal capacity or standing to sue
- § 8:64 Selected affirmative defenses that, under CPLR 3211(a), are proper bases for a pre-answer motion to dismiss—Another action pending
- § 8:65 Selected affirmative defenses that, under CPLR 3211(a), are proper bases for a pre-answer motion to dismiss—Absence of a necessary party
- § 8:66 Selected affirmative defenses that, under CPLR 3211(a), are proper bases for a pre-answer motion to dismiss—Immunity from liability under not-for-profit law
- § 8:67 Pre-answer motions to dismiss based on other unpleaded affirmative defenses
- § 8:68 Other unpleaded defenses that might justify a pre-answer motion to dismiss—Defamation lawsuits—Truth
- § 8:69 Other unpleaded defenses that might justify a pre-answer motion to dismiss—Defamation lawsuits—Privileges
- § 8:70 Other unpleaded defenses that might justify a pre-answer motion to dismiss—In pari delicto
- § 8:71 Other unpleaded defenses that might justify a pre-answer motion to dismiss—“Unclean hands”
- § 8:72 Other unpleaded defenses that might justify a pre-answer motion to dismiss—Unlicensed foreign corporation
- § 8:73 Other unpleaded defenses that might justify a pre-answer motion to dismiss—Failure to disclose assets in bankruptcy
- § 8:74 Motion to dismiss claims seeking to “pierce the corporate veil”
- § 8:75 Motion to dismiss action against “John Doe” defendant
- § 8:76 Motion to dismiss a duplicative or redundant cause of action
- § 8:77 Motion to dismiss third party complaint
- § 8:78 Converting the dismissal motion to one for summary judgment
- § 8:79 Converting the dismissal motion to one for summary judgment—Without notice from the court
- § 8:80 Converting the dismissal motion to one for summary judgment—Only with notice from the court
- § 8:83 Defendant’s time to serve answer after making motion to dismiss
- § 8:84 Sua sponte dismissals
- § 8:85 Other actions in response to the complaint

### III. JOINDER OF ISSUE

#### A. DEFENDANT’S TIME TO RESPOND

- § 8:88 When served with a summons and complaint—Measured from filing of proof of service

## TABLE OF CONTENTS

- § 8:90 When served with a summons and complaint—Service upon an authorized agent
- § 8:91.30 Service by fax *[New]*
- § 8:91.70 Service by email *[New]*
- § 8:93 When plaintiff serves an amended complaint
- § 8:94 When service of other papers is made by mail

### **B. EXTENSIONS OF TIME TO ANSWER AND OTHER STIPULATIONS**

- § 8:95 Extensions of time generally
- § 8:96 Extensions, Settlements and other Out-of-Court Stipulations *[Retitled]*
- § 8:97 Extensions by order of the court
- § 8:98 Stipulations made in “open court”
- § 8:99 Stipulations made in “open court”—Preparing the “open court” stipulation
- § 8:101 Stipulations made in “open court”—Stipulations made during arbitration

### **C. DEFAULT IN APPEARING AND ANSWERING**

- § 8:105 Motion for leave to enter default judgment
- § 8:106 Curing defaults in appearing or answering—Before entry of default judgment or order
- § 8:107 Curing defaults in appearing or answering—After entry of default judgment or order
- § 8:108 Curing defaults in appearing or answering—Demonstration of reasonable excuse for delay
- § 8:109 Curing defaults in appearing or answering—Demonstration of merits
- § 8:110 Corporate defendant’s default after service of process on Secretary of State

### **D. APPEARANCES**

- § 8:111 Defendant’s appearance

### **E. THE ANSWER**

- § 8:112 Obligation to respond in good faith
- § 8:113 General format of the answer
- § 8:114 Kinds of responses in answer
- § 8:115 General denials
- § 8:117 Specific denials—Actions involving conditions precedent
- § 8:118 Specific denials—Actions on negotiable instruments
- § 8:119 Specific denials—Actions involving goods or services
- § 8:127 Where complaint contains allegations of law
- § 8:131 Format of answer
- § 8:133 Amending the answer
- § 8:134 Amending the answer—Prejudice and surprise
- § 8:135 Amending the answer—Delay
- § 8:139 Proof of service of answer

### **F. AFFIRMATIVE DEFENSES**

- § 8:140 When pleaded
- § 8:141 How pleaded
- § 8:144 Waiver of affirmative defense by failure to plead
- § 8:145 Resurrection of waived affirmative defenses
- § 8:146 Typical affirmative defenses
- § 8:147 “Affirmative defense” of failure to state a cause of action
- § 8:149 Motion to dismiss affirmative defense

## **G. COUNTERCLAIMS AND CROSS-CLAIMS**

- § 8:152 Cross-claims
- § 8:153 Subject matter of counterclaims and cross-claims
- § 8:154 Counterclaims and cross-claims against a non-party
- § 8:155 How to plead counterclaims and cross-claims
- § 8:156 How to serve counterclaims and cross-claims
- § 8:157 Timeliness of counterclaims and cross-claims
- § 8:158 Saving a “stale” counterclaim or cross-claim under the relation-back doctrine—By amendment as against existing parties
- § 8:159 Saving a “stale” counterclaim or cross-claim under the relation-back doctrine—By amendment adding third parties
- § 8:163 When plaintiff’s complaint is dismissed
- § 8:164 Priority of discovery on counterclaims and cross-claims

## **H. VERIFICATION**

- § 8:165 Definition
- § 8:166 When answer to be verified
- § 8:167 Verification by a party
- § 8:169 Verification by the attorney
- § 8:170 Defective verifications

## **IV. PRACTICE AIDS**

### **A. PRACTICE/DRAFTING CHECKLISTS**

- § 8:172.50 Electronic service and filing of pleadings and other litigation documents *[New]*

## **CHAPTER 9. THIRD-PARTY ACTIONS**

### **I. INTRODUCTION**

- § 9:2 Purposes of third-party practice

### **II. STRATEGIC CONSIDERATIONS**

#### **A. IN GENERAL**

- § 9:3 Ascertaining third-party’s responsibility
- § 9:4 Timing considerations

#### **B. ADVANTAGES OF COMMENCING A THIRD-**

TABLE OF CONTENTS

**PARTY ACTION**

- § 9:5 Efficiency and cost savings
- § 9:8 Recovery of attorneys' fees

**III. COMMENCING THIRD-PARTY PROCEEDINGS**

**A. IN GENERAL**

- § 9:13 When third-party practice is permitted
- § 9:14 Statute of limitations
- § 9:15 Vouching in

**B. PROCEDURE FOR COMMENCING A THIRD-PARTY ACTION**

- § 9:18 Filing and service requirements—Commencement by filing—  
Service on all parties
- § 9:21 Venue requirements
- § 9:22 Allegations required in third-party complaints
- § 9:23 Attachments required with third-party complaints

**IV. PLAINTIFF'S RIGHT TO AMEND COMPLAINT**

- § 9:28 Statutes of limitations and plaintiff's right to amend

**V. RESPONDING TO A THIRD-PARTY COMPLAINT**

- § 9:30 Third-party defenses

**CHAPTER 10. REMOVAL TO FEDERAL COURT**

**II. THE RIGHT TO REMOVE**

- § 10:2 Overview: The general removal statute
- § 10:4 Removal of federal and state law claims joined in the same  
action

**III. STRATEGIC CONSIDERATIONS**

- § 10:10 Factors favoring removal

**V. PROCEDURE FOR REMOVAL**

- § 10:23 Time to seek removal
- § 10:26 Who must join in removal
- § 10:28 Effecting the removal: Service and filing

**VI. PROCEDURE FOLLOWING REMOVAL**

- § 10:31 Transmission of state court records
- § 10:35 Transfer

**VII. REMAND TO STATE COURT**

§ 10:42 The remand order and attorneys' fees

# Table of Contents

## CHAPTER 11. COMPARISON WITH COMMERCIAL LITIGATION IN FEDERAL COURTS

### II. COMMENCEMENT OF ACTION

§ 11:6 Assignment of judge and election of jury trial

### III. EXTRAORDINARY REMEDIES

#### B. INDIVIDUAL REMEDIES

§ 11:9 Attachment

§ 11:10 Preliminary injunctions and temporary restraining orders

### IV. DISCOVERY

§ 11:15 Initial disclosures

§ 11:19 Electronic discovery and related costs

§ 11:20 Privilege logs

§ 11:21 Number of depositions

§ 11:22 Depositions of corporate officers and employees

§ 11:23 Interrogatories

§ 11:25 Sanctions for failure to disclose

### VI. TRIAL

§ 11:34 Jury selection

§ 11:35 Pretrial orders and procedures

### VIII. PRACTICE AIDS

§ 11:44 Checklist of key distinctions between commercial litigation  
practice in federal and state court

## CHAPTER 12. COMPARISON WITH COMMERCIAL LITIGATION IN DELAWARE COURTS

§ 12:2 Commencement of action

§ 12:3 Commencement of action—Court selection and subject matter  
jurisdiction

§ 12:4 Commencement of action—The forms of action

§ 12:7 Commencement of action—Other Delaware courts

## COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 12:8 Commencement of action—Personal jurisdiction and service
- § 12:9 Commencement of action—Venue and forum selection agreements
- § 12:11 Commencement of action—Assignment of judge
- § 12:13 Choice of law—Internal affairs doctrine
- § 12:14 Choice of law—Choice of law agreements
- § 12:16 Discovery—Initial disclosures
- § 12:17 Discovery—Out of state
- § 12:18 Discovery—Expert witnesses
- § 12:19 Discovery—Electronic
- § 12:20 Discovery—Duty to preserve
- § 12:21 Discovery—Depositions
- § 12:23 Discovery—Interrogatories
- § 12:24 Discovery—Compelling disclosure
- § 12:25 Discovery—Sanctions for failure to comply with discovery order
- § 12:26 Discovery—Close of discovery
- § 12:28 Dispositive motions—Motions to dismiss
- § 12:29 Dispositive motions—Summary judgment
- § 12:31 Trial
- § 12:32 Trial—Right to jury
- § 12:34 Trial—Jury selection
- § 12:35 Trial—Rules of evidence
- § 12:36 Trial—Experts
- § 12:37 Trial—Jury deliberations and verdicts
- § 12:38 Transactional issues
- § 12:39 Transactional issues—Statute of limitations
- § 12:41 Transactional issues—Shareholder suits—Distinguishing derivative actions from direct actions
- § 12:43 Transactional issues—Shareholder suits—Demand requirement
- § 12:46 Transactional issues—Indemnification—Permissive
- § 12:55 Transactional issues—Best efforts covenants
- § 12:56 Transactional issues—Specific performance
- § 12:57 Transactional issues—Disclaimer of reliance
- § 12:58 Transactional issues—Disclosure-only settlements

## **CHAPTER 13. COMPARISON WITH COMMERCIAL LITIGATION IN FOREIGN COURTS**

### **II. COMMON LAW JURISDICTIONS**

- § 13:3 England and Wales
- § 13:4 England and Wales—Court structure and the role of lawyers and the judiciary
- § 13:5 England and Wales—Personal jurisdiction and venue
- § 13:6 England and Wales—Pre-litigation considerations
- § 13:7 England and Wales—Initial filings and pleadings
- § 13:8 England and Wales—Litigation costs and funding
- § 13:10 England and Wales—Remedies—Legal (monetary)

## TABLE OF CONTENTS

- § 13:11 England and Wales—Remedies—Equitable
- § 13:12 England and Wales—Class actions and other types of group claims
- § 13:13 England and Wales—Discovery
- § 13:14 England and Wales—Dispositive motions and other pretrial devices for case resolution
- § 13:15 England and Wales—Trials and presentation of evidence
- § 13:16 England and Wales—Appeals
- § 13:17 England and Wales—Summary of key distinctions
- § 13:20 Australia—Personal jurisdiction and venue
- § 13:23 Australia—Litigation costs and funding
- § 13:24 Australia—Remedies
- § 13:25 Australia—Class actions and other types of group claims

### III. CIVIL LAW JURISDICTIONS

- § 13:32 France
- § 13:33 France—Court structure and role of the judiciary
- § 13:34 France—Jurisdiction and venue
- § 13:35 France—Pre-litigation considerations
- § 13:36 France—Initial filings and pleadings
- § 13:37 France—Litigation costs and funding
- § 13:38 France—Remedies
- § 13:39 France—Class actions and other types of group claims
- § 13:40 France—Discovery
- § 13:41 France—Dispositive motions and other pretrial devices for case resolution
- § 13:42 France—Hearings and presentation of evidence
- § 13:43 France—Appeals
- § 13:44 France—Summary of key distinctions
- § 13:45 Germany
- § 13:46 Germany—Court structure and the role of the judiciary
- § 13:47 Germany—Jurisdiction and venue
- § 13:48 Germany—Pre-litigation considerations
- § 13:49 Germany—Initial filings and pleadings
- § 13:50 Germany—Litigation costs and funding
- § 13:51 Germany—Remedies
- § 13:52 Germany—Class actions and other types of group claims
- § 13:53 Germany—Discovery
- § 13:54 Germany—Dispositive motions and other pretrial devices for case resolution
- § 13:55 Germany—Trials and presentation of evidence
- § 13:56 Germany—Appeals

### CHAPTER 14. BUSINESS COURTS

- § 14:1 Scope note
- § 14:2 Jurisdiction and transfer
- § 14:3 Business court judges
- § 14:4 Accelerated adjudication
- § 14:5 Alternative dispute resolution
- § 14:8 Initial case management—Joint statements and scheduling orders

## COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 14:9 Initial case management—Conferences and orders
- § 14:10 Initial case management—Topics addressed
- § 14:11 Discovery
- § 14:12 Discovery—Conferencing requirement
- § 14:13 Discovery—Electronically stored information
- § 14:14 Discovery—Confidentiality
- § 14:16 Discovery—Interrogatories
- § 14:17 Discovery—Depositions
- § 14:18 Discovery—Expert witnesses
- § 14:19 Discovery—Disputes
- § 14:20 Motion practice
- § 14:21 Motion practice—Motions to dismiss
- § 14:22 Motion practice—Summary judgment
- § 14:24 Pre-trial requirements—Meet and confer
- § 14:25 Pre-trial requirements—Memoranda
- § 14:26 Pre-trial requirements—Judicial conferences
- § 14:29 Technology in the courtroom
- § 14:30 Trial practices and challenges
- § 14:31 New York State Commercial Division
- § 14:32 California Complex Civil Litigation Program
- § 14:33 Delaware Court of Chancery and Complex Commercial Litigation Division
- § 14:34 Illinois’ Cook County Commercial Calendar
- § 14:35 Massachusetts Business Litigation Session
- § 14:36 New Jersey Complex Business Litigation Program
- § 14:37 North Carolina Business Court
- § 14:38 Georgia Business Court
- § 14:39 Connecticut Complex Litigation Docket
- § 14:40 Arizona Commercial Court in Maricopa County
- § 14:43 Checklist—Pre-trial procedures

## **CHAPTER 15. ENFORCEMENT OF FORUM SELECTION CLAUSES**

### **I. INTRODUCTION**

- § 15:1 Scope note
- § 15:2 Preliminary considerations
- § 15:3 Practice considerations
- § 15:4 Types of forum selection clauses
- § 15:5 Forum selection clauses designating New York as the forum
- § 15:6 Forum selection clauses designating New York as the forum—  
Clauses designating a particular New York venue
- § 15:7 Forum selection clauses designating New York as the forum—  
New York General Obligations Law § 5-1402

### **II. ENFORCEABILITY OF FORUM SELECTION CLAUSES**

- § 15:8 Scope of the forum selection clause
- § 15:9 Scope of the forum selection clause—Nature of claims

## TABLE OF CONTENTS

- § 15:10 Scope of the forum selection clause—Multiple agreements
- § 15:11 Scope of the forum selection clause—Rights of non-signatories
- § 15:12 Scope of the forum selection clause—Terminated contracts
- § 15:13 *M/S Bremen* presumption of *prima facie* validity
- § 15:14 Grounds for non-enforcement
- § 15:15 Grounds for non-enforcement—Unreasonable
- § 15:16 Grounds for non-enforcement—Fraud or overreaching
- § 15:17 Grounds for non-enforcement—Grave difficulty and inconvenience
- § 15:18 Grounds for non-enforcement—Contrary to public policy
- § 15:19 Personal jurisdiction
- § 15:20 Choice of law
- § 15:21 Procedure for enforcement of forum selection clauses—Motion to dismiss pursuant to CPLR 3211(a)(1)

### III. RECENT TRENDS

- § 15:22 Forum selection clauses in e-commerce agreements
- § 15:23 Forum selection clauses adopted in corporate charters and bylaws

### IV. PRACTICE MATERIALS

- § 15:24 Practice checklist

## CHAPTER 16. ENFORCEMENT OF CHOICE OF LAW CLAUSES

- § 16:3 Preliminary matters—Forum selection clauses distinguished
- § 16:5 Preliminary matters—Applicable law when choice of law clause absent
- § 16:6 Preliminary matters—Applicability of choice of law clauses to noncontractual claims
- § 16:7 Validity of choice of law provisions
- § 16:8 Validity of choice of law provisions—What constitutes a sufficiently “reasonable relationship” for choice of law purposes?
- § 16:9 Validity of choice of law provisions—New York General Obligations Law and statutory amount in controversy
- § 16:10 Validity of choice of law provisions—General provisions of the Uniform Commercial Code (UCC § 1-301)
- § 16:11 Validity of choice of law provisions—Restatement (Second) Conflict of Laws
- § 16:12 Limitations on the enforcement of choice of law clauses
- § 16:13 Actions in New York where foreign law has been chosen
- § 16:14 Arbitration, preemption, and choice of law
- § 16:15 Class actions and choice of law
- § 16:16 Waiving enforcement of a choice of law clause

## **CHAPTER 17. JOINDER, CONSOLIDATION, AND SEVERANCE**

### **II. JOINDER**

§ 17:3 Strategic considerations

### **III. CONSOLIDATION: COMBINATION OF CLAIMS**

§ 17:4 CPLR 602

§ 17:5 Strategic considerations

§ 17:6 Factors affecting consolidation—Common questions of law and fact

§ 17:7 Factors affecting consolidation—Delay

§ 17:8 Factors affecting consolidation—Juror confusion

§ 17:9 Factors affecting consolidation—Venue

§ 17:11 Extent of consolidation—Joint trial and other joint proceedings

### **IV. SEVERANCE: SEPARATION OF CLAIMS**

§ 17:16 Factors affecting severance—Insurance coverage or indemnity

§ 17:17 Factors affecting severance—Complexity or diversity of issues

§ 17:18 Factors affecting severance—Common issues of law and fact

## **CHAPTER 18. COORDINATION OF LITIGATION WITHIN NEW YORK AND BETWEEN FEDERAL AND STATE COURTS**

§ 18:1 Scope note

§ 18:3 Litigation Coordinating Panel

§ 18:5 Litigation Coordinating Panel—Procedures

§ 18:8 Litigation Coordinating Panel—Decisions—Single event disasters

§ 18:9 Litigation Coordinating Panel—Decisions—Mass torts

§ 18:35 Rules of the Chief Judge *[New]*

## **CHAPTER 19. ISSUE AND CLAIM PRECLUSION**

### **I. INTRODUCTION**

§ 19:2 Introductory concepts

### **II. CLAIM AND ISSUE PRECLUSION: BASIC CONCEPTS**

#### **A. LEGAL PREREQUISITES FOR BOTH CLAIM AND ISSUE PRECLUSION**

## TABLE OF CONTENTS

- § 19:4 Final judgment
- § 19:5 Final judgment—Statute of limitations
- § 19:6 Issues or claims “actually determined”
- § 19:7 Full and fair opportunity to be heard

### **B. SPECIAL CIRCUMSTANCES**

- § 19:8 Distinctions in application
- § 19:9 Special circumstances
- § 19:10 Special circumstances—Legal representation: Actions by trustees, guardians, etc.
- § 19:11 Special circumstances—Class actions
- § 19:12 Special circumstances—Derivative actions

### **C. RELATED CONCEPTS AND PROCEDURAL ISSUES**

- § 19:13 Related concepts: Law of the case, judicial estoppel, and stare decisis
- § 19:14 Procedural means to assert or enforce claim or issue preclusion

## **III. CLAIM PRECLUSION (RES JUDICATA)**

- § 19:16 Defining the scope of the “claim” precluded: “Cause of action” versus “claim”
- § 19:17 New York’s “transactional” test
- § 19:18 Identity of parties
- § 19:19 Special considerations regarding finality of judgments—Appeals and collateral attack

## **IV. ISSUE PRECLUSION**

- § 19:20 Generally
- § 19:21 Issues of fact versus legal issues
- § 19:22 Scope and detail of “findings” reflected in prior judgment
- § 19:23 Treatment of issues not explicitly raised in prior proceedings
- § 19:25 Relationships between the parties bound—Privity, generally
- § 19:26 Relationships between the parties bound—Adequate representation, an element required to establish privity
- § 19:27 Relationships between the parties bound—Offensive and defensive issue preclusion
- § 19:28 Burden of proof

## **V. INTERJURISDICTIONAL CONSIDERATIONS AND NONJUDICIAL DETERMINATIONS**

- § 19:30 The effect of other jurisdiction judgments—Other states
- § 19:31 The effect of other jurisdiction judgments—Foreign countries
- § 19:34 Claim and issue preclusion and federal judgments
- § 19:36 Claim and issue preclusion and federal judgments—Implications of procedural differences between the New York and federal systems: The effect of nonsubstantive dismissals in federal court

- § 19:37 Special cases: Arbitration and administrative determinations
- § 19:38 Special cases: Arbitration and administrative determinations—Arbitration cases
- § 19:39 Special cases: Arbitration and administrative determinations—Arbitration cases—Forum for determining preclusive effect
- § 19:40 Special cases: Arbitration and administrative determinations—Administrative hearings

## **CHAPTER 20. PROVISIONAL REMEDIES**

### **I. INTRODUCTION**

- § 20:1 Scope note

### **II. STRATEGIC CONSIDERATIONS**

- § 20:2 Selecting the appropriate provisional remedy

### **III. PRELIMINARY INJUNCTION: ARTICLE 63**

- § 20:4 Overview
- § 20:5 Prohibitory and mandatory injunctions
- § 20:7 Three-part test
- § 20:8 Three-part test—Likelihood of success on the merits
- § 20:9 Three-part test—Irreparable injury
- § 20:10 Three-part test—Balancing the equities and other considerations
- § 20:11 Notice
- § 20:12 Undertaking
- § 20:13 Proof
- § 20:14 Order
- § 20:15 Remedies
- § 20:16 Damages

### **IV. TEMPORARY RESTRAINING ORDER: ARTICLE 63**

- § 20:18 Overview
- § 20:19 Obtaining a temporary restraining order when the courthouse is closed
- § 20:20 Notice
- § 20:22 Duration
- § 20:23 Undertaking

### **V. ATTACHMENT: ARTICLE 62**

- § 20:25 Overview
- § 20:28 Five statutory grounds—Nondomiciliaries, nonresidents and foreign corporations
- § 20:30 Five statutory grounds—Removing property from the state
- § 20:31 Five statutory grounds—Victims of crime
- § 20:32 Five statutory grounds—Foreign judgments

TABLE OF CONTENTS

- § 20:34 Undertaking
- § 20:40 Property subject to attachment
- § 20:41 Disclosure
- § 20:42 Remedies
- § 20:43 Damages

**VI. PROVISIONAL REMEDIES IN AID OF  
ARBITRATION: CPLR § 7502(C)**

- § 20:44 Overview
- § 20:45 Standard
- § 20:46 Procedural provisions of Article 62
- § 20:48 International arbitrations and domestic arbitrations outside  
New York State

**VII. TEMPORARY RECEIVERS: ARTICLE 64**

- § 20:49 Overview
- § 20:50 Grounds
- § 20:51 Notice
- § 20:52 Motion for appointment
- § 20:53 Appointment, duties, responsibilities, powers and  
compensation
- § 20:54 Removal and discharge

**VIII. NOTICE OF PENDENCY: ARTICLE 65**

- § 20:55 Overview
- § 20:56 Grounds
- § 20:57 Contents and filing.
- § 20:58 Service
- § 20:59 Duration, extension, and successive notices of pendency
- § 20:60 Cancellation

**IX. SEIZURE OF CHATTEL: ARTICLE 71**

- § 20:63 Grounds
- § 20:64 Grounds for an ex parte order

**X. PRACTICE AIDS**

**A. CHECKLISTS**

- § 20:70 Temporary restraining order
- § 20:74 Notice of pendency

**CHAPTER 21. PARTIES**

**I. INTRODUCTION**

- § 21:2 Addition and substitution of parties
- § 21:3 Addition of parties strategy
- § 21:5 Substitution of parties—Death

- § 21:6 Substitution of parties—Incompetence
- § 21:7 Substitution of parties—Receivership or dissolution
- § 21:8 Substitution of parties—Assignment of a cause of action
- § 21:10 Substitution of parties—Procedure and strategies
- § 21:11 Interpleader
- § 21:12 Interpleader—Jurisdictional issues
- § 21:13 Intervention
- § 21:14 Intervention—Successful intervention applications
- § 21:15 Intervention—Medical and disability insurers
- § 21:16 Intervention—Denial
- § 21:17 Intervention—Procedure
- § 21:18 Capacity of partnerships and associations to sue
- § 21:19 Capacity to sue of unauthorized foreign corporations
- § 21:21 Poor person relief
- § 21:22 Infants and incompetents

## **CHAPTER 22. SUING OR REPRESENTING FOREIGN CORPORATIONS IN NEW YORK STATE COURTS**

### **II. THRESHOLD CONSIDERATIONS**

- § 22:3 Jurisdiction
- § 22:4 Forum non conveniens

### **III. SERVICE OF PROCESS**

- § 22:7 General considerations
- § 22:8 Service of process under the Hague Service Convention

### **IV. OBTAINING DISCOVERY FROM FOREIGN COMPANIES**

- § 22:11 Overview of issues
- § 22:12 Discovery under the CPLR in actions involving foreign companies
- § 22:13 The Hague Evidence Convention
- § 22:14 Other methods permitted by the laws of the foreign jurisdiction

### **V. CHOICE OF LAW CONCERNS**

- § 22:15 Overview of issues
- § 22:16 Judicial notice of foreign law
- § 22:17 Use of expert witnesses to opine on foreign law

### **VI. ENFORCING JUDGMENTS AGAINST FOREIGN COMPANIES**

- § 22:18 Overview of issues
- § 22:19 Availability of post-judgment discovery from third parties

TABLE OF CONTENTS

**CHAPTER 23. CROSS-BORDER LITIGATION**

- § 23:2 Preliminary considerations
- § 23:3 Recent trends
- § 23:5 Common scenarios—Standard two-party dispute
- § 23:8 Common scenarios—Class actions
- § 23:9 Civil procedure
- § 23:11 Civil procedure—Service of process—CPLR
- § 23:12 Civil procedure—Service of process—Hague Service Convention
- § 23:13 Civil procedure—Disclosure
- § 23:15 Jurisdiction—Forum selection clause
- § 23:16 Jurisdiction—*Forum non conveniens*
- § 23:17 Jurisdiction—Choice of law
- § 23:18 Jurisdiction—Chain of commerce
- § 23:20 Privilege
- § 23:21 Data privacy
- § 23:22 Data privacy—Impact of foreign jurisdiction privacy laws
- § 23:25 Injunctive relief—Extraterritorial injunctions
- § 23:26 Injunctive relief—Anti-suit injunction
- § 23:27 Injunctive relief—Pre-judgment attachments
- § 23:28 Injunctive relief—Impact of freezing injunctions in other countries
- § 23:32 Managing parallel proceedings—Arbitration actions/awards

**CHAPTER 24. CLASS ACTIONS**

**I. INTRODUCTION**

- § 24:2 Nature and purpose

**II. STATUTORY PREREQUISITES TO CLASS CERTIFICATION**

- § 24:3 Generally
- § 24:4 Numerosity
- § 24:5 Commonality
- § 24:7 Adequacy of representation
- § 24:8 Superiority
- § 24:9 Actions for penalties
- § 24:10 Defendant classes

**III. MOTION FOR CLASS CERTIFICATION**

- § 24:11 Generally
- § 24:12 Timing
- § 24:13 Proof of CPLR 901(a) prerequisites required
- § 24:14 Practical considerations for the court
- § 24:15 Opposing motion for class certification
- § 24:17 Pre-certification discovery

**IV. ORDER CERTIFYING CLASS**

- § 24:19 Description of class

§ 24:22 Amendment of orders

## **VII. DISMISSAL, DISCONTINUANCE & COMPROMISE**

§ 24:34 Generally

§ 24:35 Court approval required

§ 24:38 Settlement—Class participation in settlement

## **IX. ATTORNEYS' FEES**

§ 24:40 Generally

§ 24:42 Calculation and approval of fees

# **CHAPTER 25. PRELIMINARY AND COMPLIANCE CONFERENCES AND ORDERS**

## **II. PRELIMINARY CONFERENCE**

§ 25:3 Preparation

§ 25:4 Consultation prior to conference

§ 25:7 Timing

§ 25:8 Issues addressed at the Preliminary Conference and in the resulting order

§ 25:11 Preliminary Conference Order provisions—Discovery

§ 25:14 Preliminary Conference Order provisions—Discovery—Confidentiality notice

§ 25:15 Preliminary Conference Order provisions—Discovery—Expert disclosures

§ 25:18 Preliminary Conference Order provisions—Alternative dispute resolution

## **III. COMPLIANCE CONFERENCES**

§ 25:21 Considerations

§ 25:26 Compliance Conference Order—Electronic discovery

§ 25:27 Compliance Conference Order—Expert discovery (if any)

§ 25:28 Compliance Conference Order—Alternative dispute resolution

## **IV. PRACTICE AIDS**

§ 25:30 Practice checklist—Preliminary Conference preparation and completing the Preliminary Conference Order

§ 25:31 Practice checklist—Compliance Conference preparation and completing the Compliance Conference Order [*Retitled*]

# Table of Contents

## CHAPTER 26. BILLS OF PARTICULARS

### I. INTRODUCTION

- § 26:2 Objectives and preliminary considerations
- § 26:3 Strategic considerations

### II. BILLS OF PARTICULAR IN GENERAL

- § 26:5 Verification

### III. DEMANDS AND RESPONSES TO DEMANDS; EFFECT OF FAILURE TO RESPOND

#### A. DEMANDS AND RESPONSES

- § 26:6 Demands
- § 26:7 Improper and unduly burdensome demands
- § 26:9 Practice procedure and timeline

#### B. FAILURE TO RESPOND OR COMPLY

- § 26:10 Failure to respond or comply with demands

### IV. AMENDMENTS AND SUPPLEMENTAL BILLS

- § 26:12 Time for amendments
- § 26:13 Scope of amendments
- § 26:14 Supplemental bill of particulars

### V. ALTERNATIVES

- § 26:16 Interrogatories

### VI. APPEALS

- § 26:19 Appellate court review of issues concerning bills of particulars

## CHAPTER 27. DISCLOSURE

- § 27:1 Scope note
- § 27:2 Disclosure generally
- § 27:3 Scope of disclosure under CPLR 3101
- § 27:6 When to begin thinking about disclosure—Precommencement discovery
- § 27:7 Necessity of discovery plan

- § 27:8 Developing the discovery plan
- § 27:12 Persons or entities from whom discovery may be obtained
- § 27:16 Persons or entities from whom discovery may be obtained—  
Disclosure from the government
- § 27:19 Matters protected from disclosure
- § 27:20 Matters protected from disclosure—Attorney-client privilege
- § 27:21 Matters protected from disclosure—Attorney work product  
privilege
- § 27:22 Matters protected from disclosure—Material prepared in  
anticipation of litigation
- § 27:25 The time for disclosure
- § 27:27 Supervised discovery

## **CHAPTER 28. SEALING OF COURT RECORDS**

- § 28:7 Relevant considerations—Private information
- § 28:8 Relevant considerations—Competitive harm
- § 28:9 Relevant considerations—The public's interest
- § 28:12 Relevant considerations—Previously entered confidentiality  
order
- § 28:15 Relevant considerations—Settlement agreements

## **CHAPTER 29. DEPOSITIONS**

### **II. STRATEGY AND TACTICS**

#### **A. BEFORE THE DEPOSITION**

##### **1. In General; Notice and Transcription**

- § 29:3 Strategic issues before the deposition commences—Determining  
whether to notice a deposition
- § 29:5 Strategic issues before the deposition commences—Noticing the  
deposition; selecting place and court reporter
- § 29:6 Strategic issues before the deposition commences—Videotaping,  
teleconferencing, and other transcription issues

#### **B. DURING THE DEPOSITION**

##### **1. Taking the Deposition**

- § 29:24 Strategic issues in taking a deposition—Dealing with opposing  
counsel

#### **C. AFTER THE DEPOSITION**

- § 29:29 Strategic issues after the deposition

### **III. GOVERNING LAW**

- § 29:31 Statutes, rules and case law—Noticing the deposition
- § 29:32 Statutes, rules and case law—Objections and protective orders
- § 29:33 Statutes, rules and case law—The examination

## TABLE OF CONTENTS

- § 29:35 Statutes, rules and case law—Signing the transcript
- § 29:36 Statutes, rules and case law—Use of the deposition transcript

## **CHAPTER 30. DOCUMENT DISCOVERY**

### **I. INTRODUCTION**

- § 30:1 Scope note
- § 30:1.30 Commercial Division Rules: 2022 Electronic Document Discovery Update *[New]*
- § 30:1.50 Document discovery in the “working remotely” world *[New]*

### **II. CPLR PROVISIONS, COMMERCIAL DIVISION RULES AND UNIFORM CIVIL RULES RELATING TO DOCUMENT DISCOVERY**

- § 30:2 Document discovery
- § 30:3 CPLR 3120: Document discovery from a party and a nonparty
- § 30:4 CPLR 3120: Document discovery from a party and a nonparty—Time and place requirements
- § 30:5 CPLR 3120: Document discovery from a party and a nonparty—Possession, custody or control requirement
- § 30:6 CPLR 3122(d); Uniform Rule 202.20-j and Commercial Division Rule 11-c(e): Defraying nonparty discovery expenses *[Retitled]*
- § 30:7 CPLR 3120: Designation of documents
- § 30:8 Commercial Division Rule 11-e and CPLR 3122(a): Responding and objecting to discovery requests
- § 30:9 CPLR 3122(a): Failure to timely raise objections
- § 30:10 CPLR 3122(a): State reasons for objection
- § 30:11 CPLR 3122 versus CPLR 3103
- § 30:12 CPLR 3111: Document discovery in connection with a deposition
- § 30:14 CPLR 3102(b): Document production by stipulation, including stipulations affecting the production of ESI
- § 30:15 CPLR 3119: Interstate discovery
- § 30:16 Commercial Division Rules: Rule 1(b) and Rule 11-c—Preliminary conference *[Retitled]*
- § 30:17 Commercial Division Rules: 11-c, Appendix A—Discovery of ESI from parties and nonparties *[Retitled]*
- § 30:18 Commercial Division Rules: Rule 14—Discovery disputes and Uniform Civil Rules of the Supreme and County Court: Rule 202.20-f—Disclosure disputes *[Retitled]*
- § 30:19 Supreme Court, Nassau County, Commercial Division—Guidelines for discovery of ESI
- § 30:20 Uniform Civil Rules for the Supreme Court and the County Court: 22 NYCRR § 202.12(c)(3)

### **III. THE ATTORNEY’S ROLE IN DOCUMENT DISCOVERY**

- § 30:21 Counsel’s duties and responsibilities regarding document discovery

- § 30:22 Preparing for the meet and confer session and the preliminary conference

#### **IV. THE IMPACT OF TECHNOLOGY ON DOCUMENT DISCOVERY**

- § 30:24 Discovery of electronic records stored in the cloud
- § 30:25 Discovery of social media sites
- § 30:26 Discovery of electronic records stored on personal devices
- § 30:27 E-mail, text message and instant message policies

#### **V. STAGES OF DISCOVERY: PRESERVATION AND COLLECTION**

- § 30:29 Document retention policies
- § 30:30 Proportionality
- § 30:31 Preservation: The reasonably anticipated litigation standard
- § 30:32 The preservation letter
- § 30:33 The litigation hold notice
- § 30:34 Consequences for failure to issue a litigation hold notice
- § 30:35 Accessibility of electronic records
- § 30:36 Collecting documents located in foreign countries and states with privacy laws and application of the Hague Convention
- § 30:37 Custodian self-collection

#### **VI. STAGES OF DISCOVERY: SEARCH AND REVIEW**

- § 30:38 Objective culling
- § 30:39 Keyword searches *[Retitled]*
- § 30:40 Technology-assisted review—Predictive coding
- § 30:41 Outsourcing document review

#### **VII. STAGES OF DISCOVERY: PRODUCTION**

- § 30:42 Form and manner of production of electronic records
- § 30:43 New York State cases regarding production of metadata and form of production of electronic records
- § 30:44 Electronic discovery costs
- § 30:45 Cost-shifting in connection with the production of ESI

#### **VIII. STAGES OF DISCOVERY: WITHHOLDING PRIVILEGED DOCUMENTS**

- § 30:46 CPLR 4548
- § 30:47 CPLR 3122(b) and Commercial Division Rule 11-b
- § 30:48 Redacting protected information
- § 30:49 Attorney work product

#### **IX. STAGES OF DISCOVERY: INADVERTENT PRODUCTION OF PRIVILEGED DOCUMENTS**

- § 30:51 Inadvertent production: The “middle of the road” approach

## TABLE OF CONTENTS

§ 30:52 “Clawback” and “quick peek” agreements

### **X. STAGES OF DISCOVERY: FAILURE TO PRODUCE—DILATORY CONDUCT AND SPOILIATION OF EVIDENCE**

§ 30:53 CPLR 3124: Motions to compel disclosure

§ 30:54 CPLR 3126: Sanctions for discovery abuses

§ 30:55 Sanctions for the spoliation of ESI: The *Zubulake IV* three-prong test

§ 30:56 Case law regarding the consequences for spoliation of ESI

§ 30:57 Spoliation of non-ESI evidence: New York’s common law doctrine of spoliation

### **XI. PRACTICE CHECKLISTS**

§ 30:58 Checklists—CPLR 3120

§ 30:59 Checklists—CPLR 3122(a) and Rule 11-e, Commercial Division Rules

§ 30:60 Checklists—The attorney’s role in document discovery

§ 30:61 Checklists—Document preservation and collection

§ 30:62 Checklists—Form and manner of production

§ 30:63 Checklists—Search and review techniques

§ 30:64 Checklists—Cost-shifting

§ 30:65 Checklists—Privileged documents

§ 30:66 Checklists—CPLR 3124: Motions to compel disclosure

## **CHAPTER 31. INTERROGATORIES**

### **I. PRELIMINARY MATTERS**

§ 31:3 Formal requirements of interrogatories

§ 31:4 How courts have applied the interrogatory rules in commercial cases

### **II. DRAFTING INTERROGATORIES**

§ 31:9 Drafting focused interrogatories

§ 31:12 Problems to avoid in drafting interrogatories

### **III. RESPONDING TO INTERROGATORIES**

§ 31:14 Objections

§ 31:15 Form of answers to interrogatories

§ 31:16 When must interrogatory responses be supplemented or amended

## **CHAPTER 32. REQUESTS FOR ADMISSIONS**

§ 32:3 Strategy—Conserving trial time

§ 32:5 Strategy—Settlement position

§ 32:9 CPLR 3123—Exhibits and matters of fact subject to admission

§ 32:10 CPLR 3123—Matters or materials generally not subject to admission

- § 32:11 CPLR 3123—Timing of a request
- § 32:12 CPLR 3123—Form and content of a proper notice
- § 32:13 CPLR 3123—The effects of admissions or failures to respond
- § 32:14 CPLR 3123—Form and timing of a proper denial
- § 32:28 Forms—Notice of motion and affidavit for assessment of expenses and fees

## **CHAPTER 33. SELECTION OF EXPERTS, EXPERT DISCLOSURE AND THE PRETRIAL EXCLUSION OF EXPERT TESTIMONY**

- § 33:1 Scope note
- § 33:3 Finding and selecting experts—Identifying critical issues in case
- § 33:4 Finding and selecting experts—Locating and selecting appropriate experts
- § 33:5 Expert disclosure and communications with experts
- § 33:6 Expert disclosure and communications with experts—  
Overview
- § 33:9 Pretrial exclusion of expert testimony—Expert witness disclosure deficiencies
- § 33:11 Pretrial exclusion of expert testimony—Strategies for asserting pretrial expert challenge
- § 33:12 Pretrial exclusion of expert testimony—Reliability/helpfulness of methodology
- § 33:13 Pretrial exclusion of expert testimony—Reliability/helpfulness of methodology—Federal standard
- § 33:14 Pretrial exclusion of expert testimony—Reliability/helpfulness of methodology—New York standard with respect to scientific procedures
- § 33:15 Pretrial exclusion of expert testimony—Reliability/helpfulness of methodology—New York’s approach to nonscientific methodology
- § 33:16 Pretrial exclusion of expert testimony—Reliability of data supporting opinion

## **CHAPTER 34. MOTION PRACTICE**

### **I. INTRODUCTION**

- § 34:1 Scope note
- § 34:2 Strategy, objectives, and preliminary considerations

### **II. WHERE MOTION HEARD**

#### **B. COURT AND JUDGE**

- § 34:9 General considerations

### **III. MOTION PREREQUISITES AND FORMALITIES**

- § 34:15 General considerations

## TABLE OF CONTENTS

- § 34:20 Elements of style
- § 34:21 Effort to resolve disclosure disputes

### **IV. THE NOTICE OF MOTION**

- § 34:22 General considerations
- § 34:23 Time for service and filing
- § 34:24 Effect of court orders and individual rules *[Retitled]*
- § 34:25 Reply, surreply, etc.

### **V. ORDER TO SHOW CAUSE**

- § 34:26 Order to show cause as an ex parte application
- § 34:27 Form, content, and service of an order to show cause

### **VI. FURNISHING PAPERS TO THE COURT**

- § 34:38 General considerations

### **VIII. ADJOURNMENT OF MOTION**

- § 34:46 By stipulation

### **IX. ORAL ARGUMENT**

- § 34:49 General considerations
- § 34:50 Upon the request of counsel

### **XI. SEPARATE AND IMMEDIATE TRIAL OF ISSUE RAISED ON MOTION**

- § 34:56 Mode of trial

### **XIII. MOTION AFFECTING PRIOR ORDER**

- § 34:67 Distinction between renewal and reargument—Motion to reargue
- § 34:68 Distinction between renewal and reargument—Motion to renew

## **CHAPTER 35. SUMMARY JUDGMENT**

### **I. INTRODUCTION**

- § 35:2 Nature of summary judgment

### **II. SUMMARY JUDGMENT UNDER CPLR 3212**

- § 35:4 Timing of summary judgment motions
- § 35:5 Papers and proof in support of motion
- § 35:6 Papers and proof in opposition to motion
- § 35:8 Principles governing determination of summary judgment
- § 35:9 Material issues of fact
- § 35:10 Searching the record

- § 35:11 Partial summary judgment
- § 35:13 Facts unavailable to opposing party

### **III. SUMMARY JUDGMENT UNDER CPLR 3213**

- § 35:16 Restrictions on the use of CPLR 3213

### **IV. CPLR 3211 AND SUMMARY JUDGMENT**

- § 35:17 Generally
- § 35:18 Nature and quality of supporting evidence
- § 35:20 CPLR 3211 and waiver of jurisdiction
- § 35:22 Converting motion to dismiss to motion for summary judgment

## **CHAPTER 36. DECLARATORY JUDGMENTS**

### **I. INTRODUCTION**

- § 36:2 Strategic considerations

### **II. GENERAL RULES**

- § 36:3 Nature and purpose of a declaratory judgment action
- § 36:5 Jurisdiction
- § 36:6 Venue
- § 36:7 Statute of limitations
- § 36:8 Parties
- § 36:9 Standing
- § 36:10 Pleading
- § 36:11 Pretrial procedure
- § 36:12 Burden of proof
- § 36:13 Court's discretion to grant declaratory judgment
- § 36:14 Standard of review
- § 36:15 Dispositive motions
- § 36:17 Right to a jury trial
- § 36:18 Comparison to Article 78 proceedings
- § 36:19 Appeal

### **III. UNIQUE ISSUES**

- § 36:20 Justiciable controversy
- § 36:21 Ripeness
- § 36:22 Requirements for a justiciable controversy
- § 36:23 Effect of future or contingent events
- § 36:24 Impact of other available claims
- § 36:25 Implications of contract-remedy provisions
- § 36:26 Effect of other judicial proceedings on the availability of declaratory judgment
- § 36:27 Exhaustion of administrative remedies
- § 36:28 Mootness

TABLE OF CONTENTS

**IV. AVAILABLE REMEDIES AND EFFECT OF JUDGMENT**

- § 36:30 Effect of the judgment, res judicata and collateral estoppel
- § 36:31 Effect of the denial of relief
- § 36:32 Effect of questions of fact
- § 36:33 Default judgment
- § 36:35 Injunctive relief
- § 36:36 Enforcement of declaratory judgment through motion

**CHAPTER 37. CALENDAR PRACTICE**

**II. NOTE OF ISSUE AND CERTIFICATE OF READINESS**

- § 37:8 Dismissal for failure to file note of issue
- § 37:11 Demand for trial by jury and Waiver of jury trial
- § 37:12 Vacating the note of issue and certificate of readiness
- § 37:13 Vacating the note of issue and certificate of readiness—  
Permitting discovery after filing of the note of issue
- § 37:15 Restoring the case to the calendar

**III. TRIAL PREFERENCES; ADJOURNMENT**

- § 37:18 Trial preferences—Special preference
- § 37:22 Grounds for trial adjournment—Convenience of the parties

**CHAPTER 38. REFEREES AND SPECIAL MASTERS**

**I. INTRODUCTION**

- § 38:2 Referees and special referees
- § 38:4 Special masters
- § 38:5 Power of court to appoint referee
- § 38:6 Order of reference

**II. TYPES AND POWERS OF REFEREES**

- § 38:8 Appeal of order appointing referee to determine
- § 38:9 Powers of referee to determine
- § 38:10 Referee to perform an act
- § 38:12 Referee to hear and report
- § 38:13 Referee to hear and report—Appeal of order appointing referee
- § 38:14 Referee to hear and report—Powers
- § 38:15 Referee to hear and report—Binding effect of referee's report
- § 38:19 Referee to supervise disclosure—Powers
- § 38:20 Referee to supervise disclosure—Review of referee's report

**III. SPECIFIC USES FOR REFEREE**

- § 38:24 Arbitration proceedings and award

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 38:28 Proceeding concerning proof of lost negotiable paper
- § 38:31 Corporate matters—Action against a corporation for dissolution
- § 38:34 Real property actions—Mortgage foreclosure proceedings

**IV. PROCEDURE FOR APPOINTMENT OF REFEREE**

- § 38:38 Appointment of referee
- § 38:39 Who may act as referee
- § 38:40 Number of referees

**V. TRIAL BY REFEREE**

- § 38:42 Conduct of trial by referee to report
- § 38:43 Decision
- § 38:44 Appeal of referee's decision
- § 38:45 Fees and expenses of referee

**CHAPTER 39. PRACTICE BEFORE THE COMMERCIAL DIVISION**

**I. INTRODUCTION**

- § 39:1 Scope note

**II. STRATEGY AND RISK ASSESSMENT**

- § 39:4 Discovery developments in the Commercial Division

**III. STANDARDS FOR ASSIGNMENT OF CASES TO THE COMMERCIAL DIVISION**

- § 39:8 Monetary thresholds
- § 39:9 Commercial and non-commercial cases
- § 39:10 Assignment to the Commercial Division
- § 39:11 Transfer into the Commercial Division
- § 39:12 Transfer from the Commercial Division
- § 39:13 Administrative judge's discretion on applications for transfer into and out of the Commercial Division
- § 39:14 Matters before a Judicial Hearing Officer (JHO) or a Referee  
*[Retitled]*

**IV. RULES OF PRACTICE**

- § 39:17 Statewide rules of practice for the Commercial Division—  
Preliminary conferences
- § 39:18 Statewide rules of practice for the Commercial Division—  
Discovery
- § 39:19 Statewide rules of practice for the Commercial Division—  
Motions
- § 39:20 Statewide rules of practice for the Commercial Division—  
Trials

## TABLE OF CONTENTS

- § 39:22 Rule 11(g): Automatic stay of discovery *[Retitled]*
- § 39:23 Rule 19-a: Statements of material facts
- § 39:25 Alternative dispute resolution
- § 39:26 Confidentiality agreements

### **V. TECHNOLOGICAL INNOVATIONS IN THE COMMERCIAL DIVISION**

- § 39:27 New York State Courts electronic filing system
- § 39:28 Telephonic appearances and information on future court appearances

### **VI. PRACTICE AIDS**

- § 39:32 Forms—Preliminary conference order, Commercial Division
- § 39:33 Forms—Addendum to preliminary conference order, County of New York Commercial Division

## **CHAPTER 40. COMMERCIAL CASES IN NEW YORK COUNTY FOR LESS THAN \$500,000**

- § 40:1 Scope note
- § 40:2 Strategies and objectives
- § 40:3 Alternative dispute resolution
- § 40:6 Discovery
- § 40:7 Discovery—Discovery of electronically stored information (ESI)
- § 40:10 Discovery—Strategic considerations and practice tips
- § 40:11 Motion practice
- § 40:12 Motion practice—Oral argument

## **CHAPTER 41. SETTLEMENTS**

### **I. INTRODUCTION**

- § 41:2 Thinking settlement from the outset

### **II. PREPARING TO NEGOTIATE**

- § 41:9 Admissibility of compromise and offers to compromise

### **IV. ETHICAL CONSIDERATIONS**

- § 41:17 Report all offers to your client
- § 41:18 Rules of conduct

### **VI. THE BINDING SETTLEMENT AGREEMENT: BY WRITTEN DOCUMENT OR BY SETTLING ON THE RECORD**

- § 41:23 Authority
- § 41:24 Settling on the record
- § 41:25 Filing settlement stipulations

§ 41:26 Settlements reduced to writing: Enforcement and rescission

**VII. ISSUES TO CONSIDER WHEN DRAFTING A  
SETTLEMENT AGREEMENT AND  
SETTLEMENT CLAUSES**

§ 41:31 Representations and warranties

§ 41:33 Release

§ 41:35 Covenant not to sue

§ 41:39 Confidentiality

§ 41:43 Governing law and other provisions contemplating future  
disputes

# Table of Contents

## CHAPTER 42. JURY SELECTION

### II. JURY SELECTION STRATEGY

- § 42:3 Why jury selection matters; goals of the selection process
- § 42:12 Technology

### III. THE LAW GOVERNING JURY SELECTION

- § 42:14 The right to a fair and impartial jury
- § 42:21 The statutory framework—Conduct of voir dire
- § 42:23 The statutory framework—Challenges—Cause challenges
- § 42:25 Constitutional limitations on the exercise of peremptory challenges

## CHAPTER 43. MOTIONS IN LIMINE

- § 43:1 Scope note
- § 43:2 Objectives and strategic considerations
- § 43:3 Basis and timing for motions in limine
- § 43:4 Procedure for bringing a motion
- § 43:5 Suitable issues
- § 43:6 Appeals
- § 43:8 Forms

## CHAPTER 44. TRIALS

### I. INTRODUCTION

- § 44:1 Scope note

### II. THEORIES AND OBSERVATIONS REGARDING THE TRIAL PROCESS GENERALLY

- § 44:4 Trial as a contemporary event involving critical performances by the parties, witnesses and lawyers
- § 44:5 The significance of documents
- § 44:6 The significance of documents—The added challenge of e-mails and other electronic data for the commercial trial lawyer
- § 44:8 The critical importance of the attitude, experience, and preferences of the trial judge
- § 44:9 Limitations on the role of the judge in the trial proceedings
- § 44:10 Trial in the Commercial Division or other venues
- § 44:12 Trial in the Commercial Division or other venues—Trial in other venues

### **III. SIMPLE, COMPLEX AND PROTRACTED COMMERCIAL TRIALS**

- § 44:16 Plenary, consolidated, bifurcated, and single issue trials—  
Severance
- § 44:17 Plenary, consolidated, bifurcated, and single issue trials—  
Single issue trials raised on motion

### **IV. THE TRIER OF FACT AND THE TRIER OF LAW**

- § 44:20 The right to jury trial
- § 44:21 Waiver of the right to jury
- § 44:24 Trial by referee or judicial hearing officer
- § 44:25 Strategic considerations in choosing bench, jury, or other types  
of trial

### **V. TRIAL STRUCTURE AND STRATEGY**

#### **B. TRIAL STRATEGY: THE TRIAL GAME PLAN**

- § 44:32 Formulation of the Trial Game Plan

#### **C. LOGISTICS AND TRIAL TEAM PLANNING AND ORGANIZATION**

- § 44:34 Protracted and complex cases—The trial legal team
- § 44:36 Protracted and complex cases—Legal assistants

### **VI. PRACTICE AIDS**

- § 44:38 Rules of Practice for the Commercial Division pertaining to  
trials

## **CHAPTER 45. TRIAL PRELIMINARIES AND THE OPENING STATEMENT**

### **II. PRETRIAL MATTERS**

#### **A. IN GENERAL**

- § 45:2 Pretrial conferences
- § 45:3 Marked pleadings
- § 45:6 Motions in limine
- § 45:7 Preliminary jury instructions
- § 45:8 Direct testimony by affidavit

### **III. OPENING STATEMENTS**

#### **A. IN GENERAL**

- § 45:18 Order of opening statements
- § 45:19 Permissible scope of opening statements

TABLE OF CONTENTS

**B. STRATEGIC CONSIDERATIONS IN  
COMMERCIAL TRIALS**

**2. Practical Suggestions for Winning Opening  
Statements**

§ 45:26 Purpose of an opening statement

**CHAPTER 46. PRESENTATION OF THE  
CASE IN CHIEF**

- § 46:2 Preliminary comment
- § 46:3 Determining the order of proof
- § 46:5 Subpoenaing witnesses and documentary evidence
- § 46:6 Preparing witnesses
- § 46:12 Presenting witnesses
- § 46:17 Presenting witnesses—Refreshing recollection
- § 46:18 Presenting witnesses—Introduction of documentary evidence
- § 46:19 Presenting witnesses—Use of demonstrative evidence and  
visual aids
- § 46:20 Presenting witnesses—Questioning adverse and hostile  
witnesses
- § 46:21 Presenting witnesses—Impeaching or correcting the testimony  
of a party's own witness
- § 46:22 Presenting witnesses—Redirect examination
- § 46:23 Objections and motions to strike
- § 46:24 Objections and motions to strike—Appellate review
- § 46:29 Presentation of evidence without witness testimony—Formal  
and informal judicial admissions and their presentation  
during trial
- § 46:31 Presentation of evidence without witness testimony—Prior  
testimony of an unavailable witness

**CHAPTER 47. CROSS EXAMINATION**

- § 47:1 Scope note
- § 47:5 Preliminary considerations—Cross examination today
- § 47:7 Procedure, practice, and relevant law—Scope of cross  
examination
- § 47:17 Impeachment
- § 47:20 Impeachment—Prior inconsistent statements
- § 47:21 Impeachment—Collateral v. noncollateral
- § 47:24 Content and tactics—Control of the witness
- § 47:34.50 Cross examination in a virtual environment *[New]*

**CHAPTER 48. EXPERT WITNESSES**

**II. RELEVANT LAW CONCERNING EXPERT  
TESTIMONY**

**A. IN GENERAL**

§ 48:3 Overview

- § 48:4 The need for and permissible scope of expert testimony
- § 48:5 Expert qualifications
- § 48:6 The previously unidentified expert witness

## **B. THE EXPERT'S OPINIONS AND CONCLUSIONS**

- § 48:7 Reliability
- § 48:8 Degree of certainty expressed
- § 48:9 Basis for the opinion; reliance on and disclosure of inadmissible out-of-court material
- § 48:10 Hypothetical questions

## **IV. THE DIRECT EXAMINATION OF EXPERT WITNESSES**

### **A. IN GENERAL**

- § 48:16 Determining the order of expert testimony

### **B. THE ORGANIZATION OF THE DIRECT EXAMINATION**

- § 48:19 Generally
- § 48:24 Using graphics, visual aids, and demonstrative evidence with experts

## **V. CROSS EXAMINATION OF EXPERTS**

### **B. THE CONTENT AND TACTICS OF CROSS EXAMINING THE EXPERT**

- § 48:32 The use of leading and other types of questions
- § 48:35 Portraying the expert as an advocate

## **CHAPTER 49. GRAPHICS AND OTHER DEMONSTRATIVE EVIDENCE**

- § 49:2 Preliminary comment
- § 49:5 Procedure, practice, and relevant law—Foundation requirements for admissibility
- § 49:6 Procedure, practice, and relevant law—Illustrative aids
- § 49:7 Procedure, practice, and relevant law—Disclosing graphics to the adversary
- § 49:14 Specific types of demonstrative evidence—Photographs and videos
- § 49:23 Additional strategies and tactics—Creation of graphics—Interactive techniques
- § 49:24 Additional strategies and tactics—Creation of graphics—Use of color

## **CHAPTER 50. ADMISSIBILITY ISSUES**

- § 50:1 Scope note

## TABLE OF CONTENTS

- § 50:2 Preliminary comment
- § 50:5 Hearsay—Exceptions—Admissions of an adverse party
- § 50:7 Hearsay—Exceptions—Business records
- § 50:8 Hearsay—Exceptions—Techniques for introduction of business records
- § 50:10 The parol evidence rule—The first prong
- § 50:18 The parol evidence rule—Exceptions—Fraud as to a contract with a general merger clause
- § 50:19 The parol evidence rule—Exceptions—Fraud as to a contract with a specific disclaimer or specific merger clause
- § 50:20 The parol evidence rule—Exceptions—Reformation of a contract due to mutual mistake or unilateral mistake and fraud

## **CHAPTER 51. PRIVILEGES**

- § 51:1 Scope note
- § 51:2 Attorney-client privilege
- § 51:3 Attorney-client privilege—Elements and requirements
- § 51:4 Attorney-client privilege—Elements and requirements—The attorney-client relationship
- § 51:6 Attorney-client privilege—Elements and requirements—Communications related to legal fees
- § 51:7 Attorney-client privilege—Elements and requirements—Waiver
- § 51:8 Attorney-client privilege—ESI and categorical logs
- § 51:9 “Common interest” privilege
- § 51:10 Attorney work product and materials prepared for litigation
- § 51:11 Attorney work product and materials prepared for litigation—Work product doctrine
- § 51:12 Attorney work product and materials prepared for litigation—Materials prepared in anticipation of litigation or for trial
- § 51:13 Scope of waiver

## **CHAPTER 52. FINAL ARGUMENTS IN JURY AND BENCH TRIALS**

### **II. THE PROCEDURE, PRACTICE, AND RELEVANT LAW CONCERNING CLOSING ARGUMENTS**

- § 52:5 Timing of closing statements after the charge conference
- § 52:7 Permissible scope of closing statements
- § 52:8 Objections to substance of closing statements

### **III. STRATEGIC AND TACTICAL CONSIDERATIONS FOR JURY SUMMATIONS**

#### **A. OBJECTIVES OF THE SUMMATION**

- § 52:10 Themes

## **CHAPTER 53. JURY CONDUCT, INSTRUCTIONS AND VERDICTS**

### **II. JURY CONDUCT**

- § 53:2 Jury conduct
- § 53:4 Jury conduct—Discharge and replacement of jurors
- § 53:5 Jury conduct—Misconduct
- § 53:6 Jury conduct—Participation in the trial process
- § 53:7 Jury conduct—Participation in the trial process—Notetaking
- § 53:8 Jury conduct—Participation in the trial process—Questioning of witnesses

### **III. JURY INSTRUCTIONS**

- § 53:10 Jury instructions—Preliminary
- § 53:11 Jury instructions—Final

### **IV. SPECIAL VERDICTS AND INTERROGATORIES**

- § 53:12 Special verdicts and interrogatories
- § 53:13 Preparation of proposed instructions, verdicts, and interrogatories
- § 53:15 Preliminary jury instruction concerning the role and duties of alternate jurors

## **CHAPTER 54. COMPENSATORY DAMAGES**

### **II. STRATEGY, OBJECTIVES, AND PRELIMINARY CONSIDERATIONS**

- § 54:3 Choice of law
- § 54:4 Drafting damages clauses in contracts
- § 54:6 Pleading special damages

### **III. ELEMENTS OF DAMAGES**

- § 54:11 Damages must not be avoidable

### **IV. DAMAGES FOR BREACH OF CONTRACT**

- § 54:16 Restitution
- § 54:17 Lost profits
- § 54:19 Damages for anticipatory breach
- § 54:21 Breach of agreement to negotiate a contract
- § 54:22 Liquidated damages

### **V. DAMAGES UNDER THE UCC**

- § 54:30 Buyer's damages—Incidental and consequential damages

TABLE OF CONTENTS

**VI. APPLICATION OF THE U.N. SALES  
CONVENTION OF 1980**

§ 54:33 Damages for breach of a contract

**VII. DAMAGES IN TORT**

§ 54:40 Economic loss rule in tort

§ 54:41 Tort damages for breach of contract

§ 54:42 Damages for tortious interference with contract or prospective  
business relations

**CHAPTER 55. PUNITIVE DAMAGES**

**I. INTRODUCTION**

§ 55:1 Scope note

**II. TACTICS AND STRATEGY IN PUNITIVE  
DAMAGES CASES, INCLUDING MOTION AND  
TRIAL CONSIDERATIONS**

§ 55:3 The precomplaint investigation and the pleadings

§ 55:4 Motion practice and discovery

§ 55:5 Trial of punitive damages case

**III. NATURE OF CONDUCT AND TYPES OF  
ACTIONS IN WHICH PUNITIVE DAMAGES  
MAY BE RECOVERED**

**A. IN GENERAL**

§ 55:6 Nature of conduct punishable by punitive damages

**B. NATURE OF CLAIM OR RELIEF AS  
AFFECTING AVAILABILITY OF PUNITIVE  
DAMAGES**

§ 55:8 Generally

§ 55:9 Intentional torts, generally

§ 55:10 Contract

§ 55:11 Fraud

§ 55:12 Fraud—Breach of fiduciary duty

§ 55:13 Trademark infringement and unfair competition

§ 55:14 Negligence

§ 55:16 Statutory actions

**IV. LIABILITY OF CORPORATIONS OR OTHER  
ENTITIES FOR PUNITIVE DAMAGES**

§ 55:19 Corporations

§ 55:20 Government units

## V. AMOUNT OF PUNITIVE DAMAGES THAT MAY BE AWARDED

- § 55:22 Generally
- § 55:25 Further guidance from the Supreme Court on the *Gore* guideposts
- § 55:28 Judicial review of punitive damages awards
- § 55:30 Interest on punitive damage awards

## VII. CHOICE-OF-LAW ISSUES

- § 55:36 New York choice-of-law rules as to torts

## CHAPTER 56. SPECIFIC PERFORMANCE

- § 56:2 Definition and historical development
- § 56:4 Elements—Contract
- § 56:5 Elements—Inadequate remedy at law
- § 56:6 Elements—Uniqueness
- § 56:7 Elements—Performance
- § 56:8 Elements—Equity
- § 56:9 Contextualized with other remedies
- § 56:10 Procedural concerns
- § 56:12 Defenses
- § 56:13 Defenses—Damages are available, suitable, calculable, and adequate
- § 56:16 Defenses—Statute of frauds
- § 56:17 Defenses—Impossibility or impracticability
- § 56:18 Defenses—Waiver, laches, or estoppel
- § 56:22 Substantive contexts—Real property—Conveyance or sale
- § 56:23 Substantive contexts—Real property—Options to purchase and rights of refusal
- § 56:24 Substantive contexts—Real property—Timing considerations
- § 56:28 Substantive contexts—Real property—Construction and development
- § 56:29 Substantive contexts—Stipulations of settlement
- § 56:31 Substantive contexts—Employment
- § 56:32 Substantive contexts—Employment agreements
- § 56:32.50 Substantive contexts—Restrictive covenants in other contexts [*New*]
- § 56:33 Substantive contexts—Purchase agreements
- § 56:34 Substantive contexts—Purchase agreements—Stock
- § 56:40 Substantive contexts—Joint ventures
- § 56:42 Substantive contexts—Loans—Provision to cure or repurchase defective loans
- § 56:47 Substantive contexts—Corporate formation agreements—Partnership
- § 56:48.50 Exclusive distribution agreements [*New*]
- § 56:48.70 Substantive contexts—Marital agreements [*New*]
- § 56:49 Substantive contexts—Art, artisanal services, unique services, and unique property/chattel

## TABLE OF CONTENTS

- § 56:52 Practice checklist—Order to show cause for temporary restraining order and preliminary injunction

## **CHAPTER 57. RESCISSION**

- § 57:2 Preliminary considerations
- § 57:3 Pleading no adequate remedy at law
- § 57:6 Timing of rescission
- § 57:7 Availability as remedy for fraudulent misrepresentation
- § 57:8 Availability as remedy for mutual mistake
- § 57:10 Defenses

## **CHAPTER 58. TRIAL AND POST-TRIAL MOTIONS**

- § 58:4 Trial motions—Judgment as a matter of law
- § 58:5 Trial motions—Judgment as a matter of law—Timing
- § 58:6 Trial motions—Judgment as a matter of law—Basis
- § 58:7 Trial motions—Failure to establish a prima facie case
- § 58:9 Trial motions—Effect of grant
- § 58:11 Trial motions—Conform the pleadings to the evidence
- § 58:12 Trial motions—Conform the pleadings to the evidence—Context and sua sponte application
- § 58:18 Trial motions—Continuance
- § 58:19 Post-trial motions—Types
- § 58:20 Post-trial motions—Timing
- § 58:21 Post-trial motions—Judgment as a matter of law
- § 58:23 Post-trial motions—New trial—The “against the weight of the evidence” standard
- § 58:24 Post-trial motions—New trial—The “interests of justice” standard
- § 58:26 Post-trial motions—New trial—Additur and remittitur in the context of motions for a new trial
- § 58:27 Post-trial motions—New trial—Appellate considerations
- § 58:29 Motions to correct defects in an order or judgment
- § 58:30 Motion to confirm or reject the report of a referee or judicial hearing officer

## **CHAPTER 59. JUDGMENTS**

### **II. JUDGMENT BASICS**

- § 59:8 Final and interlocutory judgments

### **III. TYPES OF JUDGMENTS**

- § 59:12 Judgment after trial—Decision by court
- § 59:17 Judgment after trial—Relief in cases involving more than one judgment
- § 59:21 Judgment by default—General exceptions
- § 59:23 Judgment by default—Parties who may obtain default judgment

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 59:24 Judgment by default—Parties against whom default judgment may be rendered
- § 59:29 Judgment by default—Relief awarded
- § 59:30 Judgment by default—Proof of default
- § 59:32 Judgment by default—Entry—Clerk’s judgment
- § 59:33 Judgment by default—Entry—Discretionary entry of default judgment by court
- § 59:34 Judgment by default—Entry—Time to apply for default judgment
- § 59:47 Confession of judgment—Statutory requirements for the affidavit

**IV. PROCEDURES**

- § 59:59 Entry, submission and settlement—Designation of amount of recovery—Pre-judgment interest
- § 59:60 Entry, submission and settlement—Judgment for or against more than one co-party
- § 59:68 Amendment and correction
- § 59:71 Vacatur
- § 59:73 Vacatur—Discretion of court
- § 59:76 Lien
- § 59:77 Foreign judgments

# Table of Contents

## CHAPTER 60. EFFECT OF BANKRUPTCY PROCEEDINGS ON PENDING LITIGATION AND JUDGMENTS

### I. INTRODUCTION

§ 60:1 Scope note

### II. JURISDICTION AND VENUE OF BANKRUPTCY PROCEEDINGS

§ 60:4 Federal subject matter jurisdiction

§ 60:5 Reference of cases and proceedings to the bankruptcy courts

§ 60:6 Venue of bankruptcy litigation

§ 60:7 Abstention in favor of state courts or state law

§ 60:8 Removal of bankruptcy-related state court actions

### III. FORMS OF LITIGATION IN THE BANKRUPTCY COURT

§ 60:9 Generally

§ 60:10 “After notice and a hearing”

§ 60:11 Proceedings instituted by notice to all creditors

§ 60:12 Adversary proceedings

§ 60:13 Contested matters

§ 60:14 Involuntary bankruptcy

§ 60:15 Bankruptcy litigation and alternative dispute procedures

### IV. AUTOMATIC STAY

§ 60:16 Generally

§ 60:17 When the automatic stay arises

§ 60:18 Scope of the automatic stay

§ 60:20 Vacating the automatic stay

### V. PROOFS OF CLAIM

§ 60:22 Necessity for filing proofs of claim

### VI. AVOIDANCE ACTIONS

§ 60:26 Preferential and fraudulent transfers

§ 60:27 Avoidance issues of concern to commercial litigators

## **VII. DISCHARGE AND DISCHARGEABILITY**

- § 60:28 Generally
- § 60:29 Objections to the discharge
- § 60:30 Dischargeability of particular debts
- § 60:31 Third party releases

## **VIII. DISCOVERY DEVICES**

- § 60:33 Required debtor filings
- § 60:34 Examinations of the debtor
- § 60:35 Preservation and discovery in adversary proceedings and contested matters *[Retitled]*

## **IX. REQUIREMENTS IN REPRESENTING THE BANKRUPTCY ESTATE**

- § 60:37 Basis for retention
- § 60:38 Professional compensation
- § 60:39 Prospects and pitfalls in the payment of fees

## **X. SETTLEMENT AND APPEAL**

- § 60:40 Settlement procedures
- § 60:41 Procedures on appeal

# **CHAPTER 61. COURT-AWARDED ATTORNEYS' FEES**

## **I. INTRODUCTION**

- § 61:2 The American rule: Attorneys' fees generally are not recoverable
- § 61:3 Preliminary considerations

## **II. PROCEDURAL AND STRATEGIC ISSUES**

- § 61:4 Determining the prevailing party
- § 61:5 The amount of attorneys' fees is determined by the court, not the jury
- § 61:6 Contractually fixed fees
- § 61:7 Criteria for determining reasonableness
- § 61:8 Law firm overhead
- § 61:9 Bifurcation
- § 61:10 Pleading an attorneys' fee claim
- § 61:11 Discovery issues
- § 61:12 Defensive strategies
- § 61:13 Right to a hearing
- § 61:14 Evidence to support an attorneys' fee claim
- § 61:16 Attorneys' fees incurred to recover attorneys' fees are generally not recoverable

TABLE OF CONTENTS

**III. THE CONTRACTUAL RIGHT TO RECOVER ATTORNEYS' FEES**

**A. RULES OF CONSTRUCTION**

- § 61:18 Strict construction
- § 61:19 The provision must encompass the claim at issue
- § 61:20 The recovery of “costs” is distinct from attorneys’ fees

**B. SPECIALIZED RULES FOR CERTAIN TYPES OF CONTRACTS**

- § 61:21 Indemnification provisions
- § 61:22 Leases
- § 61:23 Insurance contracts
- § 61:24 Confirmation of arbitration attorneys’ fees awards

**IV. STATUTES PROVIDING FOR THE RECOVERY OF ATTORNEYS' FEES**

**A. THE STATUTORY RIGHT TO RECOVER ATTORNEYS' FEES**

- § 61:31 Business Corporation Law § 626 (shareholders’ derivative action)
- § 61:33 CPLR 909 (class actions)
- § 61:34 CPLR 6212 and 6221 (attachment)
- § 61:39 Other CPLR provisions—Personal injury, injury to property, and wrongful death actions
- § 61:41 Debtor & Creditor Law § 276-a (fraudulent conveyance)
- § 61:48 General Business Law § 349 (consumer protection)
- § 61:50 General Business Law § 350-e (false advertising)
- § 61:51 General Business Law § 380 (Fair Credit Reporting Act)
- § 61:58 Real Property Law § 254 (foreclosure proceedings)
- § 61:59 Surrogate’s Court Procedure Act § 2110 (estates)
- § 61:71 Other statutes

**CHAPTER 62. FEES, COSTS, AND DISBURSEMENTS**

**II. STATUTORY EXPENSES**

**A. FEES**

- § 62:2 Fees generally
- § 62:3 Basis for fee recovery

**B. COSTS**

- § 62:4 Costs generally
- § 62:5 Basis for cost recovery, generally

- § 62:7 Costs upon entry of judgment
- § 62:8 Costs upon appeal

#### **IV. SECURITY FOR COSTS**

- § 62:25 Effect of failure to give security

### **CHAPTER 63. SANCTIONS**

#### **II. STRATEGIC AND PRELIMINARY CONSIDERATIONS IN THE DECISION TO SEEK SANCTIONS**

- § 63:3 Overview of sanctions under statute and rule
- § 63:4 Considerations of whether to seek sanctions under statute, rule or both—Consideration of the underlying proceedings
- § 63:5 Considerations of whether to seek sanctions under statute, rule or both—Consideration of the conduct in issue
- § 63:6 Considerations of whether to seek sanctions under statute, rule or both—Consideration of the monetary penalties sought
- § 63:7 Considerations of whether to seek sanctions under statute, rule or both—Timing and other preliminaries

#### **III. SANCTIONS FOR FRIVOLOUS CONDUCT IN CIVIL CASES UNDER PART 130**

##### **A. GENERALLY**

- § 63:9 Generally
- § 63:10 Comparison of sanctions and costs
- § 63:11 Comparison of sanctions and costs—Against whom costs and sanctions may be imposed
- § 63:12 Comparison of sanctions and costs—To whom costs and sanctions are paid
- § 63:13 Comparison of sanctions and costs—Penalty sum of costs and sanctions
- § 63:14 Discretionary nature of sanctions; requirement of proper motion or initiative of court
- § 63:15 Failure to pay
- § 63:16 Requirements as to award of sanctions by court; review of propriety and amount of award
- § 63:17 Scope and applicability of Part 130-1; factors to be considered in imposing sanctions
- § 63:18 Requirement that all papers be signed

##### **B. WHAT CONSTITUTES “FRIVOLOUS” CONDUCT**

- § 63:19 Generally
- § 63:20 In motion practice generally
- § 63:22 During discovery
- § 63:23 Frivolous conduct relating to reargument and/or appeal

TABLE OF CONTENTS

§ 63:24 Other situations

**IV. SANCTIONS FOR FRIVOLOUS CONDUCT IN A  
PERSONAL INJURY, PROPERTY DAMAGE,  
AND WRONGFUL DEATH ACTION UNDER  
CPLR 8303-A**

§ 63:25 Generally

§ 63:26 What constitutes “frivolous” conduct

§ 63:27 Mandatory nature of sanctions

§ 63:28 Scope and applicability of CPLR 8303-a—Limited exceptions

§ 63:29 Scope and applicability of CPLR 8303-a—Effect of \$10,000  
limitation

**V. SANCTIONS FOR FAILURE TO ATTEND A  
SCHEDULED COURT APPEARANCE**

§ 63:34 Factors to be considered

**VI. PENALTIES FOR REFUSAL TO COMPLY WITH  
ORDER OR TO DISCLOSE**

§ 63:35 Generally

§ 63:36 Availability of monetary sanctions under CPLR 3126  
distinguished from availability of other monetary sanctions

§ 63:37 When use of CPLR 3126 is appropriate

§ 63:38 Spoliation sanctions

§ 63:39 Spoliation in the context of electronically stored information  
 (“ESI”)—*Zubulake* standards in state courts

**VII. SANCTIONS IN APPELLATE PRACTICE**

§ 63:42 Sanctions for failure to notify the court of a change in  
circumstances

**CHAPTER 64. APPEALS TO THE  
APPELLATE DIVISION**

**I. INTRODUCTION**

§ 64:2 Commercial cases decided by the Appellate Division

§ 64:3 Description of the Appellate Division and applicable rules

**II. JURISDICTION**

§ 64:6 Appellate jurisdiction

**III. FIVE PREREQUISITES TO AN APPEAL**

§ 64:8 Appellant must be an aggrieved party

§ 64:11 Appellant must be an aggrieved party—Moot appeals

§ 64:12 Appellant must be an aggrieved party—Frivolous appeals

§ 64:13 Appealable paper

- § 64:14 Appealability
- § 64:16 Indirect appeals—Default orders or judgments
- § 64:17 Indirect appeals—Ex parte orders
- § 64:19 Indirect appeals—Subsequent orders—Reargument
- § 64:22 Scope of review
- § 64:23 Scope of review—Reviewability of nonfinal orders or judgments on an appeal from a final judgment
- § 64:24 Scope of review—Review of summary judgment
- § 64:26 Scope of review—Review after a trial—Trial errors
- § 64:27 Scope of review—Review after a trial—Verdicts

#### **IV. COMMENCING THE APPEAL**

- § 64:30 Taking an appeal or cross-appeal
- § 64:31 Taking an appeal or cross-appeal—Taking an appeal as of right
- § 64:32 Taking an appeal or cross-appeal—Moving for permission to appeal

#### **V. PERFECTING THE APPEAL**

- § 64:38 The record on appeal
- § 64:39 The record on appeal—Full record method
- § 64:40 The record on appeal—Appendix method
- § 64:41 The record on appeal—Agreed statement method
- § 64:42 Briefs

#### **VI. DISPOSITION OF THE APPEAL**

- § 64:51 Postdecision motions

#### **VII. PRACTICE AIDS**

- § 64:53 Summary statement on application for expedited service and/or interim relief (submitted by moving party)

### **CHAPTER 65. APPEALS TO THE COURT OF APPEALS**

#### **I. INTRODUCTION**

- § 65:1 Scope note
- § 65:2 Preliminary considerations

#### **II. APPEALS GENERALLY**

- § 65:3 Scope of appeals to the court of appeals
- § 65:4 Appeals generally from a final judgment
- § 65:6 Methods of appeal—As of right
- § 65:7 Methods of appeal—By permission
- § 65:8 Questions certified to the Court of Appeals

TABLE OF CONTENTS

**III. ADDITIONAL CONSIDERATIONS**

- § 65:9 Appeal from the proper judgment or order
- § 65:10 Preservation of issues for appeal
- § 65:11 Mootness

**IV. RULES**

- § 65:12 Time to appeal
- § 65:13 Filing an appeal as of right
- § 65:17 Procedure for filing appeal—Preliminary appeal statement
- § 65:18 Procedure for filing appeal—Filing requirements
- § 65:21 Alternative procedure for selected appeals
- § 65:28 Motions for reargument

**V. PRACTICE AIDS**

- § 65:37 Procedural checklist

**CHAPTER 66. ENFORCEMENT OF JUDGMENTS**

**II. RECORDING THE JUDGMENT**

- § 66:4 Generally
- § 66:9 Recognizing a judgment from another country

**III. LOCATION OF ASSETS**

- § 66:14 Information subpoenas

**IV. RESTRAINT OF ASSETS**

- § 66:15 Generally

**V. OBTAINING A LIEN AGAINST ASSETS**

- § 66:21 Personal property

**VI. EXECUTION AGAINST REAL PROPERTY, PERSONAL PROPERTY, AND INCOME**

- § 66:22 Generally
- § 66:23 Real property
- § 66:24 Personal property
- § 66:26 Protections of the judgment debtor against abuse

**VII. PROCEDURES FOR SETTING ASIDE TRANSFERS OR INCURRENCES OF OBLIGATIONS IN FRAUD OF CREDITORS**

- § 66:27 Generally
- § 66:28 Voidable transaction or fraudulent conveyance actions

## **CHAPTER 67. NEGOTIATIONS**

### **II. COURT-REQUIRED NEGOTIATIONS**

§ 67:3 Rules requiring negotiation in commercial cases

§ 67:4 Meaning of meet and confer requirement

### **III. ETHICAL RULES**

§ 67:5 Rules of Professional Conduct and Standards of Civility

§ 67:6 Practical applications of ethical rules

§ 67:8 Practical applications of ethical rules—Threats, extortion

§ 67:9 Practical applications of ethical rules—An attorney’s scope of authority

§ 67:10 Practical applications of ethical rules—Frivolous claims/harassment/delay

§ 67:11 Practical applications of ethical rules—Motions for sanctions/contempt

§ 67:12 Practical applications of ethical rules—Truthfulness

§ 67:13 Practical applications of ethical rules—Bluffing and puffing

§ 67:14 Practical applications of ethical rules—The difficult client

### **IV. THE ART OF NEGOTIATION**

§ 67:20 Additional practical advice

## **CHAPTER 68. MEDIATION AND OTHER NONBINDING ADR**

### **II. STRATEGY, OBJECTIVES, AND PRELIMINARY CONSIDERATIONS**

#### **A. OVERVIEW OF NON-BINDING ALTERNATIVE DISPUTE RESOLUTION**

§ 68:3 Defining non-binding arbitration

#### **B. PRACTICAL CONSIDERATIONS**

§ 68:5 Benefits of mediation

§ 68:6 Cases best suited for mediation

§ 68:7 Timing of mediation

### **III. LAW AND PROCEDURE**

#### **A. IN GENERAL**

§ 68:9 Introduction to applicable law and procedures

#### **B. RULES GOVERNING MEDIATION**

§ 68:10 State/County rules

## TABLE OF CONTENTS

- § 68:11 Ad-hoc mediation
- § 68:12 American Arbitration Association
- § 68:13 The International Institute for Conflict Prevention & Resolution (“CPR”)

### **C. TREATMENT OF MEDIATION UNDER NEW YORK LAW**

- § 68:15 Confidentiality/privilege
- § 68:16 Mediator immunity
- § 68:18 Ethical considerations in New York mediation practice

### **D. MEDIATION PRACTICES AND PROCEDURES**

- § 68:20 Considerations for selecting a mediator
- § 68:23 Attendance at mediation sessions

## **CHAPTER 69. ARBITRATION**

### **I. INTRODUCTION**

- § 69:1 Scope note
- § 69:2 Federal and New York arbitration law

### **II. BEFORE THE ARBITRATION HAS COMMENCED**

- § 69:9 Effect of choice of law provision—Background
- § 69:10 Effect of choice of law provision—Practical implications
- § 69:11 Compelling arbitration
- § 69:12 Compelling arbitration—Application to compel arbitration
- § 69:13 Compelling arbitration—Demand or notice of arbitration
- § 69:14 Compelling arbitration—Waiver of right to compel arbitration
- § 69:15 Compelling arbitration—Non-signatories
- § 69:19 Avoiding arbitration—Grounds for staying arbitration—  
Challenging the existence of an arbitration agreement
- § 69:21 Avoiding arbitration—Grounds for staying arbitration—  
Challenging the scope of the arbitration agreement
- § 69:22 Avoiding arbitration—Grounds for staying arbitration—  
Arguing that conditions precedent in the arbitration  
agreement have not been met
- § 69:23 Avoiding arbitration—Grounds for staying arbitration—  
Challenging arbitration agreements on grounds of public  
policy
- § 69:24 Avoiding arbitration—Grounds for staying arbitration—  
Miscellaneous arguments
- § 69:26 Appointing an arbitrator—Number of arbitrators
- § 69:27 Appointing an arbitrator—Qualifications
- § 69:28 Appointing an arbitrator—Court appointment
- § 69:31 Appointing an arbitrator—Court appointment—Parties fail to  
follow agreed-upon procedures
- § 69:41 Interim relief—Section 7502 today

### **III. DURING THE ARBITRATION**

- § 69:46 Removal of an arbitrator—Disqualification based on bias
- § 69:51 Compelling evidence—General principles
- § 69:52 Compelling evidence—Discovery under the CPLR
- § 69:54 Compelling evidence—Discovery under the FAA
- § 69:55 Compelling evidence—Obtaining discovery from third parties under the FAA
- § 69:56 Interim awards
- § 69:57 Interim awards—Enforcement
- § 69:58 Interim awards—Emergency arbitrators

### **IV. AFTER THE ARBITRATION**

- § 69:59 Enforcing awards
- § 69:61 Vacating awards
- § 69:64 Vacating awards—Where the arbitrator exceeded or imperfectly executed powers

## **CHAPTER 70. INTERNATIONAL ARBITRATION**

### **I. INTRODUCTION**

- § 70:1 Scope note
- § 70:2 Preliminary considerations
- § 70:3 Statutory framework
- § 70:4 Original jurisdiction of the federal courts
- § 70:5 Role of New York State Courts
- § 70:6 Procedure in the Commercial Division of the Supreme Court of the State of New York, New York County, with respect to international arbitration matters

### **II. DRAFTING AGREEMENTS TO ARBITRATE**

- § 70:9 Practical drafting considerations—Jurisdiction of courts to issue preliminary relief in aid of international arbitration
- § 70:11 Practical drafting considerations—Costs

### **III. RECOGNITION AND ENFORCEMENT OF ARBITRATION AGREEMENTS**

- § 70:13 Recognition and enforcement of arbitration agreements under the New York Convention
- § 70:14 Recognition and enforcement of arbitration agreements under the New York Convention—Requirement that the agreement be in writing
- § 70:15 Recognition and enforcement of arbitration agreements under the New York Convention—Exceptions
- § 70:16 Recognition and enforcement of arbitration agreements under the New York Convention—Exceptions—Matters not referable to arbitration

TABLE OF CONTENTS

- § 70:17 Recognition and enforcement of arbitration agreements under the New York Convention—Exceptions—Arbitration agreements that are null and void, inoperative or incapable of being performed
- § 70:19 Recognition and enforcement of arbitration agreements under the New York Convention—Procedure and remedies—Anti-suit injunctions

**IV. PROCEDURAL ASPECTS**

- § 70:20 Appointment of the arbitral tribunal
- § 70:21 Interim relief
- § 70:23 Arbitral procedure—Procedural orders
- § 70:24 Arbitral procedure—Document production
- § 70:25 Arbitral procedure—Submission of evidence
- § 70:26 Arbitral procedure—Obtaining third-party evidence

**V. ARBITRATION AWARDS**

- § 70:27 Written and reasoned awards
- § 70:28 Grounds for non-recognition and non-enforcement
- § 70:29 Grounds for non-recognition and non-enforcement—Award vacated in the seat of arbitration
- § 70:30 Grounds for non-recognition and non-enforcement—Forum non conveniens and lack of personal jurisdiction
- § 70:32 Form—Procedural order for arbitration governed by the ICC Rules of Arbitration *[Deleted]*

**CHAPTER 71. LITIGATION AVOIDANCE AND PREVENTION**

**I. INTRODUCTION**

- § 71:4 Congestion in New York State courts

**II. PRE-LITIGATION STRATEGIES**

- § 71:9 Providing comprehensive and continuous employee training
- § 71:11 Involvement of counsel and other advisors

**III. STRATEGIES FOR RESOLVING DISPUTES**

- § 71:13 Approaching the other side

**IV. SPECIFIC APPLICATIONS**

- § 71:17 Contract disputes

**CHAPTER 72. CRISIS MANAGEMENT**

- § 72:1 Scope note
- § 72:6 Strategic considerations—Public relations management
- § 72:7 Strategic considerations—Protecting attorney-client privilege

- § 72:10 Strategic considerations—Trial
- § 72:12 Common crisis situations—Alleged fraud
- § 72:13 Common crisis situations—Securities litigation
- § 72:14 Common crisis situations—Product liability
- § 72:15 Common crisis situations—Harassment and discrimination
- § 72:15.50 Common crisis situations—Negligence *[New]*
- § 72:16 Common crisis situations—Data and privacy breaches
- § 72:17 Common crisis situations—Environmental disasters

## **CHAPTER 73. TECHNIQUES FOR EXPEDITING AND STREAMLINING LITIGATION**

### **IV. COMMERCIAL DIVISION**

- § 73:6 Generally
- § 73:8 Commercial Division rule changes that foster expedited litigation
- § 73:10 Aggressive case management
- § 73:13 Aggressive case management—60-day motion rule
- § 73:14 Alternative dispute resolution program
- § 73:19 Technological advances—E-courtrooms, virtual hearings, remote video conferencing, and remote depositions *[Retitled]*
- § 73:21 Technological advances—Bookmarks and hyperlinks in e-filed papers *[Retitled]*

### **VI. PRETRIAL MOTIONS TO EXPEDITE LITIGATION**

- § 73:29 Summary judgment motion

### **VII. DEVICES TO EXPEDITE DISCOVERY**

#### **B. PROCEDURAL MECHANISMS**

- § 73:42 Limits on interrogatories
- § 73:43 Limits on depositions

#### **C. DOCUMENT PRODUCTION**

- § 73:45 Pre-preliminary conference consultations
- § 73:46 Confidentiality stipulation and order
- § 73:47 Preliminary conferences
- § 73:50 E-discovery
- § 73:51 E-discovery—Allocation of costs
- § 73:53 E-discovery—Sampling, technology—Assisted review, and predictive coding
- § 73:54 E-discovery—Guidelines for discovery of ESI from nonparties
- § 73:57 Streamlining privilege logs—Clawback and “quick-peek” agreements

#### **D. DISCOVERY DISPUTES**

## TABLE OF CONTENTS

- § 73:59 Avoiding discovery abuse
- § 73:61 Resolving discovery disputes—Negotiation

### **VIII. DEVICES TO EXPEDITE THE TRIAL**

- § 73:67 Motions in limine
- § 73:69 Alternatives to jury trial—Bench trials
- § 73:71 Alternatives to jury trial—Referees
- § 73:74 Streamlining the expert phase of trial

### **IX. HANDLING RELATED CASES**

- § 73:80 State multi-district litigation (“MDL”)

### **X. PRACTICE AIDS**

- § 73:89 Form—Commercial Division Standard Form Confidentiality Order

## **CHAPTER 74. LITIGATION MANAGEMENT BY JUDGES**

### **I. INTRODUCTION**

- § 74:1 Scope note
- § 74:3 Case management is a team effort among Chambers’ staff
- § 74:4 The use of technology
- § 74:5 Key rules for successful case management
- § 74:6 The judge’s role in pleadings and the potential interplay with motion practice

### **II. THE JUDGE’S ROLE IN DISCOVERY**

- § 74:7 Generally

### **III. OTHER CASE MANAGEMENT RESPONSIBILITIES**

- § 74:16 The judge’s role in settlement, alternative dispute resolution and trials
- § 74:17 Case management pitfalls
- § 74:18 Practical solutions to common issues

## **CHAPTER 75. LITIGATION MANAGEMENT BY CORPORATIONS**

### **I. INTRODUCTION**

- § 75:1 Scope note
- § 75:4 Matter-specific planning documents

## **II. SELECTING AND RETAINING OUTSIDE COUNSEL**

- § 75:5 Generally
- § 75:7 Deciding whether to retain outside counsel
- § 75:8 Identifying potential outside counsel
- § 75:9 Compiling a list of pre-approved counsel
- § 75:10 Retaining multiple firms for a single matter

## **III. MANAGING THE COSTS OF LITIGATION**

- § 75:11 Generally
- § 75:13 Fee arrangements—Hourly billing
- § 75:14 Fee arrangements—Contingency fee billing
- § 75:17 Hourly billing procedure
- § 75:18 Disbursements
- § 75:19 Staffing

## **IV. COMMUNICATION AND CONTROL**

- § 75:22 Managing expectations: The engagement letter
- § 75:23 The supervisory role of in-house counsel
- § 75:24 The supervisory role of in-house counsel—Monitoring written work product
- § 75:26 Client extranets and secure file transfer protocol
- § 75:27 Evaluating outside counsel

## **V. STRATEGY AND OBJECTIVES**

- § 75:32 Developing a litigation plan—Identifying and protecting privileged communications
- § 75:33 Developing a litigation plan—Conducting a preliminary investigation
- § 75:34 Developing a litigation plan—Settlement and ADR
- § 75:36 Developing a litigation plan—Discovery
- § 75:37 Developing a litigation plan—Summary judgment and the trial

# **CHAPTER 76. LITIGATION MANAGEMENT BY LAW FIRMS**

## **I. INTRODUCTION**

- § 76:2 Overview

## **III. MANAGING THE LITIGATION**

- § 76:9 Staffing
- § 76:11 Staffing—Outsourcing legal work
- § 76:14 Document collection and management—Document retention and litigation hold letters
- § 76:15 Document collection and management—Document collection
- § 76:18 Document collection and management—Document production

## TABLE OF CONTENTS

- § 76:19 Non-traditional fee arrangements
- § 76:21 Non-traditional fee arrangements—Discounted rates
- § 76:29 Non-traditional fee arrangements—Secondment
- § 76:40 Billing
- § 76:42 Technology
- § 76:44 Technology—Video and web conferencing
- § 76:45 Technology—Extranet

## CHAPTER 77. THIRD-PARTY LITIGATION FUNDING

- § 77:9.50 Legality—Champerty, maintenance, and barratry—Post-*Justinian Capital* cases finding champertous assignments in the context of litigation funding *[New]*
- § 77:13 Legality—Other theories of illegality and funder liability—Unconscionability
- § 77:19 Ethics issues—Lawyer referring a client to a funder
- § 77:21 Ethics issues—Non-recourse funding agreement between lawyer and funder
- § 77:24 Ethics issues—Lawyer’s representation of client in negotiation of funding agreement with funder
- § 77:28 Ethics issues—Lawyer’s representation of client with a claim funded by a funder—Control over the litigation
- § 77:31 Discovery—Materiality
- § 77:34 Discovery—Doctrines invoked to protect claimholder disclosures to third-party funders—Work product doctrine
- § 77:37 Discovery—Court required disclosure of funding
- § 77:37.50 Recovering third-party funding costs in litigation *[New]*
- § 77:39 International arbitration—Disclosure and arbitrators’ conflicts of interest
- § 77:41 International arbitration—Awarding of costs
- § 77:42 International arbitration—Security for costs
- § 77:50.50 Proposed New York and federal regulation of third-party litigation funding *[New]*

# Table of Contents

## CHAPTER 78. LITIGATION TECHNOLOGY

- § 78:1 Scope note
- § 78:2 Ethical considerations
- § 78:3 Case management
- § 78:4 Data collection
- § 78:5 Document review
- § 78:6 Document review—Technology assisted review
- § 78:7 Document review—Data analytics
- § 78:8 Document review—Effective coding strategies for human review
- § 78:9 Responding to written discovery
- § 78:10 Depositions
- § 78:11 Depositions—Rules for remote depositions
- § 78:12 Depositions—Stipulations
- § 78:13 Depositions—Technology features
- § 78:14 Pleadings and briefing
- § 78:15 Trial technology
- § 78:16 Trial technology—Remote courtrooms
- § 78:17 Trial technology—Trial presentation software
- § 78:18 Trial technology—Trial technology team and war room
- § 78:19 Trial technology—The 21<sup>st</sup> century courtroom
- § 78:21 Trial technology—Effectively merging high-and low-tech tools
- § 78:22 Trial technology—Admissibility of evidence

## CHAPTER 79. ARTIFICIAL INTELLIGENCE

- § 79:1 Scope note
- § 79:2 What is AI?
- § 79:2.30 Generative AI *[New]*
- § 79:2.50 Explainability *[New]*
- § 79:3 AI and the practice of law
- § 79:4 AI and the practice of law—Electronic discovery/predictive coding
- § 79:4.50 AI and the practice of law—Electronic discovery/generative AI *[New]*
- § 79:5 AI and the practice of law—Litigation analysis/predictive analysis
- § 79:6 AI and the practice of law—Contract management
- § 79:6.50 AI and the practice of law—Contract Drafting *[New]*
- § 79:7 AI and the practice of law—Due diligence reviews
- § 79:8 AI and the practice of law—Legal research
- § 79:9 AI and electronic discovery
- § 79:10 AI and the *Frye* standard
- § 79:12 AI and algorithmic bias—Is the algorithm biased?

- § 79:13 AI and algorithmic bias—Seeking disclosure of the algorithm
- § 79:13.50 AI and privacy *[New]*
- § 79:14 AI and professional conduct rules
- § 79:15 AI and professional conduct rules—Duty of competence
- § 79:15.50 AI and professional conduct rules—Duty of communication *[New]*
- § 79:16 AI and professional conduct rules—Duty of confidentiality
- § 79:17 AI and professional conduct rules—Unauthorized practice of law
- § 79:18 AI and professional conduct rules—Duty of supervision *[New]*
- § 79:19 AI and professional conduct rules—Professional independence *[New]*
- § 79:20 AI and professional conduct rules—Candor to the court *[New]*
- § 79:21 Potential impact of AI on the legal profession *[New]*

## **CHAPTER 80. MARKETING TO POTENTIAL BUSINESS CLIENTS**

### **III. SOURCES OF WORK FOR THE COMMERCIAL LITIGATOR**

- § 80:8 Referrals from other lawyers

### **IV. BUILDING AND MARKETING A TEAM AND RESOURCES**

- § 80:22 Marketing prior experience—Trial experience
- § 80:26 Marketing access to resources—Trial presentation resources

### **V. SPECIFIC MARKETING STRATEGIES**

- § 80:29 Promoting and publicizing wins

## **CHAPTER 81. TEACHING LITIGATION SKILLS**

- § 81:2 Strategy, objectives and preliminary considerations
- § 81:3 How to teach advocacy effectively
- § 81:7 Oral advocacy skills—The tools
- § 81:10 Written advocacy skills—Brief writing
- § 81:16 Interviews and witness examinations—Deposition examinations

## **CHAPTER 82. CAREER AND PRACTICE DEVELOPMENT**

### **II. EDUCATIONAL FOUNDATION**

- § 82:3 Undergraduate studies

TABLE OF CONTENTS

§ 82:4 Law school

**IV. THE WORK EXPERIENCE**

§ 82:22.50 Succeeding in a remote work environment *[New]*

§ 82:22.70 Effective communication and collaboration with colleagues and clients *[New]*

**V. BEST PRACTICES FOR EMPLOYERS**

§ 82:24 Onboarding and integration

**VI. PRACTICE AIDS**

§ 82:28 Sample commercial litigation practice area strategic plan

**CHAPTER 83. DIVERSITY AND INCLUSION**

**I. INTRODUCTION**

§ 83:3 Current landscape

**CHAPTER 84. PRO BONO**

**I. INTRODUCTION**

§ 84:1 Scope note

**II. PRACTICAL CONSIDERATIONS**

§ 84:3 Practical and strategic considerations—Sources of pro bono opportunities

§ 84:4 Practical and strategic considerations—Case assessment

§ 84:5 Practical and strategic considerations—Staffing

§ 84:6 Practical and strategic considerations—Relationship between the practitioner and the referring organization

§ 84:7 Practical and strategic considerations—Engagement letters

§ 84:8 Practical and strategic considerations—Disengagement letters

§ 84:9 Costs and fees

§ 84:10 Costs and fees—Attorneys' fees

**III. ETHICAL ISSUES**

§ 84:12 Ethical issues

§ 84:13 Ethical issues—Unbundled legal services

§ 84:14 Ethical issues—Serving as a non-profit board member

**IV. LAW AND PROCEDURE**

§ 84:15 Framework governing pro bono in New York

§ 84:16 Defining pro bono service

§ 84:17 *[Reserved]*

§ 84:18 Mandatory pro bono for new lawyers

§ 84:19 Mandatory pro bono for new lawyers—Reactions to § 520.16

- § 84:20 Mandatory pro bono for new lawyers—Application of § 520.16
- § 84:21 Pro bono with and by in-house counsel
- § 84:22 Pro bono with and by in-house counsel—Corporate social responsibility and the increase in skills-based volunteering
- § 84:23 Pro bono with and by in-house counsel—Registration rules

## **V. PRACTICE AIDS**

- § 84:26 Forms—Co-counseling agreement
- § 84:27 Forms—Engagement letter
- § 84:28 Forms—Alternative engagement letter
- § 84:29 Forms—Law firm engagement letter
- § 84:32 Forms—Disengagement letter

# **CHAPTER 85. ETHICAL ISSUES IN COMMERCIAL CASES**

## **I. INTRODUCTION**

- § 85:1 Scope note
- § 85:2 Motions to disqualify
- § 85:3 Choice of law

## **II. CONFLICTS OF INTEREST AND WAIVERS**

- § 85:5 Generally
- § 85:6 Representing an entity: Who is the client?
- § 85:9 Business transactions with clients
- § 85:11 Lawyer as witness
- § 85:14 Establish a conflict check system

## **III. CONFIDENTIALITY, IN GENERAL**

- § 85:15 Preservation of confidences and secrets of a client
- § 85:17 Confidentiality and joint clients
- § 85:20 Communications with prospective clients [*Retitled*]

## **IV. DISCLOSURE AND EVIDENCE**

- § 85:21 Inadvertent disclosure, and unsolicited receipt, of privileged or confidential materials
- § 85:22 Interviewing employees and former employees of adverse corporate party

## **V. REPRESENTING CLIENTS WITHIN THE BOUNDS OF THE LAW**

- § 85:23 Generally
- § 85:25 Disclosure of insurance coverage in settlement discussions

## **VI. ETHICAL ISSUES IN BILLING, COLLECTION, AND OTHER MATTERS**

- § 85:26 Reasonable fees

TABLE OF CONTENTS

§ 85:28 Disposition of former client files

## **CHAPTER 86. CIVILITY**

### **I. INTRODUCTION**

§ 86:1 Scope note

### **II. LAWYERS' DUTIES TO OTHER LAWYERS, LITIGANTS AND WITNESSES**

#### **A. IN GENERAL**

§ 86:3 Courtesy in all professional dealings with other persons—  
Effective representation

§ 86:5 Courtesy in all professional dealings with other persons—  
Vulgar and insulting language

§ 86:6 Courtesy in all professional dealings with other persons—  
Provocation

#### **B. WORKING TOGETHER WITH ADVERSARIES**

§ 86:9 Cooperation to avoid litigation and resolve litigation that has  
already commenced

§ 86:11 Respect for schedules and commitments of opposing counsel—  
Adjournments and extensions of time

#### **C. AVOIDING ABUSE OF THE ADVERSARIAL PROCESS**

§ 86:16 Discovery—Depositions

#### **D. TRUSTWORTHINESS**

§ 86:18 Honoring express and implied commitments

### **III. LAWYERS' DUTIES TO THE COURT AND COURT PERSONNEL**

§ 86:20 Maintenance of a respectful attitude; education of clients and  
witnesses

### **IV. RULES AND GUIDANCE ON CIVILITY**

§ 86:23 Overview and history of the Standards of Civility

## **CHAPTER 87. ATTORNEY DISCIPLINE**

§ 87:1 Scope note

§ 87:2 The disciplinary system

§ 87:3 Responding to a disciplinary complaint

§ 87:5 Commencing a case—Fee agreements

§ 87:6 Commencing a case—Formulating claims and defenses

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 87:8 Commencing a case—Conflicts of interest—Between or amongst clients
- § 87:9 Commencing a case—Conflicts of interest—Between lawyer and client
- § 87:10 Commencing a case—Conflicts of interest—Lawyer as witness
- § 87:11 Commencing a case—Diligence
- § 87:15 After the case commences—Threatening criminal prosecution
- § 87:16 After the case commences—Supervising subordinate lawyers and staff
- § 87:17 After the case commences—Inadvertent receipt of privileged information
- § 87:18 After the case commences—Evidentiary misconduct
- § 87:19 After the case commences—Handling documents in discovery
- § 87:20 After the case commences—Misconduct by the opposing lawyer
- § 87:21 After the case commences—Incivility
- § 87:24 The end of the case—Managing settlement or other escrow funds
- § 87:25 The end of the case—Withdrawing from representation

## **CHAPTER 88. CIVIL JUSTICE REFORM**

- § 88:1 Scope note
- § 88:3 Current procedures
- § 88:7 Recommendations

## **CHAPTER 89. CONTRACTS**

### **III. SUBSTANTIVE LAW OF CONTRACTS**

- § 89:16 Interpretation of contracts
- § 89:17 Implied terms
- § 89:22 Defenses to breach of contract actions—Statute of frauds
- § 89:36 Defenses to breach of contract actions—Failure to mitigate damages
- § 89:38 Damages and remedies

## **CHAPTER 90. INSURANCE**

### **II. PRE-LITIGATION CONSIDERATIONS**

- § 90:2 Analyzing the underlying event
- § 90:3 Analyzing the available insurance coverage
- § 90:4 Notifying the insurer of an occurrence
- § 90:5 Choosing the form of the action and the parties

### **III. LIKELY DEFENSES AGAINST CLAIM BY AN INSURED**

- § 90:8 Failure to provide timely notice of an occurrence
- § 90:9 Misrepresentations or omissions in the application for insurance
- § 90:11 Effect of insurer's untimely assertion of defenses: waiver and/or estoppel

TABLE OF CONTENTS

**IV. NEW YORK RULES OF POLICY  
CONSTRUCTION IN COVERAGE CASES**

- § 90:12 Burden of proof in coverage actions
- § 90:13 Enforcement of unambiguous insurance contract terms:  
summary judgment in coverage cases

**V. PARTICULAR ISSUES REGARDING COVERAGE  
IN MASS TORT, PRODUCT LIABILITY, AND  
HAZARDOUS WASTE LITIGATION**

- § 90:16 Is the event an “accident” or “occurrence” within the policy  
terms?
- § 90:19 Trigger of coverage

**VI. BAD FAITH ACTIONS AGAINST INSURERS:  
EXTRA-CONTRACTUAL CLAIMS**

- § 90:21 Bad faith refusal to settle
- § 90:22 Punitive damages

**CHAPTER 91. REINSURANCE**

**I. INTRODUCTION**

- § 91:2 Preliminary considerations and strategy

**II. NATURE AND FUNDAMENTALS OF  
REINSURANCE TRANSACTIONS**

- § 91:3 Overview
- § 91:4 Definition and principal purposes of reinsurance
- § 91:7 The basic types and forms of reinsurance—Pro rata v. excess  
(proportional v. nonproportional)
- § 91:13 The role of the intermediary
- § 91:15 The original insured and its rights vis-à-vis a reinsurer
- § 91:19 Typical documentation for reinsurance deals—The slip
- § 91:20 Typical documentation for reinsurance deals—The reinsurance  
contract
- § 91:24 Common contract clauses—Limit and retention

**III. CORE CONCEPTS AND DOCTRINES OF  
REINSURANCE**

- § 91:36 The duty of utmost good faith—Defined
- § 91:38 Follow the fortunes and follow the settlements
- § 91:39 Follow the fortunes defined
- § 91:41 Reinsurance as an honorable engagement imbued with  
industry custom and practice

**IV. NATURE OF DISPUTES ARISING OUT OF  
REINSURANCE TRANSACTIONS**

- § 91:42 Disputes involving nondisclosure and misrepresentation

## COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 91:43 Disputes involving untimely notice
- § 91:49 The exceptions to follow the fortunes and follow the settlements
- § 91:50 The exceptions to follow the fortunes and follow the settlements—*Ex gratia* payments
- § 91:55 Disputes seeking to recover expenses in addition to limits
- § 91:57 Disputes seeking to recover expenses in addition to limits—The New York Court of Appeals' decision in *Excess*
- § 91:58 Disputes seeking to recover expenses in addition to limits—The subsequent scaling back of *Bellefonte* [Retitled]

## CHAPTER 92. WORKERS' COMPENSATION

- § 92:10 Employer's obligations and methods of coverage
- § 92:12 Compensable injury
- § 92:19 Burden of proof, presumptions and defenses
- § 92:21 Fraudulent claims
- § 92:24 Benefits—Wage replacement
- § 92:25 Benefits—Wage replacement—Schedule vs. non-schedule awards
- § 92:28 Benefits—Wage replacement—Industrially disabled
- § 92:30 Benefits—Medical benefits
- § 92:32 Benefits—Death awards
- § 92:35 Board review of decisions, orders and awards
- § 92:36 Appeal to court
- § 92:37 Reopening closed claims
- § 92:40 Attorneys' fees
- § 92:43 Insurance policy for workers' compensation
- § 92:44 State Insurance Fund
- § 92:55 Practice checklists—Employer's counsel's checklist
- § 92:58 Forms—Workers' Compensation Board employee's claim for compensation (C-3)
- § 92:59 Forms—Workers' Compensation Board employer's report of work-related accident/occupational disease (C-2)
- § 92:60 Forms—Workers' Compensation Board attending doctor's report and carrier/employer billing information form (C-4)
- § 92:61 Forms—Workers' Compensation Board notice that payment of compensation for disability has been stopped or modified (C-8/8.6) [Deleted]
- § 92:62 Forms—Notice and proof of claim for disability benefits (DB-450)

## CHAPTER 93. BANK LITIGATION

### II. JURISDICTION OVER BANKS AND BANKING TRANSACTIONS

- § 93:2 Conflicts issues
- § 93:3 Forum non conveniens
- § 93:4 Jurisdiction by consent
- § 93:5 General jurisdiction
- § 93:6 Specific jurisdiction

## TABLE OF CONTENTS

- § 93:7 Subject matter jurisdiction, removal
- § 93:8 FSIA and “act of state”
- § 93:9 Extraterritorial application of New York law

### **III. BANKS AND THEIR REGULATORS**

- § 93:11 Litigation arising from bank failures

### **IV. LITIGATION BETWEEN BANKS AND BORROWERS: ISSUES OF LENDER LIABILITY**

- § 93:13 When is a commitment binding?
- § 93:14 When is an oral agreement to lend enforceable?
- § 93:15 Limitations on the lender’s right to cut off credit
- § 93:17 Liability arising from the lender’s conduct in its relationship to the borrower—Creation of fiduciary relationship
- § 93:18 Liability arising from the lender’s conduct in its relationship to the borrower—Fraud and negligent misrepresentation
- § 93:19 Liability arising from the lender’s conduct in its relationship to the borrower—Fraud in the inducement
- § 93:20 Liability arising from the lender’s conduct in its relationship to the borrower—Dominion and control
- § 93:21 Liability arising from the lender’s conduct in its relationship to the borrower—RICO

### **V. INTERBANK LIABILITY**

- § 93:22 Transaction relationships
- § 93:23 Contract and indemnity issues for the agent or lead bank
- § 93:24 Tort liability of the lead bank
- § 93:25 Liability for credit references

### **VI. BANKS AND THEIR DEPOSITORS**

#### **A. IN GENERAL**

- § 93:26 Introduction

#### **B. WHEN THE DRAWER’S SIGNATURE IS FORGED**

- § 93:27 Liability in general
- § 93:29 Defenses—Duty to examine statements
- § 93:30 Defenses—One-year limitation
- § 93:31 Defenses—Negligence

#### **C. WHEN THE INDORSEMENT IS FORGED**

- § 93:33 Liability in general
- § 93:34 Breach of warranty
- § 93:36 Defenses to forged indorsement claims—Fictitious payee defense
- § 93:37 Defenses to forged indorsement claims—Negligence
- § 93:38 Defenses to forged indorsement claims—Limitation periods

- § 93:39 Defenses to forged indorsement claims—Ratification
- § 93:41 Measure of damages

## **VII. ELECTRONIC FUNDS TRANSFERS UNDER NYUCC ARTICLE 4-A**

- § 93:42 Introduction to electronic fund transfers
- § 93:43 Initiating a funds transfer
- § 93:44 Accepting or rejecting a funds transfer
- § 93:45 Cancellation
- § 93:46 Incomplete, inaccurate, and unauthorized transfers
- § 93:47 Consequential damages
- § 93:48 Funds transfers outside of Article 4-A

## **VIII. BANKS AND THEIR CONSUMERS**

- § 93:49 Federal consumer legislation
- § 93:50 New York law
- § 93:51 Liability to consumers for “deceptive acts and practices”
- § 93:53 Confidentiality and privacy—New York law
- § 93:54 Confidentiality and privacy—Federal law
- § 93:55 Privacy and information security

## **CHAPTER 94. LETTERS OF CREDIT**

### **II. THE NATURE OF THE LETTER OF CREDIT**

- § 94:2 Unique aspects of the letter of credit

### **III. STRATEGIC LITIGATION APPROACHES AND OBJECTIVES**

- § 94:3 Preliminary considerations for lawyers
- § 94:4 For beneficiary
- § 94:6 For applicant

### **IV. TYPES OF LETTERS OF CREDIT**

- § 94:8 Standby letter of credit

### **V. PARTIES TO LETTERS OF CREDIT**

- § 94:10 Generally
- § 94:11 Issuer

### **VI. SOURCES OF LETTER OF CREDIT LAW**

#### **A. UNIFORM COMMERCIAL CODE**

- § 94:18 Generally
- § 94:19 Revised Article 5

#### **B. UNIFORM CUSTOMS AND PRACTICE FOR**

TABLE OF CONTENTS

**DOCUMENTARY CREDITS**

- § 94:22 Electronic Letters of Credit, the eUCP, versions 1, 1.1, 2.0 and 2.1 *[Retitled]*

**C. STANDBY LETTERS OF CREDIT AND GOVERNING RULES OF PRACTICE**

- § 94:23 Generally

**VII. KEY PRINCIPLES OF LETTERS OF CREDIT**

**A. THE INDEPENDENCE PRINCIPLE**

- § 94:24 Generally  
§ 94:25 The independence principle under the UCC and UCP  
§ 94:26 Policy considerations underlying the independence principle  
§ 94:27 Tension between the independence principle and the need to confirm satisfactory performance

**B. THE RULE OF STRICT COMPLIANCE**

- § 94:28 Generally  
§ 94:29 Strict compliance under the UCC  
§ 94:33 Rules of construction

**C. THE FRAUD EXCEPTION**

- § 94:34 Generally  
§ 94:37 Under the UCC and UCP  
§ 94:38 Standard for determining existence of fraud

**D. THE RULE OF TIME PRECLUSION**

- § 94:41 Generally  
§ 94:43 Time preclusion under the UCC

**VIII. REMEDIES**

- § 94:45 Remedies available to beneficiary  
§ 94:47 Remedies available for breach of duty owed by advisor

**CHAPTER 95. COLLECTIONS**

- § 95:1 Scope note  
§ 95:2 The consumer debt collection business  
§ 95:3 Allegations of abusive practices by debt collectors  
§ 95:5 A practical road map—Gather key documents  
§ 95:7 A practical road map—Interview key witnesses  
§ 95:8 A practical road map—Identify potential causes of action and potential statutes of limitations  
§ 95:11 A practical road map—Assess the client’s objectives and determine next steps  
§ 95:12 A practical road map—Determine the forum

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 95:14 A practical road map—Shortcuts for creditors
- § 95:19 The Fair Debt Collection Practices Act—Limits on communication
- § 95:20 The Fair Debt Collection Practices Act—Prohibited conduct
- § 95:21 The Fair Debt Collection Practices Act—Initial communication and validation of debts
- § 95:23 The Fair Debt Collection Practices Act—Civil liability
- § 95:26 CFPB rulemaking *[Retitled]*
- § 95:27 Developments related to COVID-19 and debt collection
- § 95:28 New York State Department of Financial Services Regulations
- § 95:29 New York State Department of Financial Services Regulations—Initial Disclosures
- § 95:32.50 New York State Department of Financial Services Regulations—Proposed Amendments *[New]*
- § 95:34 Default judgments on consumer credit card debts in New York state *[Retitled]*
- § 95:35 The Consumer Credit Fairness Act
- § 95:35.70 NYS Prohibitions on Collecting Medical Debt *[New]*
- § 95:36 The New York City Administrative Code on debt collecting
- § 95:41 Checklists—Litigation
- § 95:45 Forms—Demand letter for consumer claim
- § 95:46.50 Forms—Additional notice for consumer credit actions *[New]*
- § 95:48 Forms—Additional notice required in consumer credit action in connection with summary judgment *[New]*

# Table of Contents

## CHAPTER 96. CONTRACTS FOR SERVICES

### I. INTRODUCTION

§ 96:2 A general observation

### II. CONTRACTUAL RELATIONSHIPS

§ 96:3 Overview

§ 96:5 Implied-in-fact contracts

§ 96:8 Quasi-contract theories—Unjust enrichment

§ 96:9 Quasi-contract theories—Promissory estoppel

### III. CONTRACTS FOR EMPLOYMENT

§ 96:11 The preliminary question: Is there an employee?

§ 96:16 Employment contracts for a definite term—Implied covenant of good faith and fair dealing

§ 96:18 Employment contracts for a definite term—Non-compete clauses interpreted under foreign law

### IV. UNDERSTANDING THE AGREEMENT

§ 96:24 General rules of contract interpretation—For unambiguous agreements

### VI. DEFENSES

§ 96:31 Excuses for non-performance

### VII. DAMAGES AND OTHER RELIEF

§ 96:33 Generally

## CHAPTER 97. EMPLOYMENT RESTRICTIVE COVENANTS AND OTHER POST-EMPLOYMENT RESTRICTIONS

### II. GENERAL CONSIDERATIONS AND PREPARATION FOR LITIGATION

#### A. TYPES OF POST-EMPLOYMENT RESTRICTIONS

§ 97:7 Noncompetition provisions

- § 97:8 Nonsolicitation and nonservicing of customers
- § 97:9 Non-raid/non-hiring of employees

## **B. FACTORS TO CONSIDER IN DRAFTING COVENANTS**

- § 97:13 New York standard for enforceability
- § 97:15 How tailored is the clause?

## **C. FACTORS TO CONSIDER AS TO PURSUING DAMAGES OR INJUNCTION**

- § 97:18 Availability of injunctive relief

## **D. EMPLOYER'S PRE-LITIGATION STRATEGY AND STEPS**

- § 97:25 Securities industry rules and attorney ethics provisions

## **IV. DEFENSES AND RESPONSES**

- § 97:29 Agreement is unenforceable because overbroad in scope, duration and geographic area
- § 97:33 Reformation/"blue-penciling"
- § 97:35 Unclean hands, laches
- § 97:37 Lack of consideration
- § 97:38 Discharge and constructive discharge
- § 97:39 Protection of trade secret information and inevitable disclosure

## **VI. ISSUES CONCERNING CHOICE OF LAW**

- § 97:45 New York standard on which state's law will apply
- § 97:46 Remote employees and notes on other key states with specific nuances

## **VII. LITIGATION PRACTICE AND STRATEGIC CONSIDERATIONS**

- § 97:48 Injunctive relief application—Trial within a trial

## **CHAPTER 98. SALE OF GOODS**

### **I. PRELIMINARY CONSIDERATIONS**

- § 98:4 Scope of Article 2—Service contracts
- § 98:7 Choice of law

### **II. THE CONTRACT**

- § 98:10 Existence of contract—Battle of the forms
- § 98:12 Existence of contract—Terms supplied by the U.C.C. to fill gaps

TABLE OF CONTENTS

**III. RIGHTS AND REMEDIES UPON BREACH OF CONTRACT**

- § 98:19 Rejection of nonconforming goods
- § 98:23 Acceptance of nonconforming goods—Revocation of acceptance
- § 98:24 Acceptance of nonconforming goods—Effect of acceptance and revocation on damages
- § 98:30 Seller’s remedies—Action for the price
- § 98:32 Buyer’s remedies—Breach by anticipatory repudiation
- § 98:37 Remedies available where buyer has not accepted goods—Buyer’s incidental and consequential damages
- § 98:40 Limitation of remedies and damages
- § 98:41 Defenses to clauses limiting remedies and damages
- § 98:42 Statute of limitations

**CHAPTER 99. WARRANTIES**

**II. WARRANTIES IN GENERAL**

- § 99:8 What law governs the warranty claim—Uniform Commercial Code
- § 99:12 Choice of law—Clause in a contract of sale

**III. ESTABLISHING THE WARRANTY**

**A. EXPRESS AND IMPLIED WARRANTIES UNDER THE U.C.C.**

- 2. Express Warranties Under the U.C.C.
- § 99:16 Generally
- 3. Implied Warranties Under the U.C.C.
- § 99:21 Implied warranty of fitness for a particular purpose

**B. EXPRESS AND IMPLIED WARRANTIES AT COMMON LAW**

- § 99:24 Implied warranties

**IV. WARRANTY CLAIMS**

**A. ELEMENTS**

- 1. In General
- § 99:28 Breach of the warranty
- § 99:29 Causation
- 2. Reliance
- § 99:33 Express warranties—Under common law

3. Privity

§ 99:36 Express warranties

4. Notice of Breach and Opportunity to Cure

§ 99:38 Notice of breach

§ 99:39 Opportunity to cure

5. Damages

§ 99:41 Revocation of acceptance or rejection of the goods

**B. DEFENSES**

1. In General

§ 99:50 Modification or limitation of remedies

**CHAPTER 100. BILLS AND NOTES**

**I. INTRODUCTION**

§ 100:1 Scope note

**III. PRELIMINARY ISSUES TO INSTRUMENT'S ENFORCEMENT**

§ 100:11 Mortgage note

§ 100:12 Instruments secured by collateral

§ 100:13 Choice of law provision

§ 100:14 Consent to jurisdiction provision

**IV. TYPES OF INSTRUMENTS; NEGOTIABILITY**

**A. U.C.C. CLASSIFICATIONS**

§ 100:20 Checks

**B. NEGOTIABLE INSTRUMENTS**

§ 100:23 Generally

§ 100:24 Requirements of negotiability

§ 100:25 Holder, negotiation, and indorsement

**V. CONTRACT ISSUES**

§ 100:27 Generally; parol evidence rule

§ 100:28 Consideration

§ 100:29 Delivery

§ 100:31 Subordination

**VI. LIABILITY UNDER AN INSTRUMENT**

**A. PARTIES LIABLE**

## TABLE OF CONTENTS

- § 100:34 Drawer
- § 100:35 Drawee and acceptor
- § 100:38 Guarantor

## **VII. ENFORCING AN INSTRUMENT**

### **A. STATUTE OF LIMITATIONS; ACCRUAL OF CAUSE OF ACTION**

- § 100:43 Statute of limitations
- § 100:47 Installment instruments: Maker and acceptor
- § 100:48 Acceleration of future payments

### **B. ELEMENTS OF A PRIMA FACIE CASE**

- § 100:52 Generally
- § 100:53 Standing
- § 100:54 Signatures
- § 100:55 Signatures—Signature made by agent on behalf of principal
- § 100:56 Signatures—Unauthorized signature
- § 100:57 Production of instrument
- § 100:58 Production of instrument—Where instrument has been lost

## **VIII. HOLDER IN DUE COURSE**

- § 100:61 Elements and rights
- § 100:62 Elements and rights—Requirement that party takes instrument for value
- § 100:63 Elements and rights—Requirement of good faith; notice of claim or defense
- § 100:65 Consumer transactions

## **IX. DEFENSES TO ENFORCEMENT OF INSTRUMENT; PRECLUSION OF DEFENSES**

### **A. DEFENSES TO ENFORCEMENT OF INSTRUMENT**

- 1. “Real” Defenses
  - § 100:69 Illegality
- 2. “Discharge” Defenses
  - § 100:73 Payment or satisfaction
  - § 100:75 Cancellation and renunciation
- 3. “Impairment” Defenses
  - § 100:82 Impairment of recourse rights
- 4. Contract Defenses
  - § 100:85 Generally
  - § 100:86 Modification

- § 100:88 Economic duress
- § 100:89 Usury
- § 100:91 Usury—Payment of interest on interest

## **B. PRECLUSION OF DEFENSES**

- § 100:93 Waiver by conduct

## **X. DAMAGES**

- § 100:96 Principal
- § 100:97 Interest
- § 100:98 Attorneys' fees

# **CHAPTER 101. SECURED TRANSACTIONS**

## **II. LITIGATION STRATEGY**

- § 101:4 Litigation strategy—Initial steps

## **IV. SECURITY INTERESTS UNDER THE U.C.C.**

- § 101:15 Overview of security interests
- § 101:19 Perfection of security interests—Elements necessary to perfect

## **V. DEFAULT AND ENFORCEMENT OF SECURITY INTERESTS**

- § 101:24 Rights provided by agreement
- § 101:25 Exercise of remedies

# **CHAPTER 102. AGENCY**

## **II. NATURE, ELEMENTS, AND EXISTENCE OF AGENCY**

- § 102:6 Agency, generally
- § 102:9 Prerequisites to creation or existence of agency—Consent
- § 102:10 Prerequisites to creation or existence of agency—Control
- § 102:13 Creation of actual authority
- § 102:14 Creation of apparent authority
- § 102:15 Ratification
- § 102:17 Litigation considerations: Proving an agency—Legal, factual, and evidentiary issues

## **III. COMMERCIAL APPLICATIONS**

- § 102:22 Attorneys-in-fact and attorneys-at-law
- § 102:25 Corporations
- § 102:27.50 General contractors *[New]*
- § 102:28 Franchisors and franchisees

## TABLE OF CONTENTS

### **IV. LIABILITY ISSUES**

- § 102:32 Liability of agent to principal
- § 102:35 Liability of agent to third parties—Agent’s contract liability
- § 102:36 Liability of agent to third parties—Agent’s tort liability
- § 102:38 Liability of principal to third parties—Principal’s contract liability
- § 102:39 Liability of principal to third parties—Principal’s tort liability
- § 102:40 Liability of principal to third parties—Principal’s tort liability—Servants, agents and employees
- § 102:41 Liability of principal to third parties—Independent contractors or nonagent service providers
- § 102:42 Contractual liability of third parties

### **V. OTHER LITIGATION ISSUES**

- § 102:43 Jurisdictional issues
- § 102:44 Arbitration
- § 102:46 Imputed knowledge

## **CHAPTER 103. PARTNERSHIPS**

### **I. INTRODUCTION**

- § 103:1 Scope note
- § 103:6 Interpreting the partnership agreement
- § 103:7 Interpreting the partnership agreement—Avoiding pitfalls
- § 103:9 Personal liability of partners for judgments against the partnership

### **II. STRATEGIC CONSIDERATIONS IN PARTNERSHIP LITIGATION**

#### **A. IN GENERAL**

- § 103:11 Venue where an action may be brought
- § 103:13 Role of the formal accounting upon demand
- § 103:15 Partnership property

### **III. PARTNER VERSUS PARTNERSHIP LITIGATION**

- § 103:23 Elements of a breach-of-fiduciary-duty claim
- § 103:25 Interference with prospective advantage and interference with contract
- § 103:27 Partnership and partner liability for sexual harassment claims
- § 103:29 Contract attorneys: employees of the partnership or independent contractors

### **IV. PRACTICE AIDS**

- § 103:33 Sample jury instructions

## **CHAPTER 104. LIMITED LIABILITY COMPANIES**

### **I. INTRODUCTION**

- § 104:2 Distinctive features of LLCs
- § 104:3 Potential conflict of interest and related ethics issues

### **II. STRATEGIC CONSIDERATIONS IN LLC LITIGATION**

- § 104:4 Commencing an action against an LLC
- § 104:5 Jurisdictional issues
- § 104:6 Venue questions
- § 104:7 Choice-of-law issues arising in the foreign LLC context
- § 104:8 Choice-of-law provisions in the LLC operating agreement
- § 104:9 LLC members' right to inspect books and records
- § 104:10 LLC members' right to inspect books and records—  
Restrictions on right to inspect to books and records
- § 104:11 LLC members' right to inspect books and records—  
Consequences of a manager's refusal to provide access to  
books and records
- § 104:12 LLC members' rights to an equitable accounting
- § 104:13 LLC members' rights to an equitable accounting—Statute of  
limitations for an equitable accounting
- § 104:14 LLC members' rights to an equitable accounting—Amount in  
controversy for an equitable accounting

### **III. JUDGMENTS AGAINST AN LLC OR ITS MEMBERS OR MANAGERS**

- § 104:15 LLC members' and managers' individual liability
- § 104:16 Piercing the corporate veil
- § 104:17 Indemnification of LLC members, managers or other persons
- § 104:18 Liability for false statements in LLC articles of organization  
or certificates

### **IV. LITIGATION AMONG THE LLC AND ITS MEMBERS**

- § 104:19 Expulsion of an LLC member
- § 104:20 LLC dissolution
- § 104:21 Breach of fiduciary duty claims
- § 104:22 Disaffirmation of fiduciary duty

### **V. DERIVATIVE LAWSUITS ON BEHALF OF THE LLC**

- § 104:23 Derivative claims
- § 104:24 Derivative claims—Determining whether a claim is  
derivative or direct
- § 104:25 Derivative claims—Concurrent ownership limitation

## TABLE OF CONTENTS

- § 104:26 Derivative claims—Demand or futility requirement for LLC members' derivative suits
- § 104:27 Derivative claims—Counsel requirement
- § 104:28 Derivative claims—Mingling of derivative and direct claims

## VI. PRACTICE AIDS

- § 104:33 Sample jury instructions

## CHAPTER 105. JOINT VENTURES

- § 105:8 Joint ventures as defined by courts
- § 105:9 Joint ventures as defined by courts—An agreement manifesting the intent of the parties to be bound as joint venturers
- § 105:10 Joint ventures as defined by courts—Contributions by all the coventurers to the joint undertaking
- § 105:11 Joint ventures as defined by courts—Some degree of proprietorship and control by each coventurer
- § 105:12 Joint ventures as defined by courts—A provision or plan for the sharing of profits and losses
- § 105:13 Legal rules
- § 105:17 Legal rules—Coventurers as agents
- § 105:20 Legal rules—Dissolution

## CHAPTER 106. TRADE ASSOCIATIONS

### I. INTRODUCTION

- § 106:1 Scope note

### II. POTENTIALLY LIABLE PARTIES

- § 106:5 Officers and directors—Immunities

### III. ACTIONS AGAINST TRADE ASSOCIATIONS

- § 106:10 Antitrust—Potential plaintiffs
- § 106:11 Antitrust—Types of conduct and illegal activity
- § 106:12 Antitrust—Types of conduct and illegal activity—Price fixing
- § 106:13 Antitrust—Types of conduct and illegal activity—Bid rigging
- § 106:14 Antitrust—Types of conduct and illegal activity—Market and customer allocation
- § 106:15 Antitrust—Types of conduct and illegal activity—Membership restrictions
- § 106:16 Antitrust—Types of conduct and illegal activity—Internal policies and codes of ethics
- § 106:17 Antitrust—Types of conduct and illegal activity—Internal policies and codes of ethics—Disciplinary proceedings
- § 106:18 Antitrust—Types of conduct and illegal activity—Joint research projects
- § 106:20 Antitrust—Types of conduct and illegal activity—Standard setting and certification
- § 106:21 Antitrust—Types of conduct and illegal activity—Lobbying

- § 106:22 Antitrust—Types of conduct and illegal activity—Information sharing
- § 106:23 Products liability
- § 106:24 Products liability—Standard setting
- § 106:26 Employment and labor law

#### **IV. ACTIONS BROUGHT BY TRADE ASSOCIATIONS**

- § 106:27 In general
- § 106:28 Associational standing and capacity

#### **V. ETHICAL AND PRACTICAL CONSIDERATIONS**

- § 106:29 Conflicts of interest
- § 106:30 Attorney-client privilege and work product

#### **VI. POLITICAL ACTIVITIES**

- § 106:32 Disclosure initiatives
- § 106:33 First Amendment

#### **VII. PRACTICE AIDS**

- § 106:36 Jury instructions

### **CHAPTER 107. PRODUCTS LIABILITY**

#### **II. PRELIMINARY CONSIDERATIONS**

- § 107:4 Various types of parties involved

#### **III. JURISDICTION, CHOICE OF FORUM, AND CHOICE-OF-LAW CONSIDERATIONS**

- § 107:6 Jurisdictional issues

#### **IV. PRODUCT DEFECTS**

- § 107:11 Defects—Design
- § 107:12 Defects—Failure to warn

#### **V. CAUSATION**

- § 107:19 Medical cause of “latent” injuries

#### **VI. BASIC LEGAL THEORIES**

- § 107:22 Strict products liability
- § 107:24 Negligence claims

#### **VII. DEFENSES**

##### **A. IN GENERAL**

## TABLE OF CONTENTS

- § 107:32 Substantial modification of product after leaving manufacturers' control
- § 107:34 Plaintiff's "culpable conduct"
- § 107:35 Federal preemption of state claims

### **B. IN DESIGN DEFECT CASES**

- § 107:36 In strict liability case, product as designed was reasonably safe

## **VIII. DAMAGES**

- § 107:45 Compensatory damages

## **XII. EXPERT WITNESSES**

- § 107:55 Expert testimony—Admissibility or exclusion

## **CHAPTER 108. PERSONAL INJURY**

- § 108:4 Statute of limitations
- § 108:5 Motor vehicle accidents
- § 108:13 Motor vehicle accidents—Serious injury threshold—Pre-existing medical condition or intervening medical problem
- § 108:15 Motor vehicle accidents—Emergency doctrine
- § 108:17 Slip/trip and fall
- § 108:20 Slip/trip and fall—Notice
- § 108:21 Slip/trip and fall—Trivial defects
- § 108:23 Slip/trip and fall—Storm in progress
- § 108:24 Slip/trip and fall—Liability to police officers and firefighters
- § 108:27 Construction accidents—Covered work
- § 108:29 Construction accidents—Labor Law Section 240(1)
- § 108:32 Construction accidents—Labor Law Section 240(1)—Elevation related risks
- § 108:33 Construction accidents—Labor Law Section 240(1)—Readily available safety equipment/recalcitrant worker
- § 108:35 Construction accidents—Labor Law Section 241(6)
- § 108:40 Construction accidents—Insurance
- § 108:41 CPLR Article 16

## **CHAPTER 109. PRIVATE EQUITY**

- § 109:2 What is a private equity firm?
- § 109:6 Disputes between founders—Compensation
- § 109:11 Disputes with investors—Return on investments
- § 109:12 Disputes with investors—Alleged mismanagement of money/investment
- § 109:13 Disputes with investors—Conflicts of interest
- § 109:15 Disputes involving employees—Employee raiding/poaching
- § 109:22 Disputes involving portfolio companies—Post-closing adjustments
- § 109:24 Disputes involving portfolio companies—Fraudulent conveyance claims

- § 109:25 Disputes involving portfolio companies—Securities litigation
- § 109:26.50 Disputes involving third parties *[New]*

## **CHAPTER 110. MERGERS AND ACQUISITIONS**

### **I. INTRODUCTION**

- § 110:2 Significance of M&A litigation in New York

### **II. BASIC PRINCIPLES AND STATUTORY AUTHORIZATION**

- § 110:5 Change of control transactions defined
- § 110:6 Statutory authorization
- § 110:7 Statutory authorization—Specific business combinations
- § 110:11 Director duties—Duty of care
- § 110:12 Director duties—Duty of loyalty
- § 110:14 Standards of review—Business judgment rule

### **III. CHARACTERISTIC LITIGATION SCENARIOS**

- § 110:17 Actions by shareholders—Shareholder standing: Direct vs. derivative claims
- § 110:18 Actions by shareholders—Class actions
- § 110:20 Actions by shareholders—Claims and defenses—Price and terms
- § 110:21 Actions by shareholders—Claims and defenses—Conflicts of interest
- § 110:22 Actions by shareholders—Claims and defenses—Controlling stockholder situations
- § 110:23 Actions by shareholders—Claims and defenses—Deal protection terms
- § 110:24 Actions by shareholders—Claims and defenses—Inadequate disclosure
- § 110:25 Actions by shareholders—Claims against acquirors
- § 110:28 Actions by and against competitive bidders—Breach of fiduciary duty
- § 110:30 Actions by and against competitive bidders—Tortious interference with contract
- § 110:31 Actions by and against competitive bidders—Tortious interference with prospective contractual relations
- § 110:32 Material adverse change and “busted deal” litigation
- § 110:33 Material adverse change and “busted deal” litigation—Practical considerations and case law
- § 110:34 Confidentiality agreements, standstills, and preliminary agreements
- § 110:35 Corporate election litigation
- § 110:36 Litigation involving financial advisors
- § 110:37 Appraisal rights
- § 110:38 Appraisal rights—Practical considerations

TABLE OF CONTENTS

**IV. REMEDIES IN M&A LITIGATION**

- § 110:41 Injunctive relief—Factors influencing injunctive relief in M&A cases
- § 110:42 Specific performance
- § 110:44 Damages—Breach of fiduciary duty
- § 110:45 Damages—Breach of contract
- § 110:46 Damages—Third-party beneficiary issues

**V. FORUM CONSIDERATIONS**

- § 110:47 Practical considerations in forum selection
- § 110:50 Forum and choice of law
- § 110:51 Motions for dismissal for forum non conveniens
- § 110:52 Multi-jurisdictional merger litigation

**VI. DISCLOSURE IN M&A LITIGATION**

- § 110:53 Disclosure
- § 110:54 Privilege

**VIII. SETTLEMENT MATTERS**

- § 110:57 Settlement negotiations
- § 110:58 Settlement structures
- § 110:59 Attorneys' fees
- § 110:61 Court approval

# Table of Contents

## CHAPTER 111. VALUING A BUSINESS

### II. PRELIMINARY CONSIDERATIONS

- § 111:5 Types of valuation disputes—Appraisal proceedings under the Limited Liability Company Law
- § 111:7 Types of valuation disputes—Valuation proceedings arising from contractual agreement

### III. KEY VALUATION CONCEPTS UNDER NEW YORK LAW

- § 111:11 Valuation date
- § 111:14 Approaches and methods—Income approach
- § 111:17 Adjustments to financial statements
- § 111:18 Valuation discounts

### IV. PRETRIAL STRATEGY

- § 111:21 Choosing your expert—Does the expert have the right expertise?
- § 111:26 Obtain necessary written discovery—Discovery in BCL § 1118(b) proceedings
- § 111:27 The written valuation report

## CHAPTER 112. SECURITIES LITIGATION

### I. INTRODUCTION

- § 112:1 Scope note
- § 112:2 Preliminary considerations

### II. SECURITIES LITIGATION UNIFORM STANDARDS ACT

- § 112:3 Background
- § 112:5 Meaning of “in connection with purchase or sale” of a security
- § 112:9 Meaning of “material” misstatement or omission of fact

### III. CLASS ACTION FAIRNESS ACT

- § 112:12 Securities exclusion
- § 112:12.10 Claims Under the Securities Act of 1933 *[New]*
- § 112:12.30 Claims Under the Securities Act of 1933—Jurisdiction *[New]*

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 112:12.50 Claims Under the Securities Act of 1933—Jurisdiction—  
Basic elements of claims under the 1933 Act *[New]*
- § 112:12.70 Claims Under the Securities Act of 1933—Legislative and  
judicial developments leading to *Cyan* *[New]*
- § 112:12.80 Claims Under the Securities Act of 1933—*Cyan, Inc. v.*  
*Beaver County Employees Retirement Fund* *[New]*
- § 112:12.90 Claims Under the Securities Act of 1933—Observations  
*[New]*
- § 112:13 Effect on non-removal of cases including Securities Act  
claims

**IV. STATE LAW STATUTORY CAUSES OF ACTION**

- § 112:14 No private right of action under the Martin Act

**V. CLAIMS BY LARGE AND SOPHISTICATED INVESTORS**

- § 112:16 Breadth of evidence on motion to dismiss: Impact on  
sophisticated investors
- § 112:17 Common law legal theories in securities litigation by large  
investors
- § 112:18 Common law legal theories in securities litigation by large  
investors—Common law fraud
- § 112:19 Common law legal theories in securities litigation by large  
investors—Common law claims for negligent  
misrepresentation, breach of fiduciary duty and  
fraudulent concealment
- § 112:20.10 Mortgage-backed securities (MBS) litigation—Introduction  
*[New]*
- § 112:20.20 Mortgage-backed securities (MBS) litigation—Standing  
*[New]*
- § 112:20.30 Mortgage-backed securities (MBS) litigation—Timeliness  
*[New]*
- § 112:20.40 Mortgage-backed securities (MBS) litigation—Contractual  
sole remedy provisions *[New]*
- § 112:20.50 Mortgage-backed securities (MBS) litigation—No-action  
provisions *[New]*
- § 112:20.60 Mortgage-backed securities (MBS) litigation—Loss  
causation *[New]*

**VI. PRACTICE AIDS**

- § 112:21 Securities litigation checklist

**CHAPTER 113. SECURITIZATION AND  
STRUCTURED FINANCE**

**IV. LOAN REPURCHASE (PUTBACK) AND  
SERVICING LITIGATION**

- § 113:9 Loan repurchase claims
- § 113:11 Claims against servicers

## TABLE OF CONTENTS

- § 113:12 Commercial Division standing order
- § 113:20 Pre-suit considerations—Pre-suit notice
- § 113:24 Removal: Diversity of citizenship
- § 113:25 Statute of limitations
- § 113:26 Sampling as a method of proof

## **V. INVESTOR CLAIMS AGAINST TRUSTEES**

### **B. COMMON LAW**

- § 113:29 Contract
- § 113:30 Negligence

### **C. TRUST INDENTURE ACT**

- § 113:33 Scope

### **E. NO-ACTION CLAUSES**

- § 113:39 No-action clauses

## **VI. CDO LITIGATION**

- § 113:41 Claims among investors

## **VII. TRUSTEE INSTRUCTION PROCEEDINGS**

- § 113:44 Use in RMBS settlements

## **CHAPTER 114. DERIVATIVES**

### **I. INTRODUCTION**

- § 114:1 Scope note

### **II. THE NATURE OF DERIVATIVE PRODUCT LITIGATION**

- § 114:2 Overview
- § 114:4 Types of derivative products
- § 114:9 The ISDA
- § 114:10 The ISDA—Events of default and termination events
- § 114:11 The ISDA—“Close-out amount”
- § 114:12 The ISDA—Set-off and netting
- § 114:13 The arm’s-length relationship

### **III. PRE-LITIGATION CONSIDERATIONS**

- § 114:15 Forum selection and arbitration
- § 114:18 Statutes of limitation

## **IV. COMMON CAUSES OF ACTION AND DEFENSES**

### **A. COMMON CAUSES OF ACTION**

- § 114:19 Breach of contract
- § 114:23 General Business Law § 349

### **B. DEFENSES**

- § 114:26 Pleading standards
- § 114:27 Plain language
- § 114:29 Lack of justifiable reliance
- § 114:30 Loss causation
- § 114:32 Affirmative defenses—Waiver, ratification, and estoppel
- § 114:35 Affirmative defenses—Force majeure, impossibility, and impracticability
- § 114:36 Federal preemption

## **V. DAMAGES AND REMEDIES**

- § 114:37 Contractual damages
- § 114:38 Valuation methodology
- § 114:39 Commercial reasonableness
- § 114:43 Pre-judgment and post-judgment interest

## **CHAPTER 115. SHAREHOLDER DERIVATIVE ACTIONS**

### **I. OVERVIEW OF SHAREHOLDER DERIVATIVE ACTIONS**

- § 115:1 Scope note
- § 115:2 Preliminary considerations
- § 115:2.50 Oversight duties of directors *[New]*
- § 115:3 History and purpose of derivative actions in New York
- § 115:4 Derivative actions vs. direct actions

### **II. WHERE TO FILE AND GOVERNING LAW**

- § 115:5 Filing in state court
- § 115:7 Choice of law and the internal affairs doctrine *[Retitled]*

### **III. THE DEMAND REQUIREMENT**

- § 115:10 Making a proper demand
- § 115:12 The corporation's response to a demand
- § 115:13 Demand refusal
- § 115:14.30 Books and records demands under New York BCL Section 624 *[New]*
- § 115:14.50 Books and records demands under New York common law *[New]*

## TABLE OF CONTENTS

§ 115:14.70 Pre-action discovery pursuant to CPLR 3102(c) *[New]*

### **IV. PLEADING DEMAND FUTILITY**

§ 115:16 Demand futility under New York law

§ 115:17 *Marx v. Akers*

§ 115:18 Demand futility post-*Marx*

§ 115:19 Demand futility post-*Marx*—Post-*Marx* cases excusing demand

§ 115:20 Demand futility post-*Marx*—Post-*Marx* cases requiring demand

### **V. THE USE OF COMMITTEES IN DERIVATIVE LITIGATION**

§ 115:21 Generally

§ 115:22 Formation and character of the committee

§ 115:23 Committee investigation and decision

§ 115:24 Discovery issues for committees of the board

§ 115:25 Judicial review of committee decisions

§ 115:26 *Auerbach v. Bennett*

§ 115:27 Post-*Auerbach* review of a special committee's decision  
*[Retitled]*

### **VI. OTHER PREREQUISITES TO A SHAREHOLDER DERIVATIVE ACTION**

§ 115:28 Holder of shares at time of alleged wrong and action

§ 115:30 Adequacy of shareholder-plaintiff

### **VII. DEFENSES TO SHAREHOLDER DERIVATIVE ACTIONS**

§ 115:31 Failure to satisfy standing and pleading requirements of BCL § 626

§ 115:33 Failure to satisfy security requirements of BCL § 627

§ 115:35 Res judicata

§ 115:36 Company's certificate of incorporation bars claims

§ 115:36.50 Double and multiple derivative litigation *[New]*

## **CHAPTER 116. DIRECTOR AND OFFICER LIABILITY**

### **II. JURISDICTION AND CHOICE OF LAW**

§ 116:2 Personal jurisdiction

§ 116:3 Choice of law and the internal affairs doctrine

### **III. SHAREHOLDER DERIVATIVE ACTIONS**

§ 116:4 Derivative actions—Generally

§ 116:5 Derivative actions—Derivative claims vs. direct claims

§ 116:6 Derivative actions—Demand requirement

§ 116:10 Demand requirement—Demand refused

#### **IV. ACTIONS AGAINST DIRECTORS OR OFFICERS FOR BREACH OF FIDUCIARY DUTIES**

##### **A. IN GENERAL**

§ 116:12 Breach of fiduciary duties, generally

##### **B. DUTY OF CARE**

§ 116:14 Applicable statute

##### **C. DUTY OF LOYALTY**

§ 116:25 Specific cases—Loans

§ 116:27 Specific cases—Treatment of minority shareholders

##### **D. DUTY OF DISCLOSURE**

§ 116:34 Class actions and Securities Litigation Uniform Standards Act of 1998

#### **V. LIABILITY FOR ACTS OF CORPORATION**

§ 116:35 Generally

§ 116:37 Fraud

§ 116:38 Other torts

§ 116:39 Conversion

#### **VI. DEFENSES**

§ 116:43 BCL § 402(b) exculpation provisions

#### **VII. REMEDIES FOR BREACH OF FIDUCIARY DUTY**

§ 116:49 Statutory remedies—Involuntary dissolution under BCL § 1104-a

§ 116:55 Monetary damages—Faithless servant doctrine

### **CHAPTER 117. FIDUCIARY DUTY LITIGATION**

§ 117:3 Strategic considerations for plaintiffs—Consider choice of law

§ 117:18 Sources of law for fiduciary duties

§ 117:19 Elements of a fiduciary duty claim

§ 117:20 Prevailing fiduciary duties

§ 117:22 Types of fiduciaries—Professionals

§ 117:24 Types of fiduciaries—Directors and officers—Corporations

§ 117:25 Types of fiduciaries—Directors and officers—Not-for-profit corporations

§ 117:27 Types of fiduciaries—Directors and officers—Business judgment rule

## TABLE OF CONTENTS

- § 117:28 Types of fiduciaries—Financial institutions
- § 117:29 Types of fiduciaries—Majority stockholders of corporations
- § 117:30 Types of fiduciaries—Members of LLCs
- § 117:32 Types of fiduciaries—General and limited partnerships
- § 117:33 Types of fiduciaries—Real estate
- § 117:34 Types of fiduciaries—Non-fiduciary relationships
- § 117:36 Claims under New York law—Breach of fiduciary duty/  
statute of limitations
- § 117:40 Remedies—Equitable relief—Rescission or removal
- § 117:41 Remedies—Equitable relief—Restitution, constructive trust,  
and disgorgement
- § 117:45 Remedies—Economic damages—Punitive damages

## **CHAPTER 118. NOT-FOR-PROFIT INSTITUTION LITIGATION**

### **I. INTRODUCTION**

- § 118:3 Types of not-for-profit corporations in New York State

### **II. POTENTIALLY LIABLE PARTIES**

- § 118:6 Liabilities of directors, officers, trustees, and key persons—  
Qualified immunity
- § 118:7 Liabilities of directors, officers, trustees, and key persons—  
Derivative actions
- § 118:8 Liabilities of directors, officers, trustees, and key persons—  
The business judgment rule
- § 118:14 Successor liability

### **III. COMMENCING AN AFFIRMATIVE ACTION AGAINST A NOT-FOR-PROFIT CORPORATION**

#### **A. THEORIES OF LIABILITY**

- § 118:17 Duties of officers, directors, and key persons
- § 118:21 Duty of care—Investment decisions
- § 118:23 Duty of care—Business judgment rule
- § 118:24 Duty of loyalty
- § 118:26 Duty of loyalty—Conflicts of interest
- § 118:27 Duty of obedience
- § 118:28 Duty of obedience—Pursuing the corporate mission
- § 118:29 Derivative actions—Pleading requirements
- § 118:31 Powers of the Supreme Court

#### **C. ACTIONS BY THE ATTORNEY GENERAL**

- § 118:39 Attorney General's oversight
- § 118:40 Attorney General's oversight—Legal capacity to sue
- § 118:41 Attorney General's oversight—Notice required

## **CHAPTER 119. HEALTH CARE INSTITUTIONS**

### **I. INTRODUCTION**

- § 119:1 Scope note
- § 119:2 State government funded health care programs
- § 119:3 Strategic considerations in defending a False Claims Action
- § 119:4 Strategic considerations in defending a False Claims Action—  
Pre-intervention stage
- § 119:5 Strategic considerations in defending a False Claims Action—  
Post-intervention stage strategies

### **II. PARTIES**

- § 119:6 Potential plaintiffs
- § 119:7 Potential plaintiffs—The New York State Attorney General  
Medicaid Fraud Control Unit (NYMFCU)
- § 119:8 Potential plaintiffs—The New York Office of the Medicaid  
Inspector General (NY-OMIG)
- § 119:9 Potential plaintiffs—Qui tam plaintiffs (also known as  
relators or “whistleblowers”)
- § 119:14 Potential defendants—Substance abuse clinics

### **III. THE KEY STATUTORY SCHEMES AND CAUSES OF ACTION**

- § 119:18 Statutes that create civil causes of action for the government  
only—Social Services Law § 145-b
- § 119:20 The Federal False Claims Act
- § 119:23 The New York State False Claims Act—Qui tam actions
- § 119:26 The New York State False Claims Act—Qui tam actions—The  
first-to-file and public disclosure/original source rules
- § 119:27 The New York State False Claims Act—Interpretation
- § 119:30 The New York City False Claims Act
- § 119:33 Other causes of action—Common law unjust enrichment

### **IV. REPRESENTATIVE CASES**

- § 119:36 Cases against health care providers
- § 119:37 Cases against health care providers—Billing Medicaid for  
drugs or services that are not rendered
- § 119:38 Cases against health care providers—Billing Medicaid for  
drugs or procedures that are not medically necessary
- § 119:40 Cases against health care providers—Billing for individual  
services that should be bundled into one code (upcoding,  
unbundling or fragmentation)
- § 119:41 Cases against health care providers—Providing unlicensed  
services
- § 119:44 Cases against health care providers—Engaging in enrollment  
fraud
- § 119:46 Cases against pharmaceutical manufacturers

TABLE OF CONTENTS

- § 119:47 Cases against pharmaceutical manufacturers—Deceptive marketing practices
- § 119:48 Cases against pharmaceutical manufacturers—Off-label marketing
- § 119:49 Cases against pharmaceutical manufacturers—Failing to pay the appropriate Medicaid rebate

**CHAPTER 120. BROKER-DEALER  
LITIGATION AND ARBITRATION**

- § 120:1 Scope note
- § 120:4 Governing law and applicable rules—Federal Arbitration Act (FAA)
- § 120:6 Governing law and applicable rules—FINRA Rules
- § 120:7 Governing law and applicable rules—FINRA Rules—Application of FINRA Rules
- § 120:10 Identification of potential claims—Claims brought by customers against broker-dealers
- § 120:13 Identification of potential claims—Claims brought by broker-dealers against other broker-dealers
- § 120:15.50 Arbitration versus mediation [*New*]
- § 120:17 Arbitration versus litigation—Duty to arbitrate
- § 120:18 Arbitration versus litigation—Considerations in determining whether to arbitrate or litigate a broker-dealer dispute
- § 120:19 Arbitration versus litigation—FINRA DR Portal
- § 120:20 Arbitration versus litigation—Large Case Program
- § 120:21 Arbitration versus litigation—Expedited proceedings for seniors and seriously ill parties
- § 120:22 Selection of venue
- § 120:24 Selection of arbitrators—Arbitrator selection
- § 120:26 Initial pre-hearing conference
- § 120:27 Limitations on motions to dismiss
- § 120:29 Discovery in broker-dealer arbitrations—Discovery in customer disputes
- § 120:31 Discovery in broker-dealer arbitrations—Subpoenas, generally
- § 120:32 Discovery in broker-dealer arbitrations—Potential enforcement issues for nonparty subpoenas to a non-FINRA member or its employee or associated person
- § 120:34 Important rules in broker-dealer cases
- § 120:36 Important rules in broker-dealer cases—Effect of the six-year eligibility rule
- § 120:37 Important rules in broker-dealer cases—No arbitration for class actions
- § 120:41 Important rules in broker-dealer cases—Assert all possible claims or face preclusion
- § 120:43 Important rules in broker-dealer cases—Statutory discrimination claims
- § 120:44 Important rules in broker-dealer cases—Expungement of customer complaint information
- § 120:47 FINRA evidentiary hearing
- § 120:48 FINRA arbitration award

- § 120:50 Judicial confirmation of FINRA arbitration award—  
Procedure
- § 120:51 Judicial confirmation of FINRA arbitration award—  
Timing
- § 120:52 Judicial vacatur of FINRA arbitration award

## **CHAPTER 121. PROFESSIONAL LIABILITY**

### **III. THE ACCOUNTANT’S LIABILITY TO ITS CLIENT**

- § 121:24 Liability to client—Tax claims
- § 121:25 Liability to client—Consulting services

### **IV. SOURCES OF DUTY**

- § 121:29 Review and compilation reports

### **V. DEFENSES**

- § 121:31 Reliance and due diligence
- § 121:32 Causation
- § 121:35 Additional defenses—Statute of limitations

### **VI. MALPRACTICE CLAIMS AGAINST OTHER PROFESSIONALS**

- § 121:41 Attorneys—The “case-within-the-case”

## **CHAPTER 122. MEDICAL MALPRACTICE**

### **II. BASIC ELEMENTS OF A MEDICAL MALPRACTICE CLAIM**

- § 122:6 Informed consent
- § 122:19 Who may be held liable for malpractice—Institutional defendants
- § 122:20 Who may be held liable for malpractice—Public hospitals
- § 122:21 Who may be held liable for malpractice—Residential health care facilities
- § 122:22 Who may be held liable for malpractice—Duty to third parties

### **III. LITIGATION PROCEDURE AND STRATEGY**

- § 122:29 Commencing the litigation—Venue
- § 122:39 Discovery—Medical records
- § 122:42 Discovery—Experts
- § 122:45 Special medical malpractice issues at trial—Expert testimony

TABLE OF CONTENTS

**CHAPTER 123. FRANCHISING**

**II. SOURCES OF OBLIGATIONS**

§ 123:5 Remedies

**III. COMMON CLAIMS AND DEFENSES**

§ 123:7 Accidental franchise

§ 123:8 Breach of franchise agreement

§ 123:10 Common law fraud based on franchise sales violations

§ 123:15 Termination and non-renewal

§ 123:16 Vicarious liability

**V. PROCEDURAL CONSIDERATIONS**

§ 123:22 Statute of limitations under Franchise Sales Act

§ 123:23 Arbitration, choice of law, and choice of forum

**CHAPTER 124. ANTITRUST LITIGATION**

**I. IN GENERAL**

§ 124:2 Strategy considerations

**II. NEW YORK'S ANTITRUST LAW**

§ 124:3 The Donnelly Act

**III. ENFORCEMENT OF ANTITRUST LAW, IN GENERAL**

§ 124:9 Government enforcement of state antitrust law

§ 124:12 Government enforcement of state antitrust law—Federal-state cooperation

§ 124:14 Statute of limitations

**IV. ANTITRUST LIABILITY, IN GENERAL**

**A. KEY CONCEPTS OF ANTITRUST LIABILITY**

§ 124:15 Requirement of concerted action

§ 124:17 Per se versus rule-of-reason violations

§ 124:18 Relevant markets

**V. RECOVERY FOR ANTITRUST INJURY**

**A. IN GENERAL**

§ 124:30 Standing and antitrust injury—Antitrust injury

**VI. PLEADING AND LITIGATING NEW YORK ANTITRUST ACTIONS**

§ 124:37 Pleading antitrust claims

**CHAPTER 125. WHITE COLLAR CRIME**

**II. WHO INVESTIGATES NEW YORK STATE CRIMES**

- § 125:2 Office of the Attorney General
- § 125:3 Office of the District Attorney
- § 125:4 Department of Financial Services
- § 125:5 Regulatory or administrative departments
- § 125:6 Special prosecutors

**III. NEW YORK STATE PROCEDURE**

- § 125:10 The pretrial/indictment process—Bail considerations
- § 125:11 Discovery considerations
- § 125:15 Immunity—Grand jury proceedings
- § 125:17 Exculpatory evidence before the grand jury

**IV. NEW YORK STATE COMMERCIAL CRIMES**

- § 125:19 Financial crimes—The Martin Act: New York State securities fraud statute
- § 125:21 Financial crimes—Larceny—Penal Law Article 155
- § 125:23 Financial crimes—Bribery and rewarding official misconduct—Penal Law Article 200
- § 125:26 Financial crimes—Case examples
- § 125:27 Antitrust laws (the “Donnelly Act”)
- § 125:31 Additional financial frauds—Health care fraud
- § 125:32 Additional financial frauds—Forgery and the filing of false statements
- § 125:33 Additional financial frauds—Identity theft
- § 125:35 Crimes not involving fraud—Tax crimes
- § 125:36 Crimes not involving fraud—Computer crimes

**V. ISSUES OF PROOF AND DEFENSES UNIQUE TO NEW YORK LAW**

§ 125:46 New York’s double jeopardy clause

**VI. ORGANIZATIONAL LIABILITY FOR CRIMES**

§ 125:47 Corporate criminal liability

**VII. DISPOSITION OF CRIMINAL CASES, IN GENERAL**

§ 125:52 Sentencing

TABLE OF CONTENTS

**VIII. PRACTICE AIDS**

§ 125:56 Bail considerations checklist

**CHAPTER 126. THE INTERPLAY BETWEEN  
COMMERCIAL LITIGATION AND  
CRIMINAL PROCEEDINGS**

**I. INTRODUCTION**

§ 126:1 Scope note

**II. PARALLEL PROCEEDINGS—PRIVILEGE  
CONSIDERATIONS**

§ 126:2 Privileges

§ 126:3 Privileges—Corporate incentives to disclose privileged materials in criminal investigations

§ 126:4 Privileges—Disclosures to the government and waiver of privilege

§ 126:5 Privileges—Joint defense privilege

§ 126:8 Strategies—Establish nonadversarial relationship with the government

§ 126:9 Strategies—Request confidentiality agreement with the government

§ 126:10 Strategies—Assert the public interest privilege

§ 126:12 Strategies—Use of grand jury subpoenas

**III. FIFTH AMENDMENT**

§ 126:13 General considerations

§ 126:15 Risks of asserting the Fifth Amendment in civil proceedings

§ 126:16 Adverse inference against an individual

§ 126:17 Adverse inference against a corporation

§ 126:18 Preclusion of other relevant testimony

**IV. DISCOVERY IN PARALLEL PROCEEDINGS**

§ 126:20 General considerations

§ 126:21 Stays of civil proceedings

§ 126:22 Protective orders

§ 126:23 Discovery by the government in coordinated civil and criminal proceedings

**V. COLLATERAL ESTOPPEL**

§ 126:24 General considerations

§ 126:25 Strategic considerations

# Table of Contents

## CHAPTER 127. DECEPTIVE AND MISLEADING BUSINESS PRACTICES

- § 127:4 New York consumer protection statute legislative history
- § 127:5 New York consumer protection statute legislative history—  
Passage of GBL §§ 349 and 350
- § 127:6 New York consumer protection statute legislative history—  
Addition of a private right of action and subsequent  
amendments
- § 127:7 New York consumer protection statute legislative history—  
GBL § 349 The Consumer and Small Business Protection  
Act [*Retitled*]
- § 127:7.50 New York consumer protection statute legislative history—  
Proposed amendments to subdivisions of GBL §§ 349 and  
350 [*New*]
- § 127:8 GBL § 349
- § 127:9 GBL § 349—Elements
- § 127:10 GBL § 349—Elements—Consumer-oriented conduct
- § 127:14 GBL § 349—Other statutory requirements—“Deceptive act  
or practice”
- § 127:15 GBL § 349—Other statutory requirements—“In this state”
- § 127:16 GBL § 349—Diminished pleading requirement
- § 127:17 GBL § 349—Limitations period
- § 127:19 GBL § 349—Legal and equitable relief—Damages and  
attorneys’ fees
- § 127:22 GBL § 349—Common claims
- § 127:25 GBL § 349—More complex issues—Mortgage cases
- § 127:27 GBL § 349—More complex issues—Derivative claims
- § 127:28 GBL § 349—More complex issues—Freestanding claims
- § 127:29 GBL § 349—More complex issues—Securities cases
- § 127:32 GBL § 349—New York State Attorney General  
enforcement—Recent Internet-based deception cases
- § 127:34 GBL § 350
- § 127:35 GBL § 350—Elements
- § 127:36 GBL § 350—Illustrative cases
- § 127:37 GBL § 350—Elements of a claim by the New York Attorney  
General
- § 127:39 Select federal and state consumer protection statutes

## CHAPTER 128. FRAUD

- § 128:1 Scope note
- § 128:4 Elements of common law fraud
- § 128:6 Constructive fraud
- § 128:7 As distinct from breach of contract
- § 128:11 Pleading fraud—The standard

- § 128:13 False statements
- § 128:14 False statements—Knowledge of the false statement is critical
- § 128:18 False statements—Concealment of truth
- § 128:20 False statements—Omissions and the duty to speak
- § 128:21 False statements—Silence
- § 128:22 False statements—Statements of opinion and puffery
- § 128:23 False statements—Statement of future conduct or events
- § 128:26 Intent to deceive and induce reliance—Present vs. future intent
- § 128:29 Justifiable reliance
- § 128:30 Justifiable reliance—Sophisticated parties
- § 128:31 Justifiable reliance—Disclaimers and defendants with particular knowledge
- § 128:33 Damages—Loss causation and proximate cause
- § 128:34 Damages—Fraud with no damages
- § 128:35 Damages—Lost profits
- § 128:40 Special situations for liability—Conspiracy
- § 128:41 Special situations for liability—Aiding and abetting

## **CHAPTER 129. FRAUDULENT TRANSFER**

### **II. NEW YORK'S FRAUDULENT TRANSFER STATUTE**

- § 129:5 Legislative history

### **III. THEORIES OF LIABILITY**

- § 129:12 Constructive fraudulent transfers—Financial conditions—Insolvency

### **IV. PARTIES TO A FRAUDULENT TRANSFER ACTION**

- § 129:18 Who can pursue a claim: Present and future creditors
- § 129:19 Who can be sued for fraudulent transfer

### **V. REMEDIES**

- § 129:21 Equitable relief
- § 129:22 Provisional relief

### **VI. DEFENSES TO LIABILITY**

- § 129:27 Defenses for good-faith transferees—The meaning of “good faith”

### **VII. PROCEDURAL ISSUES**

- § 129:34 Choice of law
- § 129:37 Burdens of proof

TABLE OF CONTENTS

**VIII. ISSUES OF PROOF**

§ 129:41 The role of market data

**CHAPTER 130. NEGLIGENCE**

**II. CLAIMS**

§ 130:3 Elements

§ 130:4 Elements—Duty

§ 130:5 Elements—Duty—Foreseeability

§ 130:6 Elements—Duty—Reasonable care

§ 130:7 Elements—Duty—Nature of relationship

§ 130:8 Elements—Duty—Custom and usage

§ 130:9 Elements—Proximate cause

§ 130:10 Elements—Harm

**III. DEFENSES**

§ 130:12 Comparative negligence

§ 130:13 Assumption of risk

**IV. DAMAGES AND OTHER REMEDIES**

§ 130:14 Compensatory damages

§ 130:15 Punitive damages

**V. COMMERCIAL APPLICATIONS**

§ 130:16 Negligence versus breach of contract

§ 130:17 Negligence versus breach of contract—Negligent performance of contract

§ 130:18 Negligence versus breach of contract—Duties arising from contractual relationship

§ 130:20 Unique standards of care—Banks

§ 130:21 Unique standards of care—Corporations

§ 130:22 Fiduciary duties

§ 130:23 Duties arising by statute

§ 130:24 Professional malpractice

§ 130:25 Negligent misrepresentation

§ 130:26 Internet service providers

**VI. OTHER COMMERCIAL LIABILITY ISSUES**

§ 130:28 Contractual limitation of liability clauses and exceptions

§ 130:29 Negligence versus gross negligence

§ 130:30 Insurance coverage

**VII. LITIGATION ISSUES**

§ 130:32 Burden of proof

§ 130:33 Presumptions

§ 130:34 Use of experts

§ 130:35 Res ipsa loquitur

§ 130:36 Summary judgment

## **CHAPTER 131. THEFT OR LOSS OF BUSINESS OPPORTUNITIES**

### **I. INTRODUCTION**

§ 131:3 Preliminary considerations

§ 131:4 History and analysis

### **II. CORPORATE OPPORTUNITY CLAIMS**

#### **A. IN GENERAL**

§ 131:6 Usurpation of an “opportunity”

#### **C. REMEDIES FOR THEFT OF AN OPPORTUNITY**

§ 131:11 Damages

§ 131:12 Accounting

§ 131:13 Constructive trust

#### **D. CORPORATE OPPORTUNITY PRACTICE TIPS**

§ 131:18 Derivative vs. direct claims

§ 131:19 Choice of law

§ 131:21 Summary judgment

§ 131:23 Additional causes of action

#### **H. JURY INSTRUCTIONS**

§ 131:39 Generally

### **III. LOSS OF BUSINESS OPPORTUNITIES: TORTIOUS INTERFERENCE**

#### **A. GENERALLY**

§ 131:46.50 Preemption [*New*]

#### **B. TORTIOUS INTERFERENCE WITH EXISTING CONTRACT**

§ 131:47 Generally

§ 131:48 Existence of valid contract

§ 131:50 Interference

§ 131:51 Interference—“Intentional” and “improper”

§ 131:52 Aiding and abetting; civil conspiracy

#### **C. INTERFERENCE WITH PRE-CONTRACTUAL**

TABLE OF CONTENTS

**RELATIONS (PROSPECTIVE BUSINESS  
ADVANTAGE)**

- § 131:54 Causation
- § 131:55 Malice or illegality

**D. DEFENSES TO TORTIOUS INTERFERENCE  
CLAIMS**

- § 131:57 Economic self-interest
- § 131:58 Party cannot interfere with its own contract
- § 131:59 Limited liability of agents and attorneys
- § 131:60 Limited liability of directors, officers, and shareholders
- § 131:61 No liability for interference with the plaintiff's performance
- § 131:62 *Noerr-Pennington* defense
- § 131:64 Statute of limitations

**E. REMEDIES FOR TORTIOUS  
INTERFERENCE**

- § 131:65 Compensatory damages

**F. TORTIOUS INTERFERENCE PRACTICE  
TIPS**

- § 131:69 Pleading with particularity
- § 131:70 Burden of proving justification
- § 131:71 Standing

**CHAPTER 132. MISAPPROPRIATION OF  
TRADE SECRETS**

**I. INTRODUCTION**

- § 132:3 The Defend Trade Secrets Act of 2016
- § 132:4 Basic elements of a trade secrets claim

**II. WHAT CONSTITUTES A TRADE SECRET**

- § 132:5 General definitions
- § 132:6 Subject matter and specificity of trade secrets
- § 132:7 Basic requirements of secrecy and competitive advantage
- § 132:8 Basic requirements of secrecy and competitive advantage—  
Requirement of exclusivity of knowledge
- § 132:9 Basic requirements of secrecy and competitive advantage—  
Difficulty of acquiring or compiling the information  
independently
- § 132:10 Basic requirements of secrecy and competitive advantage—  
Plaintiff's efforts to guard the secrecy of the information
- § 132:11 Basic requirements of secrecy and competitive advantage—  
Plaintiff's investment in the information alleged to be a  
trade secret
- § 132:12 Customer lists and customer information

### **III. MISAPPROPRIATION**

- § 132:13 What constitutes misappropriation
- § 132:14 Employment and other confidential relationships
- § 132:15 Employment and other confidential relationships—Duties arising out of the employment relationship
- § 132:16 Employment and other confidential relationships—Duties arising out of other confidential relationships
- § 132:17 Use, disclosure, and inevitable disclosure
- § 132:18 Improper, unfair or wrongful means
- § 132:19 Contractual restrictions
- § 132:20 Contractual restrictions—Requirements for enforceability
- § 132:21 Contractual restrictions—Requirements for enforceability—Legitimate interests justifying enforcement
- § 132:22 Contractual restrictions—Requirements for enforceability—Reasonableness of duration, territory, and scope
- § 132:23 Contractual restrictions—Partial enforcement
- § 132:24 Contractual restrictions—Enforcement against subsequent employers
- § 132:25 Submission of ideas

### **IV. DEFENSES**

- § 132:26 Affirmative or other defenses

### **V. REMEDIES**

- § 132:28 Injunctive relief
- § 132:29 Monetary relief

## **CHAPTER 133. INTELLECTUAL PROPERTY**

### **I. INTRODUCTION**

- § 133:3 Selecting a forum
- § 133:4 Injunctive relief

### **II. TRADEMARKS**

- § 133:6 Trademark infringement
- § 133:7 Trademark-related common law unfair competition
- § 133:8 Dilution
- § 133:10 New York's consumer protection statutes
- § 133:11 Statutory trade name protection

### **IV. COPYRIGHT**

- § 133:16 Generally
- § 133:17 Nonpreempted laws
- § 133:19 Nonpreempted laws—Nonequivalent rights
- § 133:20 Transfer of copyright ownership

## TABLE OF CONTENTS

### **CHAPTER 134. LICENSING**

- § 134:4 Characteristics of licenses in particular fields—Software and technology licenses
- § 134:6 Characteristics of licenses in particular fields—Media licenses
- § 134:7 Characteristics of licenses in particular fields—Branding licenses
- § 134:8 Commonly included license terms
- § 134:12 Commonly arising procedural issues—Jury right
- § 134:13 Commonly arising procedural issues—Arbitration
- § 134:14 Commonly arising procedural issues—Standing
- § 134:16 Commonly arising substantive issues
- § 134:17 Commonly arising substantive issues—Milestones, deliverables and performance criteria
- § 134:18 Commonly arising substantive issues—Reversionary rights upon termination or breach
- § 134:20 Commonly arising substantive issues—Rights to sublicense; change in control
- § 134:22 Defenses—Licensee estoppel
- § 134:23 Damages
- § 134:24 Damages—Attorneys’ fees for prevailing party
- § 134:25 Evidence
- § 134:27 Impact of other substantive areas of the law—Patents, trademarks and copyrights

### **CHAPTER 135. FASHION AND RETAIL**

- § 135:8 Contract disputes—Manufacturing and other supply chain agreements
- § 135:9 Contract disputes—Licensing agreements
- § 135:14 Unfair competition
- § 135:16 New York General Business Law § 350 false advertisement
- § 135:17 Other claims and issues.
- § 135:17.30 New Technologies [*New*]
- § 135:17.50 Sustainability and social accountability [*New*]

### **CHAPTER 136. RIGHT OF PUBLICITY CLAIMS**

#### **I. INTRODUCTION**

- § 136:1 Scope note
- § 136:2 Historical background
- § 136:3 Historical background—Publicity and privacy rights compared
- § 136:4 Historical background—Federal court incursion into New York right of publicity law

#### **II. ASSERTING RIGHT OF PUBLICITY CLAIMS**

- § 136:6 Preliminary considerations—Choice of forum
- § 136:7 Preliminary considerations—Essential allegations

- § 136:9 Scope of statutory right
- § 136:10 Who may assert the claim
- § 136:13 Look-alikes
- § 136:14 Sound-alikes
- § 136:15 Use within the state
- § 136:16 Written consent
- § 136:17 Advertising purposes

### **III. DEFENSES**

- § 136:25 Preemption
- § 136:26 Right of publicity as a defense/counterclaim
- § 136:28 First Amendment defense

### **IV. REMEDIES**

- § 136:33 Civil relief—Exemplary damages

### **V. PRACTICE AIDS**

- § 136:35 Checklist of essential allegations

## **CHAPTER 137. PRIVACY AND SECURITY**

### **II. STRATEGIC CONSIDERATIONS**

- § 137:2 Implementing a security protocol
- § 137:4 Responding to a data or security breach—Circumstances requiring disclosure
- § 137:9 Current events

### **III. RIGHTS AND OBLIGATIONS TO THE PROTECTION OF PERSONAL INFORMATION**

- § 137:10 Overview
- § 137:11 New York statutes
- § 137:12 New York statutes—Notification required for breach of security systems
- § 137:14 New York statutes—Social Security Numbers
- § 137:15 New York statutes—Duties of employers to employees
- § 137:16 New York statutes—New York Fair Credit Reporting Act
- § 137:18 Federal laws
- § 137:19 Federal laws—Consumer reporting agencies and users of consumer reports
- § 137:20 Federal laws—Financial institutions
- § 137:23 Federal laws—Health care entities—American Recovery and Reinvestment Act
- § 137:24 Various states' privacy and security statutes

### **IV. POTENTIAL CAUSES OF ACTION**

- § 137:25 Overview
- § 137:26 Breach of contract

## TABLE OF CONTENTS

- § 137:27 Negligence
- § 137:30 Privacy: Public disclosure of embarrassing private facts

## **VI. INSURANCE**

- § 137:38 Overview

## **VII. DISCOVERY**

- § 137:39 Production requests involving private information
- § 137:43 Experts: Qualifications for data security expert

## **VIII. DAMAGES**

- § 137:44 Compensatory damages

## **CHAPTER 138. COMMERCIAL DEFAMATION**

### **I. INTRODUCTION**

- § 138:4 Preliminary considerations—Long-arm jurisdiction
- § 138:5 Preliminary considerations—Federal Communications Decency Act preemption
- § 138:9 Commercial defamation and product disparagement compared

### **II. COMMERCIAL DEFAMATION**

- § 138:12 Defamatory meaning
- § 138:15 Falsity—Opinion
- § 138:19 Statement is “of and concerning” plaintiff
- § 138:22 Degree of fault—Actual malice standard
- § 138:24 Defenses and privileges

### **III. PRODUCT DISPARAGEMENT**

- § 138:27 Elements of a product disparagement (trade libel) claim

### **IV. RELATED CLAIMS**

- § 138:31 Injurious falsehood
- § 138:34 SLAPP suits

## **CHAPTER 139. E-COMMERCE**

- § 139:2 New York law and e-commerce
- § 139:4 General jurisdiction
- § 139:5 General jurisdiction—Defining “continuous and systematic” New York presence
- § 139:6 General jurisdiction—The “solicitation-plus” requirement
- § 139:7 Specific jurisdiction
- § 139:8 Specific jurisdiction—“Transacting business” online
- § 139:10 Specific jurisdiction—Tortious acts—Committed within the State

## COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

- § 139:11 Specific jurisdiction—Tortious acts—Committed outside of New York causing injury in the State
- § 139:12 Specific jurisdiction—Ownership, use, or possession of real property within the State
- § 139:13 Practical considerations in litigating jurisdictional issues
- § 139:14 Venue and inconvenient forum
- § 139:17 Contract formation
- § 139:18 Contract formation—Offer and acceptance
- § 139:20 Contract formation—Offer and acceptance—Clickwrap contracts
- § 139:21 Contract formation—Offer and acceptance—Browsewrap contracts
- § 139:23 Contract formation—Electronic communications and the Statute of Frauds
- § 139:24 Contract formation—New York Electronic Signatures and Records Act
- § 139:25 Contract formation—Electronic signatures after COVID-19  
*[Retitled]*
- § 139:26 Advertising and marketing
- § 139:27 Advertising and marketing—“Spamming,” “spoofing,” “dark patterns,” and “astro-turfing” *[Retitled]*
- § 139:28 Advertising and marketing—Online auctions, adware, and pop-ups
- § 139:29 Advertising and marketing—Application of other established law to online marketing
- § 139:30 Advertising and marketing—Practical considerations
- § 139:31 New Internet legislation
- § 139:32 Business torts
- § 139:33 Business torts—Defamation
- § 139:34 Business torts—Defamation—Publication on the Internet
- § 139:35 Business torts—Defamation—Anonymity on the Internet
- § 139:36 Business torts—Defamation—Publishers of Internet defamation
- § 139:37 Data breach and related torts
- § 139:38 Data breach and related torts—Conversion and trespass
- § 139:39 Data breach and related torts—Unfair competition, misappropriation of trade secrets, and breach of fiduciary duty
- § 139:40 Data breach and related torts—NYAG investigations  
*[Retitled]*
- § 139:41 Data breach and related torts—Data breach legislation

## CHAPTER 140. SOCIAL MEDIA

### I. INTRODUCTION

- § 140:1 Scope note
- § 140:2 What is social media
- § 140:3 Some principal sites
- § 140:4 Glossary of terms

### II. IMPACT ON LEGAL ETHICS

- § 140:5 General duty to know

## TABLE OF CONTENTS

- § 140:6 Advertising
- § 140:7 A communication can be a solicitation
- § 140:8 Interaction with jurors
- § 140:9 Use by jurors
- § 140:10 Interactions with judges
- § 140:10.50 Confidential information stored on smartphones *[New]*

### III. USE IN CASE PREPARATION

- § 140:11 Ethics of using social media in discovery
- § 140:12 Investigation prior to commencement of the action
- § 140:13 Duty to preserve social media information
- § 140:14 Service of process and jurisdiction
- § 140:15 Obtaining disclosure from service providers
- § 140:17 Privacy concerns limiting disclosure obligations
- § 140:19 Pre-complaint disclosure
- § 140:20 Authentication of evidence

### IV. SOCIAL MEDIA AND THE COURTS

- § 140:21 Overview
- § 140:23 Actions against internet service providers based on content
- § 140:23.50 New gambling concerns *[New]*
- § 140:24 Harassment claims
- § 140:25 Employment litigation
- § 140:27 First Amendment implications

### V. CONTRACTUAL, PROPERTY, AND REGULATORY ISSUES

- § 140:28 Contractual limitations
- § 140:29 Who owns social media content
- § 140:30 Data tracking
- § 140:31 Federal regulation of social media use
- § 140:32 Federal regulation of social media use—Financial Industry Regulatory Authority (FINRA)
- § 140:33 Federal regulation of social media use—Federal Trade Commission (FTC)
- § 140:35 Insurance
- § 140:36 The right to be forgotten
- § 140:37 The GDPR and CCPA

## CHAPTER 141. INFORMATION TECHNOLOGY LITIGATION

### II. PRELIMINARY CONSIDERATIONS IN LITIGATING IT DISPUTES

#### A. IT SYSTEM/SOFTWARE FAILURE DISPUTES

- § 141:9.50 Amendment to Commercial Division Rules *[New]*

**D. SOFTWARE LICENSING DISPUTES**

§ 141:17 Generally

**III. IT LITIGATION CLAIMS**

- § 141:20 Account stated
- § 141:21 Fraud
- § 141:23 Negligent misrepresentation
- § 141:26 Other potential claims

**IV. DEFENSES**

- § 141:31 Closure or contractual statute of limitation provisions
- § 141:32 Fraud/fraudulent inducement claims barred by the merger/integration clause
- § 141:37.50 Claims barred by commercial reasonableness *[New]*

**VI. OTHER CONSIDERATIONS**

- § 141:41 Discovery
- § 141:44.50 Trial testimony considerations *[New]*

**CHAPTER 142. GOVERNMENTAL ENTITY LITIGATION**

**II. IMMUNITIES**

- § 142:6 Sovereign immunity—Standards by which a court will determine that the state or congress has waived the state's sovereign immunity
- § 142:7 Sovereign immunity—The state's sovereign immunity in foreign forums
- § 142:8 Eleventh Amendment immunity
- § 142:10 Governmental immunity—Scope of governmental functions
- § 142:11 Governmental immunity—Liability for a duty imposed through a special relationship
- § 142:12 Governmental immunity—Ministerial functions versus discretionary functions
- § 142:15 Absolute and qualified privileges from defamation liability—Application of an absolute privilege versus a qualified privilege

**III. COMMENCING AN AFFIRMATIVE DAMAGES ACTION AGAINST NEW YORK STATE**

**A. SUBJECT MATTER JURISDICTION FOR AFFIRMATIVE DAMAGES CLAIMS AGAINST THE STATE**

- § 142:22 A comparison of the Court of Claims' jurisdiction with the New York State Supreme Court's jurisdiction over Article 78 proceedings

TABLE OF CONTENTS

**IV. COMMENCING AN AFFIRMATIVE DAMAGES ACTION AGAINST A NEW YORK PUBLIC CORPORATION**

- § 142:41 Notice of claim—Accrual
- § 142:44 Notice of claim—Form and contents of a notice of claim

**V. OTHER CONSIDERATIONS**

- § 142:51 Obtaining discovery from a governmental entity
- § 142:52 Bringing a civil rights claim against a governmental entity or actor in New York State court
- § 142:56 Right to attorneys' fees and costs for claims brought against a governmental entity, officer or employee

**VI. PRACTICE AIDS**

- § 142:63 Forms—Claim

**CHAPTER 143. CPLR ARTICLE 78  
CHALLENGES TO ADMINISTRATIVE DETERMINATIONS**

**II. OVERVIEW**

- § 143:2 Generally

**III. COMMENCEMENT**

- § 143:5 Parties

**IV. SPECIAL FEATURES AND COMMON DEFENSES**

- § 143:9 Statute of limitations
- § 143:13 Venue—Original proceedings in the Appellate Division

**V. STANDARDS GOVERNING JUDICIAL REVIEW**

- § 143:14 Scope of review, generally
- § 143:17 Deference to an agency's interpretation of a statute
- § 143:18 An agency's authority to promulgate regulations
- § 143:19 The "*Field Delivery* doctrine"—Restrictions on when an agency can change course

**VI. APPELLATE CONSIDERATIONS**

- § 143:21.50 Stay [*New*]

# Table of Contents

## CHAPTER 144. TAX

### I. INTRODUCTION

§ 144:1 Scope note

### II. THE NEW YORK TAX LAW

§ 144:5 Litigation involving “trust” taxes

### III. LITIGATION IN THE ADMINISTRATIVE AGENCY

#### A. IN GENERAL

§ 144:7 Appearing before the Department of Taxation and Finance

#### B. THE AUDIT AND CONFERENCE STAGE

§ 144:8 The audit process

§ 144:9 The statutory notice

§ 144:13 Using the Freedom of Information Law

#### C. TAX LITIGATION IN THE DIVISION OF TAX APPEALS

§ 144:15 Practical considerations

§ 144:16 Burden of proof

§ 144:18 The pleadings—The petition

§ 144:19 The pleadings—The answer

§ 144:20 The pleadings—The reply

§ 144:21 The pleadings—Amended pleadings

§ 144:28 Other procedural tools—Bills of particulars

§ 144:30 Other procedural tools—Discovery, depositions and subpoenas

§ 144:33 Conduct of hearings

§ 144:34 Conduct of hearings—Hearing memoranda

§ 144:47 Small claims hearing process

### IV. TAX LITIGATION IN THE COURTS

#### A. ARTICLE 78 REVIEW OF TRIBUNAL DECISIONS

§ 144:48 Overview

§ 144:65 Standard of review—Special rules—Exclusion vs. exemption

**B. ARTICLE 78 PROCEEDINGS IN SUPREME COURT AND OTHER COURT ACTIONS**

§ 144:74 Declaratory judgment actions in Supreme Court

§ 144:90 Actions commenced by taxpayers

**V. PRACTICE AIDS**

§ 144:98 Forms—Request for Conciliation Conference (Form CMS-1)

**CHAPTER 145. COMMERCIAL REAL ESTATE**

**III. CONTRACT FORMATION ISSUES**

**A. GENERAL**

§ 145:3 Elements of a real estate sales contract, generally

§ 145:4 Terminology

§ 145:5 Essential, additional, and missing terms

**C. ADDITIONAL TERMS**

§ 145:9 Time of payment

§ 145:10 Attorney approval contingency clause

§ 145:12 License, zoning, and permit contingency clause

**D. STATUTE OF FRAUDS**

§ 145:13 Basic requirements

§ 145:14 Partial performance exception

**E. RECORDING**

§ 145:16 Risks of not recording

**IV. CONTRACT DEFAULTS OR BREACHES**

§ 145:19 Common purchaser issues—Changed economics

§ 145:21 Common seller issues

§ 145:23 Seller remedies—Damages

**V. FINANCING ISSUES**

**A. TYPES OF DEBT AND LOAN AGREEMENTS**

§ 145:34 Mortgages

§ 145:35 Mezzanine loans

§ 145:36 Inter-creditor agreements

**B. MATURITY OF INDEBTEDNESS,**

TABLE OF CONTENTS

**REMEDIES, AND LENDER LIABILITY**

- § 145:37 Maturity of indebtedness
- § 145:38 Mortgage foreclosure
- § 145:39 Uniform Commercial Code proceedings to foreclose loans

**VI. TITLE AND LIEN DISPUTES**

**A. GENERAL**

- § 145:41 Definition
- § 145:42 Lien creation
- § 145:43 Equitable liens
- § 145:44 Rights created by a lien

**B. COMMON LIEN TYPES**

- § 145:45 Mortgage lien
- § 145:46 Judgment creditor liens
- § 145:47 Mechanic's liens
- § 145:48 Tax lien

**C. LIEN PRIORITY ISSUES**

- § 145:49 Lien duration
- § 145:50 Title insurance claims
- § 145:51 Actions to quiet title

**VII. MISCELLANEOUS ISSUES**

- § 145:55 Adverse possession

**CHAPTER 146. VALUATION OF REAL PROPERTY**

**II. KEY CONCEPTS**

- § 146:3 Valuation date
- § 146:4 Property use

**IV. EVIDENTIARY ISSUES**

- § 146:13 Appraisal reports

**V. TYPES OF VALUATION DISPUTES**

- § 146:38.50 Use and occupancy *[New]*
- § 146:39 Other types of commercial actions involving property valuation

## **CHAPTER 147. LAND USE REGULATION**

### **I. INTRODUCTION**

§ 147:4 Preliminary considerations—Cost-benefit analysis of SEQRA review

### **II. ZONING BOARDS OF APPEAL**

§ 147:8 Variances

§ 147:9 Variances—Area variances

§ 147:10 Variances—Area variances—Effect on character of neighborhood

§ 147:11 Variances—Area variances—Alternative methods

§ 147:12 Variances—Area variances—Substantiality of variance

§ 147:13 Variances—Area variances—Adverse impact on physical or environmental conditions

§ 147:14 Variances—Area variances—Self-created hardship

§ 147:16 Variances—Use variances—No reasonable return

§ 147:20 Nonconforming uses

§ 147:21 Special use permits

### **III. LAND USE ACTIONS UNDER ARTICLE 78**

§ 147:23 Standing

§ 147:24 When to bring the proceeding?

§ 147:26 SEQRA

### **IV. HYBRID PROCEEDINGS**

§ 147:32 Declaratory judgments

§ 147:33 Declaratory judgments—Exhaustion requirement

§ 147:34 Section 1983 actions

### **V. LIMITATIONS ON THE ENFORCEMENT AND ENACTMENT OF ZONING ORDINANCES**

§ 147:45 First Amendment

## **CHAPTER 148. COMMERCIAL LEASING**

### **I. INTRODUCTION**

§ 148:1 Scope note

### **II. PRELIMINARY CONSIDERATIONS**

§ 148:2 Factors to evaluate

### **III. CONTRACT FORMATION ISSUES**

#### **A. GENERAL**

§ 148:3 Commercial leases

## TABLE OF CONTENTS

- § 148:5 Bilateral obligations
- § 148:6 Essential, additional and missing terms
- § 148:7 Modification, rescission and waivers
- § 148:9 Exercising options—Tenant’s option to renew the lease
- § 148:10 Exercising options—Tenant’s option to renew the lease—  
Improvements, modifications of the property made by  
tenant during the tenancy of the lease
- § 148:11 Exercising options—Tenant’s option to purchase
- § 148:12 Exercising options—Option to terminate
- § 148:14 Providing notice
- § 148:15 Forum and venue

### **B. NECESSARY TERMS**

- § 148:16 Parties
- § 148:18 Lease term
- § 148:19 Rent
- § 148:20 Rent—Rent escalation clauses
- § 148:21 Rent—Rent acceleration clauses

### **C. ADDITIONAL TERMS**

- § 148:23 Permitted uses
- § 148:24 Assignments and subleases
- § 148:25 Repairs and maintenance
- § 148:26 Arbitration as an alternative to court

### **D. DEFENSES TO LEASE ENFORCEABILITY**

- § 148:27 Statute of frauds
- § 148:28 Unconscionability
- § 148:29 Statute of limitations
- § 148:30 Fraudulent inducement
- § 148:31 Force majeure
- § 148:32 Other defenses

## **IV. BREACHES OF LEASE; RIGHTS AND REMEDIES**

### **A. BREACHES; NOTICE**

- § 148:33 Warranties, covenants and representations
- § 148:34 Good faith and fair dealing
- § 148:35 Nonpayment
- § 148:36 Improvements, maintenance and repairs
- § 148:37 Possession
- § 148:38 Eminent domain
- § 148:39 Notices to cure, late notices and termination notices

### **B. LANDLORD’S REMEDIES**

- § 148:40 Holdover proceedings
- § 148:41 Nonpayment proceedings

§ 148:43 Landlord's damages

### **C. TENANT'S REMEDIES**

§ 148:44 *Yellowstone* injunction

§ 148:46 Tenant's damages

### **V. PRACTICE AIDS**

§ 148:53 Sample provisions of a commercial lease

## **CHAPTER 149. CONSTRUCTION DISPUTE RESOLUTION**

### **II. PRELIMINARY CONSIDERATIONS IN APPROACHING CONSTRUCTION DISPUTES**

#### **B. DETAILED CONSIDERATIONS IN ADJUDICATING CONSTRUCTION DISPUTES**

§ 149:6 Notice requirements and dispute resolution procedures

§ 149:7 "No damage for delay" provisions

§ 149:8 Liquidated damage provisions

§ 149:9 "Differing site conditions" clauses

§ 149:10 Performance bonds and payment bonds

§ 149:11 Periods of limitations

§ 149:13 Subcontracts and subcontract issues

§ 149:14 Trust-fund rights under Article 3-A of New York Lien Law

§ 149:15 Mechanic's liens

§ 149:16 "Pay when paid" provisions and prompt payment requirements

§ 149:17 Scope of duties owed by architects, other design professionals, and construction managers

§ 149:21 Termination of construction contracts

§ 149:22 Rescission

§ 149:23 Damages for breach of contract

§ 149:24 Damages for owner's breach

## **CHAPTER 150. PROJECT FINANCE AND INFRASTRUCTURE**

### **I. INTRODUCTION**

§ 150:1 Scope note

§ 150:2 Overview and preliminary considerations

### **II. INFRASTRUCTURE LITIGATION**

§ 150:3 Select litigation issues

§ 150:4 Select damages issues

## TABLE OF CONTENTS

- § 150:5 Select issues involving Article 78 proceedings
- § 150:6 New York State Freedom of Information Act Discovery

### **III. NEW YORK STATE AGENCIES INVOLVED IN INFRASTRUCTURE PROJECTS**

- § 150:7 State public benefit corporations
- § 150:8 State public benefit corporations—New York State Thruway Authority
- § 150:9 State public benefit corporations—Metropolitan Transportation Authority
- § 150:10 State public benefit corporations—New York City Transitional Finance Authority
- § 150:11 Other state entities—Port Authority of New York and New Jersey
- § 150:12 Other state entities—Public Service Commission
- § 150:12.50 Other state entities—Gateway Development Commission *[New]*
- § 150:13 Other state entities—Infrastructure Bank
- § 150:14 Public Authorities Control Board (PACB) review
- § 150:15 Public Authorities Control Board (PACB) review—Urban Development Corporation
- § 150:16 Public Authorities Control Board (PACB) review—State Project Finance Agency

### **IV. PROJECT FINANCE TRENDS IN NEW YORK STATE**

- § 150:18 Private financing trends

### **V. INFRASTRUCTURE PROJECTS: THE BIDDING PROCESS**

- § 150:19 Statutory requirements
- § 150:21 Exceptions—Emergency contracts
- § 150:24 Advertisements for bids—Requirements for proposals
- § 150:25 Advertisements for bids—Change orders
- § 150:26 Advertisements for bids—Modification or withdrawal of bid
- § 150:28 Acceptance of bid and award of contract—Right to challenge
- § 150:29 Acceptance of bid and award of contract—Rejection of bids
- § 150:30 Acceptance of bid and award of contract—Public work and purchase contracts
- § 150:31 Acceptance of bid and award of contract—Lowest responsible bidder

### **VI. INFRASTRUCTURE CONTRACTS**

- § 150:32 Select contract provisions
- § 150:33 Select contract provisions—Project labor agreements
- § 150:34 Select contract provisions—Notable contract terms in New York State

### **VII. PRACTICE AIDS**

- § 150:36 Sample project labor agreement provisions

- § 150:40 Sample project labor agreement provisions—Union referral procedures
- § 150:41 Sample project labor agreement provisions—Hours of work, premium payments, shifts and holidays
- § 150:42 Sample project labor agreement provisions—Wages and benefits
- § 150:43 Sample project labor agreement provisions—Expiration of contract agreements
- § 150:44 Sample project labor agreement provisions—Apprentice ratios

## **CHAPTER 151. ENTERTAINMENT**

### **III. CAUSES OF ACTION**

- § 151:12 Breach of contract
- § 151:16 Statutory right to privacy—Causes of action pursuant to §§ 50 and 51
- § 151:21 Defamation

## **CHAPTER 152. GAMING**

- § 152:6 Constitutional framework—Amendments to Article I § 9
- § 152:11 Statutory framework—Federal Indian Gaming Regulatory Act
- § 152:14 Statutory framework—State-run lottery
- § 152:24 Casino gaming—Article 13 of the Racing, Pari-Mutuel Wagering and Breeding Law
- § 152:28 Fantasy sports betting—Racing, Pari-Mutuel Wagering and Breeding Law
- § 152:29 Fantasy sports betting—*White v. Cuomo*
- § 152:30 Fantasy sports betting—*Daily Fantasy Sports* MDL
- § 152:31.50 Fantasy sports betting—Mobile sports betting [*New*]
- § 152:31.70 Fantasy sports betting—Legalization of mobile sports betting [*New*]
- § 152:31.90 Fantasy sports betting—iGaming [*New*]

## **CHAPTER 153. SPORTS**

### **I. INTRODUCTION**

- § 153:1 Scope note

### **II. CONTRACT**

- § 153:4 Contract disputes between teams within a league or between the league and specific teams
- § 153:5 Player-team contract disputes
- § 153:6 Professional player-participant injury disputes barred by contract
- § 153:7 Agent relations
- § 153:9 Contracts with ticketholders and fans—Impact of COVID-19

TABLE OF CONTENTS

**IV. INTELLECTUAL PROPERTY**

- § 153:16 Player publicity (collegiate or semi-professional sports)
- § 153:18 Disputes involving the New York State Athletic Commission
- § 153:19 “Fantasy sports” litigation

**CHAPTER 154. ENERGY**

**I. INTRODUCTION**

- § 154:1 Scope note

**II. STRATEGY AND PRELIMINARY CONSIDERATIONS**

- § 154:2 Assessing the case
- § 154:5 Experts

**III. GOVERNMENT REGULATION**

- § 154:7 Federal agencies and organizations
- § 154:8 Litigating against state and local regulating agencies and organizations
- § 154:9 State and local agencies and organizations

**IV. CAUSES OF ACTION**

- § 154:11 Regulatory takings
- § 154:12 Regulatory takings—Total takings
- § 154:14 Breach of contract
- § 154:15 Public and private nuisance
- § 154:16 Trespass
- § 154:23 Federal displacement of state law causes of action

**V. SPECIFIC LITIGATION ISSUES**

- § 154:26 Hydraulic fracturing—New York State’s fracking ban
- § 154:29 Hydraulic fracturing—Cross-border trespass claims
- § 154:30 Hydraulic fracturing—Nuisance claims
- § 154:31 Hydraulic fracturing—Toxic tort claims
- § 154:32 Hydraulic fracturing—Claims related to seismic activity
- § 154:36 Hydraulic fracturing—Underground injection of wastewater
- § 154:38 Electric transmission siting—Article VII of the New York Public Service Law
- § 154:39 Electric transmission siting—Energy Policy Act of 2005
- § 154:40 Natural gas/oil pipeline siting
- § 154:41 Rate disputes
- § 154:42 Nuclear generation concerns—Federal and state level regulatory scheme
- § 154:43 Nuclear generation concerns—Regulations
- § 154:44 Nuclear generation concerns—Regulations through state legislation
- § 154:45 New York City/Long Island load pocket issues

## **VI. PROCEDURAL ISSUES**

- § 154:50 Jurisdiction—Potential grounds for federal court jurisdiction—Federal question jurisdiction
- § 154:52 Jurisdiction—Potential grounds for federal court jurisdiction—Forum non conveniens

## **CHAPTER 155. ENVIRONMENTAL AND TOXIC TORT LITIGATION**

### **I. INTRODUCTION**

#### **B. THE ENVIRONMENTAL REGULATORY STRUCTURE IN NEW YORK**

##### **1. Agencies**

- § 155:6 State agencies

### **II. GOVERNMENTAL ENFORCEMENT AND STATUTORY CLAIMS ARISING OUT OF THE CONTAMINATION OF THE ENVIRONMENT**

#### **A. OVERVIEW**

- § 155:13 Government enforcement and litigation under environmental statutes, generally

#### **B. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)**

- § 155:19 New York's inactive hazardous waste site cleanup statute

#### **C. OTHER ENVIRONMENTAL LAWS**

- § 155:21 The Oil Spill Act

### **III. TOXIC TORTS: PRIVATE LITIGATION BASED ON CLAIMS OF PERSONAL INJURY AND PROPERTY DAMAGES CAUSED BY THE RELEASE OF TOXIC SUBSTANCES OR POLLUTANTS**

#### **B. CAUSES OF ACTION**

##### **2. Negligence**

- § 155:38 Generally
- § 155:39 Strict liability

#### **C. DEFENSES**

TABLE OF CONTENTS

§ 155:49 Causation, product identification

**E. LITIGATION**

§ 155:62 Scientific and expert testimony: *Frye vs. Daubert*

**IV. ENVIRONMENTAL IMPACT AND LAND USE LITIGATION**

**B. THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)**

§ 155:66 Procedural overview

§ 155:68 Agency compliance with procedure

§ 155:69 Agency compliance with the hard look standard

§ 155:71 Standing

**CHAPTER 156. AN OVERVIEW OF SURROGATE'S COURT PRACTICE FOR THE COMMERCIAL LITIGATOR**

**I. INTRODUCTION**

§ 156:2 Strategy, objectives, and preliminary considerations

**II. PROBATE JURISDICTION**

§ 156:3 Subject matter jurisdiction of the Surrogate's Court

§ 156:4 Matters relating to estates and the affairs of decedents

§ 156:6 Probate exception to federal jurisdiction

§ 156:7 Personal jurisdiction

§ 156:9 Venue and objections to jurisdiction

**IV. PARTIES**

§ 156:17 Standing

**V. FIDUCIARY POWERS AND RESPONSIBILITIES**

§ 156:22 Duty of prudent investment

§ 156:23 Duty of co-fiduciaries

§ 156:24 Duty to account

§ 156:26 Penalties for fiduciary misconduct

**VI. PROBATE PROCEEDINGS**

§ 156:28 Admission of will to probate

**VII. CLAIMS PROCEEDINGS**

§ 156:36 Claims for attorneys' fees against the estate

**VIII. OTHER PROCEEDINGS AND PROCEDURAL PROVISIONS OF INTEREST**

- § 156:37 Turnover and reverse discovery proceedings *[Retitled]*
- § 156:38 Proceeding by fiduciary to continue decedent's business
- § 156:39 Construction proceedings