COMMERCIAL DIVISION BEST PRACTICES

Know the Law, Know the Rules, Know Your Judge

By Matthew D. Donovan and Viktoriya Liberchuk

We all know that understanding the law is a first step to good lawyering. But understanding what the particular judge assigned to your case likes and dislikes, and which of the judge's individual practice rules are *sine qua non*, is just as important for your success as an advocate for your client.

On June 14, 2019, the New York State Bar Association's Commercial and Federal Litigation Section held a bench-and-bar program at the Westchester County Courthouse, which featured Westchester Commercial Division Justices—Hon. Linda Jamieson and Hon. Gretchen Walsh. The Section's bench-and-bar programs are designed to provide a forum for practitioners to hear from and speak with Commercial Division Justices about best practices and rules in the Commercial Division. The format of the program was an informal question–and–answer session between the judges and moderators, and included questions from the audience as well. More than 70 attendees were on hand to listen to what the Justices had to say. Below is a summary of some of the topics discussed:

Junior Associates and/or Less Experienced Attorneys

There has been a recent trend of federal and Commercial Division judges allowing oral argument, when they otherwise would not have, if a junior or less experienced attorney would argue the motion. Both Justice Jamieson and Justice Walsh commented that they like to see young attorneys (especially young women attorneys) argue in their courtroom. Justice Walsh indicated that she is contemplating amending her rules to reflect the recent trend and permit oral argument if counsel identifies a lawyer out of law school five years or less who would argue the motion. Justice Jamieson took a similar stance and reiterated that senior attorneys should give junior attorneys a chance to speak in court. The Justices both added the caveat, however, that if they allow oral argument on a motion, which they usually do not, the decision will not be based solely on oral argument, thus alleviating some of the

concerns senior attorneys may have in permitting younger attorneys to argue in court.

Commercial Division Rule 19-a Statements of Material Fact

The consensus among the Justices was that they generally like Rule 19-a Statements on motions for summary judgment, which should contain only undisputed facts. Both Justice Walsh and Justice Jamieson indicated that Rule 19-a Statements are important because the parties provide references (or at least should provide references) to specific documents, etc. in the record to support each statement. Interestingly, this opinion appears to be contrary to what certain New York County Commercial Division Justices remarked at the June 5 NYSBA panel entitled Motion Practice Before the Commercial Division. At that panel, certain Justices commented that they prefer parties to submit joint (as opposed to separate) 19-a Statements, indicating that if the parties cannot agree on "undisputed facts," the 19-a Statements are not helpful. Some even expressed their preference to dispense with Rule 19-a Statements altogether.

Length of Papers

As of October 1, 2018, Commercial Division Rule 17 changed the length guidelines for briefs from 25 pages to 7,000 words, and reply briefs from 15 pages to 4,200 words. The rule provides that every brief must include a "certification by the counsel who has filed the document describing the number of words in the document." For those keeping score at home, if a document has standard margins and font, 7,000 words is approximately 23 pages. Irrespective of the specific language of the Rule, both Justice Walsh and Justice Jamieson expressed their support for the spirit of the Rule by emphasizing that lawyers need to keep their briefs short and concise and refrain from being repetitive.

Commercial Division Rule 3 and Presumptive ADR

Commercial Division Rule 3 permits the court to direct counsel to seek a mediator to resolve all or some of the issues in the litigation. Additionally, Rule 10 requires counsel for all parties to submit to the court at each conference a statement certifying that counsel has discussed with their clients the availability of alternative dispute resolution, and stating whether the party is willing to pursue litigation. In May 2019, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks continued this ADR trend by announcing the implementation of a statewide "Presumptive, Early Alternative Dispute Resolution" ("Presumptive ADR") program for civil cases, which is expected to begin in September 2019. This program is intended to encourage settlement and/or the narrowing of issues in a particular case, leading to quicker resolution at the outset. Both Justice Jamieson and Justice Walsh are in favor of Presumptive ADR. Justice Walsh commented that the Advisory Committee on ADR is still figuring out which types of cases should go to Presumptive ADR, noting that it may be better suited for certain types of cases.

Pet Peeves

Both Justices emphasized the importance of being courteous and professional. Justice Jamieson indicated that her biggest pet peeve is when the attorneys before her begin to argue with each other instead of addressing the court. Justice Walsh stated that if the attorneys are not courteous and cannot agree on adjournments, she will require that they come to court and go on the record. According to Justice Walsh, this usually has the desired effect of causing the parties to reach an agreement in order to avoid going to court and incurring the associated costs. Justice Walsh also noted that the Chief Judge DiFiore is coming out with new rules regarding adjournments . . . so stay tuned.

Favorite Rules

Justice Jamieson commented that her favorite Commercial Division Rule is Rule 8, which encourages attorneys to meet and confer about whether or not the case is good for ADR and discovery prior to coming to court. Justice Jamieson emphasized that attorneys should not wait for a court-ordered conference to begin discovery and should consult prior to the conference regarding any issues to be discussed at the conference. Justice Walsh stated that her favorite Commercial Division Rule is Rule 24, which requires that attorneys appear for a pre-motion conference because certain issues, including pleading deficiencies can be corrected without motion practice.

In sum, this was an informative program that provided Commercial Division litigators insight into what they should expect when entering the courtrooms of Justice Jamieson and Justice Walsh. Litigators should make every effort to attend similar programs where particular judges provide valuable information concerning their individual preferences and style.

PHOTO: Hon. Gretchen Walsh, Matthew Maron, WCBA President Hon. Linda S. Jamieson and Matthew Donovan, Vice Chair of WCBA's Business and Commercial Law Committee