

“Demystifying” the Courts: The Commercial Division of state Supreme Court

John Caher: Welcome to Amici, News and Insights from the New York Courts. I'm John Caher.

A couple of months ago, we did a demystifying-the-courts segment on the Court of Claims. Today, we are going to attempt to demystify another court, the Commercial Division of State Supreme Court. Since its creation in 1995, the Commercial Division has transformed business litigation in New York, and as you'll hear, made the New York courts a preferred forum for complex business disputes.

We have three guests with us today: the Honorable Jennifer Schecter, who has served on the Commercial Division since 2018; the Honorable Joseph Lamendola, one of the Presiding Justices of the Commercial Division in Onondaga County; and Robert L. Haig, a partner at Kelley Drye & Warren in Manhattan, and Chairman of the Commercial Division Advisory Council.

Mr. Haig, let's start with you since I think you were there basically at the founding of the Commercial Division. What is the Commercial Division? How did it come to be and why was it even needed?

Mr. Haig: Thanks, John. The Commercial Division is basically New York's business court. It's a division of the New York State Supreme Court, which is devoted to commercial litigation. It's got about 30 Commercial Division judges in 11 counties or judicial districts, mainly in the more urban parts of New York State where you're more likely to find business litigation. And generally, the judges are justices of the New York State Supreme Court who were assigned there by the Chief Judge or the Chief Administrative Judge of the state.

You asked how it came about. It began in two counties, in New York and Monroe counties, with five judges back in November of 1995. It was created by a visionary, the late Judith S. Kaye, and without Judge Kaye, it never would've happened. She was the one indispensable person.

You also asked why it was needed. If you look back at that era in the 1980s and early 1990s, the business community was basically unhappy with the State Courts and they wanted to go elsewhere. They wanted to go to the courts of other states, they wanted private arbitration, they wanted the federal courts, but they did not want to be in the New York State Courts. The reason for that was that they thought the State Courts

were slow, ponderous, overworked and under-resourced, and distracted by other matters back then.

So, Judge Kaye thought that New York State should have a public court that was capable of resolving business disputes efficiently, and that is essentially how it started. What the businesses were looking for were greater predictability. They wanted efficiency, they wanted cost-effectiveness, and they wanted a court that understood business litigation—in other words, a business-like court, and that's what they got.

John Caher: And what's the role of the Advisory Council?

Mr. Haig: The Advisory Council was created by the Chief Judge about 11 years ago, and the charge from the Chief Judge was to advise him — it was Chief Judge Lippman at that time—on an ongoing basis about all matters involving and surrounding the Commercial Division and to help fulfill the long-term strategic goals of a world-class Commercial Division in New York State. And the Advisory Council was to keep the Chief Judge apprised of developments in the business world that may affect the court system and to work to help the Commercial Division better understand and respond to the needs of the business community.

Essentially, what the Advisory Council does is it proposes new rules, it suggests operational improvements, it provides education, and it lets the world know about the advantages and the benefits of litigating in New York State. The intent of all this is to propose an environment, a litigation environment, that is responsive to the needs of the business community and to make that business litigation process in New York more efficient and predictable.

And just to finish that off, the Advisory Council is a group of judges, some Commercial Division judges, but also Appellate Judges, in-house counsel. For example, the general counsel of IBM Corporation is a member of the Advisory Council, the CEO of the Business Council of New York is a member, and a bunch of pretty distinguished lawyers in private practice.

John Caher: Thank you for that synopsis.

Justice Schechter, you came to the judiciary after a career with Skadden Arps and after serving as principal law clerk to Chief Judge Judith S. Kaye, the visionary we discussed a moment ago, and you also clerked for Justice Eileen Bransten, who was also assigned to the Commercial Division. What did you learn, what lessons do you bring from private

practice, and what lessons do you bring from clerking for Judge Kaye and Justice Bransten?

Justice Schechter: Well, I want to tell you first off that I feel like my career has come full circle because while I was at Skadden, and this was in 1997, I would say 75% of my work was in front of the Commercial Division. In fact, the case that I first went to court for, that I prepared the papers for, was in the very courtroom in which I'm sitting now. I was right on the other side of this bench, and never could I have imagined that someday I would be on the Commercial Division. But there are so many lessons that I took from working in private practice and clerking for inspirational women like Judge Kaye and Judge Bransten.

But from private practice, it was really the importance of professionalism and courtesy: Treat other lawyers the way you want to be treated. It is a very demanding practice, but if you do that, it will serve you well, and it will serve you well in the courts too because we're very mindful of how you treat other lawyers. Also, when others go low, I'm going to invoke Michelle Obama, you go high. Don't engage in nonsense. Courts are not interested in it. Again, be very professional, be very civil and focus on the important things. Pick your battles. Don't fight over every little thing because the important issues are going to get lost.

From Judge Kaye and Judge Bransten, I mean, Judge Kaye, the Commercial Division was so important to her, so that's also why this feels very special to me. But I learned the value of common sense and doing a check in the decisions that you make to make sure that the outcome aligns with common sense because 99 out of 100 times, if it aligns with common sense, you're going to reach the right result.

And from Judge Bransten, I just learned how to manage tremendous caseloads with efficiency, really to get into the weeds in cases.

John Caher: And Justice Lamendola, you followed a different path starting as an Air Force staff judge advocate and later serving as a Dutchess County prosecutor and corporation counsel in, I believe, Syracuse. How does serving as a military lawyer, prosecutor, and corporation counsel prepare you for the Commercial Division of all things?

Justice Lamendola: Well, thank you, John, for that question. And quite frankly, I can only offer one comment and that's practical experience. The Air Force afforded me the opportunity to try cases all over the world, primarily drug urinalysis cases. The Air Force maintains a zero tolerance on drug

abuse. So I litigated multiple cases using the expertise of forensic toxicologists and I honed my skills on that.

The DA's office in Dutchess County also afforded me quite a bit of trial experience. And then with the Corporation Counsel's Office—Judge Schechter mentioned case management—while I served as the Corporation Counsel, we had every imaginable flavor of lawsuit pending against the city, whether it was a 1983 action against the police department, a tax certiorari claim against the property tax division. The airport was attached to the city. We had multiple cases there.

And again, case management. And that's one of the advantages of the Commercial Division. The current case management system is phenomenal. With all of the experience I acquired from the various roles before this, it's adequately prepared me to manage multiple cases on multiple issues without missing a beat.

John Caher: Do you think there are fundamental differences between practicing or performing as a Commercial Division judge in Syracuse and in Manhattan? I ask that question to both of you.

Justice Lamendola: Judge Schechter, go ahead. I'll defer to you first.

Justice Schechter: You know, it's just a difference in money value. The basic issues are the same, so it's just different dollar amounts, but we have the same rules. So I do think the same core issues, other than the jurisdictional threshold in Manhattan is higher, but the complexity of the cases, I'm sure, is very similar.

Justice Lamendola: I would agree. The jurisdictional amount in Syracuse is all of \$50,000 as compared to Manhattan, where I think it just moved to \$500,000.

Justice Schechter: It is \$500,000.

Justice Lamendola: And what's remarkable, there are a multitude of New York City lawyers practicing in Onondaga County. The issues are the same, other than the jurisdictional amount, the same sorts of cases. Some are far more complex in New York City than they are here, but they're still one and the same.

Justice Schechter: I imagine that's because the choice of law provisions very often specifically provide for New York County, so we really get a lot of international cases. I feel like really, the business heart of the world is in

Manhattan, so we just get a tremendous amount of cutting-edge, exciting, interesting cases here.

John Caher: I'd like to ask both of you another question, starting with Judge Lamendola: Why did you want to do this? Of all the places you could sit or all the different forms of judge you could be, why Commercial Division?

Justice Lamendola: I like challenges, and I enjoy the complexity and the nature of some of the cases that have been presented in front of me. And that's not to say that, as a trial judge, I wasn't challenged, but there are, as Judge Schecter has indicated, there are a litany of cases that are all interesting, multi-million dollar tax certiorari cases. Again, I'm not saying that I'm shying away from a medical malpractice case in front of a jury, but I think that the intellectual challenge in the Commercial Division is what attracts me the most, I would say.

John Caher: Do you agree with that, Justice Schecter?

Justice Schecter: I sure do, and I also love the commercial bar. The quality of the lawyering is just phenomenal. The degree of research they do, their attention to detail, their writing, their briefing. The level of practice here is terrific. When I direct attorneys in a certain way, they're really interested in exploring different ways to resolve cases at the outset. They really respond to the court in order to make resolution efficient. It's just been a pleasure.

John Caher: That's wonderful to hear. I'd like to toss out a four-part question and invite any or all of you to weigh in as you see fit. First, what is the benefit of the Commercial Division to business litigants' businesses?

Mr. Haig: I would say that for the litigants, for the parties in the litigation, the benefits are twofold: One is predictability and the second is efficiency.

To drill into that a little bit, what businesses really want is to be able to predict the legal consequences of their business decisions so they can plan ahead in a knowledgeable way. There's always going to be some degree, probably a substantial degree, of uncertainty in the litigation process. You have less uncertainty when you have clear-cut rules and a well-developed body of law and judges who understand the rules and the law and adhere to them. And that is exactly what you have in the Commercial Division. And because of that, in many cases, businesses can avoid litigation because they can predict with some degree of reasonable accuracy what is likely to happen in the case.

The thing that businesses hate is the, so to speak, “outlier decision,” the possibility of an aberrational decision that they weren't anticipating at all, that they haven't budgeted for and planned for. That just doesn't happen almost ever in the Commercial Division, and it happens elsewhere in the litigation world, and that is something that is prized by businesses.

The second part is efficiency, and the efficiency comes from the judges. They're so good because they understand business litigation and they know how to handle it. They're also dealing with a structure of rules that is designed to increase efficiency and to be responsive to the needs, once again, in the business community.

Just to toss out a couple of examples: limits on depositions and interrogatories. You can't take depositions forever in the Commercial Division. There's some time limits on it. There can be time limits on trials. There could be categorical responses to privilege log requests, robust expert discovery, and advanced technology. There are a whole bunch of other bells and whistles that have been built into the litigation process in the Commercial Division specifically to be responsive to businesses, and the businesses appreciate them.

John Caher: Judges, what would you add to that?

Justice Lamendola: I think something that is overlooked sometimes is the willingness to minimize risk, i.e., the litigants' willingness to minimize risk by engaging early on in ADR, the ADR process. I think sometimes in just the plain, old, ordinary trial litigation files, the litigants are reluctant to engage in ADR or mediation because they don't know the file yet, they don't have the discovery process. Whereas in the Commercial Division, sometimes there's a readiness very quickly to say, “I'm not sure that I want to go down this road. I would prefer to try to find middle ground if in fact we can proceed to some process of ADR.”

Justice Schechter: Yes, and I want to bring up what Judge Lamendola mentioned a few minutes ago, which is case management. In the Commercial Division, we are focused on business litigation exclusively, and we also see every type of case, again, from all over the world. The cutting-edge cases come here, and because of that, we learn how to tailor the discovery process and how to manage the case and tailor it to its unique needs. We're really focused on each individual case, and what is the best way to resolve it in the quickest manner, in the least costly manner as possible. And it's that experience that we bring to all of these cases.

John Caher: Is it the same benefit to the lawyers as it is to their business clients, or are there additional or different benefits?

Justice Lamendola: No, I think it is. I mean, looking at it from a perspective of attorneys that practice in the Commercial Division, understand that the deadlines that are set forth in the scheduling order are enforced. There's fair disclosure for the most part. Motion practice is common. And most importantly, you've got, to a degree, advanced technology. So when an attorney appears before you, they have an understanding of what's going to be expected of them, and for the most part, they all comply with it. Again, the common goal is to move the case to its conclusion.

John Caher: It seems like a wonderful place for a result-oriented, all-business, business lawyer.

Justice Lamendola: Yes.

John Caher: What about the benefit to the state as a whole, or is there a benefit to the state as a whole? Does New York State benefit because it has a Commercial Division, and a well-respected Commercial Division at that? You want to take that, Bob?

Mr. Haig: Yes. Let me take a step back and put it in context.

Right now, there are 28 other states in the United States that have business courts, and there are 35 or so other countries that have business courts. The motivation for the creation of most of those courts, as is evident from the public documents that accompany their development and creation, is economic development. What they're trying to do is, number one, to attract business litigation to that jurisdiction, but also to attract businesses to that jurisdiction by convincing them that a facility exists in the jurisdiction for the efficient and fair resolution of commercial disputes. And this is international trade. This is really, really big business.

So the Commercial Division, because of its reputation, helps New York State to attract and retain businesses, and that in turn generates tax revenues and provides jobs. A more hospitable environment for business litigation encourages businesses to maintain a presence in New York or to locate in New York State.

The other part of it is that litigation, business litigation, is big business in New York. There are 225 lawyers in New York State. Not all of them are commercial litigators, obviously, but a lot of them are. They generate large amounts of fees during the year, but there are whole groups of

satellite industries that surround them. And so a successful Commercial Division is good not just for the lawyers, but for all the employees of their firms, and it's good for the taxi drivers, the bartenders, the chambermaids, the expert witnesses, the consultants, and everybody that's connected with the Commercial Division. And all of those people are paying taxes in New York, and this is generating jobs. So there is a major economic benefit to the State of New York by having the Commercial Division here.

John Caher: A few things I'd like to follow up on. One, I think you said there were 225 lawyers in New York. I think you forgot a few zeros on that one.

Mr. Haig: Oh, I'm sorry. You're right.

John Caher: And the concept of a court as a vehicle for economic development is an interesting perception. I'd like the judges to weigh in on that, if you could.

Justice Schechter: Mr. Haig said it so well, but in addition, if you have good, developed law, companies are more likely to incorporate and organize here to take advantage of this certainty and the well-developed law, commercial law.

John Caher: Do you think that was envisioned when Judge Kaye started this? Do you think that she—well, she was such a visionary, she probably saw all angles of it— but do you think that was something she had in mind, that this could actually be a boon to the state?

Justice Schechter: Absolutely. I have no doubt that this was her hope and vision.

Mr. Haig: John, I just wanted to throw in one other thing. The substantiation for these benefits is not just a lawyer's argument. Just to give you one recent example, the Association of Corporate Counsel, which is 47,000 in-house counsel in more than 10,000 business organizations and 105 countries, last October came up with a third in a series of Board of Director resolutions touting the economic benefits of business courts to the jurisdictions in which those courts are located. And that's not limited to New York. That is just the benefit of well-run business courts to various jurisdictions. And the resolution says that it benefits the economies and the countries essentially by being there.

And that is the business community speaking. These are the in-house lawyers that work for businesses that have come to this conclusion, and I think that they are as credible a source for opinion and judgment on this as any I can think of.

John Caher: Does it also benefit the court system of New York State? Judge Lamendola, you want to start us off on that?

Justice Lamendola: How can it not? I mean, from my perspective, if in fact you file a lawsuit, you're going to litigate it, where else to do it but New York from my perspective. I mean, you want to go to Florida? We have a couple of large corporations here in Syracuse that do business in Florida, and all of their contracts have a clause that they want to litigate in New York State. I can't imagine being a litigant trying a case in Florida versus New York State. Maybe I'm biased, but I think you're going to get a fair shake in New York State. I believe that.

John Caher: Judge Schechter, do you think it strengthens our court system?

Justice Schechter: Absolutely. I mean, again, in the Commercial Division, we have the benefit of technology ahead of many other courts in the court system, and we adopt rules first in the Commercial Division that run so well, and they help case management so well and the way litigation goes that these rules later become adopted for all of the courts. So I think the Commercial Division has just been a tremendous benefit in terms of organization and how other courts in the State are run too.

Mr. Haig: I just wanted to toss in a couple of things that weren't mentioned so far on this. The first thing is one of the benefits to the court system is that the Commercial Division takes big, complex cases out of the rest of the court system where they might not be handled very well for a number of reasons and puts them in a part where they can be resolved more quickly. So that enables the rest of the court system to function more efficiently when it doesn't get bogged down with these cases being litigated in front of judges that may not like that kind of case, may not have that much experience with them.

The other thing I think is beneficial is that years ago, before the Commercial Division was started, the conventional wisdom in New York was that there wasn't enough money and there were too many cases in the court system and that nothing could be done about it. There are still too many cases and there's still not enough money, but we've got the best business court in the world. And I think that shows you that if you try really hard to do something, that the court system can succeed. There is a substantial degree of pride inside the Commercial Division, certainly, but even outside the Commercial Division, that we can all make things better despite the immense challenges that are presented by the lack of resources. It's a "rising tide raises all boats" argument.

John Caher: One last question in the time we have remaining, and this is a question for any lawyers who may be listening to this. Judges, what advice do you have for an attorney who's about to appear before you for the very first time?

Judge Schechter, I see you nodding. Why don't you go on that one, please?

Justice Schechter: Preparation is key, and when I say preparation, it involves a few things. First of all, research the part that you're assigned to and the judge that you're assigned to because judges have individual rules. And this is not to create confusion; it's to facilitate good practice. It's to show you what we as judges like and what will streamline your case when it's in front of us. So, know our rules, look for our rules. A lot of the answers to your questions are in our rules, and that will help for very efficient practice.

And also, know your judges and prepare. We have a lot of proceedings now that are virtual and anyone can watch these proceedings. So before you argue, for example, get to know your judge. Is your judge going to ask a lot of questions? Are you going to get up and be able to make a speech in terms of your argument, or is the judge going to jump right in? So really prepare and know your judge.

John Caher: What great advice. Judge Lamendola, what do you say?

Justice Lamendola: I wholeheartedly agree with what Judge Schechter has mentioned. I follow the mantra, "Time is money." Be prepared, be professional, know your file and know a little bit about the judge or the part that you're appearing in front of so that when you show up, you at least know your adversary, you know the court, and you know what's expected of you. Many times, litigants appear and either they don't know whether the motion is on submission or it's in person, and it's a little late in the day, or they're not punctual and there's nothing worse than litigants who show up unprepared, fumble around, and they're wasting their time, their client's time, the opposition counsel's time, and the court time.

John Caher: Justice Lamendola, Justice Schechter, Mr. Haig, thank you so much for your time and your insight.