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Book Review

Municipal Attorneys Can Find Answers in the Newly Released Third Edition of *Commercial Litigation in New York State Courts*

Reviewed by Patricia E. Salkin

Municipal attorneys are constantly in search of up-to-date treatises to assist not just in our counseling function but also in various aspects of litigation. The newest edition of *COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* (WEST), edited by former New York County Lawyers President Robert Haig of Kelley Drye & Warren LLP, is an invaluable addition not for the library shelf but for prime desk space on the busy working lawyer's desk. Even former New York Court of Appeals Chief Judge Judith Kaye said of the set, "I can't imagine contemplating commercial litigation without checking the subject matter indices."¹ While the most recent edition of the treatise has been widely reviewed statewide,² there is little if any attention to the value of the set specifically for municipal attorneys.



Patricia E. Salkin

Before addressing the content of particular interest to municipal lawyers, a bit of noteworthy history is in order. This set, first published in 1995, has now grown to 106 chapters contributed by 144 authors who represent a "who's who" of leading practitioners and judges. The six-volume set (plus a CD-ROM of jury instructions, forms and checklists) is more than an annotated version of the CPLR because its approach produces a unique and helpful blending of procedure with substantive law. As will be pointed out in the chapter review, a main strength of the treatise is the insights offered by the experienced writers who provide thoughtful commentary to help both plaintiff and defense counsel. The treatise, a collaborative effort of many, is a project of the New York County Lawyers Association, initially designed to assist commercial litigation lawyers, that has grown in scope and importance, and now offers much to the municipal practitioner.

Of the nineteen new chapters added to the third edition, chapters on crisis management, litigation technology and CPLR Article 78 Challenges to Administrative Determinations may be of greatest interest to municipal attorneys. Updated chapters from the previous edition on Governmental Entity Litigation, Environmental and Toxic Tort Litigation, and Appeals to the Appellate Division are equally important. While

all litigators will benefit from the detailed methodical chapters on taking a case from start to finish, for purposes of this review the focus will be on two chapters of greatest substantive interest to municipal lawyers: CPLR Article 78 challenges, the bread and butter practice in our world; and governmental entity litigation, a close second in workload.

Chapter 102, *CPLR Article 78 Challenges to Administrative Determinations*, is authored by Court of Appeals Associate Judge Victoria A. Graffeo. Perhaps the best place to begin is with Judge Richard Platkin's assessment of this chapter, "Given the harsh consequences of failing to timely and properly commence an Article 78 proceeding, this chapter should be required reading for commercial practitioners whose clients may be affected by the actions of state and local government."³ The 56 pages that make up this chapter are among the best, most concise presentations and explanations of the Article 78 process from commencement of the action through judgment. As Judge Graffeo states, and case law demonstrates, "The ever-burgeoning expansion of state and local government regulations...has made the availability of Article 78 proceedings an important tool for lawyers in achieving results for...clients."⁴ While the chapter examines the use of the tool through the lens of lawyers who initiate these actions to protect their business clients, in reality the chapter is equally valuable to attorneys who defend these actions and for attorneys who represent individual, non-business interests, before various governmental bodies.

Beginning with a brief history explaining the common law roots to this 1937 statute, Judge Graffeo walks practitioners through a well-organized assessment of whether an Article 78 proceeding is appropriate. The section on commencement of the proceeding raises crucial issues such as named parties and standing. This is followed by a discussion of pleadings, what constitutes sufficient papers and applicable statutes of limitation. Focus then shifts to declaratory actions and venue. The interplay between the supreme court and the appellate division on transfer of "substantial evidence" issues and original proceedings in the appellate division is explained clearly and raises important practice tips. Standards governing judicial review are then examined, including substantial evidence, arbitrary or capricious, shocks the conscience, and agency deference. The chapter concludes with a review of judgments including remittals to administrative agencies, incidental monetary

relief (remember, Article 78 proceedings are not used to seek routine monetary relief), and the prayer for relief. Essentially, this chapter is a terrific primer on the Article 78 process.

Chapter 101, *Governmental Entity Litigation*, was contributed by Michael S. Feldberg, the head of Allen & Overy's U.S. Litigation Department. Perhaps because this is the "third edition" of this chapter, it has developed over the years and represents a more detailed coverage of the subject matter. The introduction sets forth succinctly the strategic considerations that must factor into the choice (where there is choice) of venue (e.g., supreme court or court of claims) as well as the statutory options that provide different forms of relief. This is followed by a discussion of the various types of governmental immunities—including a detailed explanation of sovereign immunity. After attention to various applicable statutes of limitations, the chapter turns to actions and then notices of claim. Section 1983 actions are discussed in some detail, with a mention of defenses and alternative dispute resolution.

In a time of dwindling resources for practice aids and books, everyone is looking for value. This set provides just that for all litigators, including municipi-

pal plaintiff and defense counsel. The set is also fully searchable on Westlaw.

Endnotes

1. Judith S. Kaye, *Commercial Litigation in New York State Courts, 3rd Ed.*, Edited by Robert L. Haig (West, 2010), N.Y. St. B.J., January 2011, at 53 (Jan. 2011) (book review).
2. See, e.g., Book Review: More Critical Acclaim For Commercial Litigation Treatise, The Metropolitan Corporate Counsel (August 23, 2012), <http://www.metrocorpocounsel.com/articles/20211/book-review-more-critical-acclaim-commercial-litigation-treatise> (last visited July 16, 2014).
3. Richard A. Platkin, *Book Review: Commercial Litigation in New York State Courts, Third Edition* (Robert L. Haig, Editor-in Chief), 75 Alb. L. Rev. 331, 339 (2011-2012).
4. The Honorable Victoria A. Graffeo, 4C N.Y. Prac., Com. Litig. in New York State Courts § 102:1 (3d ed.) (2010).

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