Commercial Litigators Reveal All: Exploring Commercial Litigation in New York State Courts

Norman I. Silber
Maurice A. Deane School of Law at Hofstra University

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ESSAY

COMMERCIAL LITIGATORS REVEAL ALL:
EXPLORING COMMERCIAL LITIGATION
IN NEW YORK STATE COURTS*

Norman I. Silber**

Why investigate a 3 volume, 68 chapter, 3,314 page reference set that contains a small mountain of information and advice written by 94 leading practitioners and judges? One reason is to see how such a group


** Professor of Law, Hofstra University School of Law. Many thanks to Sandra Capobianco and Eliana Schonberg for their research assistance, and to Paul Fasciano for comments and thoughts on earlier drafts.

1. 2-4 NEW YORK COUNTY LAWYERS' ASS'N, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (Robert L. Haig et al. eds., 1995) [hereinafter COMMERCIAL LITIGATION]. This three volume collection is part of a seven volume set entitled West's New York Practice Series.

Robert L. Haig, editor-in-chief, has written and lectured extensively on litigation topics. He is a partner at the law firm of Kelley Drye & Warren in New York City. The authors of the chapters were at the time of publication, with few exceptions, partners at large firms with substantial commercial litigation practices, and judges in the New York State court system. They are Stewart D. Aaron of Dorsey & Whitney; Robert M. Abrahams of Schulte Roth & Zabel; John L. Amabile of Putney, Twomby, Hall & Hirson; Arthur H. Aufses III of Kramer, Levin, Naftalis, Nessen, Kamin & Frankel; Celia Goldwag Barenholz of Kronish, Lieb, Weiner & Hellman; Garrard R. Beeney of Sullivan & Cromwell; Mark A. Beinick of Paul, Weiss, Rifkind, Wharton & Garrison; Charles G. Berry of Milbank, Tweed, Hadley & McCloy; Richard L. Bond of Dorsey & Whitney; David M. Brodsky of Schulte Roth & Zabel; John F. Cannon of Sullivan & Cromwell; P. Kevin Castel of Cahill Gordon & Reindel; Ellen M. Coin of Graubard Mollen & Miller; J. Peter Coll, Jr. of Donovan Leisure Newton & Irvine; The Honorable Barry A. Cozier, Justice, New York State Supreme Court, Second District, and Deputy Chief Administrative Judge, New York City Courts; Donald Francis Donovan of Debevoise & Plimpton; Richard E. Donovan of Kelley Drye & Warren; Robert S. Duboff, Director of Mercer Management Consulting, Inc., the parent company of Decision Research; Peter G. Eikenberry, Esq.; Blair C. Fensterstock of Sutherland, Asbill & Brennan; William R. Golden, Jr. of Kelley Drye & Warren; David M. Gouldin of Levene, Gouldin & Thompson; The Honorable Stewart F. Hancock, Jr., retired Associate Judge, New York State Court of Appeals; Joseph S. Hellman of Kronish, Lieb, Weiner & Hellman; David L. Hoffberg of Nixon, Hargrave, Devans & Doyle; Laura B. Hogue of White & Case; Stephen M. Hudspeth of Coudert Brothers;
has answered reverberating questions about the system of dispute resolution that lawyers and commercial venturers live with. Do litigators believe that judges and juries decide cases consistently with established doctrine, so that outcomes in thousands of cases and settlements mesh together? Do they think the law is settled enough to provide a basis for effective litigation counseling? Do they believe that adversarial imperatives have warped the behavior and self-esteem of lawyers or improved

Gary S. Jacobson of Kelley Drye & Warren; J. Christopher Jensen of Cowan, Liebowitz & Latman; Jay B. Kasner of Skadden, Arps, Slate, Meagher & Flom; Stephen L. Kass of Carter, Ledyard & Milburn; The Honorable Judith S. Kaye, Chief Judge, New York State Court of Appeals; Stephen Rackow Kaye of Proskauer Rose Goetz & Mendelsohn; Louis B. Kimmelman of O'Melveny & Myers; The Honorable Theodore R. Kupferman, Associate Justice, Appellate Division of the New York State Supreme Court, First Department; Deborah E. Lans of Morrison Cohen Singer & Weinstein; Bernice K. Leber of Epstein Becker & Green; Mark D. Lebow of Coudert Brothers; Burton N. Lipshie of Stroock & Stroock & Lavan; Mitchell A. Lowenthal of Cleary, Gottlieb, Steen & Hamilton; Alan Mansfield of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentell; Peter J. Mastaglio of Cullen & Dykman; Sayward Mazur of Mazur, Carp & Rubin; John P. McCahey of Hahn & Hessen; Thomas McGanney of White & Case; Joseph T. McLaughlin of Shearman & Sterling; Edwin B. Mistkin of Cleary, Gottlieb, Steen & Hamilton; James C. Moore of Harter, Secrest & Emery; The Honorable Francis T. Murphy, Presiding Justice, Appellate Division of the New York State Supreme Court, First Department; Richard E. Nolan of Davis Polk & Wardwell; John M. Nonna of Werner & Kennedy; The Honorable Geoffrey J. O'Connell, Justice, New York State Supreme Court, Tenth District; James M. Ringer of Rogers & Wells; Gary L. Rubin of Mazur, Carp & Rubin; Edward L. Sadowsky of Tenzer Greenblatt; Jay G. Safer of LeBoeuf, Lamb, Greene & MacRae; Frederick P. Schaffer of Schulte Roth & Zabel; The Honorable George Bundy Smith, Associate Judge, New York State Court of Appeals; Robert S. Smith of Paul, Weiss, Rifkind, Wharton & Garrison; James L. Stengel of Donovan Leisure Newton & Irvine; Harry P. Trueheart, III of Nixon, Hargrave, Devans & Doyle; Kevin J. Walsh of Kelley Drye & Warren; and Stephen A. Weiner of Winthrop, Stinson, Putnam & Roberts.

The co-authors were at the time of publication, with few exceptions, associates at large law firms with substantial commercial litigation practices. They are Liza R. Berliner of Skadden, Arps, Slate, Meagher & Flom; Jennifer B. Bernheim of Kelley Drye & Warren; Frederick A. Brodie of Winthrop, Stinson, Putnam & Roberts; Lynn E. Busath of Davis Polk & Wardwell; Irene Chang of Shearman & Sterling; Flor M. Colón of Nixon, Hargrave, Devans & Doyle; Jodi A. Danzig of Paul, Weiss, Rifkind, Wharton & Garrison; Richard A. De Palma of Coudert Brothers; Laurie Strauch Dix of Donovan Leisure Newton & Irvine; Leonard Allen Feiwus of Proskauer Rose Goetz & Mendelsohn; Thomas F. Fleming of Rogers & Wells; Janet A. Gordon, Senior Court Attorney, New York State Supreme Court; Michael C. Griffen of Hancock & Estabrook; Elisa F. Hyman of White & Case; Christopher P. Johnson of Donovan Leisure Newton & Irvine; Jonathan Z. King of Cowan, Liebowitz & Latman; Richard A. Ling of Shearman & Sterling; Robert Malaby of Carter, Ledyard & Milburn; Jean M. McCarron of Carter, Ledyard & Milburn; Robert P. McGreevy, Law Secretary to The Honorable Theodore R. Kupferman, Associate Justice, Appellate Division of the New York State Supreme Court, First Department; James F. Parver of Proskauer Rose Goetz & Mendelsohn; Dorothy W. Regal of White & Case; Harold E. Schimkat of White & Case; Amelia T.R. Starr of Davis Polk & Wardwell; Beverley G. Steinberg of LeBoeuf, Lamb, Greene & MacRae; Gloria M. Trattles of O'Melveny & Myers; Kevin C. Walker of Kelley Drye & Warren; Carol E. Warren of Nixon, Hargrave, Devans & Doyle; Michael R. Wright of Levene, Gouldin & Thompson; and Andrew M. Zeitlin of Tenzer Greenblatt.
it? Is the dispute resolution system, as many declare, "in a crisis"?²

This Essay submits that the authors of Commercial Litigation in New York State Courts ("Commercial Litigation") harbor views that reflect those of a substantial part of the litigation bar—particularly of the larger New York City firms.³ It argues that, to a significant degree, these practitioners (and some judges) account for their success and the state of the law with a set of unsentimental assumptions about the dispute resolution system. Their perspective combines socio-culturally rooted subjectivity to explain what judges and juries do (Part I); with claims of doctrinal indeterminacy to explain much of their own difficulty in counseling and litigating efficiently (Part II); with an anti-conciliatory game theory to explain the dance they do with their adversaries (Parts III and IV); with an acknowledgement of institutional bias in procedural rules and substantive doctrine to explain the sometimes harsh social justice that litigation produces (Part V). In the process of delivering practitioners a sophisticated bundle of information and revealed wisdom, Commercial Litigation offers a picture of the profession's self-awareness and its "natural attitude" toward litigation that undermines theories about the cooperativeness of litigators and fortifies certain popular and scholarly misgivings (Part VI).⁴

Answering a concrete question with an immediate bearing on a legal dispute, of course, is more typically the purpose for consulting a set like Commercial Litigation. This set will be consulted in bits and pieces by practicing attorneys and judges searching for basic, sensible advice and for finer points of law, and it should reward most inquiries of this kind. Commercial Litigation contains hundreds of discussions ranging in topic from the rules of trial and motion practice and advisable methods for framing specific types of pleadings, to cost-effective ways to manage corporate litigation, to the many varieties of alternative dispute resolution and settlement techniques.⁵ The analyses and factual presentations are

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² See infra Part VI.
³ Almost all of the authors appear to work at large firms with sophisticated litigation practices and substantial support for their representation of clients. See supra note 1.
⁴ Understanding the "natural attitudes" or "perspectives" of lawyers offers a way to think about their motivations without reducing them to the vocabulary of transaction economics and behavioral psychology. See, e.g., Edward L. Rubin, The Phenomenology of Contract: Complex Contracting in the Entertainment Industry, 152 J. INSTITUTIONAL & THEORETICAL ECON. 123, 125 (1996) ("While much of phenomenology is metaphysical, and far removed from anything so mundane as contracts, it also contains an analysis of ordinary life, which Husser referred to as the natural attitude.").
⁵ The set also includes advice which discourages litigation of some disputes. See, e.g., 2 COMMERCIAL LITIGATION, supra note 1, § 3.10, at 71.
handled deftly and in many instances in an engaging style. Checklists, exhibits, tables, forms, and illustrative documents are sprinkled helpfully throughout the work, which even comes with a computer disk full of model forms, and should help attorneys to simplify and standardize their filings and lower their costs. As a whole, the set does not demonstrate a bias toward defendants or plaintiffs. It is a comprehensive work which does not condescend to, confine, or significantly oversimplify its subject matter, and which will have utility for commercial litigators throughout the country whose clients do business under the laws of New York.

The utilitarian design also permits the set to illuminate more general questions, because it reveals without much varnish the individual views of distinguished attorneys about the dynamics of contemporary commercial litigation. It differs from other reference works because Robert L. Haig, the editor-in-chief, decided to incorporate individually authored guides to litigation strategy and tactics in most of the sixty-eight chapters. These guides are sometimes integrated into topical discussions and sometimes provided separately. Together they confront many of the problems and pitfalls of commercial litigation quite candidly—sometimes to the point of indiscretion. As a result of the “tell-it-like-it-is” candor, the strategic advice and the doctrinal explanations lend cumulative weight to some ignoble explanations for attorney behavior and judicial reasoning.

I. Homilies and Verities: The Real Secrets of Success

*Commercial Litigation* does not define the professional habits and character traits that produce the masters of commercial litigation—but as it addresses one litigation topic after another it provides comment about what the cherished talents are and how to acquire them.

A. Traditional Values

The model litigator conducts mountains of preparatory work and investigates the minute details of a dispute. He or she organizes activities into checklists, meticulously plans for contingencies, and focuses on every detail. The litigator understands the implications of

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6. The computerized forms can be loaded onto the hard drive of a personal computer and referred to regularly through standard word-processing software.
7. See, e.g., 2 COMMERCIAL LITIGATION, supra note 1, §§ 4.1-4.5.
8. See, e.g., 2 id. §§ 22.4-.5; 3 id. § 47.5; 4 id. §§ 53.3(b)-(i), 53.5(f)-(g), 57.12, 61.19-.20, 62.16-.17.
filing in one forum and venue as opposed to another. Some of the talents litigators need include a refined, systematic approach to all phases of litigation; case management skills; legal research competence; good tactical judgment; command over procedural rules; communicative and persuasive ability; a flair for game playing and dramatic acting; quick reactions; and client bedside manners of the highest order. These are said to come from intense study of decisions and statutes, and from the careful effort to learn from real life situations. Authors Edwin B. Mishkin and Mitchell A. Lowenthal tell readers that if they will spend their time considering “the lore and law of service [of process],” then “it can be effectively and efficiently accomplished.”

The key to succeeding in tort suits alleging unfair competition is said by authors J. Christopher Jensen and Jonathan Z. King to be time spent “understanding . . . the limits of fair competition.” As for case investigations, author Arthur H. Aufses III states that “[o]nce the lawyer knows the applicable rules and available resources, her success as an investigator will be shaped by her curiosity, energy, and time.” In their chapter on disclosure, authors James M. Ringer and Thomas F. Fleming stress that “[i]f litigation is 99% preparation and 1% inspiration, thorough preparation comes only from a well-designed and carefully planned discovery process.”

At trial, the good litigator tries methodically to choreograph every move. Author Stephen Rackow Kaye recommends that inquisitors, when cross examining, divide questions by topic or sub-topic using index cards that are “separately assembled (clips, rubber bands or both do very well).” He advises questioners to craft “soft-ball” questions which narrow the areas of factual dispute, and to develop the intensity of the questions gradually, “as a dramatic staircase, leading to a surgical cross examination of the hotly disputed facts.”

Commercial Litigation encourages attorneys to concentrate on calibrating and controlling litigation.

9. See, e.g., 2 id. §§ 10.1, 10.5; 4 id. § 55.3(a)(5).
10. In keeping with a profession of attorneys schooled to be generalists and jacks and jills of all trades, neither practical business experience nor business or accounting training would appear especially important.
11. 2 COMMERCIAL LITIGATION, supra note 1, § 2.14, at 49.
12. 4 id. § 63.2, at 629.
13. 2 id. § 4.5.
14. 2 id. § 18.2(b), at 589.
15. 3 id. § 33.4(d), at 204.
16. 3 id. § 33.5(d), at 206.
demeanor when negotiating with adversaries or arguing in court. The timing of requests and advice is crucial. The ideal commercial litigator who emerges in composite from all these segments is intelligent, sure-footed, relentless, indomitable, and obsessive.

B. Subversive Thoughts

Together with homilies and evocations of the requisite virtues of hard work and careful planning, many of the authors of Commercial Litigation communicate in a strong undertone a distressing and depressing message—that the procedures and rules of the common law are deeply flawed and incoherent. The commercial litigation system, they stress, does not regularly yield predictable results no matter how well-prepared, astute, and forceful the litigator. No matter how strong the client’s case is, the client may be defeated by being worn down, outspent, out-maneuvered, or unlucky. One side or the other can be derailed for reasons that, in truth, ought not bring credit or blame to any of the litigants.

Commercial Litigation describes available approaches in making many theoretical and strategic decisions which present themselves once a litigant has filed a complaint and requested judicial intervention. Readers are told that arriving at the right answers depends no less on accurate psychological and sociological analysis than it does on understanding the rules that govern successful motion practice and the presentation of evidence.

It appears that mind-reading, egg-crate walking, ego-flattering, and probing jurisprudential values and procedural inclinations are useful skills. Doing well with a judge, according to Stephen Rackow Kaye, requires “learning about . . . [his] preferences.” No matter how sound a case, careful study of the judge is indispensable to success:

Every trial judge is different, each with a different . . . education; different legal and judicial career; different personal background; different character, personality and temperament; different intelligence and capabilities; different philosophies; different biases and prejudices; different support staff; and other differences.

. . . . Differences in their attitudes, perceptions and preferences . . .

17. See, e.g., 2 id. §§ 27.3(a), at 895, 27.7(a), at 904; 3 id. § 31.4(d).
18. See, e.g., 2 id. §§ 20.3(c), 22.2(d), 27.6(b).
19. 3 id. § 30.2(f), at 10.
[dictate that] elements of a trial before two equally effective commercial trial judges, with or without a jury, should be handled quite differently. 20

Once discovery has begun, authors James M. Ringer and Thomas F. Fleming note, the scope of permissible disclosure is "ultimately a subjective question that each court in a given . . . case must resolve." 21 Author John L. Amabile observes that "it is the court's ultimate obligation to determine whether a cause of action exists." 22 In the face of a motion to dismiss a complaint, Amabile states, courts have searched "beyond the four corners of the complaint" to determine the viability of a claim. 23 Justice Geoffrey J. O'Connell does not defuse concern about the possible danger of pushing a judge to render an overdue decision on a motion:

There is the old saw about a given action such as a letter to the administrative judge which will not only produce a decision, but enable the writer to predict what the decision will be. However, not all judges are autocrats nor cut from the same mold. Some may appreciate a reminder that cures an oversight, others may not. A copy of Dickens' Bleak House might entertain one judge and offend another. As counsel must learn each jurist's individual rules and procedures, so must they try to acquaint themselves with individual foibles. 24

In the end, courts appear to respond to attorneys based on a subjective perception of their duty.

In an even more cautionary fashion Commercial Litigation presents the subject of juries. As a threshold matter, Stephen Rackow Kaye writes, determining whether to ask for a jury demands a calculation of the probable sociological, cultural, and psychoanalytical profile of the jurors, the parties, and the witnesses. The decision to go for a jury should be based on such considerations as the "wealth, social position, education, [and] occupation [of the parties and their witnesses,] and the appearance of those same considerations on a potential judge or jury." 25 Kaye's advice is supported by his recollection of a complex partnership matter in which the defendants based their decision to request a jury trial on two

20. 3 id. § 30.2(f), at 10-11.
21. 2 id. § 18.3(a), at 591.
22. 2 id. § 6.5(c), at 157.
23. 2 id.
24. 2 id. § 24.15(a), at 802.
25. 3 id. § 30.4(f), at 33.
considerations that had only the most remote connection to fairness or the support of legal doctrine, namely, "the potential difficulty of the jury in sifting through the issues and the evidence" and "the appearance that the plaintiff limited partners were wealthy investors who had already earned a lot of money in the partnership and were seeking now to recover large additional damages." Litigators who become involved in a jury trial are warned that it is critical to account for the differences between the classes and ethnic backgrounds of the litigants and jurors. Juries are frequently composed of middle and lower class folk, while the witnesses as well as the parties often are part of a better educated and well-heeled elite:

In a commercial case, commonly the types of fact witnesses will be corporate executives, bankers, real estate developers, . . . accountants, bookkeepers, investors and other types of business people. As a class, they will be highly educated, often professional, expected by judge and jury to conform to high ethical standards, be able to recall past events and to tell the truth. This adds to the demands of effective personal performance by those parties and witnesses.

His advice about jury behavior further indicates that some jurors will resist the most intensive, intricate, and painstaking efforts to educate them. Joseph S. Hellman finds that "it is sometimes difficult to understand why people fight to get in front of a jury," since jurors may never understand what the case is all about:

In the IBM antitrust case which resulted in a jury deadlock in 1978, the press reported that one juror was asked the meaning of the term "interface" and he responded: "Well, if you take a blivet, turn it off one thing and drop it down, it's an interface change, right?"

The lesson Commercial Litigation imparts here is hard to miss: both judges and juries are dangerously idiosyncratic; there is an unquantifiable and uncontrollable risk that they will not render a doctrinally based outcome. Notwithstanding the objective facts or the dictates of a rule, the results may be the fruit of bigotry, stupidity, and unsophistication.

Commercial Litigation presses the argument that socioeconomic, educational, and class differences among the parties, between the parties

26. 3 id. § 30.4(0), at 34.
27. 3 id. § 30.2(c), at 7.
28. 3 id. § 41.2, at 569.
and the jurors, and between the parties and the judges, frequently play a determinative role in shaping the outcomes of trials in commercial cases. For years, contrary themes—which emphasize just desserts, the objectivity of American judicial institutions, and the primacy of positive statements of law—have laced many other reference works that line law libraries.

The tone of subjectivity and social context mirrors modern re-evaluations of how laws are made and interpreted. A variety of jurisprudential perspectives, including law and economics, critical legal studies, public choice theory, critical race theory, and law and society, reflect the original anti-formalist and sociological approach of the Legal Realist Movement, which long ago exposed bias in legal institutions. We live in an age when post-modern academic criticism has challenged the significance of authorship and the meaning of texts of all kinds; when empirical analysis of court opinions and jury verdicts has confirmed that subjective factors do play a role in shaping outcomes; and when the nature of subjective influences has been magnified in high-profile cases. As Professor Jeffrey W. Stempel explains: "Legal Realism revolutionized the profession's thinking about law, making it virtually impossible for thoughtful lawyers to regard litigation procedure and policy as completely divorced from the politics of substantive outcomes."

Many readers nevertheless will find it disturbing and perhaps mistaken for so many of the authors to have infused this soon-to-be standard reference work with, if not an extreme Realist perspective, then an agnostic position about whether judges and juries are ultimately...

30. Legal Realism, of course, is the name often given to approaches which at their heart de-emphasize formal legal doctrine, and instead emphasize social relations and empirical research as a basis for analyzing the outcome of legal disputes. It found its most prominent expression in the 1920s and 1930s. The popularity of Legal Realism in the legal academy waned after World War II when it collapsed from its ability to justify too much and predict too little, and after the Legal Process school exposed excesses and flaws. See generally Morton J. Horwitz, The Transformation of American Law, 1870-1960, at 169-246 (1992); Norman Silber & Geoffrey Miller, Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler, 93 Colum. L. Rev. 854, 870-72, 930 (1993). Long after its purported demise, however, it continued to attract adherents, especially among practitioners, and it strongly influenced the sociological and economic perspectives of various movements in jurisprudence.


32. One author has described "extreme" Legal Realism as supposing that "judges' decisions depend on a large number of factors—including what the judge ate for breakfast on the morning of a decision—so numerous and relating to outcomes in so complex a manner as to obscure the actual basis for decision." Ronald A. Cass, Judging: Norms and Incentives of Retrospective Decision-Making, 75 B.U. L. Rev. 941, 944 (1995).
influenced by rules, precedents, and persuasive logic. Commercial Litigation does not imply that knowing what the legal rules actually are is unimportant; but it insists that knowledge about the rules is insufficient to produce success, and must be thoroughly supplemented in any dispute by a grasp of social context.\textsuperscript{33}

In some respects the elaborate emphasis on social context belies concerns of Dean Kronman of Yale. Kronman identifies a professional crisis which has arisen largely because recent generations of lawyers have failed to conceive of their highest goal as “the attainment of a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess.”\textsuperscript{34} Rather, Kronman laments, today’s attorneys are satisfied with mere technical mastery of the law.\textsuperscript{35} Commercial Litigation emphasizes command over technique and immersion in the rules of law—but only as prefatory to the development of an effective litigation strategy. And an effective strategy, as these authors see it, must be based on obtaining “wisdom about human beings and their tangled affairs,” such as the educational level, religion, sex, ethnicity, racial composition, and class bias of the fact-finders and decision-makers.\textsuperscript{36}

In light of the strong relation of jury and judicial determinations to subjective variables, success at litigation looks less assurable to those attorneys who have been traditionally trained in the law schools than to those who also are trained in or have access to reservoirs of knowledge

\textsuperscript{33} For example, Commercial Litigation includes in the neighborhood of 300 practice checklists to help organize a litigator’s approach to problems. See 4 COMMERCIAL LITIGATION, supra note 1, at 1229-34 (index of checklists). Ascertaining the law is only a small part of many of these checklists. See, e.g., 2 id. §§ 27.2 (settlement), 28.5 (voir dire); 4 id. § 55.4 (collections litigation).

\textsuperscript{34} ANTHONY T. KRONMAN, THE LOST LAWYER 2 (1993).

\textsuperscript{35} As Kronman states:

\textit{Th[e] crisis [in which the American legal profession is now caught] has been brought about by the demise of . . . the belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom as well.}

\textit{Id.} Kronman terms this fallen belief “the ideal of the lawyer-statesman.” \textit{Id.} at 3.

For Kronman, the susceptibility of the legal system to technical gaming is a large part of the problem—it produces the impression that technical mastery of the rules is everything. \textit{See generally id.} at 165-352 (discussing individually the negative impact of law schools, law firms, and the courts on the ideal of the lawyer-statesman).

\textsuperscript{36} It should be noted that if the perceived importance of these factors is highly significant to outcomes, it would appear to favor larger firms over smaller ones. Attorneys in large firms and others whose clients have large budgets may be able to fill the social-scientific prescriptions called for here; but attorneys in smaller firms, which lack the requisite time, support staff, and financial resources, will frequently have to proceed without investigating in the manner or depth suggested by Commercial Litigation.
about psychology, sociology, political science, anthropology, and other social science specialties.37

II. DOCTRINAL INDETERMINACY

The open and rough texture of commercial law doctrine also is central to the broader discussions of litigation technique. It appears that through interpretation New York courts have embossed certain idiosyncrasies onto many areas of procedure and legal doctrine. In fact, knowledgeable commercial litigators who sit down with the bulk of Commercial Litigation may rise discouraged about their ability to counsel clients with confidence about an appropriate course to follow.38

Consider the treatment of law regarding tortious interference with a business contract as an example. The unpredictability of satisfying the necessary elements to survive a defendant’s motion to dismiss a cause of action in this area of law is high, according to authors Stephen A. Weiner and Frederick A. Brodie. In spite of straightforward statements of the essential elements of a cause of action in the case law,39 “New York courts have differed sharply on the meaning, pleading requirements, and proof requirements for each element.”40 The description of New York doctrine which accompanies this statement indicates that the unpredictability of surviving a motion to dismiss is particularly hard to rationalize here since the Restatement of Torts and the leading New York case law which embrace it state that the presence of intent and wrongfulness “must be determined on a case-by-case basis,” upon the presentation of the evidence.41 Nonetheless, readers are informed, many lower courts impose strict requirements for specificity of evidence at the complaint stage.42 And so Commercial Litigation advises readers that “lawyers defending such claims may benefit from attacking the complaint before undertaking discovery.”43

39. These essential elements include “(i) a valid agreement; (ii) the defendant’s knowledge of that agreement; (iii) interference with the agreement (iv) which is intentional and improper and (iv) [sic] which damages the plaintiff.” 4 COMMERCIAL LITIGATION, supra note 1, § 59.12, at 425.
40. 4 id.
41. 4 id. § 59.17(e), at 439.
42. See 4 id.
43. 4 id.
The connection between indeterminate legal doctrine and the behavior of attorneys emerges not only in litigation, but in commercial counseling more generally. Divergence among the lower courts on pleading and proof requirements makes it hard for lawyers to counsel would-be plaintiffs about whether to proceed. Different standards in different courts encourage efforts at forum-shopping. The possibility of dismissal of a complaint for lack of specificity encourages plaintiffs’ counsel to gold-plate complaints and encourages defendants’ counsel to spar over preliminary matters. Early settlement becomes harder to arrive at than it would be otherwise, because each side will, rationally, wait for the preliminary matters to be resolved. It is no wonder that litigation looks inefficient and unpredictable to outsiders: the profession’s own guidebook describes it this way to insiders.

It does not require a jaundiced eye to see that Commercial Litigation can also serve as a testament to the fee-generating, uncertainty-provoking, and delay-making consequences of indeterminacy that have led commercial clients and the public at large to refrain from enforcing their rights, to disparage the dispute resolution system generally, and to distrust their own lawyers who engage in such behavior. These attitudes compose the background atmospherics that lead to opinion poll results like the one ten years ago which found that nine out of ten parents did not want a child of theirs to grow up to be a lawyer of any kind.44

Both attorneys and their clients might be tempted to reach for alternative dispute resolution (“ADR”), or for a settlement, instead of proceeding to court, after reading about so much doctrinal incoherence and about the possibilities for nonuniform results in many areas of law. But the inclination is misguided since Commercial Litigation identifies significant incoherence in the procedures and doctrine controlling these aspects of practice as well. For example, author Joseph S. Hellman indicates that New York courts sometimes uphold and sometimes overturn arbitration awards when an arbitrator declines to admit an unsworn report.45 The relevant chapters on ADR, arbitration, and settlement provide many good justifications for being relatively enthusiastic about these processes, but any urge to avoid the traditional litigation process for the sake of clarity, simplicity, or even brevity might

45. See 3 COMMERCIAL LITIGATION, supra note 1, § 41.4(e), at 585-86.
be quelled by an exploration of some of the rules.\textsuperscript{46}

III. GAME-PLAYING MANEUVERS

\textit{Commercial Litigation} also makes it clear that mastering the litigation process requires a tutored or intuitive appreciation of the theory and tactics of game playing, in combination with comprehensive knowledge about the arsenal of procedural techniques and maneuvers that are available under the statutes and rules. These volumes rehearse many strategic moves and countermoves. As with most games, litigation can produce clear winners and losers,\textsuperscript{47} and the best moves are usually intended to direct an opponent to a progressively more vulnerable—and ultimately indefensible—position.

Some facets of the game are elementary and are not difficult to execute. Justice Francis T. Murphy, in analyzing whether to argue a case in the appellate division, emphasizes that “[m]ost importantly, when counsel chooses not to argue a case, he may be giving the court the impression that he does not think the case is important or that his client’s position is weak.”\textsuperscript{48} Authors Mark A. Belnick and Jodi A. Danzig observe that plaintiffs can frustrate removal to federal court by asserting only state law claims when drafting a complaint.\textsuperscript{49} Former Judge Stewart F. Hancock, Jr. and attorney Michael C. Griffen indicate that New York law generally is unsympathetic to commercial plaintiffs who are out of privity with the seller and who seek to recover damages, and so they school attorneys that when representing sellers they should attempt to specify in their contracts that New York law applies.\textsuperscript{50} Stephen Rackow Kaye advises that prior to trial, witnesses should be taken to the “horse shed” and drilled to prepare them for their testimony: “Many lawyers drill the witness by going over the entire direct examination in question and answer form, working on each of the witness’ answers if necessary and then conducting a mock cross examination. Other lawyers go over the testimony more generally . . . .”\textsuperscript{51} Kaye

\begin{itemize}
  \item \textsuperscript{46} See 2 id. chs. 10 (arbitration), 27 (settlements); 3 id. ch. 41 (ADR); see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994); Norman S. Poser, When ADR Eclipses Litigation: The Brave New World of Securities Arbitration, 59 BROOK. L. REV. 1095 (1993).
  \item \textsuperscript{47} It should be noted, however, that litigation often produces settlements, in which case there may well be no clear winners or losers.
  \item \textsuperscript{48} 3 COMMERCIAL LITIGATION, supra note 1, § 47.4(g), at 855.
  \item \textsuperscript{49} See 2 id. § 9.7(a), at 270.
  \item \textsuperscript{50} See 3 id. § 39.29(b), at 521.
  \item \textsuperscript{51} 3 id. § 32.3(b), at 117-18.
\end{itemize}
cautions that drilling witnesses has its limits, presumably ethical and formal in nature. He states that "for reasons that need not be elaborated," witnesses should never be given scripts. 52

Especially useful are the discussions of less straightforward stratagems which foster appreciation of signals that are sent and received by the filing of different legal papers and by "between-the-lines" communications. Discussing when third-party actions can and should be brought, James C. Moore reminds readers that motions can communicate implicit as well as explicit messages to judges and juries. They are told that initiating a third-party proceeding may signal a court that the defendant is guilty, because by doing so, "the defendant tacitly concedes to the trier of fact the possibility that the plaintiff may recover a judgment against [him]." 53 Moore observes that "the defendant [thereby] weakens its position for it has admitted to the possibility of a verdict in favor of the plaintiff." 54

Choosing the correct oppositional posture to take among competing alternatives can effect dramatically the duration and outcome of a dispute. The ability to signal strength rather than weakness while moving toward a settlement is a highly prized talent. As a matter of settlement negotiating style, attorneys are advised not to be conciliatory, because, according to authors David L. Hoffberg and Carol E. Warren, "a conciliatory style is likely to be abused and your client unnecessarily disadvantaged." 55 David M. Gouldin and Michael R. Wright encourage, in settlement talks, the use of bluffing with seemingly irrational time-consuming or cost-disregarding behavior: 56 "Even though the readiness of an attorney to try a case does not truly impact the merits, it can, in the mind of the opponent, subtly affect settlement evaluations which are critical to obtaining a 'favorable' compromise of the case." 57 To get an opposing attorney to think about a settlement well before the trial stage, Gouldin and Wright urge that attention be paid not just to the formal effect of a filing but to its psychological impact. Filing a Notice to Admit, for example, may alert an adversary to the possibility of a settlement without the implication that the litigator lacks the will to "go

52. 3 id. § 32.3(b), at 118.
53. 2 id. § 7.7(b)(2), at 220.
54. 2 id.
55. 2 id. § 27.7(a), at 904.
56. One author argues that a bluff must be costly or else it would be used so often and by so many that it would lose its effect. See ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS 99-102 (1988).
57. 2 COMMERCIAL LITIGATION, supra note 1, § 22.3(e), at 743.
all the way” if necessary: “[T]he service of a strategic Notice to Admit may be a strong opener . . . . A communication exploring the interest of your adversary in settling the matter is often construed as a sign of weakness, while service of a Notice to Admit is not.”58 The use of one procedural device instead of another can stiffen the resistance of an opponent or soften it, can delay a litigation or speed it up.59

Psychological considerations guide the management and control of clients as well as adversaries. Encouraging a client to agree to a settlement requires counsel to identify the emotional needs of the client, and accordingly, to determine when the best time has arrived to give advice or bad news. “Matters of principle often become very expensive” and “it may be necessary for you, the objective outside lawyer, to wait until your client cools off before even breathing the subject of settlement.”60 Readers are reminded that attorneys who fume over a client who is apparently unreasonable and intransigent may have forgotten that one major reason the client chose to pursue litigation in the first place may have been that a matter of principle was involved, and that compromise truly is unthinkable.61

Ironically, many of the maneuvers treated by Commercial Litigation as indicative of significant talents and strengths are considered to be personality flaws (even disorders) outside of the profession; and these game-playing aspects of the resolution process which litigators take for granted are, on the outside, generally considered individually wasteful of

58. 2 id.
59. The authors are quite aware that plaintiffs try to avoid delays in recovering judgments, and for that precise reason defendants' counsel will often use procedural devices as a standpipe:
   In instances where a dispositive motion cannot be employed, debtor's counsel should utilize appropriate discovery devices. Service of proper demands for disclosure will not only inform debtor's counsel as to the particulars of plaintiff's cause, but will force plaintiff to expend its time and money in responding to the demands, and will delay the recovery of judgment.
4 id. § 55.3(b)(2), at 257 (footnote omitted).
60. 2 id. § 27.3(a), at 895. In the end, financial considerations will usually overtake emotions, and a settlement will be reached:
   Business clients increasingly prefer to resolve litigation in the most financially beneficial manner possible. Even where emotions run high at the outset (“we’ll fight this one all the way to the Supreme Court”), chances are that as the litigation drags on, disrupting the company’s productivity and draining revenue, your client will eventually see the benefit to getting the litigation wrapped up in a manner that is definite and final. . . .
   . . . Certainly, you must assure your client as well as your opponent that you will go “all the way” if necessary. But your thinking must include how you will position the case so that it can be settled for the right amount at the right time.
2 id. § 27.2, at 892.
61. See 2 id. § 27.3(a), at 894-95.
time and expense and socially counter-productive.

The practitioners in Commercial Litigation tell insiders that good litigating often comes down to displaying strong game-playing skill; the skill of knowing when to bluff, when to delay, when to appear irrational, when to dodge and feint. To outsiders, these are among the classic venal, manipulative qualities—coyness, brinkmanship, legerdemain, and the inclination to rely on procedural artifices—that have been cursed for ages by those uninitiated into the lawyer’s guild.62

The advice designed by the authors to provide constructive guidance for practitioners is in essential respects consistent with criticism that has modeled lawyers as “agents of the devil,” meaning that adaptation to the rules frequently eventuates in the sowing of discord, the prolonging of litigation, and the ratcheting up of fees.63 To clients tangled in commercial disputes, and to the public, truthseeking and the pursuit of efficient justice look like the last things the litigation game is designed to promote.

IV. ANTI-CONCILIATORY INCENTIVES

Testing the arcane and mundane rules of litigation described in Commercial Litigation against academic theories about the social utility of litigation does not necessarily lead to the conclusion that the system requires major surgery. Even though many “insider’s” virtues are widely disparaged, Professors Ronald J. Gilson and Robert H. Mnookin (“G&M”) challenge the dominant impression that litigators magnify the inherent divisiveness and cost of dispute resolution by offering a conceptual foundation for the alternate view that litigators (among other lawyers) do “the Lord’s work of facilitating cooperation,”64 thereby

62. For example, see ROTH & ROTH, supra note 44, which includes, among other popular ridicule, dialogue by the character Strepsiades, who wants to become a rhetorician (lawyer), from Aristophanes’ The Clouds:

> Bold, hasty, and wise, a concocter of lies,
> A rattler to speak, a dodger, a sneak,
> A regular claw of the tables of law,
> A shuffler complete, well worn in deceit,
> A supple, unprincipled, troublesome cheat,
> A hang-dog accurst, a bore with the worst,
> In the tricks of the jury-courts thoroughly versed.


solving problems as agents for their clients that clients could not solve by themselves. Under this view, the laborious signaling and shadow-boxing of the kind which is so well documented in Commercial Litigation is transformed into socially constructive behavior which results in efficient and valuable dispute resolution.

G&M construct their optimistic model of the legal profession by using the “prisoner’s dilemma” as an heuristic to understand the dynamics of dispute resolution. In a world without lawyers, the model suggests, two parties locked in a dispute would suffer by their mutual distrust: although cooperation would result in a superior outcome or “payoff” for both parties due in part to the avoidance of transaction costs, each party will nevertheless forego cooperation or will “defect” due to fear of exploitation by the other party, resulting in a sub-optimal payout to both.

According to the model, lawyers—and the legal system and its rules, more generally—help clients to overcome the prisoner’s dilemma. Lawyers are “repeat players who have the opportunity to establish reputations” and in this respect are different from their clients, for whom litigation with a particular adversary is most likely a one-time affair. If clients know that mutual cooperation will result in the best payout they will select, instead of “gladiators,” cooperative lawyers as their agents, whose reputations “credibly commit each party to a cooperative strategy,” thereby alleviating each client’s fear of exploitation by his adversary. For the purposes of the current discussion it is notable that the model holds that in typical discovery proceedings in a world of cooperative professional norms, even the most damaging evidence will be passed along to opponents. Through the G&M lens, the legal regime—which appears to outsiders to encourage wasteful misconduct—could be transformed by relatively minor adjustments into

65. See id. at 512. G&M relate that the game was devised in 1950 by two RAND researchers. See id. at 514 n.15. There is extensive social science and legal studies literature which relates the prisoner’s dilemma to bargaining and negotiation situations. See id.
66. See id. at 512, 514-15.
67. See id. at 512, 522-33.
68. Id. at 513.
69. See id. at 512-13.
70. Id. at 513.
71. G&M limit their model of cooperation to “disputes in which lawyers must be retained.” Id. at 525 n.42 (emphasis added). The effect of this assumption appears to limit applicable situations dramatically since, particularly in commercial cases, disputes could possibly be resolved without lawyers or without going out-of-house for lawyers.
72. See id. at 514-15.
an efficient vehicle for cooperative conflict resolution. This optimistic, transformative view of legal game-playing sustains the constructive self-image that litigators in the past have held: litigators have preferred to think of themselves as facilitators and problem-solvers in an adversarial system which, if the proper “payoff structure” applies, is both necessary and beneficial.

Without pouring water over the thesis that the rules of ethics and procedure might someday be restructured to turn lawyers more frequently into valuemakers, it would seem based on New York practice that the effort required to do so would be Herculean. A review of other literature as well as the advice given in Commercial Litigation confirms the view that the cooperation model does not simulate a large subset of real-life commercial litigation situations. The rules for litigation in New York have not been, are not now, and are not likely soon to be constructed, enforced, or applied by the parties in ways that, in general, encourage cooperative behavior.73

To begin with, the New York bar probably did not become a leading reservoir of litigation talent or a leading commercial law jurisdiction because of the cooperative dispute resolution skills of its bar so much as because of its counseling and transactional expertise. Nor did the “litigation explosion” which New York experienced in recent decades have very much to do with an exogenous rise in the volume of disputes to which litigators could add economic value by their skill.74 Indeed, trying to account for the litigation explosion during the 1960s and 1970s in New York State (as measured by case filings), Professor William E. Nelson suggests other causes for the explosion, having little to do with cooperation; among them, profit-seeking motives of attorneys (delay by debtors/defendants was rewarded because prejudgment interest rates fell far below market interest rates) and the demise of a homogeneous bar and a nonlitigious professional culture.75

If there ever appeared to be an economic advantage for a law firm, specializing in litigation, in projecting a reputation for cooperation with opposing counsel, that has not been the view of most of the members of

73. G&M suggest various structural, sociological, and communication problems which may explain why cooperative cultures might not exist. See id. at 516-20, 527-33, 534-43.
74. See id. at 534 (“Two conclusions about the character of large commercial litigation have emerged in recent years, one empirical and relating to its [heightened] frequency, the second subjective and relating to its [acrimonious] conduct.”).
75. See id. at 535-37 (citing William E. Nelson, Contract Litigation and the Elite Bar in New York City, 1960-1980, 39 Emory L.J. 413 (1990)).
the New York litigation bar during recent decades. In the opinion of New York litigators, "gladiatorial" combat between adversaries, especially in discovery proceedings, became unmerciful:

[C]ommercial litigators attested to the increasingly uncivil conduct of civil litigation. The phenomenon of discovery abuse was the most obvious manifestation. Over-reaching requests for production were met with dogged resistance to any but perfunctory compliance, and the liberal discovery contemplated by the Federal Rules of Civil Procedure—which aimed to eliminate surprise and facilitate a resolution of the merits based on full information—led instead to trench warfare.76

The benefits flowing from prolonging and brutalizing the process of litigation appear to have increased in recent years. New York litigators as a group have come to believe that the system of discovery (federal or state) has fostered neither civility as a norm nor cooperation as an ethic.77

Many of the descriptive parts and much of the advice given in Commercial Litigation offer this atomistic perspective. Commercial Litigation portrays a world of uncooperative behavior induced by a system which has been for the most part within the control of the profession itself.78 In the world these volumes describe, normally honorable civil attorneys and their litigation teams encounter adversaries who normally are also honorable. Nevertheless, the adversary sometimes becomes pugnacious and deceitful in the course of the litigation process. As Commercial Litigation authors David L. Hoffberg and Carol E. Warren put it, "[T]he world is not perfect, a lawyer does not always have a strong bargaining position and even if he does, the other side may be irrational, rude and obstructionist."79 In some contexts, such as in settlement negotiations, civil behavior may be the lawyer's best response.80 In discovery battles, however, pugnacious behavior requires the normally civil and honorable protagonist to do "what is necessary"

76. Id. at 535.
77. See id. at 511 n.10 (citing a survey in which discovery problems accounted for approximately 94% of incivility complaints).
78. In a theoretical framework, this perspective has been described as "legal centric," since it presumes that the profession itself controls the operative conditions of its own professionalism. See Ronald J. Gilson & Robert H. Mnookin, Business Lawyers and Value Creation for Clients, 74 OR. L. REV. 1, 4 (1995).
79. 2 COMMERCIAL LITIGATION, supra note 1, § 27.7(b).
80. See 2 id. § 27.7(b)-(c), at 906-07.
and to become uncivil and perhaps ever-so-slightly dishonorable.\footnote{For example, protecting the record in depositions is a basic requirement of good lawyering and must weigh ahead of any sort of concern about etiquette or civil behavior: "At bottom, you cannot be bashful about protecting the record and you must do what is necessary."}{\textit{2 id.}} § 19.7(b), at 651.

Consider the advice Garrard R. Beeney offers about how to avoid losing control upon an interruption by opposing counsel during a deposition. Treating the adversary as invisible, irrelevant, and impotent is quite proper under the circumstances:

There are several methods to [stay in] control. . . . One is to ignore opposing counsel—let him or her make his or her speech or objection, do not respond, and ask the witness "please answer the question." Opposing counsel may cease the interruptions once you indicate they are having no effect. The behavior normally will stop once counsel perceives that attempts at interruption are having no effect on your examination, and that you believe opposing counsel to be "inconsequential."\footnote{2 \textit{id.} § 19.6(f), at 649.}

Readers are instructed that the formally acceptable options in this situation are uncertain of success and likely to backfire:

Another potential response is to demand that the improper objections cease. If they do not, and you are sure of your legal grounds, you can threaten to call the court, threaten to make a motion seeking the appointment of a referee to preside at the deposition at the opposing party’s expense, or threaten to seek sanctions. It is critical, however . . . , not to threaten to take action you are not prepared to actually carry out. A hollow threat results in a loss of credibility, and opposing counsel will only be encouraged in his or her effort to take advantage.\footnote{2 \textit{id.}}

The system described does not make it easy to enforce the pretrial obligations of parties; in the language of G&M, there is a lot of “observable” misconduct, and little of this misconduct is “verifiable.”\footnote{See Gilson \& Mnookin, supra note 64, at 526-27.}

Even worse, attorneys are instructed that a failure at enforcement is a worse outcome than having made no attempt at all because of the unfortunate signal that failure sends, even at a preliminary stage.

Under the hypothetical that G&M construct, a proper payoff structure, which rewards cooperation over gladiatorial litigation, and the existence of a workable reputation market are capable of creating an
environment where lawyers may become socially desirable valuemakers. Under the current litigation structure in New York (and other places, no doubt), neither reward for cooperation\textsuperscript{85} nor reputational considerations\textsuperscript{86} are potent enough for the authors of \textit{Commercial Litigation} to recommend an approach that might accurately be described as cooperative. Further, it is doubtful, frankly, that the reforms suggested by G&M—which principally consist of changing codes of professional conduct to overcome the possible conflict between zealous advocacy and cooperative representation, and improving the capacity for cooperators to be identified\textsuperscript{87}—will dramatically affect uncooperative behavior in commercial litigation. The problem is more permanently entrenched than G&M believe.

\textbf{V. INSTITUTIONAL BIAS AND ERROR}

\textit{Commercial Litigation} documents many instances in which unfairness and bias toward particular parties to litigation have been institutionalized through procedural rules and case law decisions. Among those who appear to have fared worse in New York than in some other jurisdictions by court interpretations of procedural rights and doctrine are subcontractors, insureds, environmentalists, and at-will employees. Consider the following representative problems:

Gary L. Rubin and Sayward Mazur report that New York courts in construction industry cases usually tolerate contractual dispute resolution procedures which designate a hearing officer, often employed by the

\textsuperscript{85} The ethical rules governing the secret taping by one lawyer of a conversation with an adversary provide a rather remarkable indication that some New York rules can discourage cooperation and certainty, see discussion supra Part II, simultaneously. Authors Richard L. Bond and Stewart D. Aaron relate that the Committee on Professional Ethics of the New York County Lawyers' Association issued an opinion in 1993 stating that such taping is not unethical; less than two years later the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York found that it was unethical. See 3 \textit{COMMERCIAL LITIGATION}, supra note 1, § 50.4(b), at 1004.

\textsuperscript{86} Interestingly, one legal environment where G&M's prisoner's dilemma model may apply is in New York's new and special Commercial Part, where there are many repeat players. \textit{Commercial Litigation} suggests that cooperation is greater there:

\begin{quote}
[Several Manhattan IAS Commercial Part judges] noted that it is rare in state court to find acrimony or tension between lawyers that would preclude stipulations on the admissibility of exhibits, deposition testimony, or an agreement based on offers of proof. This may, in part, be the result of the recognition that there have been only four Commercial Parts, and commercial litigators will likely appear before the same judge frequently.
\end{quote}

\textsuperscript{3} \textit{id.}, § 31.2(d), at 61.

\textsuperscript{87} See Gilson & Mnookin, \textit{supra} note 64, at 550-64.
contractor, to make binding determinations concerning contract claims. Whether these provisions are enforceable is "[o]ne of the most controver-
sial issues presently facing New York construction attorneys."88

Kevin J. Walsh, Jennifer B. Bernheim, and Kevin C. Walker state
that New York courts enforce adhesive provisions in insurance contracts
which dictate short and even arbitrary notice requirements to insureds.
They call the rule "frequently a harsh one for insureds."89 They observe
that even where equitable considerations might be applied to excuse poor
notice, these considerations are given only lip service:

[W]hile numerous New York cases recognize that an insured's untimely
notification can be excused, very few New York cases actually excuse
it. Instead, most cases simply note that untimeliness may be excused,
cite to opinions stating the same rule, then distinguish those cases in
order to hold that the insured's delay in notifying was unreasonable and
therefore inexcusable.90

Behind this unyielding enforcement policy lies an inequitable allocation
of loss between insurers and insureds. No easier to understand is the
discipline that New York courts will not award punitive damages for a
breach of an insurance contract, "even a willful, unjustified or bad faith
breach."91

In land use disputes, Stephen L. Kass, Jean M. McCarrol, and
Robert Malaby indicate, New York Article 78 proceedings offer "two
overwhelming advantages to the developer’s and agency’s counsel: the
deferential standard of review . . . and the respondents’ ability to submit
a record that, with very rare exceptions, is not subject to either cross-
examination or supplementation by the petitioners’ counsel."92 The law,
in the end, favors developers and impairs environmentalists.

Author John F. Cannon reports that in contrast to some other
jurisdictions, New York courts are unsympathetic to wrongful dismissal
claims by at-will employees, and have taken the approach that "where the
employment is at-will the covenant [of good faith and fair dealing]
cannot be invoked to make a discharge unlawful."93

88. 4 COMMERCIAL LITIGATION, supra note 1, § 65.11, at 765. The discussion indicates that
a resolution of this sort was upheld by the New York State Court of Appeals in Westinghouse
89. 4 COMMERCIAL LITIGATION, supra note 1, § 52.4(a), at 98.
90. 4 id. § 52.4(a), at 98.
91. 4 id. § 52.7(e), at 124.
92. 4 id. § 66.4(b)(4), at 810.
93. 4 id. § 56.4(b)(3), at 282.
Some of the procedural rules that are criticized are not likely to work to the advantage of any particular group, but instead operate to the detriment of the system as a whole. The expert disclosure rules, for example, are "very limited."94 According to J. Peter Coll, Jr. and Christopher P. Johnson, they "do little to inform the adversary about expert testimony" which may be introduced.95 Bernice K. Leber observes, matter-of-factly, that time-barred claims may sometimes be revived through "back door" consolidation.96

The authors of *Commercial Litigation* rarely speculate or theorize about the sources of bias or inconsistency or the absence of unifying principles in the law—as they do when explaining the decisions of judges and the verdicts of juries.97 Few allusions are found to the inadequate resources for representation of weaker groups, the socio-economic power and influence of stronger ones, or the identification of members of the judiciary with the interest of particular groups. The authors present the institutional bias that produces social injustice as a background condition of the law, about which litigators require instruction, to attempt to avoid or avert the consequences.

VI. CONCLUSION: CONFRONTING THE LITIGATION "CRISIS"

In the literature there are many different conceptions of the litigation crisis. The authors of *Commercial Litigation*, mostly attorneys who are engaged in litigation on an everyday basis, express one that is fairly ordinary: in New York, the crisis is caused by too many cases and not enough resources. "The increasing volume of litigation and the increasing complexity of many commercial cases," the editor-in-chief writes, "have placed an insupportable burden on the present system that threatens timely and thoughtful resolution of disputes," leading many businesses to turn to the federal courts and to "states such as Delaware and to private dispute resolution."98 This evaluation of the situation does not gravely implicate the need for changing procedures, revising codes of

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94. See 2 id. § 23.3, at 759.
95. 2 id.
96. See 2 id. § 12.10, at 372. The example provided is the case 64th Street-Third Avenue Associates v. Maroulis, 519 N.Y.S.2d 990 (App. Div. 1987) (mem.), where, well after the statute of limitations for pursuing an earlier action had run, the court allowed consolidation with a new action on the grounds that the estate's right to an accounting "related back" to the complaint filed in the earlier action. See 2 COMMERCIAL LITIGATION, supra note 1, § 12.10, at 372 n.42.
97. See supra Part I.
98. Robert L. Haig, Foreword to 2 COMMERCIAL LITIGATION, supra note 1, at XI.
professional conduct, tightening up judicial discretion, restructuring law firms, reshaping professional associations, or otherwise altering the culture of litigation.

Academics with divergent theoretical inclinations tend to agree that the litigation system is in a deeper sort of a crisis than that to which Commercial Litigation refers. The crisis from their perspective is caused by developments such as a decline in professional autonomy, 99 heightened incivility among litigators, 100 spiraling litigation costs, 101 and diminished public confidence. 102 Other writers have examined law practice more broadly and have blamed many political, social, and moral factors, including a general decline in professionalism among lawyers. 103 From all of these vantage points, the increasing resort by lawyers, in-house counsel, and even entire industries, to various forms of ADR, including mandatory arbitration and mediation, are symptomatic of despair with the current court-based system of dispute resolution.

As might be expected when there are different definitions of the problem, there are divergent opinions about appropriate solutions. Professor Jeffrey W. Stempel has discussed the dialogue about solutions between litigation “reformers” and “preservationists” as between those who want to shift disputes toward ADR and those who want to retain the existing procedural rules and enrich the resources available:

Reformers want substantial change in the litigation system, reduced litigation volume, a net shift in disputes from litigation to ADR, reduced disputing costs and damage awards and faster determination of disputes. Preservationists, while not strictly opposed to these objectives (for who [could] oppose lower costs and faster resolution in the

99. See, e.g., Posner, supra note 37, at 769-71 (discussing the collapse of lawyers’ self-confidence regarding their ability to rectify problems with the legal system on their own).
100. See generally Gilson & Mnookin, supra note 64.
103. See generally MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); LINOWITZ WITH MAYER, supra note 102; Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values, 59 Brook. L. Rev. 931 (1993).
abstract?), fear that the reformist agenda will . . . create more problems than it solves . . . .

According to preservationists, ADR and mediation may achieve their objectives only “at the cost of reducing the accuracy and justice of dispute resolution.”

Focus on the litigation culture may produce another, litigator-centered, view of “crisis” and appropriate responses. Where do litigators stand in the hierarchy of larger firms? What are the typical satisfactions and frustrations in the workdays of commercial litigators? What are the emotional, physical, and interpersonal costs? How successful have women and discriminated-against minorities been in surviving and thriving as litigators? There is an emerging body of information about these matters which speaks to a crisis of a more personal nature; Commercial Litigation was of course intended to be a reference book rather than a tract or empirical study, and so it does not have much to say directly about the culture of litigation or about reforms to the litigation system or the nature of law firm practice that would be appropriate to improve it.

Professor Bryant Garth has written that the imperatives of modern legal practice are “at war with the profession and its values.” A reading of Commercial Litigation, however, suggests that litigators have avoided “war” and turned instead to a process of “internal” dispute resolution. They have resigned themselves to a cold assessment of the fluidity of legal doctrine and the limited capacity of their own legal training and preparation to direct the outcomes of disputes. Their attitudes about the way judges, juries, adversaries, and clients behave have helped them to adapt to many aspects of the crisis that insiders and outsiders have been distressed about—the loss of autonomy, the acrimony, the delay, the costliness, and the difficulty in counseling and litigating efficiently. These natural attitudes, however, crowd out and

104. Stempel, supra note 31, at 691.
105. Id.
106. For a discussion of how women have fared in achieving partnership, see Barbara B. Buchholz, Slow Gains for Women Who Would Be Partners, N.Y. TIMES, June 23, 1996, at F10.
108. Garth, supra note 103, at 931.
sometimes exclude professionally and socially prized values—values such as collegiality, solidarity, cooperation, and professional independence.\(^{109}\) In the longer run, this kind of value reconciliation proves deeply unsatisfactory.