

COLLOQUIUM ON THE FUTURE OF  
COMMERCIAL LITIGATION IN  
NEW YORK: DEVELOPING A  
COST-EFFICIENT PROCESS  
FOR THE ELECTRONIC AGE

INTRODUCTION TO THE COLLOQUIUM

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Attempting to capture in a one-day program all of the problems and competing burdens presented in modern commercial litigation, much less come up with appropriate solutions, is a very ambitious task. Even if the panelists and audience for such a program contained all of the relevant constituencies—judges who hear commercial cases, attorneys practicing commercial litigation, in-house counsel, law professors and students, and clients—the challenge would remain daunting indeed. Nonetheless, the New York State Judicial Institute addressed the matter head on, with its December 1, 2008, *Colloquium on the Future of Commercial Litigation in New York: Developing A Cost-Efficient Judicial Process for the Electronic Age* (the “Colloquium”). The Colloquium focused on issues relating to electronic discovery and alternative dispute resolution (ADR), providing some useful and enlightening dialogue on the issues, at least partially answering many questions and raising a host of others for future discussion.

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The New York State Unified Court System (UCS) includes a Commercial Division dedicated to handling complicated business disputes. The Commercial Division is part of the trial court of general jurisdiction, the New York Supreme Court, and spans 24 parts across ten different judicial districts in New York State: The counties of New York, Kings, Queens, Westchester, Nassau, Suffolk, Albany, and Onondaga, as well as the entire Seventh and Eighth Judicial Districts in the western part of the State.<sup>1</sup>

The Colloquium resulted in part from the UCS's previous positive experience in bringing together interested stakeholders to talk about how to improve commercial litigation in New York. In 2005 and 2006, the courts conducted a Commercial Division Focus Group Project, traveling to five different locations around the State and bringing together judges, litigators, and clients to talk about what was working and what could be improved in the Commercial Division. Moderated by seasoned litigator Robert Haig,<sup>2</sup> the Focus Group project collected opinions and comments from groups in New York, Nassau, Monroe, Albany, and Onondaga Counties. The Office of Court Administration prepared a report to the Chief Judge,<sup>3</sup> addressing ways to improve the Commercial Division, as well as successes of the Commercial Division that could be shared with other parts of the court system. The Colloquium was, at its core, an attempt to expand on the helpful discussions that took place in the focus groups nearly three years earlier, but with a broader audience and a more targeted set of discussion topics.

In planning the Colloquium, we attempted to draw as speakers and panelists a wide range of viewpoints from academia, the judiciary, clients, and the Bar. As a starting point, we invited Chief Judge Judith S. Kaye<sup>4</sup>, who created the

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1. For a current list of Commercial Division Justices, visit [www.nycourts.gov/courts/comdiv](http://www.nycourts.gov/courts/comdiv).

2. Mr. Haig is a member of the law firm of Kelley, Drye & Warren, resident in the firm's New York City office. He also was a member of the Colloquium's Planning Committee.

3. The Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups is available at <http://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf>.

4. The Honorable Judith S. Kaye was New York's Chief Judge from 1993 until December 31, 2008, when she retired pursuant to the State's mandatory retirement rule for judges.

Commercial Division in 1995, to present introductory remarks. We then selected as keynote speakers two individuals with a wealth of knowledge and experience in their respective fields. For the electronic discovery portion of the program, we invited Kenneth J. Withers, whose vision and leadership as the Director of Judicial Education Content at the Sedona Conference<sup>5</sup> is well-known and respected nationally. To kick off our discussion of ADR, we were pleased to have with us the Honorable Stephen Crane, a retired Justice of the New York State Supreme Court, Appellate Division, Second Department, and a mediator at a private ADR firm. Justice Crane was the Administrative Judge of New York County when the court system promulgated ADR rules for the Commercial Division shortly after the Commercial Division was created. He provided a historical framework for the growth of ADR in the Commercial Division.

The Planning Committee chose the Colloquium topics readily. Electronic discovery has, arguably more than any other issue, charted the course for commercial litigation, both in New York and nationally, over the past few years. As one focus group participant noted in 2005, electronic discovery “is going to affect how you litigate and whether you can litigate any complex litigation; and of course, it starts with the question of how do you handle [electronic] discovery and then the next question is if you get [through electronic] discovery, how do you handle trials?” As another judicial participant noted, “I guess it’s here to stay and we are going to have to learn to deal with it . . . . Electronic life is a fundamental reality . . . .” One way to “learn to deal with it,” of course, is to discuss it in a setting like the Colloquium.

Alternative dispute resolution has rapidly gained acceptance, and use, in the commercial litigation context. No longer are litigants and lawyers asking, “Why should I do that?” Instead they are focusing on questions such as, “When is the right time to go?” or “Who is the right neutral to involve in the process?” or “What issue(s) should the ADR address?” New York’s Commercial Division embraced ADR as well: the downstate

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5. The Sedona Conference® brings together leaders at the cutting edge of issues in the area of anti-trust law, complex litigation and intellectual property law to engage in dialogue to move the law forward. See [www.sedonaconference.org](http://www.sedonaconference.org).

counties of New York, Westchester, Nassau, Kings, Queens, and Suffolk and the Eighth Judicial District in the western part of the State all have formal ADR programs with rosters of available neutrals, protocols, and, in many cases, standards of conduct formally articulated and available.<sup>6</sup> Commercial Division Uniform Rule 3 (22 NYCRR 202.70[g][3]) permits a justice of the Commercial Division to direct a matter to ADR at any time, or to refer the matter at the request of the parties. The Colloquium sought to study ADR's role in future commercial litigation by investigating these and other questions.

The other vital piece to planning the Colloquium was to secure the services of two excellent moderators to keep the discussion focused, pique the audience's interest and enlist its participation. For the electronic discovery program, we were pleased to have with us Maura R. Grossman, Counsel at the New York law firm of Wachtell, Lipton, Rosen & Katz. Ms. Grossman is a well-known expert in the field who designed and taught a program to New York State judges on the basics of electronic discovery as part of the court system's ongoing judicial education programs. For the ADR portion of the Colloquium, we turned to Daniel Weitz, Esq., who, among many roles, serves as the New York Office of Court Administration's Coordinator of ADR Programs, and is the Chair of the New York City Bar Association's Committee on ADR. Suffice to say, the immense success of this Colloquium is due in large part to Ms. Grossman's and Mr. Weitz's work both in the planning and in the execution. Their efforts are evidenced in the pages that follow. We are pleased that the *Journal of Court Innovation* has published the transcript of the Colloquium proceedings so that others can share in the on-going discussion.

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6. Subsequent to the Colloquium, Suffolk County on Long Island launched its own Commercial Division ADR program.