

Lawyer Insights

Starting Your Case: Preliminary Matters, Pleadings and Appearances in the NY Commercial Division

This article is part two in a series explaining the fundamentals of Commercial Division practice. It addresses the first steps taken when litigating in the Commercial Division, including preparation and filing of pleadings, appearances and corporate disclosure statements.

By Kevin Small, Joseph Saltarelli and Charlotte Leszinske
Published in New York Law Journal | May 14, 2024



This article is part two in a series explaining the fundamentals of Commercial Division practice. The article addresses the first steps taken when litigating in the Commercial Division, including preparation and filing of pleadings, appearances and corporate disclosure statements. Part one in the series can be found [here](#).

Preliminary Matters

There is a specific New York state court style manual, which is quite different from those used in federal courts and other states (see [New York Law Reports Style Manual \[2022\]](#)). For example, case citations appear at the end of each sentence in line with the text (see, e.g., *People v Wilkins*, 37 NY3d 371 [2021]).

PRACTICE TIP: While following this style manual is technically required and Commercial Division courts use it in their decisions, your brief is not likely to be rejected for filing if you follow traditional “Bluebook” citation form.

Like other courts, the Commercial Division has specific formatting requirements, which can be found in Rule 6 of the Commercial Division Rules (22 NYCRR §202.70(g) (referenced here as “Comm’l Div. Rules”). One Commercial Division-specific rule is that every memorandum of law (and, where appropriate, affidavit and affirmation) must include bookmarks listing the document’s contents, as well as hyperlinks to documents filed on NYSCEF (Comm’l Div. Rules rule 6 [a]-[c]).

The Commercial Division also encourages linking to legal authority (Comm’l Div. Rules rule 6 [c] [1]). Parties must also comply with the formatting rules of the Supreme Court and any local and judges’ rules [see, e.g., Uniform Rules for Trial Courts [22 NYCRR] §202.5 [a] [1] [requiring footnotes be no smaller than 10-point font]. For example, briefs, memoranda and similar must be filed with a certification as to the word count and comply with page limits (see Uniform Rules for Trial Courts [22 NYCRR] §202.8-b, which tracks Comm’l Div. Rules rule 17).

Starting Your Case: Preliminary Matters, Pleadings and Appearances in the NY Commercial Division

By Kevin Small, Joseph Saltarelli and Charlotte Leszinske

Published in New York Law Journal | May 14, 2024

E-filing is typically mandatory in the Commercial Division (see [Admin Order of Chief Admin Judge of Cts AO/372/21](#) [eff Dec. 22, 2021]; see also Uniform Rules for Trial Courts [22 NYCRR] §§202.5-b; 202.5-bb). Local rules of particular counties' Commercial Divisions may impose additional requirements for filing procedures and formatting (see, e.g., NY County, [Protocol on Courthouse & County Clerk Procedures for Electronically Filed Cases](#) (Aug. 15, 2019)). Once a Request for Judicial Intervention (RJI) has been filed and a judge is assigned, it is essential to study the judge's rules.

Appearances

The very first Commercial Division rule requires attorneys who appear before a justice to be on time, “fully familiar with the case,” authorized to enter into both substantive and procedural agreements on their client's behalf and prepared to speak to any outstanding motions (Comm'l Div. Rule 1 [a], [c]). Attorneys are also expected to be “sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery,” but if they are not, they may bring a client representative or outside expert who is sufficiently versed (Comm'l Div. Rule 1 [b]). In practice, these requirements may require lead counsel to appear, rather than a junior associate.

Rather than entertain an appearance by a substitute attorney, the court may grant permission for counsel to appear remotely in exigent circumstances, so long as requests are filed at least 48 hours before the hearing (Comm'l Div. Rule 1 [d], 34 [d]). Also, motions are now generally scheduled for specific times so that parties are not waiting to be called (Comm'l Div. Rule 34 [d]). In non-Commercial Division cases, depending on the particular justice and their schedule, several cases can be scheduled at the same time, requiring counsel to wait, sometimes hours, for their turn.

Counsel appear as specified in the CPLR (see CPLR §320). Note that general registration on NYSCEF, New York's e-filing platform, does not constitute as an appearance in any particular matter (NY State Unified Court System, [Frequently Asked Questions](#)). Pro hac vice applications must comply with section 520.11 of the Uniform Rules for Trial Courts (22 NYCRR).

Pleadings

Complaints should be drafted to comply with the general rules governing New York Supreme Court practice (see, e.g., CPLR §§3011 [kinds of pleadings]; 3012 [service]; 3013-3016 [particularity and statements], 3017 [demand for relief]). Unlike federal practice, no jury demand is required at the filing stage (CPLR §4102 [a] [jury demand required with filing of note of issue]; see CPLR §3402 [note of issue]; Uniform Rules for Trial Courts [22 NYCRR] §202.21 [same]).

In commercial cases, the plaintiff must plead the amount of damages sought in the “demand for relief” at the end of the complaint (*ad damnum* clause) (CPLR § 3017 [a]; cf., §3017 [c] [in personal injury cases the “prayer for general relief shall not state the amount of damages to which the pleader deems himself entitled”). In practice, however, leave to amend is freely given (see, e.g., *Trustees of Columbia University in City of New York v. Gwathmey Siegel & Associates Architects*, 192 AD2d 151, 156 [1st Dept 1993] [“In the absence of prejudice, leave to amend an ad damnum clause is freely granted...”]).

PRACTICE TIP: In certain cases—medical malpractice, some foreclosure matters—certificates of merit must be filed with the complaint (see CPLR §§3012-a; 3012-b).

Starting Your Case: Preliminary Matters, Pleadings and Appearances in the NY Commercial Division

By Kevin Small, Joseph Saltarelli and Charlotte Leszinske

Published in New York Law Journal | May 14, 2024

The Commercial Division requires that responsive pleadings, such as answers, not only respond to each allegation with a denial, or a statement that the party lacks knowledge or information sufficient to form a belief as to the truth of the allegation (which has the effect of a denial).

In its answer (or reply), the responding party must interlineate each allegation to which they are responding. (CPLR §3018; Comm'l Div. Rule 6 [d] [1]; [Admin Order of Chief Admin Judge of Cts AO/189/22](#) [eff Aug. 17, 2022]). It is not enough to preserve the pleading's numbering; the original allegation must appear before each response. (Comm'l Div. Rules rule 6 [d] [1]). To make this process easier for the responding party, on request, the party who prepared the pleading must provide a copy of the pleading in word processing form (*i.e.*, Word) (Comm'l Div. Rule 6 [d] [2]).

Again, responsive pleadings must comply with the general rules, as well. For example, answers must sometimes be verified (*see* CPLR § 3020 [b]-[c]). Affirmative defenses must be alleged, or else they will be deemed waived (CPLR § 3018 [b]; *see, e.g., Ally Financial v. Bill's Towing Service*, 181 AD3d 1045, 1045 n 2 [3d Dept 2020]). Attorneys should not assume they will be granted leave later in the case to amend their answers to assert additional affirmative defenses, as leave can be granted only under specific conditions (such as lack of prejudice to the other party) (*see, e.g., Civil Service Employees Association v. County of Nassau*, 144 AD3d 1075, 1076-77 [2d Dept 2016]). For that reason, research potential affirmative defenses carefully.

PRACTICE TIP: The Advisory Committee on Civil Practice has recommended that CPLR § 3018 be amended to require that objections related to the timeliness or manner of service to be pleaded as an affirmative defense within 90 days of serving an answer or responsive pleading (2023 Rep of Advisory Comm on Civ. Practice to Chief Admin Judge of Cts of St of NY at 91). Be on the lookout for developments about this proposal.

Corporate Disclosure Statement

Similar to Rule 7.1 of the Federal Rules of Civil Procedure, the Commercial Division Rules require non-governmental corporate entities to file corporate disclosure statements (Comm'l Div. Rule 35; [Admin Order of Chief Admin Judge of Cts AO/289/21](#)[eff Oct. 4, 2021]). The disclosure statement must identify any parent corporation and any publicly held corporation holding 10% or more of the party's stock (Comm'l Div. Rule 35 [A]), and be filed with the party's first appearance, pleading, petition, motion, response or other request to the court for judicial intervention (Comm'l Div. Rule 35 [B] [1]). Finally, if any ownership information changes during the litigation, the party must file a supplemental statement (Comm'l Div. Rule 35 [B] [2]).

Up Next

You have filed your complaint and any requisite notices, and have served your defendant. What comes next? Part three of our series will address the general timelines, including fact and expert discovery schedules, applicable to cases in the Commercial Division.

HUNTON ANDREWS KURTH

Starting Your Case: Preliminary Matters, Pleadings and Appearances in the NY Commercial Division

By Kevin Small, Joseph Saltarelli and Charlotte Leszinske

Published in New York Law Journal | May 14, 2024

Kevin Small is a counsel in the firm's Insurance Coverage group in the firm's New York office. Kevin is a commercial litigator who represents clients in insurance coverage disputes and other business litigation. He can be reached at +1 (212) 309-1226 or ksmall@HuntonAK.com.

Joseph Saltarelli is a counsel in the firm's Corporate and Securities Litigation practice in the firm's New York office. He has been lead counsel on numerous jury and non-jury trials, arbitrations, and administrative hearings, and appellate counsel on more than 40 appeals. He can be reached at +1 (212) 309-1048 or jsaltarelli@HuntonAK.com.

Charlotte Leszinske is an associate in the firm's Insurance Coverage group in the firm's Washington D.C. office. Charlotte represents policyholders in insurance coverage actions in federal and state courts across the country, with matters involving environmental liability, mass torts, products liability, and bad faith. She can be reached at +1 (202) 594-9751 or cleszinske@HuntonAK.com.

Reprinted with permission from the May 14, 2024 issue of New York Law Journal. © 2024 ALM Media Properties, LLC. Further duplication without permission is prohibited. All rights reserved.