BOOK REVIEW: A SPACE TRAVELER'S GUIDE TO BUSINESS LITIGATION

BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS, FOURTH ED. Robert L. Haig, Editor-in-Chief. Thomson Reuters. 2016. 14 Vols. $1,806.00.

Reviewed by Jeffrey Willis*

INTRODUCTION

Is it possible to create a work that could inform virtually every aspect of any commercial case? The goal of the Fourth Edition of this treatise is exactly that. As explained by Editor-in-Chief Robert L. Haig:[1]

> [T]his treatise is a step-by-step practice guide that covers every aspect of a commercial case, from the investigation and assessment that take place at the inception, through pleadings, discovery, motions, trial, appeal, and enforcement of judgment. Great emphasis is placed on strategic considerations specific to commercial cases.[2]

Unlike a text which typically would be read from front to finish, the treatise encourages specific topical inquiry. The editor carefully cross-referenced chapters to facilitate full comprehension of a particular topic. The treatise is primarily designed to be a practice aid, not a philosophical dissertation, and the attention paid to the indexing and cross-referencing demonstrates this point. Along the way, however, the authors discuss finer legal points and have created a very scholarly work.

The breadth of the Fourth Edition is extraordinary. More than seventy-eight substantive topics are thoroughly presented to assist practitioners in

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1. Mr. Haig is a partner in the law firm of Kelley Drye & Warren LLP in New York City. His practice includes commercial, products liability, and other types of civil litigation in federal and state trial and appellate courts. He graduated from Yale College and from the Harvard Law School. *See* 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS, at xix (Robert L. Haig ed., Thomson Reuters 4th ed. 2016) [hereinafter TREATISE].

2. *Id.* at viii.

commercial litigation cases. The level of detail committed to each subject is commendable. The Fourth Edition (like its shorter predecessors[3]) provides reliable authority for frequently encountered issues within the various substantive topics, and also provides practical advice for developing the evidence and theories of any case. As noted by Mr. Haig, there is great emphasis on "strategic considerations."[4] Since the publication of the First Edition in 1998, Mr. Haig and his authors have refined and enlarged each succeeding edition.

The daunting task for this reviewer was to devise a coherent approach to this review. A thorough analysis of the 153 chapters comprised of 17,142 pages of text in fourteen volumes was impracticable (to say the least). In the end, I familiarized myself with all of the topics using the Table of Contents and extensive Tables and Index. I then drilled down in certain subjects in which I have some professional experience. Thus, I will first describe the Fourth Edition in general and then examine three chapters in more detail. These are: "Theft or Loss of Business Opportunities" (Chapter 118);[5] "Teaching Litigation Skills" (Chapter 71);[6] and "Effective Trial Performance" (Chapter 39).[7] The first of these topics is substantive in nature, and is a carryover from the previous three editions. The other two are new to the Fourth Edition and (as should be apparent from their titles) apply to all litigation, commercial or otherwise.

THE FOURTH EDITION

The treatise is as impressive as the 296 principal authors that created it.[8] There are several chapters devoted to jurisdictional issues.[9] Others address

3. The treatise was initially produced in 1998 and new editions were published in 2005, 2011 and 2016. The treatise is a joint venture between Thomson Reuters and the ABA Section of Litigation, with all royalties going to the Section of Litigation.

4. 1 TREATISE, *supra* note 1, at viii.

5. 12 *id.* ch. 118.

6. 7 *id.* ch. 71.

7. 4 *id.* ch. 39.

8. The authors of the treatise are remarkable. The 296 principal authors include twenty-seven judges (twenty-five federal and two state court), five former ABA presidents, forty Fellows of the American College of Trial Lawyers and six former chairs of the ABA Section of Litigation. The attorney authors are among the cream of the crop in commercial litigation. For example, David Boies co-authors the chapter on "Litigation Technology" (Chapter 66). 6 *id.* ch. 66. Among his other accomplishments, Mr. Boies represented plaintiffs in California in the first case to strike down a state's ban on gay marriage as violative of the Federal Constitution. *See* Hollingsworth v. Perry, 570 U.S. 693 (2013). Mr. Boies is not the only household name among the Fourth Edition authors. The list of authors and their biographies contained in Volume 1 is

specific pleadings.[10] Still others examine discrete discovery tools.[11] There are numerous chapters devoted to specific aspects of trial practice such as cross-examination[12] and closing arguments.[13] Finally, there are chapters on aspirational topics such as "Civil Justice Reform" (Chapter 11)[14] and "Civility" (Chapter 74).[15] In short, there are dissertations on almost every conceivable subject related to commercial litigation in federal courts. There are also outlines of practice aids, checklists and forms.

The Fourth Edition contains twenty-five new chapters which address developing specialties as diverse as "Social Media" (Chapter 67),[16] "Advertising" (Chapter 124),[17] "Media and Publishing" (Chapter 126),[18] "Marketing to Potential Business Clients" (Chapter 70),[19] "Civil Rights" (Chapter 141),[20] "Health Care Institutions" (Chapter 87),[21] the "Telephone Consumer Protection Act" (Chapter 96),[22] "Fiduciary Duty Litigation" (Chapter 116),[23] and "Fashion and Retail" (Chapter 149).[24] The treatise is supplemented by annual pocket parts as commercial law continues its rapid pace of evolution.

The approach used by many of the authors is an effective blend of practicality and scholarship. The substantive law chapters address frequently encountered issues within the litigation of those subject matter areas, including practical strategic concerns. The treatise is well-supported by citations to case and statutory authorities. The practitioner would be well-served to use the substantive chapters as readily available outlines of the law in those areas. In addition to the scholarly discussion of the law itself, the authors provide jury instructions.[25] The treatise is thus unique—it

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literally a Who's Who of commercial litigators in the United States. *See* 1 TREATISE, *supra* note 1, at xix-clxix.

9. 1 TREATISE, *supra* note 1, chs. 1–2.
10. 1 *id.* chs. 7–8.
11. 3 *id.* chs. 23–29.
12. 4 *id.* ch. 42.
13. 4 *id.* ch. 45.
14. 1 *id.* ch. 11.
15. 7 *id.* ch. 74.
16. 6 *id.* ch. 67.
17. 12 *id.* ch. 124.
18. 12 *id.* ch. 126.
19. 7 *id.* ch. 70.
20. 13 *id.* ch. 141.
21. 8 *id.* ch. 87.
22. 9 *id.* ch. 96.
23. 11 *id.* ch. 116.
24. 14 *id.* ch. 149.
25. *See, e.g.*, 8 *id.* §§ 86:85–87; 11 *id.* § 109:98; 14 *id.* § 147:56.

is a scholarly work designed to be a practitioners' tool for the litigation of any commercial dispute. There are no other written works that even attempt to provide this breadth of assistance. The treatise thus accomplishes what others have not yet even attempted.

Tortious Interference with Business Relationships (Chapter 118)

Chapter 118, "Theft or Loss of Business Opportunities,"[26] examines several causes of action applicable to the loss of business or corporate opportunities.[27] These fall into two broad subcategories—"Theft of Business Opportunities" and "Tortious Interference with Business Relationships."[28] The level of detail and the depth of research reflected in Chapter 118 are reflective of the treatise as a whole. By way of example, Section 118:14 presents a list of defenses available to defendants accused of usurping a corporate opportunity. The authors note that:

> If the corporation cannot seize an opportunity, a defendant may defeat any claim that she or he took advantage of it. However, this defense is selectively applied and some courts reject it altogether, or at least view it with suspicion, on the theory that it reduces the incentives of fiduciaries—who may hold the reigns of the company—to eliminate whatever inability impedes the corporation.[29]

The language quoted above is supported by two footnotes which provide no fewer than six citations to appellate opinions from a variety of jurisdictions supporting the proposition.[30] There are even summary

26. 12 *id.* ch. 118. The authors are Rod Phelan and Van H. Beckwith (both of Baker Botts). Mr. Phelan represents professional service firms, publicly traded and privately held business entities and their principals. He was most recently recognized in *The Best Lawyers in America*, *Top 100 Texas Lawyers* and *Chambers Global*, to name a few. *See Rod Phelan*, BAKER BOTTS, http://www.bakerbotts.com/people/p/phelan-rod [https://perma.cc/9NMY-QW4T] (last visited Jan. 12, 2019). Mr. Beckwith has over twenty-eight years of experience in large, complex litigation and arbitration. He is an elected member of the International Academy of Trial Lawyers. Most recently, he was recognized as a *Texas Super Lawyer* by Thomson Reuters. *See Van H. Beckwith*, BAKER BOTTS, http://www.bakerbotts.com/people/b/beckwith-van-h [https://perma.cc/LQ3N-GUQH] (last visited Jan. 12, 2019).

27. 12 TREATISE, *supra* note 1, § 118:1.

28. 12 *id.* §§ 118:02–22, 23–40.

29. 12 *id.* § 118:14 (footnotes omitted).

30. 12 *id.* § 118:14 nn.1–2. (For example, *Horton Grand Saddlery Hotel Joint Venture v. Rose*, 64 F.3d 666 (9th Cir. 1995); *Irving Trust Co. v. Deutsch*, 73 F.2d 121, 124 (2d Cir. 1934); *Huff Energy Fund, L.P. v. Longview Energy Co.*, 482 S.W.3d 184, 210 (Tex. App. 2015)).

statements of the holdings within the footnote.[31] This provides a practitioner with an effective starting point to research with more recent or jurisdiction specific cases while confronting these issues in cases filed in federal litigation.

The seventeen subchapters addressing tortious interference with business relationships are equally thorough and informative. Within this grouping of subchapters, the practitioner benefits from a discussion on "Litigation Strategy and Practice Tips";[32] "Elements of Tortious Interference with a Contract";[33] and "Elements of Tortious Interference with a Business Relationship Where There Is No Contract,"[34] as well as discussions of the available remedies[35] and the affirmative defenses.[36]

The practitioner is also provided with check-lists of essential allegations and defenses and potential sources of proof for those allegations and defenses.[37] Finally, adding to the quiver of practice aids, the authors provide forms for a complaint[38] as well as jury instructions on the claims for diversion of corporate opportunity[39] and for tortious interference with either a contract or a business relationship.[40] In short, the treatment of the topic is exhaustive and could be of great assistance to practitioners defending or presenting claims in this area.

31. *See, e.g.*, 12 TREATISE, *supra* note 1, § 118:14 n.1 ("*Beane v. Beane*, 856 F. Supp. 2d 280, 311, 2012 DNH 49 (D.N.H. 2012) (granting summary judgment for defendant on misappropriation of corporate opportunity claim where the corporation 'could not make the [product it contracted to sell] work, was not going to continue trying, and lacked funding to do so and, for that matter, stopped returning [the contract partner's] e-mails and calls').").

32. 12 TREATISE, *supra* note 1, §§ 118:24–27.

33. 12 *id.* §§ 118:28–31.

34. 12 *id.* §§ 118:32–36.

35. 12 *id.* § 118:37.

36. 12 *id.* §§ 118:38–40.

37. 12 *id.* §§ 118:41–46.

38. 12 *id.* §§ 118:47–51.

39. 12 *id.* §§ 118:52–56.

40. 12 *id.* §§ 118:57–61.

Teaching Litigation Skills (Chapter 71)[41]

One of the twenty-five new chapters in the Fourth Edition is entitled "Teaching Litigation Skills."[42] Unlike the substantive chapters which explore discrete legal subjects in detail and provide practice tips, the chapter on teaching litigation skills offers guidance to more senior lawyers on training junior lawyers in the skills of a business litigator. Author McKnight first describes these skills as ranging from: "[A] Thespian's ability to impart drama, to a raconteur's ability to tell a gripping story, to a sleuth's ability to find and master facts, to the writer's persuasion, to the social worker's empathy, to Honest Abe's credibility, to a marathon runner's endurance."[43]

The chapter is divided into five "transcendent skills": (1) teaching oral advocacy; (2) teaching written advocacy; (3) teaching factual mastery and fact gathering; (4) teaching emotional intelligence; and (5) teaching credibility.[44] Even though non-substantive, this chapter explores the antecedents of modern advocacy techniques back to the ancient Greeks and Romans. In the subchapter entitled "Teaching Oral Advocacy,"[45] the treatise relies on historical masters such as Cicero, Demosthenes, Pericles, Aristotle, and Quintilian.

The treatise urges supervising attorneys (or teachers) to encourage their junior colleagues (or students) to think through Cicero's Five Canons. For those readers not immediately up to speed on Cicero, the Canons are (1) Invention; (2) Arrangement; (3) Elocution and Style; (4) Delivery; and (5) Memory.[46] Mr. McKnight then discusses the application of each of the five elements, noting,

> The modern federal litigator may not follow the classical form but will need to be taught each of these elements since the practitioner likely will have each of these somewhere in his opening statement or argument to the court. . . . Good journalists, credible politicians

41. The author of the new Chapter 71, "Teaching Litigation Skills," is Frederick L. McKnight, with assistance from Sarah Conway. 7 *id.* § 71:1. Mr. McKnight is best known for his tenure as the head of Jones Day's litigation practice in Los Angeles. 1 *id.*, at cxii. He has experience in bench and jury trials involving antitrust, bankruptcy, business tort, contract, entertainment, environmental, ERISA, fraud, health care, insurance, intellectual property, oil and gas, product liability, securities, toxic tort, trade secret, and tax matters. *Id.* He is a Fellow of the American College of Trial Lawyers, and he was recognized as "one of the top 100 lawyers in California by the *Daily Journal* and a 'leading individual in California' by *Chambers USA*." *Id.*

42. 7 *id.* ch. 71.

43. 7 *id.* § 71:1.

44. *Id.*

45. 7 *id.* §§ 71:3–9.

46. 7 *id.* § 71:4; *see also* 7 *id.* §§ 71:5–8.

> and modern-day TV humorists teach at least some of these techniques well. These sources can be used with junior attorneys as examples of the skill.[47]

The treatise also includes the universally-accepted advice that "[p]racticing [oral argument] with an eighth grader" can be instructive because "eighth graders provide a useful standard for understanding and attentiveness."[48] Never were truer words spoken. In my experience, in the world of commercial litigation, cases should be tried on the assumption that the jurors' collective comprehension is approximately that of an intelligent twelve-year-old (or an eighth grader).

The chapter on teaching litigation skills examines the other subtopics in a similar fashion. Rather than refer to Cicero or other ancients in the subchapter on "Teaching Written Advocacy,"[49] the author relies instead on more contemporary practitioners of effective writing. Practical advice is offered, as reflected in the comment that:

> Persuasive legal writing uses the fewest and simplest words for the greatest impact. New writers often use ten words where two will do. Some fall prey to needless Latin terms. "[I]t is most advantageous to use language that any high school graduate would readily understand and to avoid language that invites reference to a dictionary or thesaurus."[50]

The remainder of the presentation on teaching litigation skills is as intriguing as the provisions on oral and written advocacy. The author bravely addresses teaching emotional intelligence and empathy. While emotional intelligence and empathy are critical in the courtroom (as well as life), teaching these personality traits could be quite challenging as they are typically the product of a lifetime of experiences. (I am skeptical that empathy or emotional intelligence are even subjects that can be taught.) Nevertheless, the treatise provides numerous examples and suggestions for conduct that creates at least the appearance of being empathetic. After all, in the world of litigation, perception is often reality.

For example, the senior lawyer is urged to "stress how empathy is an essential part of the client-lawyer relationship."[51] The younger lawyers need

47. 7 *id.* § 71:6.

48. 7 *id.* § 71:7.

49. 7 *id.* §§ 71:10–15.

50. 7 *id.* § 71:12 (quoting Lawrence D. Rosenberg, *Writing to Win: The Art and Science of Compelling Written Advocacy*, 2012 A.B.A. SEC. LITIG. 12, https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/34-2_writing_to_win_art_and_science_compelling_written_advocacy.authcheckdam.pdf [https://perma.cc/Z7YE-C4SD]).

51. 7 *id.* § 71:27.

to understand that their clients must feel comfortable that the attorney is "truly interested in resolving their case and concerns."[52] There is practical advice for developing the outward manifestations of empathy, such as facing the speaker, maintaining eye contact, being attentive, listening to the speakers' words, and keeping an open mind.[53]

The chapter concludes with a practice checklist entitled "Teaching the Transcendent Skills of a Federal Business Litigator" which has twenty-eight suggested areas of instruction for more senior lawyers to impart to their protégés.[54] Some of these are quite practical—such as video recording and providing written transcripts of role playing sessions; and some are ephemeral—such as instilling the principles of invention, organization, arrangement, style, memory and delivery in the more junior lawyers.[55] Good advice, but the skills will ultimately be the product of experience, not mentoring or teaching.

Effective Trial Performance (Chapter 39)

Chapter 39 is the creation of the Honorable Reggie B. Walton of the United States District Court for the District of Columbia.[56] Judge Walton addresses eight topics related to trials in federal courts. Unlike the other two chapters discussed in this review, Chapter 39 does not have a depth of legal authorities—which is not surprising given the subject matter. Rather, the discussion on effective trial performance may fairly be characterized as Judge Walton sharing the benefit of his more than forty years of experience as a trial judge, prosecutor, and public defender. As he notes at the outset, the purpose of the chapter is "to assist counsel, particularly younger or inexperienced trial counsel, to improve their courtroom performance by addressing common mistakes and exemplary performances I have

52. *Id.*
53. *Id.*
54. 7 *id.* § 71:36.
55. *Id.*
56. 4 *id.* ch. 39. The Honorable Reggie B. Walton is a senior judge on the United States District Court for the District of Columbia. Judge Walton previously served as an Associate Judge on the Superior Court of the District of Columbia. He then served as President George H.W. Bush's Associate Director of the Office of National Drug Control Policy in the Executive Office of the President, as well as the Senior White House Advisor for Crime. In 2001, Judge Walton was nominated to the federal bench by President George W. Bush and confirmed by the Senate. In 2007, Judge Walton was appointed to a seat on the Foreign Intelligence Surveillance Court. He was subsequently appointed the Presiding Judge of that court in 2013. 1 *id.*, at clvii–clviii.

experienced or observed during trial preparation and courtroom proceedings."[57]

The chapter itself is a down-to-earth discussion of the dos and don'ts of effective trial practice. Judge Walton identifies jury selection, opening statements, examination of witnesses, cross-examination of witnesses, expert witnesses, closing arguments, and jury instructions as the essential elements of a commercial case.[58] He very astutely observes that "[e]ffective trial advocacy requires a resolute commitment to absolute perfection,"[59] and that a successful trial performance is a complex endeavor.

Using a specific example, he wisely counsels that lawyers should be aggressive in exercising peremptory strikes even if there may be a potential *Batson* challenge.[60] He describes a particular attorney's failure to exercise a peremptory strike on an African American juror who, in Judge Walton's opinion, should have been properly stricken because of a potential bias arising from his employment—not his race.[61] Judge Walton concludes that the failure to strike was motivated by misplaced *Batson* concerns.

There are numerous suggestions for effective witness examinations and the presentation of hard evidence. For example, he highlights the frequently encountered "inept" attempt to refresh a witness's present recollection as a common mistake. He stresses (without citing to Rule of Evidence 612) that if a document is used to refresh a witness's recollection, counsel should first have that document marked as an exhibit, shown to opposing counsel, and then shown to the witness with the request that the witness read it silently. Only then, after the document has been removed, may counsel ask whether the witness's recollection has been refreshed. That Judge Walton should highlight this as a common mistake is confirmed by the many law school trial practice courses stressing the distinction between refreshing a witness's recollection and/or introducing a past recollection recorded.[62] The first is a matter of competency and the second is a hearsay issue.

Judge Walton also notes that lawyers are always "on" in a courtroom and that any conduct in the jury's presence can have both positive and negative effects. His last subchapter is on "Courtroom decorum and civility"[63] in which he imparts sound advice on civility with the following suggestions:

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57. 4 *id.* § 39:1.
58. 4 *id.* §§ 39:1–12.
59. 4 *id.* § 39:1.
60. Batson v. Kentucky, 476 U.S. 79 (1986).
61. 4 TREATISE, *supra* note 1, § 39:4.
62. *See* THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 540–41 (9th ed. 2013).
63. 4 TREATISE, *supra* note 1, § 39:11.

> Some common acts of decorum that counsel should assume most judges will demand are: standing when the judge and the jury enter and depart the courtroom; standing when addressing the court and questioning witnesses; requesting permission from the court to approach witnesses during their examination; seeking permission from the court to consult with opposing counsel; refraining from engaging in discussions with opposing counsel without the court's approval; not lodging unfounded ethical and ad hominem attacks against opposing counsel; not employing 'speaking' objections designed to influence the jury; not manifesting disapproval of a court ruling through inappropriate body language and facial expressions; and not attempting to speak when the judge is also speaking.[64]

Judge Walton's candid advice should not be underestimated, as it is reflective of the guidance set forth in the Code of Pretrial and Trial Conduct by the American College of Trial Lawyers.[65] What better way to end a discussion on effective trial practice than with a reference to the Code of Conduct endorsed by Chief Justice William Rehnquist, among others.[66]

CONCLUSION

The treatise stands alone as the only comprehensive source of learned instruction for the trial of commercial cases in federal courts. Mr. Haig and his authors have achieved the stated purpose of the treatise by creating a highly reliable and authoritative body of work which should assist practitioners in almost every substantive area of commercial litigation. The treatise is a valuable tool for commercial litigators and may be reliably consulted on virtually every procedural, substantive, and persuasive topic encountered in a commercial case.

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64. *Id.*

65. AM. COLL. OF TRIAL LAWYERS, CODE OF PRETRIAL AND TRIAL CONDUCT (2009), http://www.vawd.uscourts.gov/media/3143/pretrial_and_trial_conduct.pdf [http://perma.cc/JFF8-CR6R].

66. See 7 TREATISE, *supra* note 1, § 71:33 for a discussion of the origins of the Code, which was recommended to the trial bar by the former Chief Justice William Rehnquist. *Id.*; *see also* 7 *id.* § 74:3 n.9 ("This Code is meant 'not to supplant, but to supplement and stress certain portions of the rules of professional conduct in each jurisdiction.' . . . It details the minimal duties owed to clients, opposing counsel, the court and the administration of justice. . . . The Code stresses, however, that lawyers should strive for an even higher level of civility whenever possible.").