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Business and Commercial Litigation in Federal Courts, Third Edition

Robert L. Haig, Editor in Chief
2011 West, 12,742 pages

Reviewed by JILL YAZIJI

Business and Commercial Litigation in Federal Courts, Third Edition, edited by Robert L. Haig, is a compilation of knowledge, experience and legal strategies of 251 of the nation's most distinguished federal practitioners, including 22 judges. The Third Edition is eleven volumes, adding three volumes to the Second Edition, published in 2005. This expanded treatise is welcome: it updates the original chapters of the Second Edition and expands its reach to 34 new chapters, such as "Derivatives," "Money Laundering," and even "Medical Malpractice."

The eleven-volume Third Edition is astounding not only in its thematic reach, but also in the depth of its detail. Each chapter is equipped with practice tips, and many have forms that bring the concepts discussed to the fingertips of the user. In fact, a state court practitioner frustrated by the lack of comprehensive business and commercial forms may well turn to this edition and find its forms applicable—from contingent fee agreements and noncash settlements to fraudulent inducement, demand letters, and partnership litigation. Likewise, this edition adds checklists of allegations, defenses, client counseling sections, and jury instruction, all also included on a CD.

Our own Texas litigators and judges contribute prominently to this epic endeavor, including 15 different authors and seven chapters, with Charles Babcock featuring one of the new chapters entitled, "Prior Restraints on Speech"—a riveting discussion of this constitutional doctrine and its applicability to the business context.

Vincent Hess and John McElhaney co-authored the chapter on "Costs and Reimbursements," rendering this relatively technical subject engaging and accessible. This strategy-filled chapter discusses how a prevailing party can recover costs, the applicable statutes allowing recovery of taxable costs, and various definitions of "prevailing" party, along with a comprehensive list of costs that may or may not be recoverable. Hess and McElhaney argue that seeking the court's prior approval of items to be taxed or recovered at the outset of the case is not placing the cart before the horse, as many litigants suppose, but rather a wise practice supported by extensive case law.

Stephen Susman and Barry Barnett co-authored the chapter on "Techniques for Expediting and Streamlining Litigation." As a pioneer of high-stakes litigation conducted in an efficient and collegial manner, Susman has a winning record that would put to rest any argument that efficiency and collegiality may compromise a litigant's advantage. The chapter imparts the common wisdom rarely used in litigation: "less is best"—that massive document productions often impede rather than enhance the evidence presented, and may hinder a party's ability to surprise at trial. The authors advocate openness and cooperation to reduce the prohibitive cost and waste of litigation, sharing a "standard list of discovery" to opposing counsel, service of documents by email and on a rolling basis as soon as the documents become available, and even suggest allowing open file searches as long as privileges and confidential information are preserved.

Two Texas federal judges contributed chapters to the treatise as well. Judge Barbara M. G. Lynn wrote the chapter on "Requests for Admissions" along with David Coale. This chapter richly and methodically lays out the law on this subject, analyzing the effects of poorly timed admissions requests, as well as the difference between substantive requests and those seeking to establish evidentiary matters. The chapter abounds with strategies and subtle distinctions between effective requests, often "short, clear, and suggest an obvious answer," and requests that are ambiguous, thus lacking the desired "foreclosure" effect, even when admitted. The chapter turns the requests for admissions into a highly effective discovery tool, including establishing the ultimate issue in the case, to avoid expensive trial discovery.

Judge David Hittner coauthored the chapter on "Jury Selection" along with David Beck and Eric J.R. Nichols. The authors emphasize the federal court's wide discretion in (dis)allowing attorneys to conduct their own examination of the jury veneer, pointing out that two-thirds of the federal judiciary thinks that attorneys use *voir dire* for "inappropriate purposes." With that perception, the authors discuss factors that encourage federal judges to allow the attorneys' own examination of jurors, and cite examples of cases where the court's failure to allow the parties to ask questions eliciting potential juror bias resulted in reversal. Particularly enlightening is the authors' discussion of the important role of diplomacy in eliciting a reticent juror's acknowledgement of his or her bias. In the highly constrained world of federal *voir dire*, the authors' wisdom on this subject may be best gleaned from a quote by Clarence Darrow that a "large part of [an attorney's] work is sizing up judges, jurors, and witnesses at the first glance."

The treatise's broad jurisprudence and eminent practicality are interwoven with ethical considerations throughout. But "Ethical Issues in Commercial Litigation," co-authored by Harry Reasoner, George Kryder and Edward Carr, specifically maps out the legal ethics maze of complex litigation and ways to navigate it. Another Texas attorney, Blake Tartt, along with Bruce Wilkin, provides the first chapter, comprehensively treating the authority of federal courts to hear any case in "Subject Matter Jurisdiction."

Business and Commercial Litigation in Federal Court, Third Edition is a composite of jurisprudence and data points. For example, a footnote in chapter 55 on "Appeals to the Courts of Appeals" takes the reader to U.S. court of appeals statistics website, where the she will quickly learn that the number of private cases filed in the Fifth Circuit in 2011 was the second largest in the nation, or that the number of immigration cases involving alien smuggling in the Fifth Circuit in 2011 was the largest in all federal circuits, and almost twice the number of those in the Ninth Circuit.

No review, short or long, can adequately describe the contributions of these stellar practitioners or the time expended by the editor-in-chief in assembling them together. The outcome is packed equally with authoritative legal analysis and hands-on practical tips, and is universally applicable to the business litigation practitioner, in state or federal court.

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Reading Law: The Interpretation of Legal Text

By Justice Antonin Scalia & Bryan A. Garner, Thomson/West, 2012

Reviewed by JEFFREY L. OLDHAM

What do you expect when you see a book about interpreting legal texts that is co-written by a U.S. Supreme Court Justice renowned for his interpretive skills, and a lexicographer who has edited *Black's Law Dictionary* and authored highly regarded books about legal writing? An authoritative and comprehensive treatise that is likely to be a staple of many lawyers' bookcases. And that is exactly what Justice Antonin Scalia and Bryan Garner have delivered with *Reading Law: The Interpretation of Legal Texts*.

The most obvious contribution of *Reading Law* is its incomparable collection of principles for interpreting legal language. The book is in this sense a classic treatise: it identifies and explains 37 canons of interpretation applicable to all legal texts—whether a contract, a statute, or other legal text—and then does the same for 20 additional canons that are specific to statutory interpretation. In characteristic Justice Scalia fashion, the book closes with 13 other notions that the authors believe are misguided. For each principle, Justice Scalia and Mr. Garner provide an explanation and examples of proper usage—and for many canons, they offer much more. Some of these descriptions are steeped in technical grammar rules; others include discussions about originalism or other important topics. The collection is therefore not just a useful reference guide to have close by when an interpretation question arises; rather, it is an engaging treatise about the principles of interpretation and legal writing and theory in general. The book is a must-have for any lawyer, law student, or citizen who wants a primer on legal interpretation and writing.

But *Reading Law* is as much an argument about how to interpret legal texts as it is a catalogue of the tools for doing so. Not surprising to anyone familiar with the work of Justice Scalia, the book advocates textualism as the proper method for interpreting legal texts. The book's lengthy introduction conceptualizes the proper role of a judge when interpreting a written text—to determine and apply the text as written according to its definite and ascertainable meaning, using the proper interpretive tools—and then argues that a "fair reading" textualism is the best method for performing that role. It also rebuts criticisms of this method and some competing theories of interpretation. The authors end the book with a lengthy section on interpretive falsities, many of which underscore the arguments in favor of textualism and against competing modes of interpretation.

For instance, in criticizing an alternative theory of interpretation that they call "purposivism," the authors note that this approach allows a foray into the use of legislative history (which Justice Scalia famously abhors), and they complain that "[t]he purposivist, who derives the meaning of text from purpose and not purpose from the meaning of text, is free to climb up th[e] ladder of purposes and to 'fill in' or change the text according to the level of generality he has chosen." This sentiment returns when Justice Scalia and Mr. Garner later refute the "false notion that the quest in statutory interpretation is to do justice," writing that "[t]he problem is that although properly informed human minds may agree on what a text means, human hearts often disagree on what is right. That is why we vote... on what the law ought to be, but leave it to experts of interpretation called judges to decide what an enacted law means."

Some of these arguments about theories of interpretation are not new to *Reading Law*. But as the reaction to *Reading Law* has already demonstrated, including the unusually fierce public debate between Justice Scalia and Seventh Circuit Judge Richard Posner shortly after Judge Posner reviewed the book, this presentation of the arguments will continue to be provocative.

Reading Law should not only be read by practitioners and law students for legal purposes, but for the sake of reading a well-written, highly enjoyable text as well.

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