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NEW YORK STATE - FEDERAL JUDICIAL COUNCIL
ADVISORY COMMITTEE

Which Court? State or Federal and Why?
Selecting Your Jurisdiction

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I. Key Differences Between Federal and State Courts

TOPIC	FEDERAL COURT	STATE COURT
Commencement of an Action	<p>“A civil action is commenced by filing a complaint with the court.” Fed. R. Civ. P. 3.</p>	<p>Three options: (1) filing a summons with Notice, <i>see</i> CPLR 304; (2) filing a petition in a special proceeding governed by Article 4, <i>see</i> CPLR 304; or (3) filing a summary judgment motion in lieu of a complaint upon an instrument for the payment of money only, <i>see</i> CPLR 3213.</p>
Venue	<p>(1) The district where any defendant resides (if all defendants are from the same state); or (2) a district where a substantial part of the events or omissions giving rise to the claim occurred. <i>See</i> 28 U.S.C. § 1391(b)(1), (2).</p>	<p>(1) In any county in which one of the parties resided when it the action was commenced; or (2) If none of the parties resided in the state, in any county designated by the plaintiff. <i>See</i> CPLR 503(a).</p>
Assignment of Judge	<p>The District Judge is randomly assigned upon the filing of the Complaint.</p>	<p>A judge is randomly assigned upon a party’s filing of a Request for Judicial Intervention (“RJI”). <u>Note on the Commercial Division Rules:</u>¹ In 1995, New York created the Commercial Division as an efficient, sophisticated, up-to-date court dealing with challenging commercial cases. By virtue of its specialized subject matter jurisdiction, the Commercial Division’s judges are chosen for their extensive experience in resolving sophisticated commercial disputes.²</p>

¹ The *Rules of the Commercial Division of the Supreme Court* are located at 2 N.Y.C.R.R. § 202.70 (“*Commercial Division Rules*”) and contains certain jurisdictional requirements, which are set forth in at 22 N.Y.C.R.R. § 202.70(a), (b), and (c). The *Commercial Division Rules* specifically state that unless “provide[d] specifically to the contrary, the rules of Part 202 also shall apply to the Commercial Division, except that Rules 7 through 15 shall supersede section 202.12 (Preliminary Conference) and Rules 16 through 24 shall supersede section 202.8 (Motion Procedure).”

² *See generally* 22 N.Y.C.R.R. § 202.70 at Preamble.

TOPIC	FEDERAL COURT	STATE COURT
Initial Disclosures	Required, pursuant to Fed. R. Civ. P. 26, at or within 14 days of the Rule 26(f) Conference.	Initial disclosures are not required. Preliminary Conference is to establish a timetable for the completion of discovery. <i>See</i> 22 N.Y.C.R.R. § 202.20-b. <u>Commercial Division Rules: 22 N.Y.C.R.R. § 202.70(g)</u> (“Rules 7 through 15 shall supersede section 202.12 (Preliminary Conference)”).
Priority of Disclosure	No rule	The defendant preserves priority of deposition or interrogatory by serving notice with the answer. <i>See</i> CPLR 3106(a), 3132.
Out-of-State Discovery	Readily available pursuant to Fed. R. Civ. P. 45	New York has now enacted the Uniform Interstate Depositions and Discovery Act. <i>See</i> CPLR 3119.
Expert Disclosure	The Federal Rules permit broad expert disclosure, including detailed expert reports (<i>see</i> Fed. R. Civ. P. 26(a)(2)(B)), as well as depositions.	Significantly less robust than in Federal Court. Need only make CPLR 3101(d)(1) disclosure. No depositions unless court ordered. <u>Note on the Commercial Division Rules:</u> ³ Expert discovery is now more closely aligned with the procedure set forth in the Federal Rules.
Number of Depositions Permitted	Generally limited to 10 per party and unless the parties otherwise agree, leave of court is required to exceed the limit. <i>See</i> Fed. R. Civ. P. 30. “Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours.” Fed. R. Civ. P. 30(d)(1).	Now similar to the Federal Rules. <i>See</i> 22 N.Y.C.R.R. § 202.20-b; <u>Note on the Commercial Division Rules:</u> ⁴ Generally the same.
Number of Interrogatories Permitted	Leave of court required to take more than 25 per party. <i>See</i> Fed. R. Civ. P. 33(a).	Now similar to the Federal Rules. <i>See</i> 22 N.Y.C.R.R. § 202.20.

³ *See* 22 N.Y.C.R.R. § 202.70(g) at Rule 13(c).

⁴ *See* 22 N.Y.C.R.R. § 202.70(g) at Rule 11-d.

TOPIC	FEDERAL COURT	STATE COURT
		<p><u>Note on the Commercial Division Rules:</u>⁵ Unless otherwise ordered by the Court, interrogatories are limited to certain subjects, which is consistent with how interrogatories are treated under certain Local Rules (but not the Federal Rules).</p>
<p>Stay of Discovery via Dispositive Motions</p>	<p>There is no Federal Rule automatically staying discovery when a party brings a pre-answer motion to dismiss.</p> <p>However, some judges will grant a stay of discovery <i>sua sponte</i>, while others may grant a stay when an appropriate showing has been made.</p>	<p>Discovery is automatically stayed pending the determination of motions to dismiss or for summary judgment, except where the motion is based solely on improper service.</p> <p><i>See</i> CPLR 3214(b).</p> <p><u>Note on the Commercial Division Rules:</u>⁶ Stay is not automatic.</p>
<p>Jury Demand</p>	<p>Must be made no later than 14 days after serving the last pleading directed to the issue on which a jury is demanded</p> <p><i>See</i> Fed.R.Civ.P. 38(b).</p>	<p>Made in the Note of Issue.</p> <p><i>See</i> CPLR § 4102.</p>
<p>Jury Selection</p>	<p>With some very limited exception, jury selection in federal court is conducted by the trial judge and limits a trial attorney's participation in the juror <i>voir dire</i> process.</p> <p><u>Peremptory Challenges:</u> Three per party, subject to the discretion of the Court.</p>	<p>Judges play a far less active role and <i>voir dire</i>⁷ is largely attorney run.</p> <p>Judge has discretion as to whether supervision of voir dire is necessary for the entire process <i>See</i> 22 NYCRR § 202.33(e).</p> <p><u>Peremptory Challenges:</u> An equal amount per "side," <i>i.e.</i>, all defendants or all plaintiffs. <i>See</i> CPLR 4109.</p>
<p>Jury Composition</p>	<p>May be composed of 6-12 jurors. <i>See</i> Fed. R. Civ. P. 48(a).</p> <p>Verdict must be unanimous</p>	<p>Civil juries in New York are composed of six jurors, plus alternates. <i>See</i> CPLR 4104.</p> <p>Five of six jurors must agree to verdict.</p>

⁵ *See* 22 N.Y.C.R.R. § 202.70(g) at Rule 11(a) ("Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence.").

⁶ *See* 22 N.Y.C.R.R. § 202.70(g) at Rule 11(g) ("The Court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.").

⁷ Ann Pfau, *Implementing New York's Civil Voir Dire Law and Rules*, available at <https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/ImplementingVoirDire2009.pdf>.

TOPIC	FEDERAL COURT	STATE COURT
Expert Testimony	<i>Daubert</i> ⁸ “reliability” standard	<i>Frye</i> ⁹ “general acceptance” standard
Interlocutory Appeals	<p>Generally, only “final decisions” are appealable. <i>See</i> 28 U.S.C. § 1291.</p> <p>An interlocutory appeal requires court approval; must show that the decision involved:</p> <ol style="list-style-type: none"> (1) “a controlling question of law”; (2) as to which there is a “substantial ground for difference of opinion”; and (3) “an immediate appeal” may “materially advance the ultimate termination of the litigation.” <p><i>See</i> 28 U.S.C. § 1292(b).</p>	<p>Interlocutory appeals are permissible.</p> <p><i>See</i> CPLR 5701 (a)(2) (setting forth for eight types of appealable orders)</p>

⁸ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

⁹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

II. Articles and Other Secondary Sources

- New York State-Federal Judicial Council and the Second Circuit Judicial Council,
 - o *Interplay Between State And Federal Law: Pitfalls To Avoid* (Jun. 15, 2023), available at <https://nys-fjc.ca2.uscourts.gov/programs/06-15-23%20-%20Materials%20for%20CLE%20on%20Interplay%20Between%20State%20and%20Federal%20Law.pdf>.
 - o *Appellate Practice in State and Federal Courts: Practical Considerations and Ethical Concerns* (Jun. 15, 2023), available at <https://nys-fjc.ca2.uscourts.gov/programs/5-23-18%20-%20Judicial%20Advisory%20Council%20and%20the%20Second%20Circuit%20Judicial%20Council.pdf>.
- Kyle C. Biseglie, *LexisNexis Practice Guide: New York e-Discovery and Evidence* (LexisNexis).
 - o This two-volume treatise analyzes the statutory and case law of discovery and disclosure in New York, including comparing New York and federal discovery rules. The treatise also contains 100+ checklists and forms.
- Anne M. Payne & Arlene Zalayet, *Modern New York Discovery* (Westlaw).
 - o Analyzes the statutory and case law of discovery and disclosure in New York, including comparing New York and federal discovery rules.
- Arlene Zalayet, *New York Examination Before Trial and Disclosure Devices* (Westlaw).
 - o Analyzes the statutory and case law of discovery and disclosure in New York, including comparing New York and federal discovery rules.
- Robert A. Barker, Vincent C. Alexander, *Evidence in New York State and Federal Courts* (Westlaw).
 - o Provides a complete exposition on the law of evidence in New York, with parallels to federal law.
- Michael S. Oberman, *The Choice of Forum for a Commercial Litigation*, 65-JUN N.Y. St. B.J. 28, (1993).
- New York State Unified Court System, *Comparison of the Federal Rules of Evidence (FRE) & Guide to NY Evidence (GNYE)*, available at <https://www.nycourts.gov/JUDGES/evidence/16-INDEX.FRE-GNYE.shtml>.
- Frank X. Altimari, *Foreword: Evidence Symposium: A Comparative Study of Federal and New York Evidence Law*, 11 Touro L. Rev. 1 (1994).
 - o This edition of the Touro Law Review was devoted to a symposium put on by Touro Law School, the goal of which was comparing the Federal Rules of Evidence with New York's evidence law, and included multiple articles on the topic.
- Randi M. Simanoff, *Distinctions Between the Public Records Exception to the Hearsay Rule in Federal and New York Practice*, 11 Touro L. Rev. 195 (1994).
- Siegel's Practice Review, *Comparing New York and Federal Rules on Awarding Prejudgment Interest*, 77 Siegels' Prac. Rev. 4 (1998).

Steven J. Phillips, *The Use of Expert Proofs in Complex Product Liability Litigation in New York: A Preliminary Consideration of Varying Federal and New York State Approaches to Disclosure and Admissibility*, 15 *Touro L. Rev.* 699 (1999).

- Kenneth A. Manning and Kevin M. Hogan, *State or Federal Court? The Commencement or Removal of Civil Cases in New York*, 1999 *Fed. Cts. L. Rev.* 5, (1999).
- Thomas H. Cohen, *Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts*, 2nd Annual Conference on Empirical Legal Studies Paper (2006), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=912691.
- Robert L. Haig, *New York Practice Series - Commercial Litigation in New York State Courts § 11:1, et seq* (Westlaw).
 - o This is an entire chapter titled “Comparison with Commercial Litigation in Federal Court”, which provides a broad examination of the differences between New York State and Federal procedure.
- Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York*, 26 *Seton Hall L. Rev.* 183, 211 (1995).

III. Federal Statutes with Concurrent State Jurisdiction¹⁰

CIVIL RIGHTS / TORT CLAIMS

Generally, state courts have concurrent jurisdiction over civil rights actions and constitutional tort claims asserted under the procedures authorized by the federal civil rights statutes.

- See e.g., *Brown v. State*, 89 N.Y.2d 172 (1996)

Discrimination claims brought pursuant to Civil Rights Act, 42 U.S.C. § 1983

- See e.g., *Felder v. Casey*, 487 U.S.131, 147 (1988).
- *Mulcahy v. New York City Dept. of Educ.*, 99 A.D.3d 535 (1st Dep't 2012).

Americans with Disabilities Act, 42 U.S.C. § 12182

42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence

- *U.S. v. Morrison*, 529 US 598, 606 (2013).

Federal Consumer Product Safety Act

- See e.g., *Howard v. Poseidon Pools, Inc.*, 133 Misc.2d 43 (Sup Ct, Allegany County 1986), rev'd on other grounds, 134 A.D.2d 926 (4th Dep't 1987).

EMINENT DOMAIN PROCEEDINGS

When brought under the Federal Power Act

- *Erie Blvd. Hydropower, L.P. v. Stuyvesant Falls Hydro Corp.*, 30 A.D.3d 641 (3d Dep't 2006).

TRADEMARK INFRINGEMENT

Claims brought under the Lanham Act. See 5 U.S.C. § 1121, 28 U.S.C. § 1338(a).

- See *Ryan v. Volpone Stamp Co., Inc.*, 107 F. Supp. 2d 369, 375 n. 3 (S.D. N.Y. 2000) (“Although federal courts are granted exclusive jurisdiction with respect to patent, plant variety protection and copyright cases, the state courts enjoy concurrent jurisdiction with the federal courts over trademark....”).

EMPLOYMENT LAW

Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e to 2000e3-17).

- See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990)

The Federal Employers' Liability Act (“FELA”).(45 U.S.C.A. § 56)

- *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57-58 (1912)

State courts have concurrent jurisdiction over individual benefit claims under ERISA

- See *Iacona v. JP Morgan Chase Bank NA*, 12 Civ. 2330 (BMC).(E.D. N.Y. Jul. 13, 2012)

- Under Section 502(e)(1).of ERISA, “the district courts of the United States. . . have exclusive jurisdiction of civil actions” brought under ERISA, except that “[s]tate courts

¹⁰ “Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); see also *Clafflin v. Houseman*, 93 U.S. 130, 136, 23 L. Ed. 833 (1876) (“if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.”).

of competent jurisdiction and district courts of the United States shall have concurrent of actions under paragraphs (1)(B).and (7).of subsection (a).of . . . section [502]”

- Federal courts have exclusive jurisdiction in civil actions for *breach of fiduciary duty* brought by a participant or beneficiary of an employee benefit plan covered by ERISA when brought against the plan fiduciary

LABOR

Claims brought under the Fair Labor Standards Act, 29 U.S.C. § 216(b)

Claims brought by and against labor organizations under 29 U.S.C. § 1985

- *Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962)
 - State courts have concurrent jurisdiction with federal courts to compel arbitration of collective bargaining agreements.
 - *Milk Drivers and Dairy Emp. Union Local No. 338 v. Dairymen's League Co-op. Ass'n*, 304 F.2d 913 (2d Cir 1962).
 - State courts have concurrent jurisdiction over breach of collective bargaining agreement claims; however, the state court is obligated to apply federal law in those cases.
 - *Morales v. Meat Cutters Local 539*, 778 F.Supp. 368 (E.D. Mich 1991).
 - State courts have concurrent jurisdiction over all actions under this chapter for suits for violations of contract between an employer and a labor organization, and will apply federal substantive law in such proceedings.
 - *District No. 1-Pacific Coast Dist., Marine Engineers' Beneficial Ass'n, AFL-CIO v. Trinidad Corp.*, 583 F.Supp. 262 (S.D.N.Y.1984).

Claims under Labor Management Relations Act (29 USC § 301), for breaches of collective bargaining agreements.

- *See Charles Dowd Box v. Courtney* 368 U.S. 502 (1962); *see also Livadas v. Bradshaw*, 512 US 107 (1994)
 - Note, however, that claims under the National Labor Relations Act (29 U.S.C. §157) are within the exclusive jurisdiction of federal courts.

SECURITIES ACT OF 1933 (15 USC § 77v)

- If these actions are commenced in state court, they are *not removable* to federal court
- Note that state courts **do not** have concurrent jurisdiction over actions brought under the Securities Exchange Act of 1934

RICO

State courts have concurrent jurisdiction over civil RICO claims.

- *Tafflin v. Levitt*, 493 U.S. 455 (1990).

BANKING

Claims for “Tying Arrangements” pursuant to 12 U.S.C. § 1972.

ADMIRALTY AND MARITIME LAWS

State courts have concurrent jurisdiction over admiralty action under “saving to suitors” statute, pursuant to 28 U.S.C. § 1333

- *Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991)

State courts have concurrent jurisdiction to try *in personam* admiralty actions.

- *Bergeron v. Quality Shipyards, Inc.*, 765 F. Supp. 321 (E.D. La. 1991).

State and federal courts have concurrent jurisdiction in admiralty and maritime cases.

- *American Mfrs. Mut. Ins. Co. v. Manor Inv. Co.*, 286 F. Supp. 1007 (S.D.N.Y. 1968).

OTHER

Claims for violations of the Perishable Agricultural Commodities Act (“PACA”), pursuant to 7 U.S.C. §§ 499a–499s

Truth in Lending Act (“TILA”)

- *See Reliable Credit Service, Inc. v. Bernard*, 339 So.2d 952 (La. App. 4th Cir. 1976).

Claims arising under the **Telephone Consumer Protection Act** (47 U.S.C. § 227).

- *See Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740 (2012).