

THE NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION

Minutes of the Annual Meeting of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on January 19, 2021.

Members Participating via Zoom

Jonathan Fellows, Chair	Emma Frean	Kevin Quaratino
Daniel Wiig, Chair Elect	Hon. Helen Freedman	Hon. Sylvia Hinds Radix
Ignatius Grande, Vice Chair	Suzanne Galbato	Courtney Rockett
Jessica Moller, Secretary	Marilyn Genoa	Lesley Rosenthal
Dana Alamia	Margarite Grays	William Russell
Joan Alisme	Rachel Gupta	Sonia Russo
Gregory Arenson	Sarah Haddad	Jay Safer
L. Austin	Helene Hechtkopf	Paul Sarkozi
Edward Beane	Maury Heller	Ted Semaya
Mark Berman	Jay Himes	Roy Simon
Constance Boland	Robert Holtzman	Michael Starr
Amanda Burns	Kathy Kass	Kathy Suchocki
Michael Cardello	Laurel Kretzing	Laura Swain
Ralph Carter	Bernice Leber	Vincent Syracuse
Vincent Chang	Hon. Debra A. Livingston	Lauren Wachtler
Edward Copeland	Jonathan Lupkin	Tara Ward
Melissa Crane	Frank Maas	Soraya Watkins
Pierre de Ravel d'Esclapon	Scott Malouf	Joshua Wurtzel
Richard Dircks	Christie McGuinness	Melissa Yang
D. Kusakab	Brem Moldovsky	Jeffrey Zaino
Bridget Donlon	Hon. Andrew Peck	Hon. Debra A. Livingston*
Hon. Cenceria P. Edwards	Peter Pizzi	Catherine Carl (NYSBA)*
Meaghan Feenan	Sharon Porcellio	Simone Smith (NYSBA)*
Clara Flebus	Erica Powers	

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:35 p.m. A quorum was present.

Guest Speaker

Hon. Debra A. Livingston, Chief Judge, U.S. Court of Appeals for the Second Circuit

Judge Livingston spoke to the Section about the operations of the Second Circuit during the COVID-19 pandemic. Although it has been a difficult time for the courts, the pandemic has been a time of innovation in public service. Of necessity, the courts have had to find new ways to engage in oral advocacy, and both judges, staff and the bar have adapted. At the Second Circuit,

operation shifted to almost entirely remote, nearly overnight, in early-March 2020. The shift to remote was so seamless that the Court did not need to postpone a single argument date.

Since then, the Second Circuit's work has continued uninterrupted. Judges could hold argument conferences with one another, and work with their staff. Some judges experimented with green screens and virtual backgrounds; others worked socially distant from chambers. Briefs were shipped to some judges who liked to work with hard copy documents, and some shifted to paperless for the first time. Approximately half of the oral arguments are telephoned and half are conducted over Zoom, at the option of the panel. All oral arguments are open to the public who can listen live over the Internet.

Currently, there are approximately 4,300 pending cases before the Court, and remote operations did not slow anything down. Over the Summer 2020, the Court exceeded its productivity for the same period in 2019, and issued 108 opinions and 223 summary orders. During the Fall 2020, the Court was similarly productive, issuing 50 opinions and disposing of over 300 cases by summary order. The Court is optimistic that at the end of the pandemic, it will emerge without a backlog and be essentially up to date.

Judge Livingston closed her remarks with some comments on oral advocacy in the age of Zoom. In many circuits, there is a presumption that attorneys will not orally argue regardless of whether or not counsel want oral argument. However, the Second Circuit has a long history of oral advocacy and there is a presumption that counsel *will* be able to argue if they so desire. That has not changed in the virtual context. She has noticed that the remote format has given advocates more of an opportunity to develop their points without being interrupted by questions from the panel. Ironically, the virtual oral arguments conducted during the pandemic have been more comprehensive and more helpful to the judges than in the live context. Although Judge Livingston is looking forward to being able to return to the live courtroom, the remote argument may survive the pandemic to some degree.

Hon. Judith S. Kaye Commercial and Federal Litigation Scholarship Recipients

Daniel Wiig announced the recipients of the Hon. Judith S. Kaye Commercial and Federal Litigation Scholarship Recipients as follows: Amanda Burns, a Partner at Ward Greenburg Heller & Reidy LLP; Meaghan Feenan, an Associate at Harris Beach PLLC; Sonia Russo, an Associate at Farrell Fritz P.C.; and Tara Ward, a Senior Associate at Phillips Lytle LLP.

Scheindlin Award for Excellence in Trial Practice

Ignatius Grande announced the recipients of the Scheindlin Award for Excellence in Trial Practice as follows: Bernice Leber, a Partner at Arent Fox LLP; and Lauren Wachtler, a Partner at Barclay Damon LLP.

Message from the New York Bar Foundation

Lesley Rosenthal, President of the New York Bar Foundation, gave an update on the work of the Foundation. Last year was a very different year for the Bar Foundation. With the arrival of the pandemic, the Foundation raised close to \$100,000 for COVID-19 emergency legal relief, and 27

grants were awarded by the Foundation with the funds raised. The Foundation also set forth an action plan regarding racial injustice. Close to \$750,000 in seed money was provided to innovative and groundbreaking legal services initiatives, and the Foundation funded a total of 60 Summer Fellowships from every law school in New York State. In addition, 38 new Fellows joined the Foundation, and unfortunately a number of Fellows were lost to COVID-19.

Report of the Nominating Committee

Jonathan Lupkin presented the Nominating Committee's slate of proposed officers for the upcoming 2021-2022 term as follows: Daniel Wiig as Chair; Ignatius Grand as Chair Elect; Anne Sekel as Vice Chair; Helene Hechtkopf as Treasurer; and Jessica Moller as Secretary. Sharon Porcellio presented the Nominating Committee's proposed delegates to the House of Delegates for the 2021-2022 term as follows: Jonathan Fellows and Laurel Kretzing as Delegates; and Robert Holzman as Alternate Delegate. Jonathan Fellows asked if there were any additional nominations from the floor per the Section's bylaws. No additional nominations were presented. Jonathan Lupkin made a motion for the Section to adopt the Nominating Committee's slate of proposed officers for the 2021-2022 term, Sharon Porcellio seconded that motion, and the motion was unanimously approved.

The meeting adjourned at 7:15 p.m.

THE NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
EXECUTIVE COMMITTEE

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on January 27, 2021.

Members Participating via Zoom

Jonathan Fellows, Chair	Jeffrey Zaino	Lesley Rosenthal
Ignatius Grande, Vice Chair	Laurel Kretzing	Kevin Quaratino
Anne Sekel, Treasurer	Peter Pizzi	Jeffrey Harradine
Jessica Moller, Secretary	Paul Sarkozi	Stephen Roberts
Hon. Sylvia Hinds Radix	Ralph Carter	Alan Brody
Hon. Helen Freedman	Steve Hochman	Kathy Kass
Hon. Karla Moskowitz	Maryann Stallone	Hon. Jennifer G. Schechter*
Vincent Syracuse	Helene Hechtkopf	Joshua Wurtzel*
Mark Berman	James Wicks	Samantha Ettari*
Natasha Shishov	Jay Safer	Jason Lichter*
Viktoriya Liberchuk	Charles Moxley	Gina Sansone*
Robert Holtzman	Gregory LaSpina	Catherine Carl (NYSBA)*
Jay Himes	Michael Fox	
Gregory Arenson	Courtney Rockett	

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:03 p.m.

Guest Speaker

Hon. Jennifer G. Schechter, Supreme Court New York County

Justice Schechter spoke to the Executive Committee about the operation of the Commercial Division during the COVID-19 pandemic, and noted that it has largely been “business as usual.” Except for jury trials, most everything else can be done in a remote/virtual setting, and it is “full steam ahead” with most of their cases. Justice Schechter commended both her staff and the Bar generally for the work they have done to keep cases moving “full steam ahead” during the pandemic.

Justice Schechter also discussed things that attorneys can do to adjust to the new normal of virtual court proceedings. For example:

- Make sure to look at the particular court’s part rules. Judges will often have temporary rules in place for operations during the pandemic. For example, Justice Schechter has temporary rules in place regarding communicating with the Court by email as opposed to by phone. She also requires that proposed orders/stipulations be sent to Chambers

as a Word document so that they can be easily signed and uploaded to the docket by the Court without the need of any paper.

- Be aware of background noise during virtual proceedings.
- Although bench trials are currently being conducted virtually, do not anticipate that bench trials will necessarily continue to be conducted virtually after the pandemic. However, Justice Schechter expects that when the pandemic is over, she will be much more open to do certain things, including certain witness testimony and oral argument, virtually if all parties consent. Although there are some cases that would be very hard to try in a virtual setting, Justice Schechter encourages all attorneys to be open to virtual proceedings.
- Be understanding and courteous of those who may have difficulties with technology or who have health conditions that may impact their ability to do in-person proceedings.

Justice Schechter also answered various questions posed by members of the Executive Committee, including the following:

- *How have the budget cuts in the judiciary impacted the Commercial Division?* The most impactful budget cut has been on the clerks. Previously, the “norm” was that each Commercial Division justice had three law clerks. But then there was a hiring freeze. Currently, a justice can seek permission to hire a clerk, but will need to justify why additional staff should be provided. Justice Schechter had only one clerk for a long time. Although she recently got permission to bring on a second clerk, that is still not full staff. She hopes the retiring justices will be replaced, but foresees caseloads will increase as a result of the retirements.
- *How do you see increased ADR coming to the Commercial Division?* It depends on the attorneys and their willingness to go through the process. She had sent every case on her docket information about the availability of mediation on consent, but although she got some participation she did not see vast participation. It is really about the willingness of attorneys and the parties to use ADR.
- *Have you seen more cases go to mediation or use of special master during the pandemic?* Justice Schechter does not have many cases where a special master is involved. There is possibly a little more mediation with the pandemic, but not materially so.
- *Is it appropriate to have presumptive mediation early on in CD, in light of the fact that parties often desire discovery prior to mediation?* Justice Schechter looks at each case and what makes sense in a particular case. She does not require every case go to mediation before a preliminary conference because each case is different and she wants mediation to be efficient and make sense in the circumstances of the particular case. It may make sense to mediate at the outset of litigation, but it may not make sense at that point in which case she will wait to refer the case to mediation until after documents have been exchanged.

Report on Annual Meeting

Ignatius Grande reported on the NYSBA Annual Meeting that was held last week. Although it was conducted virtually due to the pandemic, it was a good event with good participation. Approximately 60-70 individuals attended the Section's reception that held in the evening of January 19, 2021, and there was approximately 165 attendees for the Section's CLE panels on January 20, 2021. The Section has received positive feedback on the event.

Update on Spring Meeting

Jonathan Fellows gave an update on this year's Spring Meeting. Unfortunately, it will not be in-person due to the on-going COVID-19 pandemic, but it will proceed virtually on May 6-8, 2021. There will be CLEs and virtual socialization. Stay tuned for more details.

Reports from the Commercial Division Committee on Proposed Rules

- (1) Ralph Carter reported on the proposed amendment to Commercial Division Rule 3(a) regarding the court's ability to refer cases to ADR and to expressly permit parties to agree to pursue neutral evaluation. The draft report that was circulated to the Executive Committee suggests that separate rosters be maintained for neutral evaluators and mediator panels. The draft report also suggests that parties be provided an appropriate period of time to consent to neutral evaluation, and if consent is not obtained that the parties then be referred to mediation. A motion was made by Jonathan Fellows, and seconded by Gregory Arenson, to accept the Committee's draft report as a report of the Section. The motion was approved unanimously.
- (2) Joshua Wurtzel reported on the proposed Commercial Division rule that would require the filing of corporate disclosure statements and the Committee's draft report regarding same. The proposed rule is virtually identical to Rule 7.1 of the Federal Rules of Civil Procedure, except that proposed rule also applies to interveners and not just parties. One modification to the proposed rule that the Committee is suggesting is that the disclosure requirement not be limited to corporations and instead be expanded to cover all entities regardless of form (corporations, LLCs, partnerships, etc.). A motion was made by Jonathan Fellows, and seconded by Ignatius Grande, to accept the Committee's draft report as a report of the Section. There was one abstention, but the motion was otherwise unanimously approved.
- (3) Mark Berman reported on the proposed amendment to Commercial Division Rule 30 to require mandatory settlement conferences post-note of issue, and the Committee's draft report regarding same. Currently the rule permits but does not require the court to schedule a settlement conference at the time a case is certified as trial ready. The proposed amendment would make a settlement conference mandatory. The proposed rule would also give the parties some options on consenting to different mechanisms for the settlement conference (private mediation, court ADR, etc.). The Committee's report endorses the proposed amendment. A motion was made by Jonathan Fellows, and seconded by James

Wicks, to accept the Committee's draft report as a report of the Section. The motion was approved unanimously.

Plans for Scheindlin Award and Mock Trial Event

Jonathan Fellows provided an update on the Scheindlin Award and Section's mock trial event. We had hoped to honor the Scheindlin Award recipients and Kaye Scholars in-person at the mock trial event on April 22nd. But unfortunately the mock trial event will not be going forward either in-person or remotely in April. We are hoping to honor the recipients at an in-person event in the fall.

Report on Progress of Mentoring Program

Maryann Stallone reported that the Section's mentoring program has been launched. Mentors and mentees have been introduced and are moving forward with connections. She expect a meeting will be held in mid-February, and some virtual social events will be hosted thereafter. There has been great feedback on the program so far.

Section Committee Appointments

Ignatius Grande discussed a desire to change the name of the Cybersecurity Committee to the Privacy Data Security and Information Technology Committee, and to have Samantha Ettari named as a new Co-Chair of the renamed committee. He also discussed a desire to have Jason Lichter and Gina Sansone named as the new Co-Chairs of the Electronic Discovery Committee. A motion to approve the name change and Co-Chair appointments was made by Jonathan Fellows, seconded by Gregory Arenson, and unanimously approved.

Other Business

Ignatius Grande reported on administrative order from Chief Administrative Judge Lawrence Marks that incorporates many Commercial Division rules into the Unified Rules for the Supreme Court effective February 1, 2021.

Ignatius Grande also provided an update on a program that he is working on concerning stress testing democracy and the rule of law. The program is expected to be held in either April or May, and will likely be co-sponsored with another section and the New York Bar Foundation. If anyone knows of potential speakers please let Ignatius know.

Jonathan Fellows reminded everyone of the Section's upcoming events listed in agenda, and encouraged everyone to participate.

The meeting adjourned at 7:52 p.m.