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Commercial and Federal Litigation Section Newsletter

A publication of the Commercial and Federal Litigation Section
of the New York State Bar Association

Message from the Chair

The Section's mantra of "Faster, Cheaper, Smarter" is catching on!

David H. Tennant

Our "Faster, Cheaper, Smarter" (FCS) Working Group is hard at work identifying and promoting super-efficient processes for resolving business disputes. The Group issued an Interim Report on January 25, 2012, as part of our Annual Meeting. A copy of the Interim Report, which contains preliminary working concepts, is available on the Section's website at http://www.nysba.org/ComFedFasterCheaperSmarter.

Our Annual Meeting explored the FCS theme further in the context of a new paradigm of cooperation among counsel and best practices in e-discovery. See the report on page 3. A special thanks to Vice Chair Gregory K. Arenson for putting together the excellent CLE program.

On March 7, 2012, the Section examined best practices in streamlining litigation in a "Tri-City" CLE program, which linked by videoconference pairings of Commercial Division justices and federal magistrates in Syracuse, Rochester, and Buffalo. Kudos to Mitchell Katz, co-chair of our Commercial Division Committee, for organizing this program.

Four members of our FCS Working Group are also serving on Chief Judge Lippman's Task Force on Commercial Litigation for the 21st Century, announced February 14, 2012—helping to spread our Section's mantra and mission.

The FCS Working Group will issue specific proposals and recommendations in a final report expected June 1, 2012.

The Section's diversity pipeline initiative has taken root at UB law!

Our Section has a long history of supporting diversity in the profession, including establishing and running the annual Smooth Moves CLE/networking event for attorneys of color (see report below) and funding a minority fellowship program that provides paid internships in the Commercial Division for minority law students. Those programs, however, do not address "pipeline" issues—how to attract more college students of color to law school. To address that specific need, the Section is working to establish at each law school in New York State a minority moot court program that targets

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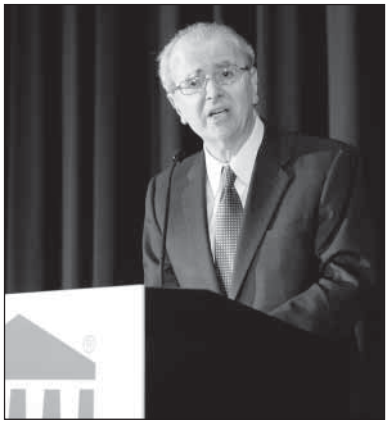
Inside

Annual Meeting 2012

Section Chair David Tennant introduced Chief Judge Lippman to present the Section's Stanley H. Fuld Award to Justice Anne Pfau.

The highlight of the Section's Annual Meeting on January 26, 2012, was the presentation of the Stanley H. Fuld Award to Justice Anne Pfau by New York Chief Judge Jonathan Lippman. Justice Pfau was given the Fuld Award for her contributions as Chief Administrative Judge of the New York courts from 2007 through 2011 in maintaining the New York State court system, and, in particular, the Commercial Division, in times of extraordinary fiscal stress and in introducing electronic filing in some of the New York courts, including the Commercial Division.



Chief Judge Jonathan Lippman warmly praised Justice Anne Pfau for her work as Chief Administrative Judge of the New York State courts before presenting the Section's Stanley H. Fuld Award to her.

The theme of this year's morning CLE program was faster, cheaper, smarter litigation. The morning began with the distribution of the Working Concepts of the Faster Cheaper Smarter Working Group of the Section. Section Chair David H. Tennant described the Concepts as a work-in-progress. The Concepts could be characterized as covering things businesses can do ahead of time by way of contract to streamline litigation, such as by encouraging alternative dispute resolution early in any litigation or in the discovery process, and as things courts can do, such as earlier and more comprehensive case management and encouraging more efficient discovery efforts. David promised a more fulsome report by June.

Justice Anne Pfau graciously accepted the Section's Stanley H. Fuld Award.

The first CLE panel focused on The Sedona Conference's® Cooperation Proclamation in an adversarial system. The moderator, Southern District Judge Shira Scheindlin, described the Cooperation Proclamation as an attempt to promote open and forthright information sharing and dialogue among parties and clients to facilitate cooperative, collaborative, and transparent discovery. This panel examined real-world opportunities for cooperation between opposing counsel in business litigation, and the change in attitude among litigators that is needed to generate meaningful cooperation. The litigators on the panel (Milberg's Ariana Tadler and Winston & Strawn's John Rosenthal)—both true believers in cooperation and representing sophisticated class action lawyers on both sides of the "v"—described a handful of relationships that were marked by such cooperation, but they said many litigators were not receptive to the concept or embraced it only superficially.

Chief Judge Jonathan Lippman presents the Section's Stanley H. Fuld Award to Justice Anne Pfau.

More than 160 people packed the room for this year's morning CLE program on Faster, Cheaper, Smarter Litigation focusing on cooperation and e-discovery.

Justice Anne Pfau and Chief Judge Jonathan Lippman after he presented the Section's Stanley H. Fuld Award to her.

One of the morning CLE panels focused on the Section's Best Practices in E-Discovery in New York State and Federal Courts. Vice Chair Greg Arenson (far left) introduced the panel (from left to right) of moderator Adam Cohen of Ernst & Young and panelists Connie Boland of Nixon Peabody, Western District Magistrate Judge Jonathan Feldman, Jeff Harradine of Ward Greenberg, and Nassau County Commercial Division Justice Timothy Driscoll.

Much more work needs to be done to spread the word about the many practical benefits of cooperation (large cost and time savings) and to instill among lawyers the expectation for such cooperation.

Chair-Elect Tracee Davis welcomed Section members and guests to the annual luncheon.

The discussion among the first panel also highlighted real differences in perspective between judges and in-house counsel when it comes to e-discovery burdens. General Electric's Senior Executive Counsel for Environmental Litigation and Legal Policy, Tom Hill, emphasized the difficulties the courts were creating in the relationship between outside counsel and clients by holding outside counsel responsible for detailed monitoring and knowledge of efforts by clients to preserve and produce electronically stored information (ESI). Judge Scheindlin suggested that outside counsel had always been held responsible for the preservation and production of materials by their clients, but Mr. Hill responded that, because of its volume, ESI represented a completely different situation than existed before. Mr. Hill pointed out that e-discovery requests may implicate thousands of custodians worldwide, and tens of millions of documents, with most of the material tangential or of no relevance to the actual claims in any litigation. The burdens are enormous, and a company faces the very real prospect of overlooking some custodians and missing some documents. He advocated a "rule of reason" requiring corporations to undertake only a reasonable search, and, if material later surfaces, then the corporation would not be judged by 20/20 hindsight, presumed to have acted in bad faith, and assessed sanctions. Mr. Hill claimed that current judicial rules establish incentives for corporations to engage in uneconomic behavior in responding to requests for ESI to avoid sanctions.

The second panel picked up where the first left off. Anthony Davis, adjunct professor at Columbia, reiterated Tom Hill's point that the occurrence of spoliation can set outside counsel and a client at loggerheads, pointing to the case of *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), and 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010). *Qualcomm* illustrated the difficulties that can arise between in-house counsel and outside counsel when spoliation occurs and suggests that outside counsel must engage in prophylactic efforts with their clients, especially regarding ESI, to minimize exposure to sanctions. Kings County Commercial Division Justice Carolyn Demarest agreed that attorneys from the outset must be proactive with their clients to get the clients to show the attorneys what the clients have, and then the attorneys should come to the first pretrial conference prepared to discuss discovery issues meaningfully and knowledgeably. Northern District Judge Frederick Scullin confirmed that his court's Local Rule 7.1(d) required good faith consultations between opposing parties regarding discovery issues.

CLE Panelist Jeffrey Harradine (center) makes a point about e-discovery to Western District Magistrate Judge Jonathan Feldman (on the left) and Nassau County Commercial Division Justice Timothy Driscoll (on the right).

This year's Annual Meeting luncheon was attended by more than 300 Section members and guests, including judges from across the state.

Eastern District Judge Nicholas Garaufis chatted with Section members during the reception before the Annual Meeting luncheon.

The third panel took off from the Section's Best Practices in E-Discovery in New York State and Federal Courts co-authored by moderator Adam Cohen of Ernst & Young's Forensics Technologies and Dispute Services Practice and Connie Boland of Nixon Peabody. Connie summarized the Guidelines for the audience as: know where your client's ESI is stored and how to get it; communicate early and often with your opposing counsel; be cooperative and reasonable; and document everything. Western District Magistrate Judge Jonathan Feldman said that the number one complaint from judges is the lack of preparation by lawyers before the Rule 16 conference. He encouraged attorneys to make a meaningful effort to discuss and reach agreement on ESI issues before the conference, including preservation trigger dates, inadvertent disclosure, the form of production, and what is reasonably accessible. Nassau County Commercial Division Justice Timothy Driscoll emphasized that when there is no meaningful meet-and-confer in advance of a conference, it makes clients' costs much higher. As did others on the panels, Justice Driscoll also suggested that it made sense to have someone with a working knowledge of the clients' technology present at the court conference. Ward Greenberg's Jeffrey Harradine then emphasized the buzz words for 2012 introduced by Magistrate Judge Feldman: predictive coding. Predictive coding is the next system beyond search terms to enable computers to search ESI to identify responsive materials more accurately than lawyers can and to do so more quickly and cheaply. If predictive coding proves useful, technology may provide a practical and efficient answer to managing the potentially enormous, ongoing problems technology has created.

New York County Supreme Court Commercial Division Justice Charles Ramos listened to Section members' viewpoints during the reception before the Annual Meeting luncheon.

Gregory K. Arenson

2013 NYSBA Annual Meeting

January 21-26, 2013

Hilton New York
1335 Avenue of the Americas
New York City

Commercial and Federal Litigation Section Meeting
Wednesday, January 23, 2013

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Initial Comments on the US Citizenship and Immigration Service's Notice of Intent to Implement Provisional Waivers of Inadmissibility for Certain Immediate Relatives

Commercial and Federal Litigation Section

Commercial & Federal Litigation #4 February 23, 2012

The Commercial and Federal Litigation Section submits the following initial comments in response to the USCIS notice of intent to implement stateside processing of provisional unlawful presence waivers of inadmissibility for certain immediate relatives, 77 Fed. Reg. 1040 (Jan. 9, 2012).

We applaud the Service for taking initial steps to lessen the hardships faced by U.S. citizens and their families as they navigate the complicated and often lengthy permanent residence process. Permitting qualified individuals to await adjudication of an unlawful presence waiver while remaining in the United States will incentivize them to come out of the shadows and seek the lawful status for which our laws allow them to apply. Currently, many individuals who would likely qualify for a waiver choose not to apply when faced with the significant risks, costs, and hardships associated with a lengthy separation from their families. We commend USCIS for announcing its intent to create a system that recognizes the importance of family support and unity, while permitting more streamlined adjudications and improved processing times. We look forward to the publication of the proposed rule in the coming weeks, and offering feedback and support as the rule is implemented. In the meantime, we ask that the Service take the following initial comments into consideration as it works toward a draft proposed rule.

1. Expand the Rule to Permit Preference Relatives to Apply for Provisional Waivers

USCIS states that provisional waiver process "reflects the Administration's strong commitment to efficiency in the administration of immigration law and the facilitation of legal immigration" by "encourage[ing] individuals who may be eligible for a waiver of inadmissibility to seek lawful readmission to the United States ...."[1] In addition, it is expected that rule change "would

[1] "USCIS to Propose Changing the Process for Certain Waivers," *also reprinted on American Immigration Lawyers Association (* AILA) InfoNet at Doc. No. 12011065 (*posted* 1/10/12).

provide a more predictable and transparent process and improved processing times ... [and] would streamline the process for both USCIS and the Department of State."[2]

As currently formulated, the provisional waiver process would only apply to a very limited group of applicants, namely, immediate relatives of U.S. citizens who can show extreme hardship to a U.S. citizen spouse or parent. As a practical matter, the process would be limited to:

> Spouses of U.S. citizens who can show extreme hardship to their spouses or to a U.S. citizen parent;
>
> Parents of adult U.S. citizens who can show extreme hardship to a U.S. citizen parent; and
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> Children (under 21) of U.S. citizens who can show extreme hardship to their U.S. citizen parent (by definition, children cannot be married). Since children cannot accrue unlawful presence, this category would be limited to children between the ages of 18 and 21.

A better path would be to open the provisional process to preference categories, including unmarried adult children of U.S. citizens, and spouses and children of lawful permanent residents (LPRs). The hardships suffered by these preference category families, who face the same lengthy separation from loved ones when they seek LPR status, are as compelling as those suffered by immediate relatives. Opening up the provisional waiver process to preference relatives would offer more measurable benefits to USCIS and DOS, would better facilitate legal immigration by encouraging a more sizable group to come out of the shadows, and comports with USCIS's stated goal to alleviate unnecessary familial hardships.

In its FAQs, USCIS notes that part of its justification for limiting the provisional waiver process to immediate relatives is that immediate relatives are not subject to the numerical limitations on visas, and therefore, visas are always available to this group.[3] However, if preference relatives are permitted to apply for a provisional waiver only when their priority date is current and an immigrant visa is available, we see no discernable difference for limiting the process to immediate relatives.

2. Expand the Rule to Permit Lawful Permanent Residents to Serve as Qualifying Relatives for Hardship Purposes

INA §212(a)(9)(B)(v), which sets forth the statutory basis for the unlawful presence waiver, permits a waiver for those who can show hardship to a U.S. citizen *or* an LPR spouse or parent. However, USCIS has indicated its intent to exclude immediate relatives who can show hardship to an LPR spouse or parent under the new process. The principles of family unity and benefits of reduced hardships apply with equal force to LPRs as they do to U.S. citizens. Such a policy will limit even further the individuals who can benefit from the new process, without any

[2] *Id.*
[3] *Id.*

rational reason for doing so. Therefore, USCIS should open the provisional waiver process to those who can demonstrate extreme hardship to an LPR spouse or parent.

3. Expand the Rule to Permit Provisional Processing of Other Waivers

USCIS states that the process change will be limited to individuals whose only ground of inadmissibility is unlawful presence. As a result many people with compelling equities who could obtain lawful status will be unable to benefit from the new process simply because they are subject to an additional, waivable ground of inadmissibility. USCIS should consider opening up the provisional process to other waivers that require extreme hardship since such waivers could easily be adjudicated at the same time. For example, INA §212(h)(1)(B), which waives certain criminal grounds of inadmissibility, uses the extreme hardship standard. Similarly, INA §212(i), which waives inadmissibility for fraud or misrepresentation, use the exact same language as the unlawful presence waiver.

Under sound policies adopted by USCIS in 2009 guiding the adjudication of I-212 and I-601 waivers, USCIS stated that an I-212 waiver of a prior removal order may be approved if the agency has already granted an unlawful presence waiver (or other inadmissibility waiver), "since approval of the Form I-212 involves the exercise of discretion and, by deciding to approve the Form I-601, the adjudicator has determined that the alien merits a favorable exercise of discretion."[4] This same logic can be applied here. If USCIS finds that an applicant has established extreme hardship to a family member for the purposes of one waiver, it should find the same for a second.

USCIS should also consider opening up the process to waivers that do not require extreme hardship, such as waivers under INA §212(h)(1)(A), and §212(d)(11). The current Form I-601 is designed to accommodate multiple waiver requests and it would take few additional resources to adjudicate multiple waivers through this process. Moreover, broadening the process to include additional grounds of inadmissibility would further USCIS's goals of increasing efficiency in the administration of immigration law and facilitating legal immigration.

4. Permit Provisional Waivers for Individuals at Different Stages of the Immigrant Visa Process

The notice of intent states that "[a]n alien would be able to obtain [a provisional] waiver only if a Petition for Alien Relative, Form I-130, is filed by a U.S. citizen on his or her behalf and that petition has been approved...."[5] In addition, in its FAQs, USCIS states that the proposed waiver process "would only affect individuals who have not yet filed a Form I-601 and who will file a waiver request after a final rule is published."[6] In drafting the final rule, we ask USCIS to include language clarifying that individuals at various stages of the immigrant visa process may benefit from the provisional waiver rule. Applicants should be permitted to file for a provisional waiver concurrently with the I-130, Petition for Alien Relative, or separately if the I-130 has

[4] *See Immigrant Waivers: Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers,* April 28, 2009, at 59, *reprinted on* AILA InfoNet at Doc. No. 09061772 (*posted* 6/17/09). USCIS has removed this document from its website pending revision.
[5] 77 Fed. Reg. 1040 (Jan. 9, 2012).
[6] *See supra* note 1.

already been approved. In addition, the provisional waiver process should be available to individuals whose cases are pending at the National Visa Center, and to individuals whose cases have been transferred to the consulate, but who have not yet departed the U.S. for their visa interview at the time the final rule is implemented. Individuals who have an interview date scheduled, but who have not yet departed the U.S., should be permitted to reschedule their interviews in order to apply for a provisional waiver.

5. Permit Concurrent Filing of I-212 Permission to Reapply for Admission after Deportation or Removal

Aliens who are inadmissible due to a prior removal order may file Form I-212 to obtain permission to reapply for admission. Applicants who are in the United States seeking adjustment of status, or who are seeking advance permission to reapply before departing the U.S. to consular process can submit Form I-212 with USCIS for stateside adjudication. As noted above, it is USCIS policy to grant an I-212 waiver if the agency has already granted an I-601 waiver.[7] Therefore, individuals who require an unlawful presence waiver and permission to reapply following removal should be permitted to file Forms I-212 and I-601 through the stateside process concurrently.[8] To conclude otherwise would require the applicant to first file the I-212 and obtain permission to reapply, and then separately file a provisional unlawful presence waiver. Consecutive, rather than concurrent adjudication would be a waste of USCIS time and resources.

6. Issue Notice of Intent to Deny (NOID) When an Additional Ground of Inadmissibility Is Suspected

The notice of intent states that "USCIS would deny the application for a provisional waiver if other possible grounds of inadmissibility are found or arise during adjudication."[9] Whether a person is subject to one or more grounds of inadmissibility is not a black or white determination. In many cases, it may be impossible for the Service to determine whether a particular ground of inadmissibility applies without first obtaining additional information from the applicant. If an additional ground of inadmissibility is suspected, we propose that USCIS issue a NOID, rather than an immediate denial. This would provide individuals with the opportunity to demonstrate, if applicable, that they are not subject to the inadmissibility ground alleged, and remain eligible for the provisional waiver process. Issuing a NOID would ensure that all persons who are eligible for a provisional waiver are able to benefit from the process and would decrease the number of decisions that are appealed to the already overburdened Administrative Appeals Office.

7. Provisional Waivers Should Not be Readjudicated and a Presumption of Extreme Hardship Should Apply to the Adjudication of Additional Waivers

According to the announcement, if the provisional waiver is approved, the applicant would proceed abroad for a formal interview with a U.S. consular officer. If no grounds of inadmissibility other than unlawful presence arise, "the provisional waiver ... would facilitate

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[7] *See supra* note 4.

[8] The regulations already permit concurrent filing in certain circumstances. 8 CFR §212.2(d) states that an applicant for an immigrant visa who is outside the United States and requires advance permission to reapply for admission and a waiver under INA §§212(g), (h), or (i), must file the I-601 and the I-212 simultaneously.

[9] 77 Fed. Reg. at 1042.

immigrant visa issuance."[10] The rule should make it clear that, absent disclosure of negative factors during the consular interview, USCIS's decision to approve a provisional waiver is to be honored by DOS.

According to the announcement, if a consular officer makes a determination that the applicant is subject to another ground of inadmissibility that can be waived, the applicant will be instructed to file another waiver application with USCIS. USCIS should not readjudicate the previously approved provisional unlawful presence waiver and officers should not require applicants to submit additional documentation to supplement the previously-approved waiver. In addition, the approval of a provisional unlawful presence waiver should give rise to a presumption of extreme hardship, which should be applied to the adjudication of waivers of additional grounds of inadmissibility with the same standard.

8. Clarify Provisions Relating to Individuals in Removal Proceedings

The proposed regulations should clarify that respondents in removal proceedings may benefit from the provisional waiver process. Currently, the notice of intent states that "aliens with waiver applications under section 212(a)(9)(B)(v) of the Act currently pending in either administrative or judicial proceedings would not qualify for this new process."[11] However, there are many individuals in removal proceedings without a pending waiver who should be deemed eligible. These include individuals whose cases have been administratively closed as part of the Administration's current prosecutorial discretion initiative or because they were granted temporary protected status while in proceedings. If these otherwise eligible individuals are not permitted to benefit from the provisional waiver process, they will remain in limbo on the immigration court docket, instead of taking steps to obtain lawful permanent residence. To prevent this, individuals in removal proceedings should be permitted to apply for a provisional waiver while their proceedings are pending. If the waiver is granted, proceedings would be terminated, and the individual would depart the United States for consular processing. Similarly, provisional waiver applications filed by individuals who are placed in removal proceedings while the application is pending should continue to be processed and adjudicated by USCIS. In the alternative, Immigration and Customs Enforcement (ICE) should adopt a policy of refraining from filing a notice to appear for individuals with a pending waiver until USCIS has rendered a final decision (including appeal) on the application.

9. Take Additional Steps to Communicate with the Public and Prevent the Unauthorized Practice of Law by Notarios and Unscrupulous Practitioners

As expected, the January 6 announcement generated a significant amount of interest from the press and the public. Although the announcement and follow-up materials clarified that no process changes would be implemented until a final rule is promulgated, the message was slow to trickle down to the stakeholder community, and notarios pounced. AILA has received numerous reports from members around the country who report seeing and hearing television, print, and radio advertisements by notarios soliciting business for the "new waiver." We have also received reports that well-intended individuals, such as members of the clergy, are telling people to "go to immigration and apply for the waiver."

[10] *Id*.
[11] *Id*.

At present, it appears that the only materials relating to the proposed change on the USCIS website are the "Fact Sheet" and a transcript of the press conference where the announcement was made. Despite continued public interest in this topic, these items are not prominently displayed on the site's home page, nor does there appear to be a general warning alerting the public about notario scams arising out of the announcement. A quick check of the Spanish version of the USCIS website reveals a Spanish translation of the Fact Sheet, but no transcript of the press conference and no obvious fraud warning. USCIS should take immediate steps to provide clear information, in both English and in Spanish, that no changes have been implemented at this time and also provide bold warnings and outreach to the public to not be taken in by the fraudulent claims and promises of notarios.

Section Chair: David H. Tennant, Esq.

High-Tech Outreach by the Commercial and Federal Litigation Section a Resounding Success

On November 8, 2011, the Commercial and Federal Litigation Section pulled off a technological first by broadcasting an open meeting of its Executive Committee to six separate locations across the State via simultaneous live stream videoconference feed. The event was centrally broadcast from SUNY at Buffalo Law School with Section Chair David H. Tennant and NYSBA President Vincent E. Doyle, III welcoming participation from New York City, Albany, Binghamton, Rochester, and Syracuse. The program from Buffalo also featured remarks from special guest speaker Court of Appeals Judge Eugene F. Pigott, Jr.

(l to r) NYSBA President Vincent E. Doyle, III, Judge Eugene F. Pigott, Jr., Section Chair David H. Tennant

In attendance at the Buffalo location were several prominent members of the local bar and judiciary, as well as law students and law school faculty. Each location was treated to an impressive visual display, with participants from each location able to see the others through a "video grid" display (think "Brady Bunch"). As each location was called to participate, that particular location would be rotated into a magnified main frame to optimize interaction and flow of the meeting. In Buffalo, the "video grid" was projected across the front of a large auditorium-style classroom (approximately thirty feet wide and fifteen feet high).

Judge Pigott delivered remarks about appellate practice at all levels. He described creative techniques that can be employed to make an argument on appeal more persuasive, touched upon the diversity of practice rules among the appellate divisions, and the development of "best practices" guidelines to bring about greater uniformity between and among the various levels of appellate practice. Judge Pigott's comments were interesting, insightful, and entertaining.

Pictured is an image of the simultaneous interactive live stream "video-grid"

Following Judge Pigott's remarks, a meeting of the Executive Committee was held in which several committees delivered reports and debated several substantive issues including proposed Amendments to Federal Rule of Civil Procedure 45 and proposed Amendment to Rule 4.4(b) relative to inadvertent disclosure of confidential information. Also discussed was a diversity initiative and a "Tri-City Summit" (also connected via videoconference) involving a Commercial Division judge and a local U.S. Magistrate Judge from Buffalo, Rochester, and Syracuse, and focusing upon efficient resolution of commercial cases.

"This was an opportunity to showcase the NYSBA and demonstrate that it is a cutting edge and dynamic organization which provides valuable substantive information to its members," commented Section Chair Tennant. In addition to the high-tech display, the meeting was publicized through social media channels in order to reach out to a broader cross-section of members and potential members. "The Commercial and Federal Litigation Section is committed to using technology to shrink distances, open channels of information delivery, and increase member engagement. Openness and ease of use translate into tangible value for our members," Tennant said.

The event was made possible through the concerted efforts of the NYSBA and SUNY at Buffalo Law School staff. Special thanks go out to Patricia W. Johnson, NYSBA Section Attorney Liaison; Amy Hayes Atkinson, SUNY at Buffalo Law School Director of Special Events; Terry McCormack, SUNY at Buffalo Law School IT Manager; Section Secretary Nicole Mastropieri in New York City; Mitchell J. Katz, Co-chair of the Section's Commercial Division Committee, in Syracuse, and Section member Heath J. Szymczak in Buffalo.

Section Will Feature Program on Diverse General Counsels and Their Perspectives on Career Development within the Legal Department and on Business Development Strategies for Law Firms

It's springtime, which means it's that time of the year when the Commercial and Federal Litigation Section hosts its annual *Smooth Moves: Career Strategies for Attorneys of Color* event. This year's event will be held on April 24, 2012, at Lincoln Center's Stanley Kaplan Penthouse. It will begin with a continuing legal education program at 4:00 p.m., followed, at 5:30 p.m., by a reception and presentation of the Honorable George Bundy Smith Pioneer Award.

This year the Section's Smooth Moves continuing legal education program, entitled *Views From the Corner Office: Diverse GCs Discuss How To Get There, and How to Win Their Business,* will feature a stellar panel of Chief Legal Officers, many serving Fortune 500 companies, who will offer their perspectives on career development within the corporate legal department and on business development strategies for law firms.

The program's distinguished participants will include Jeffrey Harleston, Esq., Executive Vice President and General Counsel, Universal Music Group; Sandra Leung, Esq., General Counsel and Corporate Secretary, Bristol-Myers Squibb; Don H. Liu, Esq., Senior Vice President, General Counsel and Secretary, Xerox Corporation; and Colonel Maritza Sáenz Ryan, Esq., Head of the Department of Law, United States Military Academy.

Following the CLE program, at a gala reception, the Section will present the Pioneer Award to the Honorable Samuel L. Green, former Associate Justice of the Supreme Court, Appellate Division, Fourth Department. As with past recipients, the Section will bestow this award on Justice Green for his pioneering career accomplishments, legal excellence, and commitment to community service. At the event, the Section will also award the Minority Law School Fellowship to a first-year law student. The Fellow will serve during the summer of 2012 in the Chambers of Honorable Shirley Werner Kornreich, Justice of the Commercial Division of the Supreme Court, New York County.

The Section encourages all members and non-members to attend and to support this important event.

Tracee Davis

NYLitigator Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article in the *NYLitigator* is a great way to get your name out in the legal community and advertise your knowledge. Our authors are respected statewide for their legal expertise in such areas as ADR, settlements, depositions, discovery, and corporate liability. MCLE credit may also be earned for legal-based writing directed to an attorney audience upon application to the CLE Board.

If you have written an article and would like to have it considered for publication in the *NYLitigator*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information to its Editor:

David J. Fioccola, Esq.
Morrison & Foerster
1290 Avenue of the Americas
New York, NY 10104
(212) 336-4069
dfioccola@mofo.com

Authors' Guidelines are available under the "Article Submission" tab on the Section's Web site: www.nysba.org/NYLitigator.

www.nysba.org/NYLitigator

The Section's 2012 Spring Meeting, which will take place on May 18-20, 2012, at the Mohonk Mountain House near New Paltz, New York, promises to offer Section members a spectacular combination of cutting-edge CLE programs, professional networking opportunities, and sporting and cultural activities in the beautiful Hudson Valley region.

On the evening of Friday, May 18, 2012, the Section will present a 1-hour optional CLE program entitled the *United Nations' Global Compact: The Lawyer's Role in Corporate Sustainability and Corporate Social Responsibility*, featuring Ursala Wynhoven, General Counsel of the UN's Global Compact Office. Ms. Wynhoven will discuss the business case for corporate social responsibility, how it factors into corporate risk management and the essential role of legal counsel in corporate sustainability.

On the morning of Saturday, May 19, 2012, the Section will present two CLE programs: *New York Courts: A Premier Forum for Resolving International Disputes*, focusing on the competitiveness of New York in the international legal market, the advantages of New York law and its various forums and the efforts under way to dispel rumors and enhance New York's presence in the international arena; and *A Symposium on Ethics and Civility*, focusing on what's new in ethics and civility in everyday lawyering. On Sunday morning, the Section's White Collar Litigation Committee will present a CLE program on *The News Corp. Phone Hacking Scandal*, focusing on the litigation exposure and criminal liability arising from information gathering in a digital world. In conjunction with the Young Lawyer's Section, the Section will offer programs on effective pre-trial litigation strategies in state and federal courts and on the skill-building benefits of volunteering legal services through the newly created New York State Bar Association's Charity Corps.

The Section will confer the 2012 Robert L. Haig Award for Distinguished Public Service on the Honorable Theodore T. Jones, Associate Judge of the New York State Court of Appeals, at a reception and dinner on Saturday evening.

For more information please e-mail Lori Nicoll at lnicoll@nysba.org.

Chief Administrative Judge Expands E-Filing Program

On January 12, 2012, the Chief Administrative Judge, Hon. A. Gail Prudenti, expanded both the voluntary and the mandatory program for electronic filing in New York State courts. See http://nycourts.gov/attorneys/pdfs/admin-order-245-12.pdf. In particular, e-filing is now mandatory in the following courts and cases:

Mandatory E-Filing

Effective Date	County	Court	Type of Cases
Jan. 17	Rockland Westchester	Supreme	All actions, except matrimonial, Article 78, Election Law, & Mental Hygiene Law
Feb. 27	New York	Supreme	Commercial, contact, & tort actions
Feb. 27	Bronx	Supreme	Medical malpractice actions
Feb. 27	Kings	Supreme	Commercial actions where amount in controversy equals or exceeds $75,000 (Commercial Division matters)
March 1	Chautauqua Erie Monroe	Surrogate's	Probate & administration proceedings and miscellaneous proceedings related thereto

2012 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's N.Y. Orders 1-9 of 2012)

22 NYCRR §	Court	Subject (Change)
202.5-bb	Sup.	Amends requirements for mandatory e-filing to include breach of contract actions
202.6(b)	Sup.	Eliminates default applications to the clerk from RJI's filed without fee

Note that the court rules published on the Office of Court Administration's website include up-to-date amendments to those rules: http://www.nycourts.gov/rules/trialcourts/index.shtml.

CPLR Amendments: 2011 Legislative Session

(2011 N.Y. Laws ch. 1-610)

CPLR §	Chapter, Part (Sub-part, §)	Change	Eff. Date
306-b	473(1)	Changes "filing of the summons and complaint, summons with notice, third-party summons and complaint, or petition" to "commencement of the action or proceeding"	1/1/12
306-c	59, H(52-h)	Adds a new CPLR 306-c requiring that notice be given to Dept. of Health or county social services of commencement of personal injury action by person who has received medical assistance under Soc. Serv. Law Art. 5, Titles 11 and 11-D	6/29/11
909	566	Provides that attorneys' fees may be awarded to any person, in addition to representatives of the class, who acted to benefit the class	9/23/11
1008	264	Provides that third-party defendant may not assert in answer defenses of improper service of summons and complaint, summons with notice, or notice of petition and petition or lack of personal jurisdiction over third-party plaintiff	8/3/11
1101(d), (f)	57, A(17)	Extends sunset of CPLR 1101(f) and proviso in CPLR 1101(d) until 9/1/2013	3/31/11
1101(f)(1)(i), (3)	62, C (B, 51)	Changes "correctional services" to "corrections and community supervision"	3/31/11
2101(f)	473(2)	Extends time to object from two days to 15 days	1/1/12
2302(b)	307(1)	Requires that, in absence of patient authorization, only court may issue trial subpoena duces tecum for patient's medical records	8/3/11
3025(b)	473(3)	Adds requirement that motion be accompanied by proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading	1/1/12
3122	307(2)	Adds court-issued subpoenas or orders as an alternative to meeting the requirement for patient authorization for production of medical records	8/3/11
3217(a)(1)	473(4)	Adds that the 20-day deadline applies if no responsive pleading is served and strikes whichever deadline is earlier	1/1/12
3409	59, H(52-d)	Adds a new CPLR 3409 requiring settlement conferences in dental, podiatric, and medical malpractice actions	6/29/11
5011	62, C(B, 52)	Changes "correctional services" to "corrections and community supervision"	3/31/11
5205(a)(8)	1	Excludes exemption where state or municipality is judgment creditor	1/21/11
5224(a)(3)(i)	342(1)	Adds to the certification compliance with Gen. Bus. Law § 601	9/2/11

Notes: (1) 2011 N.Y. Laws ch. 284, eff. 9/2/11, replaces Uniform City Court Act § 206 with a new provision on arbitration. (2) 2011 N.Y. Laws ch. 502, eff. 6/23/12, authorizes secretary of state to accept mail and service of process on behalf of victims of domestic violence in order to maintain the confidentiality of their location. (3) 2011 N.Y. Laws ch. 543, eff. 9/23/11, expands e-filing and fax filing pilot programs.

Notes of the Section's Executive Committee Meetings

October 11, 2011

Guest speaker, the Hon. Kiyo Matsumoto, United States District Judge for the Eastern District of New York, discussed judges' best practices, phone conferences, and oral argument.

The Executive Committee heard reports on the Section's minority fellowship program, the membership roundtable, and the Mentorship 2011 Kick-Off event and discussed the Resolution Committee Plan for international matters implemented by the State Bar.

November 8, 2011

Guest speaker, the Hon. Eugene F. Pigott, Associate Judge of the New York State Court of Appeals, discussed appeals generally and briefs specifically.

The Executive Committee voted to approve a report recommending that the First Department rules be amended to conform to the Second Department rules on motions for leave to appeal. The Executive Committee also discussed a proposed report of the Federal Procedure Committee on proposed amendments to Rule 45 of the Federal Rules of Civil Procedure.

December 13, 2011

Guest speaker, the Hon. Gerard E. Lynch, United States Circuit Judge for the Second Circuit, gave some helpful tips on how to win an appeal and discussed the nature of the Court's docket and oral argument.

The Executive Committee discussed a report of the Committee on Attorney Professionalism on the Proposed Amendment to Rule 4.4(b) and the report of the Federal Procedure Committee on proposed amendments to Rule 45 of the Federal Rules of Civil Procedure

January 10, 2012

Guest speaker, the Hon. Bernard J. Fried of the Supreme Court, Commercial Division, New York County, discussed the large volume of cases in the Commercial Division and possibly redefining what constitutes a Commercial Division case in order to limit the intake, as well as the impact of budget cuts.

The Executive Committee approved, with amendments, the report of the Federal Procedure Committee on proposed amendments to Rule 45 of the Federal Rules of Civil Procedure and discussed a proposed report of the Appellate Practice Committee on the interlocutory appeals process.

Message from the Chair

(Continued from page 1)

undergraduate students of color. An existing program through the Black Law Student Association at Cornell Law School, which recruits Cornell undergrads, serves as a model. Thanks to the efforts of Section member Sheldon K. Smith, University of Buffalo (UB) Law grad and Past President of the Minority Bar Association of Western New York (current Vice President of the Association's Foundation), our Section is combining forces with the presidents and leaders of each of the minority law student associations at UB Law to run the inaugural "Moot Court Program for Undergraduate Students of Color." The event will take place on April 28th at UB Law School. In its first year, the program is reaching out to undergraduate students at UB and at Bryant & Stratton. In the future, the program expects to reach out to other colleges in the Buffalo area. The program is supported by the faculty and staff at UB Law School as well as by the multi-cultural minority council for the undergraduate school at UB. With such broad support we think the program has an excellent foundation and will be able to attract students of color in meaningful numbers for years to come.

We are actively discussing similar programs at several other law schools, and will eventually reach out to each law school in New York. Based on current discussions, we expect additional schools to run minority moot court programs in the next academic year. This is a critical need and one that requires the sustained commitment of our Section.

David H. Tennant

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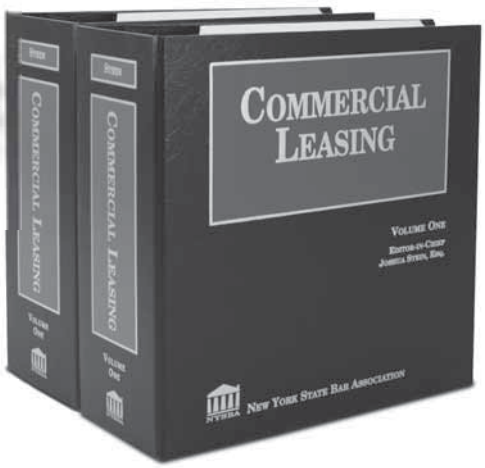

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