NYSBA FALL 2002 | VOL. 8 | NO. 2

Commercial and Federal Litigation Section Newsletter

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

A Message from the Chair

As the days shorten and we move through the hard-work months of the Fall, the Section year is in full swing. This newsletter is the place to read all about it. We were fortunate to have our newest Commercial Division judge, Justice Elizabeth Emerson, as the guest speaker at our July Executive Committee meeting. On October 2, 2002, the Section followed that introduction by co-hosting a ceremonial reception in honor of the opening of the Suffolk County Supreme Court Commercial Division. Lew Smoley, Chair Elect and Chair of our Commercial Division Committee, and Section member Harold Levy (Thaler & Gertler, Westbury) did an outstanding job organizing and publicizing the event, with the assistance of Section Liaison Lisa Bataille. In his remarks at the reception, Chief Administrative Judge Jonathan Lippman paid special tribute to the contributions of our Section in advocating the founding and the expansion of the Commercial Division Parts throughout the state, with special kudos to Section founder Bob Haig. The happy occasion provided the opportunity to meet and work with the Suffolk County Bar Association. We pledge to continue our contacts with SCBA President Lynne Adair Kramer and President Elect Douglas Lerose to find more opportunities for our members to interact.

We have been experimenting with new ways to make it easier for members to participate in Section life. In September, Section Committee Chairs were offered the option of participating in a meeting of the Committee Chairs by teleconference. Many availed themselves of that option and it worked very well. The purpose of the meeting was to review the recommendations of the Section's Task Force for the operation of Committees, including reinforcing our Section's commitment to furthering its reputation as a Section that produces high quality substantive reports on cutting-edge issues. Each Committee was assigned an officer liaison to offer assistance in helping the Committee track its projects and programs for the coming year. We welcome new Committee Chairs Jayne Conroy (Products Liability), Carroll Neeseman (Co-Chair, Arbitration and ADR), Peter Pizzi (Internet and Litigation), and Robbi Smith (Co-Chair, Federal Courts Counsel).

Inside

On September 19, 2002, we pulled off our first experiment in taking the Executive Committee on the road. With the draw of an exciting panel presentation on Corporate Life After Enron held in the University of Buffalo Law School's real-life courtroom, program chairs Sharon Porcellio and Carol Heckman succeeded in luring a band of six of us to Buffalo on Jet Blue. Lesley Friedman and the Paul Weiss firm graciously hosted a videoconference site for those Executive Committee members who could not make the trip to Buffalo. After a short business meeting (and buffet dinner at both locations), all of us joined a crowd of Buffalo-area Section members, and many interested potential members, for the very lively panel program. The evening was pronounced a rousing success and we look forward to our next Executive Committee road trip to Albany in March. Stay tuned for details. The Albany planning group will be hard-pressed to top Sharon's and Carol's efforts. Many thanks to both of them.

Executive Vice-Chair Lauren Wachtler, with help from Treasurer Lesley Friedman, is planning an outstanding Annual Meeting program for Wednesday, January 22, 2003 at the Marriott Marquis on the role of the commercial litigator in assisting corporations under siege in the post-Enron era, including effective communication with the press and media. This year's recipient of the Section's Fuld Award, to be presented during our luncheon program at the Annual Meeting, is Federal District Judge Sidney Stein. Please plan to join us for the meeting and to honor Judge Stein. Until then, please give what time you can to the important work of our committees. Now is the time to polish a report or start work on one. If you have not yet found a committee home that's a good fit, give me a call to talk about your interests. It's a big tent. Come on in.

On a final note, take a good look at this issue of the newsletter. Have you missed an opportunity to share an important professional achievement or other **Member News** with our almost 2,000 members? Have you missed an opportunity to publicize your Committee or its work? Our newsletter currently comes out three times a year. The deadline for submissions for the Spring issue is **March 1, 2003**. Don't wait. Send an e-mail with your news to Editor Mark Davies (mldavies@aol.com) or to Member News Editor Vanessa Elliott (velliott@beattielaw.com). Don't miss out.

Cathi A. Hession

Business Records Bill Proposed by Section Becomes Law

On September 24, 2002, Governor Pataki signed A.8384-B, effective September 1, 2003. This bill significantly changes and expands procedures for discovery of business records of non-party witnesses, in an effort to make involvement in litigation less burdensome for those who are not parties. Its provisions amend CPLR 2305 and 3122 and add a new CPLR 3122-a so that records may be obtained from a non-party witness without either a deposition or a court order. A recipient of a subpoena for such discovery may object merely by writing a letter, eliminating the need for a motion for a protective order, and need not comply with the subpoena until adequate provision is made for the cost of production. The certification that accompanies records produced in discovery may be used on notice to authenticate the records at trial without the necessity of calling a witness to testify to ministerial and custodial matters.

This bill is based on a report of the CPLR Committee of the Section, prepared by Steve Critelli in 1995. The report was submitted by the Section's executive committee to the Executive Committee of the NYSBA and adopted by it in 1996. Thereafter the bill was "adopted" by the Advisory Committee on Civil Practice to the Chief Administrator of the Courts (also known as the OCA Advisory Committee on Civil Practice) and first appeared in its annual package of proposed bills in January 1998. It appeared in the OCA "package" in each of the succeeding years and received several minor amendments important to the New York State Trial Lawyers Association before it was enacted this year. Despite these amendments the bill remains essentially what Steve drafted in 1995.

The history of the bill at once illustrates that this Section and its individual members can have an impact on the legislative process, which all amendments to the CPLR must survive, and that much patience may be required to achieve success. The Section's CPLR Committee welcomes new members who believe the CPLR can stand improvement and who would like to be involved in that process. Contact Co-Chairs Jim Bergin, (212) 468-8033, jbergin@mofo.com, or Jim Blair, (212) 867-1800, jblair@wbklaw.net.

Jim Blair

Commercial and Federal Litigation Section Annual Meeting

The Section's Annual Meeting will be held on January 22, 2003, at the Marriott Marquis in New York City. This year the Stanley H. Fuld Award will be presented by Hon. Guido Calabresi, U.S. Court of Appeals, Second Circuit, to Hon. Sidney Stein, U.S.D.J. for the Southern District of New York. The Section's annual program, "Corporate America Under Siege: The Role of the Commercial Litigator," will be an exciting one. The morning programs, "Commercial Litigation in the Post-Sarbanes-Oxley World" and "Litigating the Financial Fraud Case: Practical and Ethical Considerations," will focus on the "nuts and bolts" of Sarbanes-Oxley and securities enforcement issues in the current business environment. The panel includes top state and federal regulators, private practitioners, Charles Creek, senior ligitation counsel in Enron's General Counsel's office, and one of the chief drafters of Sarbanes-Oxley. The afternoon program, entitled "A Matter of Corporate Responsibility: Where Are We Going From Here?," is co-sponsored by the Commercial and Federal Litigation Section, the Corporate Counsel Section, and the Business Law Section. The first of the two afternoon panels is entitled "Effective Communication in Financial Fraud Cases" and includes a panel of journalists, representatives from the media and press, a commercial litigator, a prosecutor, a federal judge, and a representative of a crisis management organization. Such issues as dealing with your client, the public, a jury, a judge, and the press in a financial fraud case and a fact pattern involving ethical issues for both the press and the private practitioner will be presented. The second afternoon panel is entitled "Examining the Roles of Lawyers, Corporate Officers and Directors, Accountants, and Government." Panelists include John Biggs and State Attorney General Eliot Spitzer.

The morning program runs from 9 a.m. - noon, followed by a cocktail reception and luncheon, and the afternoon program will run from 2:00 p.m. - 5:00 p.m. In the afternoon we will be joining President Lorraine Power Tharp in her "Presidential Summit." All State Bar members are also invited to attend the President's Reception immediately following the Presidential Summit from 5:30 p.m. - 7:30 p.m. Please plan on joining us for an exciting day.

Committee Spotlight

Welcome to New Chair of Internet and Litigation Committee

Peter J. Pizzi, Esq. is the new Chair of the Internet and Litigation Committee, a committee started last year by Lesley Friedman. Peter is the partner in charge of Connell Foley LLP's New York office, which was opened in August 2001 and is doing well in 2002. Peter's practice is federal and state court business litigation. He has handled a number of cases involving Internet defamation, sometimes referred to as "cyber smear," and is frequently called upon to "unmask" anonymous postings in Internet chat rooms that are causing injury to corporate clients. Peter also lectures on employee and workplace privacy rights. Peter currently is serving also on a committee that is studying online research options for the New Jersey State Bar Association. For further information on Peter's background, visit Connell Foley's Web site at www.connellfoley.com.

* * *

Antitrust Committee Picking Up Speed

The Antitrust Committee, chaired by Jay L. Himes, is being rejuvenated after a period of repose. The Committee has begun a project that will investigate the use of state antitrust resources in cases where the federal government has declined to proceed. The Committee is seeking new members and invites you to get involved.

Jay L. Himes is the Chief of the Antitrust Bureau of the Office of the New York Attorney General, a position that he assumed in April 2001. New York's Antitrust Bureau is one of the leaders of the multistate antitrust enforcement effort, which currently includes cases involving contact lenses, brand-name drugs, vitamins, and compact discs. The Bureau also regularly investigates mergers, such as that between Exxon and Mobil, and United Airline's proposed acquisition of US Airways. The latter transaction was abandoned by the parties in 2001 after the Department of Justice, New York, and several other states announced their intention to sue to stop the deal. New York also was the lead plaintiff in the multistate monopolization case against Microsoft which various states prosecuted jointly with the United States Department of Justice.

Mr. Himes was one of the state representatives in the marathon 2001 negotiations leading to the proposed settlement between Microsoft, the Department of Justice, and nine states, including New York. Prior to joining the Attorney General's Office, Mr. Himes was a member of the litigation department at Paul, Weiss, Rifkind, Wharton & Garrison, where he handled antitrust cases and counseling, as well as complex commercial litigation. He is a member of the antitrust and litigation sections of the American Bar Association, and of the Federal Legislation Committee of the Association of the Bar of the City of New York. Mr. Himes also is the principal drafter of the 1997 revision of *Appeals to the Second Circuit*, prepared while he was a member of the City Bar's Federal Courts Committee. Mr. Himes received his undergraduate and law degrees from the University of Wisconsin-Madison.

* * *

A New Committee on Products Liability Will Be Chaired by Jayne Conroy

A new Products Liability Committee was recently formed and will be chaired by Jayne Conroy, a partner in the New York City law firm of Hanly & Conroy and counsel to the Washington, D.C., law firm of Gilbert, Heintz & Randolph. During the coming year the Products Liability Committee plans to take an in-depth look at Article 16 of the New York Civil Practice Law & Rules dealing with the limited liability of parties jointly liable. The Committee also will consider the particular concerns that products liability lawyers face in discovery as well as the current state of the law with respect to confidential settlements. Jayne is an experienced trial lawyer whose practice is focused primarily in products liability, mass torts, and insurance. For the past several years Jayne has acted as national trial counsel to a multinational corporation and several of its subsidiaries. In that position, she has managed the defense of over 300,000 asbestos lawsuits pending throughout the United States. Jayne welcomes anyone interested in the field of products liability to join the Committee. She can be contacted at jconroy@hanlyconroy.com.

* * *

Welcome to the New Co-Chair of Federal Courts Counsel Committee

Roberta H. Smith is the new Co-Chair of the Federal Courts Counsel Committee. Robbi is a Staff Attorney in the Pro Se Office of the United States District Court for the Southern District of New York. Prior to becoming a Staff Attorney in 1998, Robbi was a litigation associate at Kirkpatrick & Lockhart in New York and Hill & Barlow in Boston. After graduating from New York University Law School in 1992, Robbi clerked for the Hon. Kathleen A. Roberts, U.S. Magistrate Judge for the Southern District of New York. During law school, Robbi served on the Editorial Board of the *Review of Law & Social Change*, and she was the recipient of the Marden Advocacy Award and two American Jurisprudence Awards. Robbi graduated from Dartmouth College, cum laude, in 1989. In recent years, Robbi has been actively involved with the Committee on Law Student Perspectives of the Association of the Bar of the City of New York, serving as Editor of that committee's quarterly newsletter, which is distributed to students of all metropolitan area law schools.

* * *

Welcome to the New Co-Chair of Arbitration and ADR Committee

Carroll Neesemann is the new Co-Chair of our Arbitration and ADR Committee. Carroll is a dispute resolution partner with Morrison & Foerster LLP in New York City. He has concentrated his practice on acting as an arbitrator, mediator, and advocate in the resolution of large, complex disputes. Carroll has written and spoken frequently on the subjects of arbitration and mediation, including annual contributions of chapters in the Practicing Law Institute's course manual on Securities Arbitration. Carroll also is a member of the City Bar ADR Committee and Co-Chair of its Subcommittee on the Uniform Mediation Act. Until recently, he was the Chair of the Committee on Arbitration of the Association of the Bar of the City of New York and of the Arbitration Committee of the Dispute Resolution Section of the ABA. Carroll also was recently a member of a commission established by CPR Institute to study the current practice of arbitration and suggest improvements for the future. For more than three years, Carroll was an official observer of the Drafting Committee of the National Conference of Commissioners on Uniform State Laws, which developed the Revised Uniform Arbitration Act that was enacted in July 2000. Carroll also served as a member of a Task Force on Consumer Arbitration of the ABA Section of Dispute Resolution.

* * *

Section Hosts Reception for Suffolk County Commercial Division

On October 2, 2002, the Judicial and Commercial and Federal Litigation Sections of the New York State Bar Association (NYSBA), joined with the Suffolk County Bar Association (SCBA), in hosting a reception for the newly established Commercial Division of the Suffolk County Supreme Court.

Left to right: Cathi A. Hession, husband Michael Emerson, Honorable Elizabeth Hazlitt Emerson, and Lynne Adair Kramer.

Distinguished speakers included: Honorable Jonathan Lippman, Chief Administrative Judge, Office of Court Administration; Honorable Alan D. Oshrin, District Administrative Judge, Suffolk County; Honorable Leonard B. Austin, Presiding Judge, Nassau County Commercial Division; Honorable Elizabeth Hazlitt Emerson, Presiding Judge,

Judge Charles E. Ramos

Suffolk County Commercial Division; and hosts Honorable Charles E. Ramos, Chair, NYSBA Judicial Section; Cathi A. Hession, Chair, NYSBA Commercial and Federal Litigation Section; and Lynne Adair Kramer, President, SCBA. Honored guests included: Honorable Edward G. McCabe, Administrative Judge, Nassau County; Honorable Robert W. Doyle, Presiding Judge, Suffolk County; Honorable Emily Pines, Presiding Judge, Suffolk County; Honorable Ira B. Warshawsky, incoming Commercial Division Justice, Nassau County; Honorable Melanie L. Cyganowski, United States Bankruptcy Judge, Eastern District of New York; Honorable Richard B. Lowe III, Presiding Judge, New York County; Honorable Thomas A. Stander, Presiding Judge, Rochester, New York; Suffolk County Attorney Robert J. Cimino; and last but not least, our own past Chair, Robert L. Haig.

Suffolk County joins New York, Albany, Erie, Monroe, Westchester, and Nassau Counties as the seventh county within the state to establish a dedicated Commercial Part. The initial threshold jurisdictional minimum for Suffolk County Commercial Division cases has been set at $25,000. While the rules of the Division are not identical to the Commercial Division rules in other counties, they are very similar. Copies are available from the Supreme Court Clerk's office. As of this writing, the rules have not been posted on the New York State Unified Court Web site. Assignment to the Commercial Division is initiated by identifying the case as a commercial matter on the RJI, and submitting with the RJI an affirmation that the case meets Commercial Division guidelines.

The need for Commercial Divisions was first envisioned by Chief Judge Judith S. Kaye to fill the needs of New York State as a world leader in the business community, and as an alternative to federal

courts to meet the demands of complex commercial litigants. According to Suffolk County Administrative Justice Oshrin, "The support of Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman has proved to be invaluable in the establishment of this specialized division within our Supreme Court. In addition, I am grateful for the continued and unwavering support of my predecessor, [Appellate Division, Second Department] Presiding Justice A. Gail Prudenti, who during her tenure as District Administrative Judge first recognized the need for a specialized Commercial Part in Suffolk County and was instrumental in establishing the framework for its creation. It is hoped that thisa dedicated Commercial Division will be able to appropriately address the needs of our residents and, in particular, the business community at large."

"The need for Commercial Divisions was first envisioned by Chief Judge Judith S. Kaye to fill the needs of New York State as a world leader in the business community, and as an alternative to federal courts to meet the demands of complex commercial litigants."

Suffolk County was an obvious choice for the addition of a Commercial Division, with its increasingly sophisticated corporate base. Indeed, the proliferation of a major corporate presence in western Suffolk County has already raised questions concerning the possibility that the Commercial Division might split its bench by sitting in Central Islip at least one day per week.

As a prior corporate partner at Sherman & Sterling, and a Supreme Court Justice with six years experience, Elizabeth Emerson, Presiding Justice of the new Part, comes well qualified. We welcome her and wish her and her new Part success.

Special thanks to Commercial and Federal Litigation Section Chair Cathi Hession, Commercial Division Committee Chair Lew Smoley, SCBA President Lynne Kramer, and SCBA Executive Director Jane LaCova, for their efforts in organizing this event. It was a great pleasure for me to be able to assist them in this reception.

Harold Levy

NEWS flash
Member News

On October 3, 2002, the business law firm Torys LLP celebrated the three-year anniversary of its merger, with a reception in its Park Avenue office. Since the merger, eleven partners have joined the firm's New York office to strengthen the Corporate, Environmental, Insolvency & Restructuring, Tax and Technology practices. The firm has over 300 lawyers in New York and Toronto.

Executive Committee members Jayne Conroy (Chair, Products Liability Committee) and Daniel P. Levitt (Chair, Technology Committee) participated during the second day of the Litigation Summit & Exposition held at the New York Hilton on October 15 and 16, 2002. They represented the "defendant" in a mock trial of a hypothetical product liability case. This important litigation program was co-sponsored by the Section, on whose behalf Section Vice-Chair Lauren Wachtler gave introductory remarks.

Lesley Friedman Appointed to New York State Bar *Journal* Board of Editors

Lesley Friedman of New York, a senior litigator in the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, has been named to the New York State Bar Association (NYSBA) *Journal* Board of Editors.

"We chose Ms. Friedman from nearly three dozen applicants based on her considerable writing and editing experience in the legal field," said NYSBA Past President Paul Michael Hassett of Buffalo (Brown & Kelly). Hassett, Bernice K. Leber of New York (Arent, Fox & Kintner), and NYSBA President Lorraine Power Tharp of Albany (Whiteman Osterman & Hanna) formed the selection committee.

Friedman earned her undergraduate and law degrees at Harvard. She also spent an undergraduate year at Oxford University, England.

Active in the NYSBA, Friedman has served on the Executive Committee of the Commercial and Federal Litigation Section since 1994. She currently serves as the Section's Treasurer. She is the founding Chair of the Section's Internet and Litigation Committee and is a Past Chair of its Committee on Professional Responsibility. From 1996-98, she was Editor-in-Chief of the Section's journal, *NYLitigator*.

In 1997, Friedman was named Outstanding Young Lawyer of the Year by the NYSBA's Young Lawyers Section.

Her other affiliations include the Federal Bar Council's Committee on the Second Circuit, and the Chairman's Task Force on Commercial Courts, which led to the establishment of the Commercial Division of the New York State Supreme Court, to hear business disputes and complicated commercial cases.

Friedman has authored and co-authored numerous articles, including "Tips for Avoiding Foreign Jurisdictional Hassles on the Web" and "Revising Privacy Policies on the Internet." In addition, she often serves as a presenter and moderator for various legal programs, including, most recently, the New York State Judicial Institute's Summit on the Internet.

Members of the *Journal's* Board of Editors are limited to three consecutive three-year terms. Friedman fills a vacancy left by Kenneth P. Nolan of New York (Speiser Krause Nolan & Granito), who reached his term limit this year. Chief Judge Judith S. Kaye and Sanford J. Schlesinger of New York (Kaye Scholer LLP) were both reappointed.

Developments in Product Liability and Tort Law

By Jayne Conroy

New York products liability and tort law practitioners should be aware of the following recent national developments in other states.

On September 26, 2002, the Illinois Supreme Court agreed to hear an appeal brought by State Farm Mutual Automobile Insurance Company, the largest automobile insurer in the country, in which it challenges an Illinois-record $1.05 billion judgment against it, which includes a punitive damages award of $600 million. The case, a class action lawsuit styled *Avery v. State Farm Mutual Automobile Insurance Co.*,[1] arose from State Farm's practice of specifying in some of its estimates that automobile body shops should use cheaper aftermarket auto parts (such as hoods, fenders and doors) for its policyholders. The plaintiff policyholders alleged that the parts did not deliver the same level of fit, finish, corrosion resistance, and (in some instances) safety as so-called "OEM" parts made by automobile manufacturers, and asserted claims sounding in breach of contract, consumer fraud and equitable relief. The Illinois Circuit Court for Williamson County certified a class consisting of all State Farm policyholders in every state (except Arkansas and Tennessee residents and State Farm employees) who had the aftermarket parts installed on their vehicles after April 1994 (except California, where the date was September 1996).[2]

In October 1999, a jury found the replacement parts mandated by State Farm to be substandard, and returned a $457 million verdict against it, to which the Circuit Court judge added $130 million in "engorgement damages" and $600 million in punitive damages.[3] On appeal, a three-judge panel of the Appellate Court of Illinois for the Fifth District reversed the award of engorgement damages as a double recovery,[4] but affirmed the compensatory and punitive verdicts,[5] citing "overwhelming evidence" of State Farm's "calculated deception of its policyholders" from which it realized "an ill-gotten gain . . . at the expense of persons that trusted State Farm for honest, fair treatment."[6]

In its current appeal, State Farm's argument focuses upon both the lack of evidence of inferiority of the aftermarket parts to the OEM parts and the inappropriateness of the massive punitive damages award, which State Farm argues seeks to "punish [it] for engaging in a fully disclosed business practice that has been specifically endorsed by insurance regulators and consumer advocates throughout the country." In addition, State Farm argues that it was error for the Circuit Court to have certified a class of over 4.7 million policyholders in 48 states (not all of whom State Farm maintains are entitled to relief under the laws of their respective states), and alerted the Illinois Supreme Court to the effect that permitting such a large nationwide class action to proceed in the Illinois state court system could have on business seeking to locate in—or move from—the state. It remains to be seen whether any decision on the punitive damages issue from the Illinois Supreme Court would eventually make its way to the U.S. Supreme Court.

Another important development arose from the latest efforts of defendants to challenge the practice of consolidating thousands of asbestos personal injury cases for trial in a single court. *State ex rel. Mobil Corp. v. Gaughan*[7] involved the unsuccessful efforts of Mobil Corp. and several of its co-defendants to overturn, through a writ of prohibition or mandamus, a Charleston, West Virginia, trial court's trial scheduling order consolidating between 5,000 and 7,500 such asbestos cases for trial and its implementation of a complicated statistical matrix and a punitive damages multiplier to calculate damages across the entire span of cases. Since the late 1980s, four other mass trials in Charleston and two other mass trials in Monongalia County had previously survived other defendants' similar challenges in the West Virginia state court system.[8] Nonetheless, Mobil argued that the consolidation was improper both because it failed to apply a court-imposed calculus of four factors to be analyzed and considered in determining whether to consolidate cases for trial under the West Virginia equivalent of Rule 42(a) of the Federal Rules of Civil Procedure,[9] and because the lack of commonality of issues among the cases in the liability phase of the trial violated its due process rights.[10] The West Virginia Supreme Court rejected both claims.

First, the court held that the need to apply the *Ranson* factors was obviated by a specifically enacted, post-*Ranson* trial court rule governing trial procedure and consolidations in mass tort trials, such as asbestos personal injury cases. The court further held that the rule granted trial judges wide latitude in managing such cases and that the trial scheduling order was in conformity with the rule.[11]

The court similarly dismissed Mobil's due process arguments, finding that any constitutional determination was premature, "speculative, and possibly unrealized" because the trial court had not yet "finalized the specifics" regarding the identification of common issues for the liability phase of trial, nor "definitively ruled" on the use of either the damage matrix or the punitive multiplier.[12] The practical effect of the court's decision was

thus to defer any constitutional challenge to a similar trial scheduling order in a mass consolidated trial until appeal from a final judgment (or at least the eve of trial via an emergency application), once the procedural framework for the trial had been finally determined.[13]

One of the judges wrote a separate concurring opinion.[14] Noting that the case left him "with a profound disgust," the judge concluded that Mobil was "probably correct" that its due process rights had been violated and that "some federal court will eventually tell us so."[15] The judge used his concurrence to criticize not only the process of consolidating thousands of unrelated asbestos cases for trial as inconsistent with the U.S. Supreme Court's holdings in *Amchem Prods., Inc. v. Windsor*[16] and *Ortiz v. Fibreboard Corp.*[17] that global class treatment of such cases was inappropriate in light of the disparities among the purported class members, but the reality that the majority of the plaintiffs were not even West Virginia residents or had been exposed to asbestos in the state.[18] Nonetheless, the judge concurred rather than dissented because he agreed with the majority that Mobil had not made out a case for the "extraordinary relief" that it was seeking.[19]

Following the affirmance of the trial scheduling order and the establishment of a final trial date in September 2002, Mobil and all of its co-defendants (with a single exception) settled with the entire group of plaintiffs. Although Mobil's efforts to obtain *certiorari* in the U.S. Supreme Court proved unsuccessful, it appears that another litigant in another case must successfully do so to stop similar mass consolidations in the future.

Endnotes

1. 254 Ill. Dec. 194, 746 N.E.2d 1242 (2001).
2. *Avery*, 254 Ill. Dec. at 199-200.
3. *Id.* at 201.
4. I*d.* at 213.
5. *Id.* at 214.
6. *Avery v. State Farm Mut. Auto. Ins. Co.*, unpublished text.
7. 211 W. Va. 106, 563 S.E.2d 419 (2002).
8. *Gaughan*, 563 S.E.2d at 424.
9. *State ex rel. Appalachian Power Co. v. Ranson*, 190 W. Va. 429, 438 S.E.2d 609 (1993).
10. *Gaughan*, 563 S.E.2d at 421.
11. *Id.*, 563 S.E.2d at 424-425.
12. *Id.*, 563 S.E.2d at 426-27.
13. *Id.*, 563 S.E.2d at 426.
14. *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 330, 565 S.E.2d 793 (2002).
15. *Gaughan*, 565 S.E.2d at 793.
16. 521 U.S. 591 (1997).
17. 527 U.S. 815 (1999).
18. *Id*.
19. *Id.*, 565 S.E.2d at 795.

The Opening Statement: Some Basic Practice Pointers

By Lauren J. Wachtler

"What we call the beginning is often the end
And to make an end is to make a beginning
The end is where we start from."

T.S. Eliot, *Four Quartets*, "Little Gidding"

The Purpose of the Opening Statement

Individuals and attorneys who have made studies of juries claim that a case may often be resolved after the Opening Statements have been made. In fact, studies show that between 65 percent and 80 percent of jurors actually make up their minds or, at a minimum, begin taking sides during Opening Statements.[1]

The Opening Statement gives attorneys a unique opportunity to outline their case for the jury, introduce them to the party or parties they represent, and provide the jury with a narrative account of what the evidence they will be hearing will show and how it supports their story. Because this is the first opportunity that the jury will actually have to hear anything about the case in detail, it is extremely important that the Opening Statement be well-structured and organized; and it should be presented bearing in mind that whatever the jury hears at this point may well set the tone for the remainder of the case and the view they take of the evidence which you present to them during the course of the trial. Thus, it is extremely important that prior to giving your Opening Statement, even before you begin thinking about it, you begin structuring the trial in its entirety, starting with the theory of your case and the evidence you intend to use to support it.

Preparing Your Case for the Opening Statement

Before actually preparing the Opening Statement, you should be sure that your case has been adequately prepared. This includes knowing the order of your witnesses, the documents you intend to introduce into evidence, and the cross-examination of the other party's witnesses. It is helpful, in preparing the Opening Statement, to start thinking about your summation as well. Hopefully, if the case goes in as you have prepared it, you will be able, in your summation, to show that everything you said in your Opening Statement actually came to pass. Of course, during a trial, certain eventualities occur which make it impossible to anticipate everything which will happen during the trial, but if your trial preparation has been complete, and you have analyzed both your *and* your adversary's case thoroughly, you should be able to utilize the most important points which you make in your Opening Statement at the beginning of the trial in your summation at the end.

"[S]tudies show that between 65 percent and 80 percent of jurors actually make up their minds or, at a minimum, begin taking sides during Opening Statements."

Telling a Story in Your Opening Statement

As trial lawyers, most of us are quite accustomed to telling stories, whether it be to a jury in an Opening Statement or a judge in arguing a motion when seeking some form of relief from the court. There have been some fascinating studies conducted which demonstrate that if a lawyer can convince a majority of jurors to accept a story which supports his or her theory of the case, he or she is likely to prevail when the verdict is returned. In a study conducted by Pennington and Hastie, discussed in an article by Richard Lempert in the *Cardozo Law Review*[2], the impact of a lawyer's ability to present her case was examined. In the study, utilizing a criminal case, one group of individuals received case information in "story order," while others received information in "witness order."[3] The study revealed that there was a substantial effect on the verdict reached as determined by the manner in which the case was presented. In the first experiment, the state's evidence was presented in story order and the defense's evidence was presented in witness order. When the evidence was presented in this manner, 78 percent of the subjects returned a guilty verdict. When the situation was reversed, and the defense evidence was presented in story order, and the state's in witness order, the guilty verdicts returned dropped to 31 percent.

In another interesting study, conducted by Bennett and Feldman, also discussed in the Lempert article, an experiment was conducted with college students in which some students were asked to tell a story about something that had actually happened to them while other students were asked to tell a story about something which was made up. Interestingly, Bennett and Feldman found that the truth of the story had no significant effect on whether the majority of the audience found the story to be true. What did have an effect was the story's structure; the more coherent the story, the more likely the story was regarded as true whether or not it actually was.[4] The point, of course, is not to concoct a tale simply for presentation's sake, but to remember that presenting the theory of your case in story form is perhaps the most effective manner in which to present your Opening Statement to the jury, utilizing your evidence, witness testimony and exhibits to tell that story. In order to do this effectively, it is critical that your Opening Statement be well-organized with respect to the testimony you will be presenting to the jury as well as the exhibits upon which you will rely.

"Often attorneys believe that if they are confident with their own story and the case which they intend to present to the jury, their task is complete. Nothing can be further from the truth."

Know Your Case *and* Your Adversary's Before You Prepare Your Opening Statement

Often attorneys believe that if they are confident with their own story and the case which they intend to present to the jury, their task is complete. Nothing can be further from the truth. In fact, it is as critical, if not more critical, that you understand your adversary's theory of his case. This will help you recognize potential weaknesses in your case which may be a target for your adversary in his Opening Statement, and later in the case which he intends to present.

After you have made a list of your witnesses and exhibits, and the witnesses you intend to use to introduce your evidence (even if it is through an adverse witness), it is helpful to outline some of the issues or potential issues which your adversary will raise. It is also helpful to make a thorough review of any adverse witness's deposition testimony. This review will also help you in preparing your cross-examination of those witnesses and provide a method for you to focus on potential areas where your case might be vulnerable, which you may even wish to address in your Opening Statement before your adversary does.

Presenting the Opening Statement

A. Your Demeanor

Since your Opening Statement is the first and last time which you will have to address the jury prior to the commencement of the trial itself, your demeanor and tone should be reflective of the confidence you have in your case and your client. You should convey this confidence to the jury, and while being engaging, pleasant, and direct, always let the jury know the seriousness with which both you and your client take this matter. In discussing cases with jurors after a verdict has been reached, I have always been impressed by the number of jurors who have indicated that a flippant or casual attitude of an attorney or a "too friendly" approach during the Opening, as well as in addressing your witnesses, often colors the way in which the jury believes both you and your client view his case.

Jurors are also more likely to feel comfortable with an attorney who expresses pleasure in representing his or her client, whether it be an individual or a corporation. I have frequently introduced myself to the jury in the Opening followed by a statement that "it is my pleasure to represent [my client] in this case." A professor who taught a trial advocacy course I took when I was in law school told us that one should always be able to "point with pride and view with alarm"—obviously pointing with pride at your client, and viewing with alarm your adversary's client and the manner in which he has either wrongfully brought suit against your client if you are representing the defendant, or refused to perform an obligation which has forced you to bring the lawsuit if you are representing a plaintiff.

B. Your Client's Demeanor

From the commencement of Opening Statements, and if possible, even after he or she has testified, your client should be present in the courtroom, either individually or if a corporation, through a representative of the entity. This will assure the jury of the importance to him of the matter which they will be deciding.

If you refer to your client or its representative in your Opening, making reference to his or her presence, never address your client by his or her first name, but opt for the more formal "Mr." or "Ms." References by first name often tend to undermine the seriousness of the event for the jury. You want them to trust and believe your client, not be his or her pal.

Make sure that you remind your client to refrain from making gestures or faces. At least one member of the jury will be watching.

By showing your confidence in your case and in your client, the jury will feel confidence in you as an attorney and, perhaps not consciously, may credit your confidence in your case and your client with the merits of the case itself.

Telling Your Story

Each lawyer has his or her own style in communicating with the jury; however, keeping the story model in mind, the Opening Statement gives you an opportunity to tell your story, hopefully uninterrupted (discussed later) where you can set the scene and introduce some of the players to the jury. It is most helpful for the jury if you can present the theory of your case, in story form, in a precise and direct manner, giving them a road map to what you know and are confident you can prove to them by the end of the case. In telling the jury why they are there, and the importance of their job, you should mention the players in the case without getting bogged down in too much detail of the testimony those individuals might give. If you refer to any documents in the Opening Statement, it should be limited to those which you feel are really critical to any understanding of the theory of your case and the story you are telling in your Opening.

By the time you are ready to prepare the summation, you should be able to refer to your Opening Statement to the promises which you made in the Opening and which you (unlike your adversary) have kept through the evidence and witness testimony which you presented during the trial. Although attorneys are always cautioned never to make promises to a jury that they are not certain they can keep, such as promising the jury that they will see a document which is ultimately excluded from evidence, or assure them that they will be hearing the testimony of a witness who suddenly doesn't show up or is unavailable for some other reason, it is equally important to tell the jury what you know you will be presenting and the testimony you know your witnesses will give. This will be particularly true with respect to your client's testimony, which you (hopefully) have prepared with him or her to such a degree that you know exactly what he or she will say. The same holds true for documents which may be at the very heart of the matter, such as a contract which has either been stipulated by the parties or cannot possibly be excluded on any evidentiary basis.

If you are certain, through what should have been a very thorough review of any deposition testimony, witness statements, and documents written by any of the witnesses you know will be testifying on behalf of your adversary's client, you should be confident in making bold statements such as, "Not one witness will be able to tell you that he actually saw my client execute that contract," or, "There is not one document which the defendants in this case will show you to contradict the express terms of this contract." If you do know your case inside out, as you should by the time of trial, and are confident in making such a statement, the jury will respect you for your confidence in your case and your client's position. If, on the other hand, you are not absolutely sure that there isn't some document which you have overlooked or some statement made by a witness somewhere to contradict something you intend to prove, you should not risk the jury's confidence in the theory of your case. Unequivocal statements are likely to be remembered by the jury *and* your adversary and he will certainly take advantage of it at the time of summation if you fail to keep a promise or misstate what the evidence ultimately shows.

"By showing your confidence in your case and in your client, the jury will feel confidence in you as an attorney and, perhaps not consciously, may credit your confidence in your case and your client with the merits of the case itself."

The importance of preparation in anticipation of the Opening Statement (not to mention the trial) cannot be overstated. Only that preparation will enable you to make an unequivocal statement about the evidence. You should take careful notes during your adversary's Opening to make sure that he or she keeps any promises made to the jury in the Opening which, if they haven't been kept, can be used very effectively when it is time for summations.

Referring to Your Adversary's Case in Your Opening Statement

It is important never to fall into the trap of responding to your adversary's position in the event that he or she is the plaintiff in the case, or where you are the plaintiff, anticipating and giving too much attention to statements you know your adversary will be making in his or her Opening Statement. You should focus on *your* case during the Opening Statement and not your adversary's. Nevertheless, it is also important that you do anticipate some of the things that will be said by your adversary, either before or after your Opening Statement has been made. It can be quite effective when you are the plaintiff *after* you have told your story, to make a statement to the effect that "the defen-

dant's attorney will speak to you now and will tell you x, y and z," with the caveat that you believe that those statements which the defendant's attorney is about to make will not be supported by the evidence, or will be undermined by the what you believe the testimony and evidence will show. Often the jury will be impressed with the fact that you have anticipated something that the defense attorney is about to say, or it may force your adversary to alter his Opening Statement which he might have carefully prepared the night before. In either event, you have drawn the sting from any potentially harmful things your adversary may say in his Opening which you will not have an opportunity to address, other than through your witnesses, until the summation.

"Just as you should object to your adversary's use of improper subject matter or personal and inflammatory attacks on your client, you should refrain from doing so in your own Opening . . ."

If you are the defendant, you have already had an opportunity to hear some of the things the plaintiff has said and if properly prepared, will have anticipated that those are the points that the plaintiff will be making during the Opening Statement without having to take copious notes while your adversary is speaking. Without compromising the importance of telling *your* story, you may wish to comment briefly on some of the things the plaintiff has told the jury about his case, and after *briefly* doing so, redirect the jury's attention to your case and how you will show that the plaintiff will not be able to meet his burden of proof or substantiate his theory of his case with evidence during the trial. The same holds true when referring to your adversary's evidence.

Objections During Opening Statements

All lawyers have always been cautioned to make judicious use of objections during the course of the trial, and particularly during the Opening Statements. When you object frequently, or even at all, the jury begins to suspect that you have something to hide, and will suspect that you and your client are withholding something from them.

There are, however, times when you have no choice but to make an objection during your adversary's Opening Statement. If, for example, an attorney continually makes personal attacks on your client or your client's position or insists on bringing to the jury's attention matters which are totally irrelevant to the case, i.e., personal circumstances of your client, you may have to object if the attorney does this more than once or twice during the Opening Statement. Objections are also appropriate where the subject matter is patently improper, such as a reference to settlement discussions or insurance or if he refers to evidence which you both know will not be introduced at trial. You may wish to object, if it becomes necessary, with an apology, and a statement that you have tried to refrain from objecting, but you believe that your adversary has exceeded the bounds of appropriate conduct.

When making an objection, you may wish to do so and request a sidebar so as to prevent the jury from hearing anything further if your adversary appears to have no intention of discontinuing his inappropriate or improper remarks. Although it has been suggested that if an objection must be made that it should be done so at the end of the Opening Statement at a sidebar and that you should ask the judge to give a curative instruction relating to any improper subject matter which has been discussed in the Opening, many attorneys share the view that once the damage has been done, any curative instruction will, in all likelihood, only serve to redraw the jury's attention to the inappropriate matter which has been presented to it in the first place. This, of course, is strictly a judgment call depending on the importance of the matter which has been raised by your adversary, and whether it was made the focus of any part of the Opening.

Thus, with respect to any objections you make during an Opening Statement, you should be quite certain that the objection you are making is necessary and will, in all likelihood, be sustained so that the jury does not believe that you are being obstructionist or rude to your adversary.

Preventing Objections to Opening Statements

In using objections judiciously during your adversary's Opening Statement, it is equally important that you avoid any objections being made by your adversary during your Opening Statement. If, for example, you intend to utilize demonstrative evidence such as a chart or other visual aid during your Opening Statement, be sure that you discuss this with the court and your adversary prior to doing so. Otherwise, you may look very foolish when you haul in a chart or an enlarged photograph only to be met by an objection which is sustained, followed by an awkward silence while you attempt to relocate your visual aid to a place out of the jury's view.

Just as you should object to your adversary's use of improper subject matter or personal and inflammatory

attacks on your client, you should refrain from doing so in your own Opening, being as direct and straightforward as you can and as non-argumentative as possible. Argument can be saved for the summation.

Things to Avoid During the Opening Statement

Your demeanor, when addressing the jury, should be one of interest, and you should deliver your Opening Statement with a certain degree of animation. If you are not excited, or at least interested in your case, you certainly cannot expect the jury to be, either. On the other hand, you do not wish to personalize the case to a point where you have invited not only an objection, but perhaps a mistrial.

"If you have prepared your witnesses and structured your trial before *the Opening Statement, your summation should be just that: a summation . . ."*

If you are unsure as to whether a statement you are making will personalize your remarks so as to be objectionable, preface it with "we believe . . ." or "the evidence will show . . .," followed by your statement. Thus, where you are prohibited from saying "I think the defendant can't be trusted," or where even the statement "The defendant can't be trusted" might raise an objection which may be sustained or draw an admonition from the court, saying, "the evidence will show that the defendant can't be trusted," should not present that risk. And the jury will get the message.

You should avoid making any comment with respect to the veracity of any witness who may be testifying, including your own. You may, of course, in the manner in which you state what witnesses will be testifying for your adversary, ask the jury to listen carefully to what those witnesses say, because they will be asked at the end of the trial to assess witnesses' credibility. Again, if you have prepared your case thoroughly, you will know exactly what those witnesses will be testifying to and where you will be able to cross-examine them to *show* the jury through your cross-examination that those witnesses are not to be trusted or that they are not telling the truth.

Conclusion

Your Opening Statement should not only tell your story of the case, introduce your client and your witnesses, as well as the evidence which you intend to present and what the evidence will show to them during the course of the trial, but you should also fashion your Opening Statement so that you will be able to utilize portions of it in your summation. If you have prepared your witnesses and structured your trial *before* the Opening Statement, your summation should be just that: a summation of what you have promised to provide to the jury, and a summary of the evidence which you actually did present with a reference to the promises which you made at the beginning of the trial, which you kept.

Some time ago I tried a commercial case before a jury. In my summation I closed with a line from T.S. Eliot's *Four Quartets*, "East Coker," which starts: "In my beginning is my end . . ." Although I was certain that only a few of the jurors had any idea who T.S. Eliot was, I am equally certain that the meaning was not lost on them when I was able to refer to my Opening Statement, review the evidence which I presented during the trial, and reflected in the summation that I had indeed kept those promises.

Endnotes

1. William S. Daly, *The Artful Lawyer: More Show, Less Tell*, Trial (Oct. 1993); James W. Jeans, Trial Advocacy (1975) cited in H. Freedman, New York Objections, ch. 3, "Opening Statement."
2. Richard Lempert, *Telling Tales In Court: Trial Procedure and The Story Model*", 13 Cardozo L. Rev. 559 (Nov. 1991).
3. "Story order" was defined as providing the jury with a chronological picture, or story of events though a variety of witness testimony. "Witness order" was defined as evidence being presented witness by witness, each telling the jury everything he or she knew about the subject matter on which he or she was testifying, after which the next witness was presented and did the same.
4. The studies discussed in the article cited above were Pennington & Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. Experimental Psychol.: Learning, Memory and Cognition, 52 (1988), and Bennett & Feldman, Reconstructing Reality in the Courtroom: Justice and Judgment In American Culture (1981).

CPLR Amendments 2002 Legislative Session
(Through Chapter 633[1])

CPLR §	Chapter (§)	Change	Eff. Date
103(c)	593(1)	Authorizes court to convert motion to special proceeding	1/1/03
203(c)	334(1)	Clarifies that, in an action commenced by filing, claim is interposed when the action is commenced	11/21/01[sic]
214-b	88(1)	Extends effective date for commencing Agent Orange actions until 6/16/04	6/11/02
304	110(1)	Extends pilot program on commencement of actions by fax or e-mail until 7/1/03 & adds Albany and Nassau counties to program	6/28/02
1101(f)	81(F, 1)	Extends effective date for 1101(f) until 9/1/03	4/1/02
2103(b)(7)	110(1)	Extends pilot program on service of interlocutory papers by e-mail until 7/1/03	6/28/02
2305(b)	575(1)	Provides that a subpoena duces tecum may be combined with a subpoena to testify or may be issued separately	9/1/03
3120	575(2)	Combines provisions for discovery from parties and non-parties and requires service of copy of subpoena duces tecum on all parties & notice that documents are available	9/1/03
3122	575(3)	Provides, in case of subpoena duces tecum, for objections, production expenses, and production of copies; provides special rules for subpoena duces tecum to medical provider	9/1/03
3122-a	575(4)	Adds provision for certification of business records	9/1/03
4503(a)	430(1)	Excludes, absent agreement, from attorney-client privilege beneficiaries of estate and fiduciaries where attorney's client is personal representative	8/20/02
4518(a)	136(1)	Provides for admissibility of electronic records	7/23/02
5529(a)	595(1)	Replaces most requirements as to format for briefs and appendices with authorization to appellate courts to regulate those matters	1/1/03
8018(a)	83(B, 1)	Increases index number fee by $15 (to $185)	7/1/02[2]
8021(a)(4)(b)	83 (B, 2)	Increases certain county clerk fees by $15	7/1/02[3]
8021(b)(11)(b)	83 (B, 3)	Increases certain county clerk fees by $15	7/1/02[4]
8023	110(1)	Extends pilot program on payment of fee by credit card until 7/1/03	6/28/02
8303(a)(6)	530	Corrects cross-references to General Business Law	3/16/03

Endnotes

1. Chs. 2-4, 590, and 597 have not yet been enacted. The text of ch. 626 is not yet available on-line.
2. Expires (along with the additional $5 fee previously added) on Dec. 31, 2005.
3. Expires (along with the additional $5 fee previously added) on Dec. 31, 2005.
4. Expires (along with the additional $5 fee previously added) on Dec. 31, 2005.

Notes of the Section's Executive Committee Meetings

June 19, 2002

Guest speaker Hon. Karla Moskowitz, Commercial Division, Supreme Court, New York County, spoke about her personal judicial procedures, in particular her procedures for motion practice.

July 24, 2002

Guest speaker Hon. Elizabeth Emerson, Supreme Court, Suffolk County, and Justice-Designate of the Commercial Division of that court, discussed the need for a Commercial Division in Suffolk County.

The Executive Committee approved the Lien Law bill, with certain technical amendments, and the final report of the Task Force on membership and CLE issues.

September 19, 2002

This meeting was held in Buffalo, with other Executive Committee members joining by videoconference from New York City.

The Executive Committee adopted the report of the CPLR Committee in support of the creation of a new CPLR 3216-a. The Executive Committee also adopted the Comment Report of the Section's Ad Hoc Committee on the Public Service Alternative Bar Examination that opposed the joint report of the Association's Committee on Legal Education and Admission to the Bar proposing such an alternative.

Friends from Other Sections

International Law and Practice Section

The paths of the International Law and Practice Section (ILPS) and the Commercial and Federal Litigation Section (CFLS), and their members, have crossed in beneficial ways over the years, and ILPS is pleased to report that this year is no exception. Cathi A. Hession joined her partner John F. Zulack, Treasurer of ILPS, as featured speakers at the ILPS Fall Meeting in Rome, Italy. Their program addressed "What Every International Lawyer and Business Should Know About Product Liability Developments in the European Union and in the United States." They were joined by Antonio Auricchio from Gianni, Origoni, Grippo & Partners, one of Italy's leading firms. The Fall Meeting was held at the Grand Hotel Plaza from October 16th through the 20th, and provided up to 20 MCLE credits, depending on the programs attended. ILPS invited CFLS members to join CFLS's Chair in attending this outstanding conference.

ILPS also welcomes the involvement of CFLS in its initiative to assist the U.S. Trade Representative (USTR) in developing a negotiating proposal concerning cross-border legal services for inclusion in the WTO General Agreement on Trade in Services (GATS), which would provide U.S. attorneys with access to foreign markets consistent with New York's liberal rules for foreign legal consultants. The USTR had requested the recommendations of ILPS and other bar associations, and ILPS worked in conjunction with lawyers from the Association of the Bar of the City of New York (ABCNY) in preparing a proposal which was ultimately adopted by NYSBA and ABCNY. The USTR has considered the proposal favorably, and discussions with ILPS and other bars are ongoing.

Kenneth A. Schultz
Chair
International Law and Practice Section

Request for Articles

If you have written an article and would like to have it published in The *NYLitigator*, which is published by the Commercial and Federal Litigation Section, please submit to:

Jonathan D. Lupkin, Esq.
Solomon, Zauderer, Ellenhorn,
Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information, and should be spell checked and grammar checked.

Section Committees and Chairs

Antitrust
Jay Himes
NYS Attorney General's Office
(212) 416-8282
E-mail:
jay.himes@oag.state.ny.us

Appellate Practice
Brian C. Eckman
Nixon Peabody LLP
(716) 263-1656
E-mail: beckman@
nixonpeabody.com

Patricia Taylor Fox
Simpson Thacher & Bartlett
(212) 455-2462
E-mail: p_taylor@stblaw.com

Arbitration and Alternative Dispute Resolution
Carroll E. Neesemann
Morrison & Foerster LLP
(212) 468-8138
E-mail: cneesemann@mofo.com

Lauren J. Wachtler
Montclare & Wachtler
(212) 509-3900
E-mail: ljwachtler@
montclarewachtler.com

Civil Practice Law and Rules
James Michael Bergin
Morrison & Foerster LLP
(212) 468-8033
E-mail: jbergin@mofo.com

James N. Blair
Wolman, Babitt & King, LLP
(212) 867-1800
E-mail: jblair@wbklaw.net

Civil Prosecutions
Neil V. Getnick
Getnick & Getnick
(212) 376-5666
E-mail: ngetnick@
getnicklaw.com

Class Action
Ira A. Schochet
Goodkind Labaton Rudoff & Sucharow, LLP
(212) 907-0864
E-mail: ischochet@glrslaw.com

Commercial Division
Lewis M. Smoley
(212) 698-2010
E-mail: lms@pipeline.com

Complex Civil Litigation
Vincent J. Syracuse
Tannenbaum, Helpern, Syracuse & Hirschtritt
(212) 508-6722

Construction Litigation
John F. Grubin
Wasserman Grubin
& Rogers, LLP
(212) 581-3320
E-mail: jgrubin@swglaw.com

Continuing Legal Education
James M. Wicks
Farrell Fritz P.C.
(516) 227-0700
E-mail: jwicks@farrellfritz.com

Creditors' Rights and Banking Litigation
Peter J. Craig
(585) 586-1060
E-mail: pjcraig@aol.com

Michael Luskin
Luskin Stern & Eisler, LLP
(212) 293-2700
E-mail: mluskin@lse-law.com

S. Robert Schrager
Bondy & Schloss, LLP
(212) 661-3535
E-mail: rschrager@bschloss.com

Employment and Labor Relations
Edward F. Beane
Keane & Beane, P.C.
(914) 946-4777
E-mail: ebeane@kblaw.com

Carrie H. Cohen
Attorney General's Office
(212) 416-8245
E-mail: carrie.cohen@
oag.state.ny.us

Evidence
Stanley Futterman
(212) 687-3121
E-mail: futtest@worldnet.att.net

Federal Courts Counsel
Jessica L. Malman
(212) 805-0475
E-mail: jessica_malman@
hotmail.com

Roberta H. Smith
(212) 805-0136

Federal Judiciary
Carol E. Heckman
Harter, Secrest & Emery
(716) 853-1616
E-mail: checkman@hselaw.com

Jay G. Safer
LeBoeuf, Lamb, Greene & MacRae, LLP
(212) 424-8287
E-mail: jsafer@llgm.com

Federal Procedure
Gregory K. Arenson
Kaplan Kilsheimer & Fox
(212) 687-1980
E-mail: garenson@
kaplanfox.com

Intellectual Property
Lewis R. Clayton
Paul, Weiss, Rifkind, Wharton & Garrison
(212) 373-3215
E-mail: lclayton@paulweiss.com

James E. Hough
Morrison & Foerster
(212) 468-8185
E-mail: jhough@mofo.com

International Litigation
Stephen H. Orel
LeBoeuf, Lamb, Greene & MacRae, LLP
(212) 424-8000
E-mail: shorel@llgm.com

Ted G. Semaya
Eaton & Van Winkle
(212) 561-3615
E-mail: tsemaya@evw.com

Internet and Litigation
Peter J. Pizzi
Connell Foley LLP
(973) 533-4221
E-mail: ppizzi@connellfoley.com

Membership
Vanessa Elliott
Beattie Padovano, LLC
(201) 573-1810
E-mail: velliott@beattielaw.com

John Nonna
LeBoeuf, Lamb, Greene & MacRae, LLP
(212) 424-8311
E-mail: jnonna@llgm.com

Pro Bono and Public Interest
Michael W. Martin
Fordham University School of Law
(212) 636-7781
E-mail: mwmartin@mail.lawnet
.fordham.edu

Bernard W. McCarthy
Chadbourne & Parke, LLP
(212) 408-5397
E-mail: bernard.w.mccarthy@
chadbourne.com

Products Liability
Jayne Conroy
Hanly & Conroy LLP
(212) 401-7600
E-mail:
jconroy@hanlyconroy.com

Professionalism in Litigation
James M. Wicks
Farrell Fritz P.C.
(516) 227-0700
E-mail: jwicks@farrellfritz.com

Publications
Prof. Mark L. Davies (*Newsletter*)
(914) 631-7922
E-mail: davies@coib.nyc.gov

Jonathan D. Lupkin (*NYLitigator*)
Solomon, Zauderer, Ellenhorn, Frischer & Sharp
(212) 956-3700
E-mail: jlupkin@szefs.com

Real Estate Litigation
David Rosenberg
Marcus Rosenberg
& Diamond LLP
(212) 755-7500
E-mail:dr@realtylaw.net

Securities Litigation
Stephen P. Younger
Patterson, Belknap, Webb & Tyler, LLP
(212) 336-2685
E-mail: spyounger@pbwt.com

Social Functions
Carrie H. Cohen
Attorney General's Office
(212) 416-8245
E-mail:
carrie.cohen@oag.state.ny.us

State Court Counsel
Tracee E. Davis
Zeichner Ellman & Krause LLP
(212) 223-0400
E-mail: tdavis@zeklaw.com

Kathy M. Kass
(212) 374-4710
E-mail: kkass@courts.state.ny.us

State Judiciary
Charles E. Dorkey, III
Torys LLP
(212) 880-6300
E-mail: cdorkey@torys.com

Technology
Daniel P. Levitt
(212) 687-3455
E-mail: levittdan@aol.com

Trial Practice
Michael J. Levin
Barger & Wolen, LLP
(212) 557-2800
E-mail: mlevin@barwol.com

Consultants on Admiralty and Maritime
Frank Arthur Atcheson
Peter D. Clark
Clark & Atcheson

Former Chairs

Robert L. Haig
Michael A. Cooper
Hon. Shira A. Scheindlin
Harry P. Trueheart, III
P. Kevin Castel
Mark H. Alcott
Gerald G. Paul
Mark C. Zauderer
Bernice K. Leber
John M. Nonna
Jack C. Auspitz
Sharon M. Porcellio
Jay G. Safer

ISSN 1530-4043

COMMERCIAL AND FEDERAL LITIGATION SECTION NEWSLETTER

Commercial and Federal Litigation Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155