NYSBA FALL 2019 | VOL. 25 | No. 2

Commercial and Federal Litigation Section Newsletter

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

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JANUARY 27–31
NEW YORK CITY

2020

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Message from the President

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Commercial and Federal Litigation Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

• According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.

• Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.

• Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.

• Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.

• Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads on Diversity

Hank Greenberg

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. (See http://www.nysba.org/diversitychairs)

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hmgreenberg@nysba.org.

Message from the Chair: Our ComFed DNA

I'm writing this on Father's Day 2019. The Spring Meeting is behind us, and our June reorganization meeting and my term as Chair of the Federal Litigation Section is ahead of us. In thinking about what I wanted to write as my first "Message from the Chair" for our *Newsletter,* it struck me that while Father's Day has become a marketing opportunity for DNA testing kits, we members of ComFed have no need for testing; our DNA is on display in our cadre of Former Chairs. I capitalize those words because being a Former Chair of ComFed is clearly a continuing position for almost everyone who has served as a Chair of the Section. They are among our most active Section members, and their advice and wisdom is actively sought by the current officer corps.

Laurel R. Kretzing

In addition to planning the June reorganization meeting, the Chair is charged with planning the Former Chairs dinner, something I had never heard of before I became Vice-Chair. The purpose of the dinner is not to celebrate the elevation of a new Chair but to give the Former Chairs an opportunity to give the new Chair their guidance and thoughts on future initiatives for the Section. In planning this year's dinner, I noted that Robert N. Holtzman, with whom I have had the privilege to serve as Chair Elect, was our 30th Chair and is now our 30th Former Chair. In addition to Robert, the vast majority of Former Chairs regularly attend our Former Chairs dinner. That's a lot of collective wisdom from some of the most talented litigators and judges in the country, and I hope I can absorb it all. But I know that if I can't take all that advice in at one time, these leaders will be around to share their thoughts with me over the coming year. I know this because I know them. Although their terms have ended, the Former Chairs have continued to be involved in the Section in one way or the other. Some regularly attend the Executive Committee meetings and the Annual and Spring Meetings, and some chair Section committees, regularly organize CLE presentations, appear as panelists on our CLE programs, or take part in our signature programs, such as Smooth Moves, the Women's Initiative Task Force, the Shira A. Scheindlin Award, and the Kaye Scholarship Program, or our mock trial program, Taking the Lead. This continued active involvement of our former leaders demonstrates the commitment they all share in making this Section a leader in the quest for diversity and the place to be to learn about and participate in the development of the broad array of topics that are encompassed by commercial and federal litigation. I'm very grateful for the continuing commitment of our Former Chairs.

However, as grateful as I am for the Former Chairs' continuing involvement, an organization can only grow and evolve and continue with the active participation of new, younger members. The need to reach out to and nurture younger lawyers has been an issue that Section leadership has been addressing for some time. Former Chair Mitch Katz was fond of saying that his job was to build the forts where Mark Berman and other Chairs that came before him planted the flags of new programming for the Section. He did this by institutionalizing and putting a structure behind the programs so that they last from year to year, and Robert Holtzman continued that mission. I'm hoping to build the fort where Robert and all the Chairs that came before him planted the flag of reaching out to younger people, by creating a new Young Lawyers Committee within the Section. This new Committee will be a space within our Section for younger lawyers to network and develop programming and ways of communicating with each other which are meaningful to them. I'm hopeful the Young Lawyers Committee will not only be a forum for young lawyers to interact with each other but a gateway to a broader participation and a pathway to leadership in the Section as a whole. The most important thing we can do as a Section is to pass on our DNA, which is embedded in excellence in the legal profession, to the next generation of leaders so that our mission can continue for another 30 years and beyond.

Looking forward to the events for the upcoming year, I am privileged to announce that the Shira A. Scheindlin Award for Excellence in the Courtroom and the Honorable Judith S. Kaye Commercial and Federal Litigation Scholarship will once again be presented in the Ceremonial Courtroom of the Southern District of New York at 500 Pearl Street on the evening of November 13, 2019. This is always a moving event as we honor outstanding veteran female litigators and award up and coming female litigators. I look forward to meeting the 2019 awardees who, I am sure, will all be very talented. I also look forward to our Annual Meeting on January 29, 2020, during Bar week, and our Spring Meeting at the Otesaga Resort in Cooperstown, New York, from May 1 through May 3, 2020.

Lots more programming is being planned throughout the upcoming year, so please stay tuned.

Laurel R. Kretzing

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Notes from the Spring Meeting

Commercial Arbitration at Its Best: How Arbitration Can Benefit Clients Maximizing the Benefits and Minimizing the Risks

This program, presented at the Section's Spring Meeting and moderated by Charles J. Moxley, Jr., Esq. of Moxley ADR LLC, addressed the robust body of arbitration "best practices" materials available to practitioners and discussed an array of topics dealing with arbitration. This included, but was not limited to: discussing the strong case for promoting arbitration in many kinds of commercial cases, what contemporary commercial arbitration looks like and how it differs from court-based litigation, comparing statistics as to arbitration versus court-based litigation, and addressing how to maximize the benefits and minimize the risk of commercial arbitration.

The diverse panel consisted of practitioners, neutrals, and providers. The Honorable Ariel E. Belen (Ret.), of JAMS in New York City, provided the perspective of the neutral and gave guidance as to how to achieve the arbitral objectives of efficiency and economy without sacrificing fairness in particular cases. Jeffrey T. Zaino, Esq., Vice President of the Commercial Division of the American Arbitration Association in New York, addressed the perspective of the provider and discussed the process of selecting arbitrators for particular cases who possess the targeted skills necessary to handle the types of commercial matters before them.

Carla M. Miller, Esq., Vice President of Business and Legal Affairs and Litigation Counsel for Universal Music Group, and Stephen P. Younger, Esq., a partner of Patterson, Belknap, Webb & Tyler LLP in New York City, discussed commercial arbitration from the perspective of the client. In addressing the differences between arbitration and litigation from the client's perspective, the panelists highlighted that arbitration can potentially resolve the commercial dispute in a more time efficient manner and can be more cost effective than litigation. On the other hand, a dispute will generally not be resolved by way of a dispositive motion, as can be the case in litigation, the parties receive less discovery, with usually no depositions, and it is often difficult to compel out-of-state witnesses to appear and testify. The panel discussed the pros and cons of these differences and the issues that should be considered when drafting agreements that include arbitration provisions.

Nancy M. Thevenin, Esq., who is the founder and principal of Thevenin Arbitration and ADR, serves as neutral in international commercial disputes, including arbitrations, mediations, neutral evaluations, and dispute boards. She also serves as General Counsel for United States Council for International Business (USCIB) and works closely with USCIB's Business Development team to ensure a more comprehensive policy, legal, and arbitration membership outreach to both law firms and corporations. Nancy discussed the ins and outs of international arbitration and addressed how, unlike domestic arbitration, parties to international disputes abroad are generally required to go to arbitration, as neither party is inclined to partake in a court proceeding in a foreign jurisdiction. Jurisdictionally, neutral and binding arbitration is generally favored.

The program closed with the panel providing final remarks about the benefits of arbitration in resolving commercial disputes.

Working with Men to Advance Women in the Profession

The second of four programs presented at the Section's Spring Meeting addressed topics relating to advancing women in the profession, with a focus on how men and women can work together on diversity and inclusion. Rachel Silverman, an advisor at Hub6 Advisors, and Carrie H. Cohen, Esq., a partner at Morrison & Foerster LLP, lead the discussion; and the audience participation was facilitated by by Lauren J. Wachtler, Esq., a partner at Phillips Nizer LLP, and Tracee E. Davis, Esq., a partner at Zeichner Ellman & Krause LLP.

The speakers discussed how to be, and the difference between, an ally, a sponsor, and a mentor, and the importance of introducing female attorneys to clients and transitioning clients to those attorneys. A mentor is one who provides guidance and advice to a female colleague. A sponsor advocates on her behalf and is someone who is willing to put her or his name and reputation on the line to vouch for that colleague. An ally, however, takes it one step further and proactively supports and aids the advancement of that female attorney. It is a male colleague who promotes the advancement of women in the legal profession when there are no women in the room.

The program was structured as an interactive discussion with attendees breaking out into groups to address specific questions on the topic. These discussions included hypotheticals with audience participation. The first question posed to the attendees was who are the most effective allies for women in your firm? What motivates them and what makes them effective? The answers commonly addressed the need and presence of effective allies from upper management of firms. The discussions also

highlighted the need for firm management to promote the advancement of female attorneys with clients. In this regard, the members of the bench have been helpful in advancing this goal by implementing rules and encouraging younger and diverse attorneys to appear in court and for oral argument.

The second question was does your firm encourage, support, and reward the efforts of allies and how does your firm address obstacles to more people being allies? Attendees discussed the various ways firms have advanced the goals of diversity, including by forming diversity committees that are meant to address the issue head-on. The discussion showed that although strides have been made, there is significant room for firms to grow to assure that these goals are continuously advanced.

The final question was what can and should allies do to have the greatest impact? Attendees raised the issue of promoting diversity and inclusion with clients and addressed how best to aid clients in recognizing that inclusion is in their best interest. Although large institutional clients have made diversity a priority and are seeking out firms that have similar goals, some attendees raised the point that smaller businesses and clients at times create a challenge to the goal. Firms are met with the handling of the delicate balance between generating business and promoting the important goals of diversity.

The program concluded by encouraging attendees to raise these questions at their own firms, to start a conversation about advancing the goals of diversity and inclusion, and to encourage partners to be allies for their female colleagues. The program was followed by a luncheon of the Task Force of Women's Initiatives, where it was announced that the Task Force is working on compiling data and generating a follow-up report to the New York State Bar Association's November 2017 report entitled *If Not Now When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*. The report, which has been approved and adopted by the American Bar Association, can be found at www.nysba.org/womenstaskforcereport.

Lessons for the Trial Lawyer from "My Cousin Vinny"

The third program, which addressed ethics, trial techniques, and courtroom decorum, was inspired by the iconic movie, *My Cousin Vinny*. Jeremy R. Feinberg, a Special Referee of the New York County Supreme Court, Civil Division, led the discussion as the moderator of the program. Serving as panelists were the Honorable Norman St. George, the Administrative Judge of Nassau County Courts, the Honorable Deborah H. Karalunas, Justice of the New York State Supreme Court, Onondaga County, the Honorable Timothy Driscoll, Justice of the New York State Supreme Court, Nassau County, and Tracee Davis, Esq., a partner at Zeichner Ellman & Krause LLP in New York City. Rather than use clips from the movie itself, the panel members illustrated their points with vignettes inspired by scenes from *My Cousin Vinny* , skillfully portrayed by attorneys and staff of the Lupkin LLP firm in New York City,

After each scene, the panel discussed any relevant and applicable rules of ethics that would apply to each scenario, outlined the errors that can be taken away from the clips when appearing in court, and highlighted the "do's and don'ts" of courtroom decorum using "Vinny's" techniques as examples.

The first scene and topic addressed the challenges of appearing in a jurisdiction or before a judge for the first time. The panel stressed the importance of knowing your court and your judge, learning the rules in the jurisdiction and court that you are practicing in before you appear, and knowing what to do when appearing in an unfamiliar jurisdiction or before an unfamiliar judge. The second scene and topic concentrated on preparation, or in Vinny's case the lack thereof, and presented tips for preparation. The third scene and topic addressed what trial techniques and strategies are permissible and impermissible. In this regard, scenes showing voir dire, using hand motions in court, and repetition in front of the jury were all used as examples of effective and ineffective trial techniques.

The next scene and discussion concentrated of dealing with surprises in court and at trial. The scene concentrated on the prosecution's presentation of an expert witness and Vinny's cross examination, wherein he asked questions he did not know the answers to. The panel again stressed the importance of preparation and discussed how, in the civil context, such surprises are minimized by significant pre-trial proceedings. In the event of a surprise, however, the panel presented tips for dealing with such an instance, including making a record and asking for an adjournment outside of the presence of the jury. The final scene addressed the notions of candor with the court and general courtroom decorum. Clips showing examples of inappropriate attire in the courtroom, improper conduct, and unprofessional comments were used as a backdrop for this discussion.

The program ended by highlighting that *My Cousin Vinny* is not only a great movie but is also a wonderful tool for teaching attorneys, by example, the ins and outs of litigation, appearing in court, and trial techniques.

Natasha Shishov

Social Media Update 2019: Lessons in Ethics and Evidence for the Bench and Bar

The final panel of the 2019 Spring Meeting weekend was "Social Media Update 2019: Lessons in Ethics and Evidence for the Bench and Bar." The panel was moderated by Hon. Deborah Karalunas of the New York State Supreme Court, Onondaga County, and the panelists were Samantha Ettari of Kramer Levin, Ignatius Grande of the Berkeley Research Group, Scott Malouf of the Law Offices of Scott L. Malouf, and Hon. Lisa Margaret Smith, Magistrate Judge for the U.S. District Court for the Southern District of New York.

The panelists started off by catching the audience up on how the variety of new and evolving social media platforms continue to present ethical challenges to attorneys. Whether it be clients communicating using Facebook Messenger or a party in a case posting a damaging video on YouTube, attorneys have a duty of competence and must educate themselves on what platforms are out there, where they can look for evidence, and the advice that they should give their client.

The next topic that was addressed by the panel was social media discovery issues. Sam Ettari and Scott Malouf told the attorneys in attendance that it is important to deal with social media issues early on in a case to ensure a better outcome and to avoid spoliation issues. The panelists noted that attorneys cannot direct their clients or third parties to perform investigations on social media that they wouldn't be able to do in their attorney role.

The discussion then moved to the impact of the 2018 New York Court of Appeals decision in *Forman v. Henkin*. In the year-and-a-half since the *Forman v. Henkin* opinion was issued, in different ways, courts have followed the ruling that held that as long as the materials requested may be "reasonably calculated to contain relevant information," they may be discoverable. It was noted that, in particular, in the First Department *Forman v. Henkin* has been cited often in recent cases addressing social media requests.

The panelists then debated whether attorneys should get the court's permission before performing social media research on jurors. The consensus was that an attorney needs to assess the presiding judge and the local rules that are in place, but it is often prudent to be transparent about the social media research that an attorney performs during the *voir dire* process.

The topic of geofencing was raised as it recently was an issue in a case against Monsanto in California. The defendant in that particular case paid for targeted ads to appear about the safety of their product on mobile devices near the courtroom. The judge in that court denied a motion to block the ads. The judge found that geofencing ads were no different from someone holding up a sign or placard outside of the courthouse. This new technology is likely to impact New York courts in the near future.

Finally, the panel discussion concluded with a lively conversation about the use of social media by judges and court staff. Judge Smith shared her perspective on the increased use of social media by judges. More judges are becoming active on social media for a variety of reasons. There are many resources out there to enable judges to avoid running into ethical issues and to educate judges as to how to keep personal information off of social media and the internet.

New and changing technology such as social media keeps attorneys on their feet, and this panel helped to give the Spring Meeting attendees some valuable tips that they all took home with them from the Equinox.

Ignatius Grande

Smooth Moves 2019: Career Strategies for Attorneys of Color

By Colby Creedon

On May 23, 2019, the Commercial and Federal Litigation Section of NYSBA sponsored the 2019 Smooth Moves Career Strategies for Attorneys of Color CLE program held at The Lincoln Center for the Performing Arts. This evening program featured a panel discussion entitled *The Color of Neutrality: Increasing Diversity in Alternative Dispute Resolution* and an awards ceremony where Hon. Preet Bharara and Hon. Joon Kim received the Hon. George Bundy Smith Pioneer Award, while Johnny Nguyen—a student at Benjamin N. Cardozo School of Law—received the Kay Crawford Murray Commercial Division 1L Diversity Fellowship.

The "Color of Neutrality" panel, moderated by Theo Cheng, Esq., discussed the importance of diverse alternative dispute resolution (ADR) neutrals, how the lack of diversity in ADR is a problem, and strategies for increasing diversity among ADR neutrals. Panelists included Hon. Ariel Balen, Mediator and Arbitrator, JAMS; Sasha Carbone, Esq., Associate General Counsel and Assistant Corporate Secretary, American Arbitration Association (AAA); Nicole Haynes, Esq., Associate Director of Recruitment and Training, FINRA; and, Nancy Thevenin, General Counsel for the U.S. Council for International Business and Founder/Principal, Thevenin Arbitration and ADR.

Mr. Cheng started the discussion by outlining some reasons for ADR's diversity problem, which include corporate America not including diversity as a requirement in arbitrator and mediator selection contract clauses, implicit bias by individuals making arbitrator and mediator selection decisions—including in-house counsel and outside law firms—and the confidential nature of the ADR process creating an information gap. The panel agreed with Mr. Cheng and added a chicken-and-egg problem, where to be hired as an ADR neutral, a prospective arbitrator or mediator needs ADR experience; however, the experience is gained by being an arbitrator and mediator.

The panelists agreed that diversity is essential to ADR not only for fairness, cultural competence, and legitimacy reasons but also because clients are demanding diversity. ADR neutrals need cultural competence to make sound decisions. Cultural competence is demonstrated by relating to the parties, and the ability to relate arises from having similar backgrounds. As such, when litigants are diverse, it is essential for neutrals to be diverse so that neutrals make sound decisions by relating to the parties. Additionally, diverse neutrals are necessary because a perceived unfairness may arise when neutrals "look" more like one party versus another. That similarity may be seen to consciously or subconsciously influence outcomes. Ms. Haynes said, from FINRA's perspective, fairness is the most important reason to provide diverse arbitrators to its members. FINRA wants its forum to reflect the communities it serves; communities are diverse, providing diverse arbitrators enhances confidence in the arbitration process. Ms. Carbone emphasized that ADR must be fair in fact and in perception, which is only possible when neutrals reflect the diversity of our communities. Regarding legitimacy, Ms. Thevenin discussed how non-diverse arbitrators deciding claims between diverse parties might result in parties questioning whether an ADR forum is appropriate for resolving claims. Parties questioning whether an ADR forum is appropriate undermines the legitimacy of ADR generally.

Despite the importance of diverse ADR neutrals, the panelists agreed that the ADR industry struggles to recruit diverse neutrals. The panel cited some abysmal diversity-related statistics. Women account for 20% of arbitrators resolving matters valued over $1 million. Additionally, African Americans account for 7% and women account for 27% of FINRA arbitrators. These statistics can and should be improved because, as Mr. Cheng noted, ADR is the privatization of an otherwise public function; public courts have made significant diversity improvements, and the ADR industry should act in kind.

Strategies discussed to improve diversity among ADR neutrals included digital marketing, traditional networking, diversity fellowships, and setting organizational diversity targets. FINRA uses a digital media strategy, targeting advertisements specifically at diverse individuals—to become a FINRA arbitrator—via website banner ads and online platforms such as LinkedIn. The panel agreed that word-of-mouth advertising via networking with diverse bar associations—like the National Association of Women and Minority Owned Law Firms—are excellent channels for recruiting diverse neutrals. The

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Colby Creedon is a member of the Section's Publications Committee. He is a project manager at NYSERDA, where he oversees a multi-million dollar portfolio of cleantech commercialization programs. Before NYSERDA, he worked at a Glauconix Biosciences as co-founder and chief operating officer, and at the University at Albany as director of business development for atmospheric sciences.

AAA's Higginbotham Fellows Program has been successful in providing training, networking and mentorship to diverse early-stage ADR practitioners. Other successful strategies include organizational mandates, accompanied by metrics and transparency. The AAA has annual diversity recruitment goals, requires every roster of neutrals submitted to litigants be at least 20% diverse, and reports diversity statistics to its Board of Directors every quarter using a Diversity Scorecard. As a result of the AAA's initiatives, 42% of neutrals added to the AAA's roster were diverse in 2018. Since tracking diversity statistics, FINRA has seen 20% and 30% increases in the number of African American and women arbitrator applicants, respectively.

The panel concluded with a few takeaways: (1) diversity is essential to the legal profession, including ADR; (2) the legal profession, including ADR, has a diversity problem that is slowly improving; and (3) individuals and organizations within the legal profession should promote diversity initiatives.

Following the panel discussion, Carla Miller, Esq., Program Co-Chair, introduced then-NYSBA President-elect, Hank Greenberg, Esq. Mr. Greenberg reiterated the importance of diversity in the legal profession and highlighted NYSBA's requirement that every committee and section have at least one diverse officer. Mr. Greenberg closed by acknowledging attorneys are needed now more than ever to bring people together through understanding both sides of an issue and resolving issues with logic.

Following Mr. Greenberg's remarks, Hon. Preet Bharara, and Hon. Joon Kim were presented with the Hon. George Bundy Smith Pioneer Award. The Commercial and Federal Litigation Section presents this award annually to an attorney of color whose career accomplishments exemplify the high standards in legal excellence, community commitment, and mentoring illustrated by the late Judge Smith, who served on the New York State Court of Appeals.

Although Mr. Bharara and Mr. Kim gave separate remarks when accepting the award, both reminisced about their tenure at the U.S. Attorney's Office for the Southern District of New York. Mr. Bharara and Mr. Kim emphasized the importance of diversity in the legal profession and encouraged young attorneys to enter public service to do good things for the country.

Law Day 2019

By the Hon. Colleen McMahon

I am not at all amused by what has come to be called The Post-Truth Society.

And since truth is the beating heart of the law, I have been thinking, as Law Day approached, about how our profession might be impacted by a world in which there are things called "alternative facts"—as opposed to opinions or, worse, lies—and where everyone is free to decide for oneself what is real and what is "fake news."

"Facts are stubborn things."

Those words were uttered by my favorite among the founders, John Adams—a man who was way ahead of his time where women were concerned, and a public man of unimpeachable integrity, who was, according to his peers, utterly incapable of telling a lie to anyone, including himself.

"Facts are stubborn things."

I had forgotten the context in which Adams said this, but one of my law clerks knew. He sent me a link to the speech given at his Stanford Law School graduation by Dean Elizabeth Magill. I give credit where credit is due, and Dean Magill can certainly take a good deal of the credit for these remarks, because she seems to have been thinking about the very things that are troubling me. And she, too, found inspiration in John Adams.

Adams, like all of us in this room, was a lawyer. He said, "[f]acts are stubborn things" during the closing argument in what is undoubtedly his most famous case, the one for which he is most revered by the members of our profession. I refer, of course, to the so-called Boston Massacre case.

In his award-winning biography of Adams, historian David McCullough brought the evening of March 5, 1770, vividly to life. The streets of Boston were covered with snow. A British sentry standing outside the Customs House was being taunted by a band of men and boys. Suddenly, and for no apparent reason, a church bell rang out, and several hundred unruly citizens poured into the streets. The crowd pelted the sentry, and eight soldiers who came to his aid, with sundry items— some of them, like snowballs, not particularly dangerous, but some of them, like chunks of ice and stones, potentially lethal. One of the soldiers was clubbed, and then clubbed again when he tried to rise after absorbing the first blow. And the crowd shouted, "Kill them! Kill them!"

Not surprisingly, the beleaguered soldiers opened fire. And five Bostonians died.

Men of stature in the community condemned the incident as an example of British tyranny. Some of those men, like Samuel Adams and Paul Revere, were pursuing a political agenda—independence—and they seized on the firing of muskets and the death of their fellow citizens to stoke public outrage against the British. Things got so tense that, when the soldiers and their captain were charged with murder, no Boston lawyer would take their case. That is, no lawyer would take their case until John Adams was approached. He understood that representing such unpopular clients might endanger his reputation. But Adams was a lawyer, and as McCullough says, "His duty was clear" (65-66).

In crafting his defense, Adams took his cue from a treatise by an Italian penologist, Cesare, Marchese di Beccaria, who had written that even the contempt of mankind would be bearable if recourse to "invincible truth" saved an innocent victim from tyranny—or from ignorance, which was even worse.

The truth that Adams used to save the redcoats from the tyranny and ignorance of the Bostonians was that the soldiers, attacked by a mob bent on violence, had reacted in self-defense. After using the evidence to paint that picture—just as so many of you do in our courtrooms every day—Adams concluded his argument with the peroration that has come down to us today: "Facts are stubborn things, and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence."

In John Adams' world, facts were indeed stubborn things. He and the other founders placed bet after bet on the proposition that facts would, in the end, win out.

They submitted their case for independence to a candid world by listing, one by one, the facts that demonstrated England's prolonged mistreatment of her colonies.

They founded a new society on the basis of principles they believed to be self-evident— which they could do because, as Men of the Enlightenment, they held to a consensus about what was so obvious that it must be fact.

Hon. Colleen McMahon is Chief Judge, United States District Court, Southern District of New York.

And when they identified freedom of speech and of the press as the most fundamental of their God-given rights, they were expressing their conviction that, if falsity were confronted by truth, falsity would be recognized for what it was and rejected.

Everything the founders built was predicated on their belief that facts were stubborn things.

And for two centuries and more, through political contretemps and vicissitudes that include a civil war, devastating economic recession, two worldwide conflagrations, a battle against prejudice for the civil rights of every citizen, even the prospect of nuclear annihilation, this country has operated on the assumption—best and most plainly articulated by the man for whom my courthouse is named, Daniel Patrick Moynihan —that: "Everyone is entitled to his own opinion, but not to his own facts."

Today, however, we live in world where it seems like everyone's opinion is treated as though it were a fact.

And in such a world, facts do not seem so terribly stubborn.

Let me offer two examples from this week's news. I chose these examples because they involve precisely the sort of fact-finding in which we judges and lawyers engage in the ordinary course of our work.

There is overwhelming consensus among the world's doctors about the safety of vaccinations—so overwhelming that, after a *Daubert* or *Frye* hearing, no judge would permit any so-called "expert" to testify otherwise.

Almost 99% of the world's scientists agree that carbon emissions caused by human beings are altering our climate, which is changing life as we know it on this planet, at a rapid and increasing rate. That is to say, those whom we would permit to testify in a court of law on this subject are statistically unanimous about what is going on.

In our world, tested by the standards we employ in our profession, these things are facts.

But because enough people are of the opinion that these are not facts—either on the basis of evidence that has been repeatedly proven false, or on the basis of no evidence at all—we as a society don't seem able to take the steps that are necessary to protect the public health today, or the future of our children and our grandchildren tomorrow.

To this conflation of opinion and provable fact, let us add something else: technologies that were unthinkable to men like John Adams can actually render facts malleable.

We used to say, "A picture is worth a thousand words." By that, we meant that a photograph could capture the truth of a scene or an event more accurately than the fallible memories of human beings.

But today it is possible to edit the content of a picture with a few clicks of a mouse—erasing what is true and creating what only appears to be true, but what will be accepted as true because we are conditioned to believe what we see.

It's not that there were no lies, no doctored evidence, no rank injustices predicated on appeals to emotion and prejudice, in years past. Such things have always been with us.

But today's technological developments make it uniquely difficult to know whether we can believe our own eyes and ears. As Dean Magill told her graduating class, "In an age of social media, bots, artificial intelligence, digital manipulation of voices and video, hacking, and hijacking of personality…..we are vulnerable to being convinced that something that has no basis in reality is in fact true."

That, ladies and gentlemen, is a dangerous development.

And yet it remains the firm foundation of our profession that facts are stubborn things.

When a lawyer signs a document before filing it with a court, he or she attests to the truth of the facts stated therein.

At trials, we subject our witnesses to cross examination in the belief that ferreting out lies will help us prove the facts.

We test the credentials of so-called experts against the consensus of those learned in various arts and sciences before we allow them to influence the finding of facts by testifying.

We require our public companies, as a condition of doing business, to disclose, accurately and completely, their earnings and other facts pertinent to a rational person's evaluation of their investment potential.

Full and accurate disclosure of the facts is also the basis on which we borrow money, buy insurance, pay our taxes, end marriages, provide for the support of children—all those legal matters that touch on every aspect of our lives.

Facts, ladies and gentlemen, are our stock in trade.

And that being so, we know, as perhaps others do not, that the rule of law cannot exist in the absence of a consensus that there are true and discoverable facts—facts that, whether we find them palatable or not, cannot be gainsaid.

We lawyers cannot function is a world of "truthiness," to use Stephen Colbert's once-but-no-longer-so-funny noun. "Truthfulness" must remain the measure of what we collectively believe.

So how do we lawyers get —and keep—our bearings in a world where facts may not be quite as stubborn as they used to be?

I wish I could tell you that I had a good answer to that question.

I am old, and I am a self-confessed Luddite. I fear how these new technologies, which are so intoxicatingly addictive, can undermine the value of evidence and prevent the triumph of truth.

And I am concerned that, as a profession, we have been slow to grapple with this brave new world of truthiness and fake news and "alternative facts."

But we had best buckle down and start thinking about the implications of a paradigm shift as radical as the invention of the printing press was 500 years ago.

I am sure of one thing: We lawyers will have to be extraordinarily vigilant guardians of facts.

We will have to work harder than our predecessors in order to detect what is real and what is really not.

We may have to devise new procedures, the better to probe the veracity of what is offered at trial or across a negotiating table. Perhaps we will need to craft new rules of evidence—and certainly invent new and cost-effective ways to sift through the massive amount of useless information that can be used to hide the facts that truly matter.

You, the members of the Bar, need to be acutely sensitive to the independence of the judiciary, and firmly committed to rebuking those who insist that judges are deciding cases on the basis of their own predilections—a task that is admittedly made more difficult by the increasing, deplorable and non-partisan politicization of the judicial nomination process.

And all of us must recommit ourselves to the ethical precepts that ultimately wed us, as lawyers, to the truth at all costs—even when a client's interest may seem to lie in a world of alternative facts.

John Adams counted his representation of the soldiers accused of the Boston Massacre as, "one of the best pieces of service I ever rendered for my country." In an atmosphere of public outrage and mistrust, where respected leaders, including his own cousin, espoused some individual version of the truth in order to further a cause, he insisted on bringing the stubborn facts to light.

As lawyers, we are peculiarly and particularly equipped to be his heirs in that task.

For when we were called to the Bar, we made a promise—of loyalty, of citizenship, of our office—a promise so fundamental to this nation that it was prescribed in a law passed by the first Congress that ever sat, the Senate over which John Adams presided.

We raised our rights hands and swore to preserve, protect and defend the Constitution of the United States—not the country, or its leaders, or its people, or any political party—but the supremacy of the rule of law.

And we swore to protect the Constitution against ALL its enemies, foreign and domestic.

I have never believed that the rule of law in this country could be brought down by any foreign power. But if we lawyers are not vigilant for the truth, we could very well see it brought down around us by our own inaction.

So on this Law Day, let us rededicate ourselves to our oath—to the supremacy of the rule of law, and to the stubborn facts that are necessary to its continuation. The fate of the Republic lies in the balance. May we not fail her.

NYIAC Talks: Bar to Bench Dialogue
The Role of the New York State Court in International Arbitration with Reception Welcoming Justice Scarpulla

By Alan W. Bazil

On June 11, 2019, the New York International Arbitration Center (NYIAC) and members of New York's international arbitration bar held a "bench-bar dialogue" at NYIAC to welcome Justice Saliann Scarpulla of the New York Commercial Division. Justice Scarpulla was appointed as the point person to handle the Commercial Division's international arbitration docket earlier this year.

The reception was moderated by past-Chair of the New York Bar Association's Dispute Resolution Section, Charles J. Moxley, Jr., and it included a panel of representatives from the different domestic and international arbitration institutions.

During her speech, Justice Scarpulla expressed her enthusiasm in assuming her new role. She shared her legal background and stated how her prior positions had granted her different perspectives that now aid her in deciding the cases that come before her. She praised the work of her predecessor, the now-retired Justice Charles Ramos, and vowed to make sure that New York continues to be the center for both business and international arbitration.

Justice Scarpulla took the opportunity to share two issues that she believes to be at the forefront of arbitration. The first is the lack of diversity in arbitrators. This concern arose on the occasions parties have sought to disaffirm an arbitration agreement when they have been presented with a list of non-diverse potential neutrals. She acknowledged that it is vital to ensure that those who choose international arbitration as their dispute resolution mechanism have confidence in the arbitrators who preside over their proceedings. On this point, she called upon the different panelists to make this issue part of their institution's agenda.

The second issue shared by Justice Scarpulla centered on the difficulty of giving notice and serving documents to parties abroad. Specifically, she has found that current mechanisms have not always been the most facilitative manner to give notice, serve documents, and acquire information from international participants. One of the ways she believes the international community can tackle this issue is by making innovations in this area. For example, she explained that arbitration is a creature of contract, and therefore mechanisms and procedures can be established as part of the arbitration agreements to facilitate notice and service of process.

Panelists Luis Martinez, vice president of the International Centre for Dispute Resolution (ICDR); Noah Hanft, as president of the International Institute for Conflict Prevention & Resolution (CPR); and Nancy Thevenin, General Counsel for the United States Council for International Business (USCIB), all welcomed Justice Scarpulla and shared an overview of their respective institutions. They outlined the roles each has played in shaping international arbitration and how new developments are being brought about. In turn, Alexander Fessas, Secretary General of the International Chamber of Commerce (ICC), applauded the idea of having a "bench-bar dialogue," hoping that these activities would be sustained throughout Justice Scarpulla's tenure.

Stephen P. Younger, as vice chair of NYIAC, shared some background on how NYIAC and the Commercial Division's international arbitration part came about. He noted that, as part of the New York State Bar, the Task Force on New York Law in International Matters was formed. Following its creation, the task force issued a report recommending the creation of both NYIAC and a part dedicated to international arbitration matters. The goal was to promote expertise and stability in decision making. Like Justice Scarpulla, Mr. Younger emphasized the role New York State will continue to play in being a seat for international arbitration, adding that continued development in our commercial law will keep New York at the forefront.

NYIAC's June 11 reception came to an end, promising to be the start of many more dialogues to come between the bench and bar.

Taking the Lead 2019: Winning Strategies and Techniques for Commercial Cases

By Moshe Boroosan

On March 12, 2019, the Commercial and Federal Litigation Section held its annual "Taking the Lead" CLE. The program, which was co-sponsored by the Young Lawyers Section and the Committee on Continuing Legal Education, opened with a mock trial that pitted a team of talented young female commercial litigators against a group of more experienced female practitioners. The event showcased opening and closing statements, and the direct and cross examination of witnesses, convincingly played by former ComFed Chairs Jim Wicks (an agitated septuagenarian in a wig) and Jonathan Lupkin (a brash and unapologetic police officer). The performances were closely observed by prominent members of the judiciary, including District Judge P. Kevin Castel (S.D.N.Y.), District Judge Mae A. D'Agostino (N.D.N.Y.) and Commercial Division Justices Saliann Scarpulla (New York County) and Timothy S. Driscoll (Nassau County). The Honorable Shira A. Scheindlin served as the presiding judge.

After the trial, the judges critiqued the performances in the trial, and discussed tips, strategies, and techniques for successfully trying complex commercial cases. Below are some of the observations, advice, and insights discussed by the panel, in no particular order:

Judge Castel

Incorporate technology into your presentation. Put your notes on a PowerPoint so you will be free to engage with the jury.

Work as a team. If you notice that another member of your team failed to elicit key testimony, make sure to address it so there will not be any holes when it comes time for summation.

As defense counsel, focus on the fact that the plaintiff just wants money.

Pro Tip: The Prompt Denial. As defense counsel, your opening statement in every case that you try should start with the following words: "You just heard my client accused of _____, _____, and _____. Those are not the facts. That is not what happened. Good afternoon. My name is _____ and I represent the Defendant."

Judge D'Agostino

Write your summation before anything else. It will help guide you through the trial.

Avoid starting every sentence with "and," even on cross examination.

Use proper diction, not legalese. You will present as a more polished attorney.

Speak loudly and clearly so the judge and jury can hear you.

Control your witness. Make sure to get a clear "yes" for the record, and not a "yep."

Keep a poker face, even if you get a bad ruling.

Pro Tip: Object! Don't be afraid to object. Protect the record. Even if you can't articulate why a question is improper, if it feels wrong, object. The court might agree.

Justice Driscoll

Lead with the facts. The most effective trial attorneys tell the facts first and then explain how they fit into the law, not the other way around.

Don't be married to your outline. Listen closely to the witnesses and adjust your questions to their testimony in real time.

Learn how to project your voice. Practice by listening to your voice in a recording. Speak loud enough so the jury can hear, but don't yell at the jury.

Pro Tip: The Rule of Three: Hear, Understand, and Perceive. Use the Rule of Three in your opening and closing statements.This will give the jury a second chance to hear the evidence.

Justice Scarpulla

Less is more, especially in closing arguments.

Use numbered lists to make your important points. Numbering helps the jury focus.

Quote key witness testimony verbatim in closing statements.

Pro Tip: Learn everything you can about the presiding judge before trying your case. Every judge has her own idiosyncrasies. Justice Scarpulla, for example, is extremely unforgiving when attorneys attempt to improperly introduce hearsay. She does not permit leading questions on direct, or summary questions by lawyers that are just trying to repeat witness testimony. And she does not permit lawyers to instruct the jury on the law.

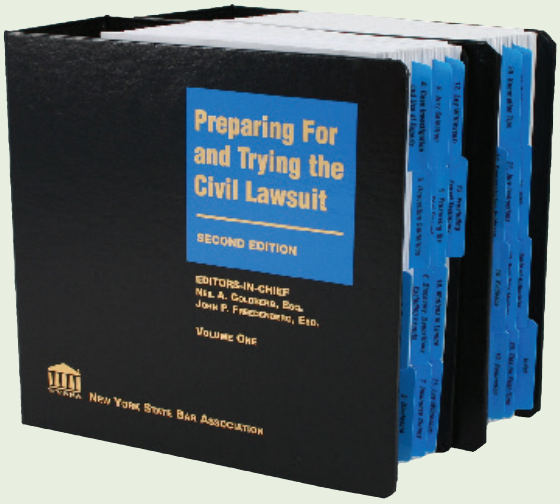
"Taking the Lead" 2019 was undoubtedly a success and was both entertaining and instructive to commercial litigators at all levels of practice. Congratulations to Sarah Hanson of Kramer Levin Naftalis & Frankel LLP; Ndidi Igboeli of Smith Villazor LLP; Riane F. Lafferty of Bond Schoeneck & King PLLC;and Kat E. Mateo of Morrison & Foerster LLP for their impressive performances.

But more important, as Judge Scheindlin noted, the evening highlighted the crucially important work of the ComFed's Task Force on Women's Initiatives and called further attention to the Task Force's Report, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*. The report was co-authored by Judge Scheindlin, Program Chair Lauren J. Wachtler, and program faculty members Carrie H. Cohen and Tracee E. Davis.

From the NYSBA Book Store

Preparing For and Trying the Civil Lawsuit, 2d Ed, 2018 Rev

More than 30 of New York State's leading trial practitioners and other experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit. Expert commentary and numerous practice tips guide you through all aspects of a civil lawsuit, from discovery to appeals. A thorough discussion of pretrial preparation and investigation will aid the attorney in obtaining an advantageous settlement even if the case never goes to trial.



Especially helpful are the excerpts from actual trial transcripts, which illustrate the effectiveness of certain lines of questioning. Trial attorneys will benefit by using the book to supplement and reinforce their own methods of practice.

EDITORS-IN-CHIEF

Neil A. Goldberg, Esq.; John P. Freedenberg, Esq.

PRODUCT INFO AND PRICES

Print: 41955 | 2018 | 1,606 pages | 2 vols. | NYSBA Members $185 | Non-Members $235

E-book: 41955E | 2018 | 1,606 pages | 2 vols. | NYSBA Members $185 | Non-Members $235

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NYSBA

Above: **Henry (Hank) Greenberg, President of NYSBA (then President-Elect)**

Above Right: **Former Chairs Tracee Davis, Lauren Wachtler, Lesley Rosenthal**

Right (l-r): **Hon. Joel Cohen, Mark Zaudere, Mitch Katz**

Commercial and Federal Litigation Section Spring Meeting

Above: **The Quatela Chimeri Crew *(l-r)*: Joseph Quatela, James Salvage, Jr., John Fellin, Hon. Joseph Covello, Christopher Chimeri, Alexander Sendrowitz**

Above Left: **Carol Skretny and Hon. William Skretny**

Bottom Left (l-r): **Kevin Schlosser, Anthony Harwood, Hon. Leonard Austin**

(l-r): **Hon. Norman St. George, Jeremy Feinberg, Hon. Timothy Driscoll, Clifford Roberts**

Lesley Rosenthal presents the 2019 Robert L. Haig Award to Hon. Colleen McMahon

(l-r) **:Hon. Marguerite Grays, Nancy Thevenin, Hon. Sylvia Ash, Hon Cheryl Chambers, Carla Miller**

Chair Robert Holtzman

Above: Commercial Arbitration at Its Best (l-r): **Jeffrey Zaino, Nancy Thevenin, Charles Moxley, Carla Miller, Stephen Younger, Hon. Arel Belen**

Working with Men to Advance Women in the Legal Profession, Above: **Carrie Cohen, Rachel Silverman;** *Right:* **Tracee Davis;** *Below:* **Lauren Wachtler**

Above Right: Social Media Update (l-r): **Scott Malouf, Hon. Deborah Karalunas, Hon. Lisa Margaret Smith, Samantha Ettari, Ignatius Grande**

Right: Lessons for the Trial Lawyer from "My Cousin Vinny" (l-r): **Hon. Deborah Karalunas, Hon. Norman St. George, Hon. Timothy Driscoll, Tracee Davis, Jeremy Feinberg**

NYLitigator Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article published 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:

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

www.nysba.org/NYLitigator

Commercial Arbitration at Its Best: Tips and Tools for Parties and Their Counsel

By Ashley Alenick

On March 25, 2019, the Commercial & Federal Litigation Section, Dispute Resolution Section, Corporate Counsel Section, and Committee on Continuing Legal Education of the NYSBA sponsored the Commercial Arbitration 2019 CLE course. This all-day seminar, held in the Scadden Conference Center of Fordham Law School at Lincoln Center, featured five panels composed of a total of 28 speakers, as well as several speeches. A total of 7.0 MCLE credits (in the areas of skills, areas of professional practice, and ethics) were offered for all-day participation.

Ashley Alenick

After opening remarks from Professor John D. Feerick, Esq. of Fordham Law School, one of the program co-chairs, Charles J. Moxley, Jr., Esq., described the purpose of the course as a discussion on how successful groups have been in changing the prevailing notion from several years ago that commercial arbitration is failing (i.e., not effective, not more efficient and economical, etc.).

The first panel, entitled *The Ten Most Important Things in Arbitration for an Effective, Economical and Fair Process*, provided several different perspectives: the panelists included Jeffrey T. Zaino, the other program co-chair, who spoke on behalf of the AAA; Noah Hanft, Esq. of CPR, who offered the user perspective; Michael D. Young, Esq., who advised on what arbitrators can do to make the arbitration process most effective; and Peter Stroili, Esq. and Elizabeth Shampnoi, Esq., who provided useful tips for choosing an unbiased, effective arbitrator.

Though each panelist had his or her own list of most effective tips, several themes emerged from the panel as a whole. First, and most frequently discussed, was the importance of the arbitration clause itself. The panelists agreed that, if drafted correctly, the clause can and should streamline the arbitration process, thereby reducing the criticism that arbitration is inefficient. More specifically, the panelists suggested that counsel understand the rules of arbitration, incorporate those rules into the standard arbitration clause, and tailor the clause to meet the specific needs of any particular case. The second theme that emerged during the discussion was the importance of the preliminary hearing. The panelists discussed that these hearings are most effective when they include a recitation of all of the issues that could potentially arise, as well as a detailed schedule of all deadlines. By addressing all of these subjects at the preliminary hearing instead of waiting for them to arise sporadically, the arbitration process is streamlined. Finally, the panelists agreed that selecting an arbitrator is critically important to the process as a whole, and that counsel should be very careful in making that decision. They advised that the arbitrator selected from a diverse group should be familiar with the law relevant to each case and that, once chosen, counsel should trust the arbitrator's unbiased nature.

The second panel of the day was entitled *Provider Perspectives on Arbitrator and Counsel Best Practices in Arbitration*. In addition to discussing arbitrators and social media (a branding presence is acceptable; posting opinions is not) and the expansion of third-party funding (an area which still remains very grey to providers), the discussion focused on arbitrators' role in reining in "out of control" discovery and whether arbitrators should do any legal or factual research on their own. While arbitrators should ideally limit the role they play in discovery, in practice, part of the arbitrator's case management role is to resolve any disputes that arise (for example, by setting firm deadlines and sanctioning lawyers who do not comply) in order to maintain the efficiency of the arbitration process. While currently no clear answer exists as to whether arbitrator independent research is best practice, the panelists agreed that, when it occurs (either by the arbitrator or a hired law clerk), transparency and disclosure to all parties is key.

The third panel, *Distinctive Differences Between International and Domestic Arbitration—What Each Can Learn from the Other*, focused on the difference between international and domestic arbitration. The panelists outlined many significant differences between the two types of arbitra-

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Ashley Alenick is a member of the Publications Committee of the Commercial and Federal Litigation Section of the NYSBA. She is a former law clerk to the Honorable David B. Katz, P.J.F.P. in Essex County, New Jersey Family Court, and is Assistant Legal Counsel at Vodafone Americas.

tion: the process, the ethical standards, the governing rules, and the overall methodology. One of the panelists, Nancy K. Thevenin of the United States Council for International Business, argued that though domestic arbitration has adopted much of what international arbitration offers, the process in the United States still has a way to go so as to achieve the ultimate goal of arbitration—that is, consensual, private, often confidential proceedings that lead to a final and binding decision on the issues between the parties.

The afternoon session began with Professor Feerick's keynote address, which emphasized his views on the most important skills and traits arbitrators must possess: efficiency and legitimacy. John S. Kiernan, Esq. of Debovoise & Plimpton LLP also gave a report on the work currently being done by the Chief Judge's Advisory Committee on Advancing ADR in the New York Court System.

The fourth panel focused on recurring areas in arbitration that require close attention. These areas include class action arbitration (the panelists agreed that, though currently problem-ridden, a set of best practices in this area will eventually emerge), ESI (which the panelists agreed needs to be limited as a general matter), and cyber security (a new issue which the panelists agreed requires much more research).

The final panel of the day, *Practice Development—How to Get More and Bigger Cases as a Neutral*, featured a practical discussion on how neutrals can get more and bigger cases. The panelists highlighted several ways neutrals can market themselves in order to develop business: joining a provider, creating a brand on LinkedIn, and networking through bar associations, etc. Competition for cases is high, and therefore, separating oneself through successful marketing and a business-minded approach is essential.

Becoming an Ally: Four Trailblazing Jurists Discuss Diversity and Inclusion

Wednesday, February 5, 2020 | Foley & Lardner LLP | 90 Park Avenue | NYC

5:30 p.m.: Registration and Reception

6:30 p.m. – 8:00 p.m.: CLE program

1.5 MCLE credits in Diversity, Inclusion and Elimination of Bias

Free for Co-Sponsoring Section Members

$50 NYSBA Members | $150 Non-Members

In this program, four of New York's most noteworthy jurists discuss the importance of championing attorneys from historically underrepresented backgrounds. These jurists are:

Honorable Joel Cohen (Commercial Division, New York County)

Honorable Dora Irizarry (Chief Judge of the Eastern District of New York)

Honorable Saliann Scarpulla (Commercial Division, New York County)

Honorable Laura Taylor Swain (Southern District of New York)

This program will be an interactive discussion about topics relating to advancing female attorneys, attorneys of color, LGBTQIA+ attorneys, and attorneys with disabilities in the profession. The focus will be on how attorneys can work together to foster diversity and inclusion. The program will include hypotheticals with audience participation on a variety of areas such as how to be an ally, a sponsor, and a mentor. The program will also include hypotheticals about the importance of introducing attorneys from diverse backgrounds to clients.

This program is co-sponsored by the Commercial and Federal Litigation Section, the Young Lawyers Section, and the Committee on Continuing Legal Education.

Find more information at www.nysba.org/BecomingAnAlly

Meeting the Justices of the Commercial Division, New York County: Motion Practice Before the Commercial Division

By Alan W. Bazil

On June 5, 2019, the Section held a bar and bench discussion with the justices of the Commercial Division, New York County. The discussion centered upon motion practice before the court, which granted the participants an opportunity to hear directly from the bench what it takes to succeed. The event was organized by Mark A. Berman, past Chair of the Section, and Justice O. Peter Sherwood and was held at Skadden, Arps.

After the 175 registrants took their seats, moderator Robert N. Holtzman initiated the discussion by highlighting the significance of motion practice before the Commercial Division. It is no secret that most cases before the court end at the motion practice stage. Following this short preface, Mr. Holtzman placed the first question to the justices regarding discovery motions.

On this point, Justice Scarpulla stated that discovery motions are disfavored in her part. She finds that 99% of the discovery issues are resolved when parties are asked to come in for a conference. On the other hand, Judge Schecter indicated that a phone call with everyone on the line is an effective means of solving discovery disputes. Justice Ostrager, however, stated that he has designated every Tuesday morning for conferences. There, he is usually able to resolve three to four discovery disputes.

The justices were then asked whether they allow oral argument on every substantive motion and how helpful they are. Justice Masley stated that she grants oral argument on almost every motion. Her goal is to render decisions from the bench and work quickly and efficiently. Justice Cohen, in turn, stated that some motions do not require oral argument. Nonetheless, he acknowledges that oral argument is necessary on motions with complicated issues.

The discussion then turned to summary judgment motions and each justice's individual rules regarding Rule 19-a statements. Justice Friedman and Justice Borrok stated that they require joint 19-a statements. However, they did not find them useful if the parties restated the facts contained in their briefs or they weren't narrowly tailored. Justice Cohen indicated that he finds the 19-a statements useful when he's preparing for oral argument. On the other hand, Justice Ostrager stated that he has never looked at a 19-a statement, while Justice Sherwood indicated that he has found them helpful 30% of the time. Justice Scarpulla stated that the statements are useful to her but refuses to penalize the parties if they don't produce one. Justice Masley stated that it would be helpful if, wherever the parties stated their facts, citations to the record were provided.

Other topics included a discussion about diversity. Here, some justices stated that the responsibility rested on the law firms to allow attorneys of different backgrounds and with lesser experience an opportunity to present oral arguments before the court. Other justices agreed that the judiciary should play a bigger role. A short insight was then provided into Justice Scarpulla's technologically equipped courtroom, and the event culminated with each justice voicing their pet peeves. "Come to court prepared," "make a good-faith effort to fairly assess your case," and "treat each other with collegiality" were some of the concerns voiced by the judges.

While the NYSBA event served to show how motion practice varies depending upon which justice is presiding over the case, there is always one thing the parties can be certain of: seven out of eight justices will render a decision at the end of oral argument.

CPLR AMENDMENTS: 2019 LEGISLATIVE SESSION

(2019 N.Y. laws ch. 1-382)

CPLR §	Chapter (Part) (Subpart, §)	Change	Eff. Date
208(b)	11(2)	Extends statute of limitation for sexual abuse claims and causes of action	2/14/19
213(9)	184	Adds actions by attorney general pursuant to Gen. Bus. Law Art. 23-A or Exec. Law § 63(12)	8/26/19
213-a	36(F)(6)	Provides that overcharge claim may be filed at any time but penalties and damages may go back only six years	6/14/19
213-c	315(3)	Extends statute of limitations to 20 years, expands list of sexual offenses included, and expands list of potential defendants	9/18/19
214-g	11(3)	Adds revival provision for sexual abuse claims and causes of action	2/14/19
215(9)	245	Adds a proviso that actions to recover damages for injuries arising from domestic violence shall be commenced within two years	9/4/19
1311(1)	55(PP)(1)	Deletes an action to recover a money judgment; deletes certain actions relating to post-conviction forfeiture crimes	10/9/19
1311(11)(d)	55(PP)(9)	Adds a requirement for contents of certain documents given to State Division of Criminal Justice Services	10/9/19
1311-b	55(PP)(2)	Adds a section on obtaining money judgments	10/9/19
1312(1), (3), (4)	55(PP)(3)	Deletes money judgment (subd.1); adds requirement relating to applications for provisional remedies (subd. 3); adds restriction on court in modification or vacatur of provisional remedies (subd. 4)	10/9/19
1349(2)	55(PP)(4)	Adds exception to supercession by another law	10/9/19
1349(5)	55(PP)(5)	Adds a provision on deposit of certain monies and proceeds from sale of property realized as a consequence of forfeiture	10/9/19
1352	55(PP)(8)	Adds a requirement for a prompt opportunity to be heard	10/9/19
1602(14)	180	Adds an exception for failure to obey or enforce certain orders of protection	10/20/19
3218(a)(1)	214	Deletes non-residents	8/30/19
3218(b)	214	Amends provision on places for filing affidavit	8/30/19
3403(a)	11(4)	Adds a special trial preference for cases revived under 214-g	2/14/19
4511	223(1)	Deletes subdivision (c) and reletters (d) and (e)	12/28/18
4532-b	223(2)	Adds a new provision on information taken from web-mapping service, global satellite imaging site, or internet mapping tool	12/28/18
5003-b	160(9)	Replaces "sexual harassment" with "discrimination, in violation of laws prohibiting discrimination"; adds cross reference to Exec. Law art. 15	10/11/19
6312(b)	167(6)	Adds exception for actions brought under Real Prop. Law § 265-a	8/14/19
Art. 63-a	19(1)	Adds provisions on extreme risk protection orders	8/24/19
7515(a)(2), (3)	160(8)	Replaces "unlawful discriminatory practice of sexual harassment" with "discrimination, in violation of laws prohibiting discrimination"; adds cross reference to Exec. Law art. 15	10/11/19
8019(a)	55(SS)(1)	Adds Suffolk County exception	4/12/19
8021(f)(1)(b)	55(SS)(2)	Adds Suffolk County exceptions	4/12/19

Notes: (1) 2019 N.Y. Laws ch. 55, Part O, § 16, extends the expiration of CPLR 1101(f) (fees for inmates) until March 31, 2020. (2) 2019 N.Y. Laws ch. 55, Part VV, § 1, deletes the expiration of CPLR 3408(a). (3) 2019 N.Y. Laws ch. 47, § 1, extends the expiration of CPLR 105(s-1) ("the sheriff") until June 30, 2020. (4) 2019 N.Y. Laws ch. 212, § 1, extends the expiration of CPLR 2111(2-a) until Sept. 1, 2020.

2019 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's 2019 N.Y. Orders 1-30; Adopted Rules on OCA website, at http://nycourts.gov/rules/comments/index.shtml; amended rules on appellate court websites)

22 NYCRR §	Court	Subject (Change) Link to Order	Eff. Date
202.6(b)	Sup.	Adds applications for extreme risk protection orders Link: https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-171-19.pdf	8/12/19
202.70(g)	Sup.	Replaces Preamble for the Rules for the Commercial Division Link: https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-332-18.pdf	1/1/19
202.70(g), Rule 3(a)	Sup.	Adds provision encouraging counsel to work together to select mediator Link: https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-399-18.pdf	1/1/19
202.70(g), Rule 10	Sup.	Adds (1) requirement that statement submitted by counsel must include certain information prescribed by OCA and (2) ADR attorney certification form Link: http://ww2.nycourts.gov/sites/default/files/document/files/2019-03/AO90-internet.pdf	7/1/19
202.72	Sup.	Adds new provision on actions revived under CPLR 214-g Link: http://ww2.nycourts.gov/sites/default/files/document/files/2019-07/AO-170-19.pdf	7/31/19
670.1(c)	2nd Dep't	Adds provision on appearance of counsel Link: http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%20 20190327.pdf#page=4	3/27/19
670.2	2nd Dep't	Adds restrictions and requirements relating to withdrawal of appeal and defines "settlement" for purposes of 22 NYCRR § 1250.2(c) Link: http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%20 20190327.pdf#page=5	3/4/19
670.7	2nd Dep't	Adds provisions on supplemental records Link: http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%20 20190327.pdf	6/12/19
670.9(a)	2nd Dep't	Adds requirement that digital copies of records, appendices, and briefs comply with guidelines for e-filed documents Link: http://nycourts.gov/courts/ad2/pdf/Local%20Rules%20-%20 20190327.pdf#page=9	11/28/18
Part 850	3rd Dep't	Amends provisions relating to exceptions to initial filings under 22 NYCRR § 1250.3(a) (§ 850.3); certification of records on appeal (§ 850.7(b)); time, number, and manner of filing of records, appendices, and briefs (§ 850.9); dismissals (§ 850.10); criminal appeals (§ 850.11); original special proceedings (§ 850.13); certain miscellaneous appeals and proceedings (§ 850.14) Link: http://www.nycourts.gov/ad3/RulesOfPracticePart850.pdf	1/7/19

Proposed Rules of Interest to Civil Litigators

(http://nycourts.gov/rules/comments/index.shtml)

Note: The comment periods for all of the following proposed rules have expired except as noted.

September 10, 2019: Request for Public Comment on the Proposed Amendment of the Commercial Division Standard Form Confidentiality Order and Rule 11-g to Allow "Highly Confidential – Attorney's Eyes Only" Designations

Description of proposal: http://ww2.nycourts.gov/sites/default/files/document/files/2019-09/RPC-HighlyConfidential.pdf

Email to: rulecomments@nycourts.gov by November 8, 2019

September 3, 2019: Request for Public Comment on the Proposal to Repeal Commercial Division Rule 23 ("60-day Rule")

Description of proposal: https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/RPC%20Rule%2023%20repeal.pdf

Email to: rulecomments@nycourts.gov by November 1, 2019

August 22, 2019: Request for Public Comment on the Proposed Amendment to Commercial Division Rule 6 to Require Proportionally Spaced 12-Point Serif Type in Papers Filed with the Court

Description of proposal: https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/Request%20for%20public%20comment%20-%20Font.pdf

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August 1, 2019: Request for Public Comment on the Proposed Amendment to Commercial Division Rule 1 to Facilitate Remote Video Appearances by Counsel

Description of proposal: http://ww2.nycourts.gov/sites/default/files/document/files/2019-08/RequestForPublicComment-Rule1.pdf

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June 27, 2019: Request for Public Comment on the Proposed Amendment of Attorney Civility Standards

Description of Proposal: http://ww2.nycourts.gov/sites/default/files/document/files/2019-06/RPC%20-%20Proposed%20Amendment%20to%20Civility%20Standards.pdf

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November 14, 2018: Request for Public Comment on a Proposal to Enhance Attorney Certification Concerning Mediation in the Commercial Division

Description of proposal: https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/RPC-CommDivRule10%2011-14.pdf

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October 15, 2018: Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

Description of proposal: http://ww2.nycourts.gov/sites/default/files/document/files/2018-10/UsingCommercialDivRulesOct15.pdf

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Jul 31, 2018: Request for Public Comment on a Proposed Amendment of 22 NYCRR Part 125 (Uniform Rules for the Engagement of Counsel) to address postponement of criminal proceedings involving incarcerated defendants
Description of proposal: https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/Part125.pdf

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April 10, 2017: Proposal to Amend E-filing Rules to Require an Opportunity to Correct a Failure to Provide Working Copies of Motion Papers
Description of proposal:
http://nycourts.gov/rules/comments/PDF/Efile-WorkingCopiesA.pdf

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October 12, 2016: Proposed Amendment to Commercial Division Rules – Sealing of Court Records
Description of proposal:
http://nycourts.gov/rules/comments/PDF/RequestPublicComment-Commercial%20Division-Sealing.pdf
Public Comments: https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/received/SealingCourtRecords-Comment.pdf

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October 6, 2016: Proposed Amendment to Commercial Division Rules - Hyperlinking
Description of proposal:
http://nycourts.gov/rules/comments/PDF/RPC-Commercial-Division-Hyperlinking.pdf

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September 16, 2016: Proposed Amendments to the Rules Governing Electronic Filing
Description of proposal:
http://nycourts.gov/rules/comments/PDF/Request-Public-Comment-E-Filing.pdf
Public Comments:
http://nycourts.gov/rules/comments/PDF/received/ElectronicFilingRules-Comment.pdf

SAVE THE DATE!

UPCOMING COMMERCIAL AND FEDERAL LITIGATION SECTION EVENTS

- ***Jan. 27-31: NYSBA Annual Meeting, New York City***

  Jan 28: Thurgood Marshall Event - 5:30 - 8:30 pm

  Jan. 29: Section meeting - Panels include:

  -Emerging Technologies in Litigation

  -Budding Cannabis and CBD Legislation

- ***Feb. 5: CLE: "Becoming an Ally: Four Trailblazing Jurists Discuss Diversity and Inclusion," NYC, 5:30-8 pm***

- ***May 3-5: Spring Meeting, Otesaga Resort, Cooperstown***

For more information, see www.nysba.org/comfed.

The Commercial and Federal Litigation Section Welcomes New Members

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ISSN 1530-4043 (print) ISSN 1933-8570 (online)

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