NYSBA SPRING 2003 | VOL. 9 | NO. 1

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

This very cold winter has been a busy one for our Section. The Executive Committee approved a total of four excellent committee reports—a report by the CPLR Committee recommending an amendment to CPLR 3212, a report by the Evidence Committee on proposed changes to Federal Rule of Evidence 804(b)(3), and reports by the Federal Procedure Committee on consultations between deponents and their counsel during depositions and recommending a proposed revision to Federal Rule of Civil Procedure 50. (This issue of the newsletter spotlights the CPLR Committee and the Federal Procedure Committee. Both committees have earned special accolades for consistently excellent and prolific work on behalf of the Section.) The Executive Committee also enjoyed meeting with invited guests Fordham Law School Dean William M. Treanor, Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton, and Nassau County Commercial Division Judge Leonard P. Austin. Anyone interested in helping to establish a Section-sponsored commercial litigation competition at Fordham Law School should give me, CLE Chair Jim Wicks or Pro Bono Committee Co-Chair Mike Martin a call.

The Securities Litigation Committee prepared comments on the proposed SEC rule regarding attorney conduct under the Sarbanes-Oxley Act. (Those comments were incorporated into the Business Law Section's comments, which were adopted by and forwarded by the Association to the SEC in December.) The final SEC rule was "significantly modified" in light of the comments the SEC received, including the tabling of the controversial proposed noisy withdrawal requirement. Kudos to Dan Kramer and Committee Chair Steve Younger for their hard work.

The winter season was capped by record-breaking attendance at an outstanding Annual Meeting program chaired by Vice-Chair Lauren Wachtler, with the assistance of Treasurer Lesley Friedman. In addition to an exciting morning program on *Corporate America Under Siege: The Role of the Commercial Litigator* featuring two exciting panel presentations, an overflow crowd was on hand for the presentation of the Section's Stanley Fuld Award to our friend and colleague Honorable Sidney Stein. The eloquent remarks of the Honorable Guido Calabresi were a warm highlight of the happy occasion. In the afternoon, the Section broke new ground by pre-

Inside

senting the lead-off program at NYSBA President Lorraine Power Tharp's innovative presidential summit on corporate responsibility. Judge Lewis A. Kaplan moderated the lively panel discussion on strategy and tactics for managing the media in a financial fraud case.

In other Annual Meeting action, the Section's revised bylaws were approved by the Association on its consent calendar. Carroll Neesemann, Chris Mason and Lauren Wachtler of the Section's Committee on Arbitration and ADR spearheaded the Section's presentation to NYSBA's Executive Committee advocating that the Association support the adoption of the Uniform Mediation Act in New York. The Section's proposal was unanimously adopted. With the support of the Association behind it, the working group is now focused on the Legislature, where legislation has been re-introduced by Senator Volker.

We took the Executive Committee on the road again as part of our commitment to make the Section more accessible to members throughout the state. The March Executive Committee meeting was held at the Bar Center in Albany, following a special tour of the Capitol. The Albany Executive Committee Meeting also provided an opportunity for us to meet with representatives of two committees appointed by Chief Judge Scullin of the Northern District of New York to discuss how our Section can help the court increase interaction between the bench and bar throughout the Northern District. All Section members who practice in the Northern District were invited and encouraged to attend. Executive Committee member Maggie Rossi and Section Liaison Lisa Bataille deserve our thanks for organizing the March meeting.

The Section has been asked by Justice Ramos and Justice Austin to help plan and provide programming for a meeting of the Commercial Division judges to be held on May 1, 2003 at the new Pace University Judicial Institute. A number of Section members will participate and will join the justices for a dinner that evening with representatives of other bar groups focusing on commercial litigation.

And it will soon be time for our Spring Meeting in Hershey, PA, on May 16-18. (See enclosed preview note by Chair-Elect and Spring Meeting Chair Lew Smoley.) Please use that time to finish reports and other projects that are in the works for presentation to the Executive Committee. Anyone who has not yet found a comfortable niche in the Section should call me. Some of you already have taken advantage of an open invitation to attend an Executive Committee meeting and meet some of the Committee chairs and Section officers. There is still lots to be done.

Cathi Hession

Did You Know?

Back issues of the *Commercial and Federal Litigation Section Newsletter* (2001-2003) and the *NYLitigator* (2000-2001) are available on the New York State Bar Association Web site.

(www.nysba.org)

Click on "Sections/Committees/ Commercial and Federal Litigation Section/ Member Materials/ *Commercial and Federal Litigation Section Newsletter* or *NYLitigator*

For your convenience there is also a searchable index (*NYLitigator* only). To search, click on the Index then "Edit/ Find on this page."

Note: Back issues are available at no charge to Section members only. You must be logged in as a member to access back issues. For questions, log in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

Section's 2003 Spring Meeting: A Great Success

As we go to press, Section members are just returning from a wonderful weekend at the Hotel Hershey in Pennsylvania. The highlights included a Friday night kick-off keynote speech by Vice Chancellor Jack B. Jacobs of the Delaware Court of Chancery on how that court handles commercial cases, a first of its kind Commercial Division Forum featuring ten of our Commercial Division justices fielding questions on court practices by panel chairs Bob Haig and Mark Zauderer, presentation of a special commemorative plaque from the Section to the family of Lee Kreindler, Hon. Howard A. Levine's memorable presentation of the Section's Robert L. Haig Award for Distinguished Public Service at Saturday's gala dinner to the Hon. Richard C. Wesley, and an exciting international litigation program, including discussion of current 9/11 suits against terrorists and those who support them and Alien Tort Claims Act cases brought against corporations charged with committing or supporting human rights violations and other breaches of the law of nations. We were pleased to applaud Vice Chancellor Jacobs's nomination to the Delaware Supreme Court and Justice Wesley's nomination to the Second Circuit. Many new members attended the Spring Meeting and a good time was had by all. A more detailed report will follow in the next newsletter, but we wanted to share these photos, hot off the presses. Be sure to mark your calendar for next year's meeting at Mohegan Sun Resort Casino in Connecticut the weekend of May 21-23, 2004!

Vice Chancellor Jacobs and Commercial Division Justices

Hon. Richard Bryant Lowe, III and Vice Chancellor Jack B. Jacobs

standing: Hon. Howard and Barbara Levine and Hon. Albert and Julia Rosenblatt
seated: Kathy Geneseo and Hon. Richard Wesley

back row (l to r) Paul Edelman, Justice Wesley, Lidia Pousada and Jim Kreindler
front (l to r) Rosemary Edelman, Victoria Kreindler and Anna Maibaum

standing: Sarah Wesley and Matthew Wesley
seated: Roxanne Rice, Kathy Geneseo and Hon. Richard Wesley

Bob Haig, Justice Wesley, Justice Rosenblatt, Justice Levine

Committee Spotlight

The Federal Procedure Committee Is Doing a Stellar Job

Gregory Arenson

The Federal Procedure Committee, under the direction of Chair Gregory Arenson of Kaplan Fox and Kilsheimer LLP, has been one of the Section's most active committees. Over the last two years, the Federal Procedure Committee has produced four reports that have been adopted by the Section. These have concerned (1) a proposed amendment to Rule 50, Fed. R. Civ. P., (2) consultations between witnesses and counsel during depositions, (3) a proposed amendment to Rule 68, Fed. R. Civ. P. and (4) the appropriate status for "unpublished" courts of appeals decisions.

I. Rule 50

This report examined the history of Rule 50—the provision for obtaining judgment on a matter of law in jury trials—and the current practice under the rule. It concluded that the current procedure was a "trap for the unwary" in that it requires a party to renew, prior to submission of the case to the jury, a motion for judgment that had already been made, or lose the right to make a post-trial motion for judgment. The harshness of the rule has led to extensive litigation as to whether parties should be relieved from strict application of the rule, with the circuit courts taking widely divergent positions. The committee recommended and the Section adopted a simple amendment to the rule to require that the motion need only be made once (after the opposing party had been heard on the issue) prior to submission of the case to the jury. We expect to submit this report to the Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts for its consideration.

The principal author of this report was Thomas McGanney. Mr. McGanney is a 1959 graduate of Stanford University and a 1962 graduate of Harvard Law School. He clerked for two years for Edward C. McLean, U.S.D.J. in the Southern District, before joining White & Case. He has been a partner there since 1973. He was for several years an Adjunct Associate Professor of Law at New York University Law School teaching Federal Civil Procedure. He has served on several bar association committees over the years, and has authored articles on federal procedure for *Litigation* magazine and other legal publications. He is a Fellow of the American College of Trial Lawyers.

II. Consultations During Depositions

In this report, the committee visited a controversial area and found that no consensus could be reached as to when it is appropriate for a deponent to consult with counsel, and, if consultation occurs, whether the content of that consultation should be subject to examination by the interrogator. There was agreement on two principles. One, incorporated in Local Rule 30.6 of the United States District Court for the Eastern District of New York, is that there should never be a consultation while a question is pending, except for the purpose of ascertaining whether a privilege or other protection from discovery should be asserted. The second is that there may be unfettered consultation during overnight breaks in a deposition. Between these principles, no agreement could be found. Some would not prohibit any consultation between a deponent and deponent's counsel. Of this group, however, some would permit the interrogator to explore what was said during the consultation, if the consultation is during a break initiated by the witness or the witness' counsel, although without otherwise waiving the attorney-client privilege. Others would prohibit any consultation between the deponent and the deponent's attorney, except for the purpose of discussing whether to halt the deposition due to the bad faith of the interrogator or unreasonable annoyance, embarrassment or oppression under Rule 30(d)(4), after a record of objections to such questioning has been made.

The principal author of this report was Gregory Arenson. He is a 1971 graduate of the Massachusetts Institute of Technology with a J.D. from the University of Chicago Law School in 1975. He has been a partner at Kaplan Fox and Kilsheimer LLP since 1993, after having been a partner at Proskauer Rose LLP for six years. Mr. Arenson has been chair of the committee since 1997.

III. Rule 68

In this report, the Federal Procedure Committee examined the concept of an "offer of judgment" under Rule 68, which has been practically a dead letter since its adoption as one of the original Federal Rules of Civil Procedure in 1938. The intent of the rule has been to encourage settlements by shifting taxable costs to a claimant (usually the plaintiff) who rejects a written settlement offer on the claim and later fails to obtain a judgment more favorable than the rejected offer. The report found that the rule's lack of utility as a settlement-promoting device stemmed from its inapplicability to a broad enough range of situations and because its limited financial consequences did not provide a sufficient economic incentive for offerees to settle by accepting offers

of judgment. The Section narrowly approved the recommendations that Rule 68 be modified (i) to make it applicable to both claimants and defendants on a claim; (ii) to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer; (iii) to make it applicable when the claimant-offeree loses at trial or on a dispositive motion; and (iv) to strengthen the potential economic consequences to the party rejecting the offer by shifting, in addition to taxable costs, the offeror's reasonable post-offer expenses (but not attorneys' fees) to the offeree, at the discretion of the court. This report was submitted to the Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts for its consideration.

The principal author of this report was Charles E. Miller. He is a senior partner at Pennie & Edmonds LLP, where he has been since 1971. Mr. Miller specializes in intellectual property law. He obtained bachelor's, master's and doctor's degrees in chemistry and organic chemistry from Columbia College in 1963, 1964, and 1966, and then obtained a J.D. from New York University School of Law in 1970. Mr. Miller is a commercial/intellectual property arbitrator for the American Arbitration Association and for the World Intellectual Property Organization, and he has served as a special master in patent infringement litigation on appointment by the United States District Court.

IV. Unpublished Opinions

Unpublished opinions by the United States Courts of Appeals continue to proliferate. For the year ending September 30, 2000, almost 80 percent of U.S. Court of Appeals decisions on the merits were unpublished. Because of various local court of appeals rules, unpublished decisions of most of those courts cannot be relied upon as precedent or even cited by advocates or other judges, except in very limited circumstances. Those decisions are, in effect, virtually a nullity except for the parties to the case. This report examined the arguments for and against retaining unpublished decisions, particularly as articulated by Circuit Judges Arnold and Kozinski in *Anastasoff v. United States*,[1] and *Hart v. Massanari*.[2] The Section adopted the recommendation of the committee opposing the local rules of the federal courts of appeals to the extent they prohibit citation to unpublished opinions. The Section recommended that the local rules of the courts of appeals at a minimum permit unpublished opinions to be given whatever weight the court to which they are cited chooses to give them. This report was submitted to the Subcommittee on Courts, the Internet and Intellectual Property of the Committee on the Judiciary of the House of Representatives for its consideration in hearings on this issue in June 2002.

The principal author of this report was James F. Parver. He is Counsel to Shiff & Tisman and before that was Special Counsel at Proskauer Rose LLP. Mr. Parver is a 1964 graduate of Cornell University and a 1967 graduate of the Columbia University Law School, where he was an editor of the *Columbia Law Review* and a Harlan Fiske Stone Scholar.

Endnotes

1. 223 F.2d 898 (8th Cir.) (Arnold, J.) (holding the 8th Circuit's Local Rule unconstitutional), *vacated on rehearing en banc as moot*, 2000 WL 1863092 (Dec. 18, 2000)
2. 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.) (upholding the constitutionality of the 9th Circuit's Local Rule).

* * *

The CPLR Committee: Crucible for Change

The CPLR Committee has been an active contributor to the work of the Section since the founding of the Section and continues in that role today. In a broad sense it serves as a laboratory for the development of legislation to improve New York's litigation procedures, while providing an opportunity for individual commercial litigators to have an influence on the development of the CPLR as it relates to commercial litigation.

The committee played a pivotal role in the development and passage of legislation replacing the commencement by service system with a commencement by filing system in New York state supreme and county courts. Over the years, the committee has played an important role in the continued evolution of New York's procedures for service of process by mail. The committee spent several years developing simplified procedures for obtaining document discovery from non-parties and authenticating business records, enacted in 2002; that proposal takes effect this September.

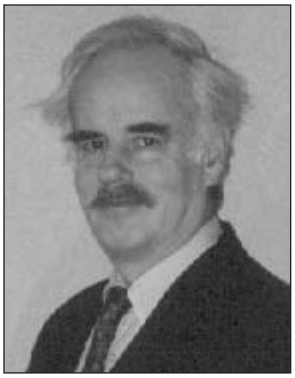
The committee recently developed a proposal to substantially revise the CPLR's provisions for filing, challenging and renewing notices of pendency; that proposal was approved by the NYSBA Executive Committee in January 2002, and the committee is now working for its passage with the Office of Court Administration's Advisory Committee on Civil Practice.

The committee has developed or contributed to numerous other proposals to amend the CPLR, often working in conjunction with the NYSBA's Committee on the Civil Practice Law and Rules (a standing committee not affiliated with any Section). These efforts have covered such topics as sanctions for frivolous litigation conduct, standards for deposition civility, expanded expert discovery in substantial commercial cases, discoverability of surveillance materials, revised procedures for motions for summary judgment and motions to dismiss, and numerous other issues.

Currently, the committee's agenda includes an examination of electronic document discovery under the CPLR, proposals to allow courts in appropriate circumstances to limit the precedential effect of unusual decisions, and other issues.

In addition to developing new initiatives on behalf of the Section, the committee also routinely reviews and advises the Section on proposed amendments to the CPLR put forward by other bar groups or individual legislators, and often files legislative reports on such bills with appropriate committees of the Senate and Assembly on behalf of the Section. This ongoing review serves a dual function: flagging flawed amendments at an early stage and identifying potentially valuable proposals that are deserving of the Section's support.

The CPLR Committee is co-chaired by Jim Blair and Jim Bergin.


Jim Blair

Jim Blair is a graduate of Dartmouth College and Harvard Law School, a member of Wolman, Babitt & King LLP, and a veteran of the U.S. Navy Submarine Force. Jim's practice includes a wide variety of commercial disputes, large and small, often with an engineering angle. Jim has had a long-standing interest in the problems of New York procedure. He joined the "CPLR Community" in 1990 as a member of the Section's newly formed CPLR Committee; he served as chair of the committee from 1991 to 1995, and again as co-chair from 2000 to the present. Jim is also a member of the NYSBA's Committee on the Civil Practice Law and Rules, and of the OCA's Advisory Committee.


Jim Bergin

Jim Bergin is an alumnus of Columbia College and Columbia Law School, and is a member of Morrison & Foerster LLP. Jim's practice focuses on complex commercial cases and multi-jurisdictional litigation, including consumer class actions, products liability, financial services litigation, insurance disputes and other diverse commercial litigation matters. Jim was co-counsel (with NOW Legal Defense and Education Fund) in extensive reproductive rights litigation. Jim's interest in comparative law and procedure led him to join the CPLR Committee in 1993. He served as secretary to the committee from 1993 to 1998 and, since 1998, as co-chair.

Welcome to Our New Section Officers

At the Annual Meeting in January 2003, the slate of new officers of the Commercial and Federal Litigation Section was announced for the upcoming 2003-2004 year. New to the rotation are Stephen P. Younger, who will serve as Vice-Chair in the coming year, and Michael B. Smith, who will replace Bernard Daskal as Secretary.


Stephen P. Younger

Stephen P. Younger is a partner in Patterson, Belknap, Webb & Tyler LLP in New York City, where he concentrates in commercial litigation and alternative dispute resolution. He is a cum laude graduate of Harvard College and a magna cum laude graduate of Albany Law School, where he was Editor-in-Chief of the *Albany Law Review*. He is the current Chair of the Securities Litigation Committee of the Section, and a past Chair of the Alternative Dispute Resolution Committee. Steve also recently chaired the Section's Long Range Planning Task Force. The Task Force was charged with reviewing the work and structure of the Section and proposing Section initiatives, with a focus on increasing membership and enhancing member benefits.


Michael B. Smith

Michael B. Smith is an associate with Solomon, Zauderer, Ellenhorn, Frischer & Sharp in New York City, where he concentrates in international and complex commercial litigation and arbitration. He graduated from Harvard College magna cum laude and was a Harlan Fiske Stone Scholar at Columbia University School of Law.

NEWS flash

Member News

Congratulations to Jonathan S. Lupkin

The Section extends its congratulations to Jonathan S. Lupkin on his recent nomination as partner of the firm of Solomon, Zauderer, Ellenhorn, Frischer & Sharp in New York City. Jonathan is the Editor-in-Chief of the *NY Litigator* and a member of the Executive Committee of this Section.

Jonathan is a graduate of Columbia College and Columbia University Law School, where he was an editor of the *Columbia Law Review* and a Harlan Fiske Stone Scholar. Following a clerkship with the Honorable Edward R. Korman, United States District Court, Eastern District of New York, Jonathan has concentrated his practice in commercial litigation, securities law and white-collar criminal defense.

He has tried a wide variety of commercial cases, including the defense at trial of a major New York City law firm sued for over $10,000,000 for alleged breach of the firm's partnership agreement (the case settled after two weeks of trial for a small fraction of the *ad damnum*); the successful appeal to the Second Circuit of a complex antitrust action on behalf of a distributor of satellite television programming packages; and the defense of a generic pharmaceutical manufacturer in a series of related patent infringement actions. We wish him all the best in his new role as partner.

CPLR AMENDMENTS 2002 LEGISLATIVE SESSION
(Through Chapter 693)

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 and 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 and 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
4545(d)	672	Excludes voluntary charitable contributions from collateral source rule	12/9/02
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
8011	655	Increases sheriff's fees	2/24/03
8018(a)	83(B, 1)	Increases index number fee by $15 (to $185)	7/1/02[1]
8021(a)(4)(b)	83 (B, 2)	Increases certain county clerk fees by $15	7/1/02[2]
8021(b)(11)(b)	83 (B, 3)	Increases certain county clerk fees by $15	7/1/02[3]
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. Expires (along with the additional $5 fee previously added) on 12/31/05.
2. Expires (along with the additional $5 fee previously added) on 12/31/05.
3. Expires (along with the additional $5 fee previously added) on 12/31/05.

Notes of the Section's Executive Committee Meetings

October 15, 2002

Guest speaker Honorable Myriam Altman, Supreme Court of the State of New York, Appellate Division, Second Department, spoke about her practice in the Appellate Division and what lawyers appearing before the Second Department should expect.

The Class Action Committee reported on some of the changes being considered for Fed. R. Civ. P. 23. The Executive Committee discussed proposed changes to the Section's bylaws and approved, with modification, proposed amendments to CPLR 3211 and 3212.

November 13, 2002

Guest speaker William M. Treanor, Dean of Fordham Law School, discussed the recent trend of including increasing numbers of clinical programs in law school curricula.

The Executive Committee approved a report of the Section's CPLR Committee on the proposed amendments to CPLR 3212. The Section's Special Committee on Section Bylaws reported on proposed revisions.

December 12, 2002

The Honorable Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, discussed pro bono representation.

The Executive Committee approved the revisions of the Section's bylaws proposed by the Special Committee on Section Bylaws and approved a report of the Federal Procedure Committee on Consultations between Deponents and Their Counsel During Depositions. The Executive Committee also approved a recommendation of the Section's Alternative Dispute Resolution Committee to recommend passage of the Uniform Mediation Act in New York and approved a report of the Section's Evidence Committee endorsing changes to Rule 804(b)(3) of the Federal Rules of Evidence.

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.

Presidential Summit on Corporate Responsibility and the Legal System
Lawrence Fox, Stephanie Mudick, Prof. Richard Painter

Hon. Guido Calabresi and Hon. Sidney Stein

(l to r) Lesley Friedman Ro Cathi Hession, Hon. Sid Hon. Guido Calabresi,

Leslie Neustadt

Lesley Friedman Rosenthal, Lauren Wachtler and Hon. Sol Wachtler

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Annual
January

Lauren Wachtler

Hon. Sidney Stein, Hon. Guido Calabresi and Jonathan Glater

Robert Haig

Presidential Summit on C and the Leg (l to r) William Allen, Ken Lawrence Fox, St Prof. Richard Painter a

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lney Stein, Lew Smoley,
Lorraine Power Tharp

Cathi Hession

(l to r) Melvyn Weiss, Greg Markel, Gail Shapiro,
Raphael Grunfeld, Lauren Wachtler, Ira Lee Sorkin,
Steven Krane

from the
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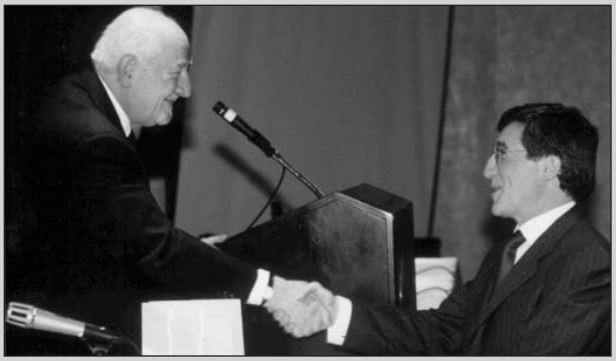
Meeting
22, 2003



Hon. Guido Calabresi and Hon. Sidney H. Stein

Hon. Sidney H. Stein

Hon. Guido Calabresi

Corporate Responsibility
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nneth Bialkin, John Biggs,
ephanie Mudick,
and Hon. Eliot Spitzer

Hon. Eliot Spitzer

(l to r) Melvyn Weiss, Greg Markel, Gail Shapiro,
Raphael Grunfeld, Lauren Wachtler, Ira Lee Sorkin

Selecting and Working With a Forensic CPA

By Stephen L. Ferraro, CPA, CVA and Marie D. Sonnen, CPA

During the course of their work, attorneys may have called upon a forensic CPA for assistance. It might have been for the valuation of damages. A CPA may be hired to calculate future lost earnings or to prepare a business valuation for an estate or matrimonial dispute. Perhaps a forensic accountant was engaged to determine financial motives for arson. As with most things in life, some attorney experiences with forensic accountants have probably been good and some have been bad. How do attorneys get the most out of their CPA relationships?

Call Early

One of the best ways to compromise the effectiveness of a CPA is by delaying his or her involvement in the process. Some attorneys are hesitant to call, in the hopes of controlling the cost of outside experts. Others only think of forensic accountants as expert witnesses at trial and, consequently, delay the involvement of investigative accountants. There are also those who mistakenly think that if they gather some financial information on their own it will make the process smoother. Whatever the reasons, most delays in making that phone call will result in weakening the CPA's value.

"Having the assistance of a forensic CPA to develop a well-drawn document request and insightful deposition questions is the first step toward negotiation and, ultimately, a reasonable settlement."

The initial phone call does not have to result in the start of a full-scale engagement. In fact, it may only be for assurance purposes since frequently there is no need for further involvement on the part of the CPA. On the other hand, many times the immediate involvement by the forensic accountant is required to effectively develop the document request or to follow up interrogatories or important deposition questions. Having the assistance of a forensic CPA to develop a well-drawn document request and insightful deposition questions is the first step toward negotiation and, ultimately, a reasonable settlement. The bottom line is that it does not hurt and in fact can only help your situation by calling the CPA early in the process.

Communicate Throughout the Process

Advanced and regular communication is required to properly manage the work—and ultimately the bill—of the CPA. Attorneys should be very specific in their instructions right from the start. This will serve to avoid unnecessary or duplicate work, as well as the omission of important procedures, on the part of the accounting experts.

The attorney should discuss the overall strategy with the forensic accountant. Often an attorney may discuss what needs to be done, but will omit the reason. Investigative accountants have a broad background and a great deal of experience in dealing with these types of financial matters. If the attorney discusses strategy with the expert accountant, the CPA may be able to suggest alternatives that the attorney had not even considered.

Experience Is a Must

Engaging a CPA with forensic and investigative experience is a must. Litigation support and expert testimony are very different from traditional public accounting, which typically involves tax-return preparation and auditing for a client with whom the CPA has had a relationship for many years. A forensic accountant has to be much more creative and adaptable. Investigative CPAs are often faced with an adversarial relationship that a typical CPA may be unprepared to deal with. These situations require the ability to be forthright, yet tactful. A forensic accountant must also have a broad business background and be perceptive to differing methodologies, techniques and record-keeping options. An investigative accountant must be able to delve into the situation in spite of disorganized or incomplete records.

Engaging an experienced accountant who has no expertise in forensic or investigative accounting results in the attorney paying for the accountant to get the proper training or experience. Even a very talented accountant who has no previous experience will have to spend some time getting up to speed in forensic and investigative techniques and methods. The basic point is that hiring a CPA inexperienced in forensic and investigative accounting could easily produce substandard results, mishandling or unnecessarily high billings.

Evaluate Expected Costs versus Potential Benefits

During the initial telephone call the attorney should begin to evaluate the extent of involvement warranted

by the CPA. If the issue is relatively small, the attorney may be able to proceed after only a short conversation with the CPA. In this type of situation extensive work would probably be overkill and not considered cost-effective. On the other hand, in more complex situations, the attorney may want a more extensive level of involvement on the part of the CPA to help develop effective document requests, interrogatories, deposition questions, and perhaps, ultimately, expert testimony.

"The relationship should begin early, and there should be good communication between the CPA and the attorney regarding the work to be performed and the strategy."

Control the Cost of Experts

One way to keep billings under control is to remember that attorneys should not always request a formal detailed written report. The CPA's financial analysis can be made in financial schedules. A shorter, less formal report can serve well in many instances for effective negotiation and settlement proceedings. In many situations the attorney could make the most effective use of the CPA's time by hiring him or her for a meeting or teleconference to help explain the analysis and reach a mutually agreeable settlement. Formal detailed reports are more appropriate for cases definitely going to trial and with complicated fact patterns. If appeal is a factor, a formal detailed report will undoubtedly become a welcome part of the attorney's records.

In summary, an experienced forensic accountant can be an invaluable tool for an attorney. The relationship should begin early, and there should be good communication between the CPA and the attorney regarding the work to be performed and the strategy. The attorney should weigh the cost of the expert against the benefit the attorney hopes to obtain and direct the expert work accordingly.

Stephen L. Ferraro is a partner in Roback, Ferraro & Pehl, CPAs, LLP, located in the Capital District which provides experienced forensic and investigative accountants. Its Forensic and Litigation Support Division is dedicated almost exclusively to this type of accounting. Marie D. Sonnen is an associate CPA that manages the firm's Denver, Colorado office.

Business Litigation Program on October 24

The Commercial and Federal Litigation Section of the New York State Bar Association will present a very special CLE program on Friday, October 24, 2003 in New York City. The title of the program is "Advice From the Experts: Successful Strategies for Winning Commercial Cases in Federal Courts."

At the program, an extraordinary panel of distinguished federal judges, well-known commercial litigators and prominent in-house counsel at major corporations will provide you with practical advice and strategies for winning business and commercial cases in federal courts. This program is designed for both newly admitted attorneys seeking an overview of business and commercial litigation in federal courts and experienced attorneys seeking to refine and update their litigation skills. The program will take place from 9:00 a.m. to 4:30 p.m. on October 24, 2003 in the Jury Assembly Room of the United States Courthouse at 500 Pearl Street in downtown Manhattan. Attendees will receive 7.0 hours of CLE credit.

All registrants at the program will receive a copy of the critically acclaimed six-volume treatise *Business and Commercial Litigation in Federal Courts* published by West Group. This publication was written by 152 outstanding attorneys and federal judges throughout the United States and gives you everything you need to handle commercial cases from initial assessment, through pleadings, discovery, motions, trial and appeal. Strong emphasis is placed on strategic considerations specific to commercial cases. Sample forms are provided as well as procedural checklists. In addition, there is comprehensive coverage of 28 areas of substantive law, including strategy, checklists, forms and jury charges. Covered as well are compensatory and punitive damages and other remedies.

The six-volume, 6,690-page set comes with a CD-ROM containing 349 forms and 319 jury instructions. The retail price of the set is ordinarily $480. All royalties from sales of this publication go to the American Bar Association's Section of Litigation.

Justice in Bhutan

By Carrie H. Cohen

"The thoughts of peoples and their ways and wills,
Those, too, the great Law binds
More is the treasure of the Law than gems."

— Lord Buddha

Nestled in the Himalayas, between Tibet on the north and India on all other sides, is the Buddhist Kingdom of Bhutan, referred to locally as Druk Yul, Land of the Thunder Dragon. Never colonized and somewhat isolated for many years, the Bhutanese are fiercely proud of their culture and heritage, but at the same time the country is developing and modernizing at an outstandingly quick pace. In the fall of 2002, I was fortunate to be invited to spend three months in this Kingdom, working for the Chief Justice of the High Court, Lyonpo Sonam Tobgye.

Having tea with the Chief Justice on my first day of work, we discussed how the Lord Buddha's teachings inform the Bhutanese legal system and the court's perspective on how to achieve justice. Buddhism, the Chief Justice explained, demands that the Bhutanese legal system be compassionate and forgiving in order to allow individuals to develop the means to enlighten themselves. The Chief Justice further explained that the Bhutanese legal system is set up to give form and direction to the natural world and instructed me, quoting Justice Benjamin Cardozo, that "the final cause of law is the welfare of society." My job, he explained, was to draft the country's first Penal Code and Evidence Act keeping in mind these principles.

The Bhutanese legal system dates back to the fifteenth century when Zhabdrung Ngawang Namgyal (a Tibetan scholar-saint) unified Bhutan and codified its laws. The 1652 Code of the Zhabdrung was based on the fundamental teachings of Buddhism and included ten pious acts and sixteen virtuous acts. The Code of the Zhabdrung still forms the basis of the Bhutanese legal system, although in 1959 the National Assembly enacted the *Thrimzhung Chhenmo*, meaning Supreme Law, which is a comprehensive codified set of laws. The *Thrimzhung* contains all types of laws, criminal and civil alike; and as Bhutan has begun to develop, certain areas have been carved out and codified in separate laws, such as the Child Support Act, Inheritance Act, Civil and Criminal Procedure Code and Land Use Act.

Using the *Thrimzhung* as a guide and a Bhutanese attorney as my teacher, I began to draft the Penal Code and the Evidence Act. Thankfully, the Chief Justice already had collected penal codes and rules of evidence from a variety of countries; and I had packed the Model Penal Code, the New York Penal Code, and the Federal Rules of Evidence. Comparing and contrasting our laws with those of other countries as well as the laws of Bhutan, I cobbled together a draft Penal Code and Evidence Act. Next, I worked with the Bhutanese attorney to modify my drafts to conform to Bhutanese customs and traditions. Once these revised drafts were completed, I submitted them to the Chief Justice for his review.

"Never colonized and somewhat isolated for many years, the Bhutanese are fiercely proud of their culture and heritage, but at the same time the country is developing and modernizing at an outstandingly quick pace."

Having tea once again with the Chief Justice, we discussed my drafts. The Chief Justice began this meeting by explaining the meaning of the symbols depicted in the crest of the High Court. He explained that the crest depicts a golden yoke, which is a symbol of secular law, wrapped in a silken knot. The knot is important, he continued, because it can be loosened to remind the court to temper punishment with compassion but also can be tightened to remind the court that sometimes the severity of the crime warrants less compassion. The Chief Justice next quoted Justice Oliver Wendell Holmes as saying that "live by symbols because symbols inspire us" and then remarked that my draft Penal Code in particular seemed inspired by the court's crest's symbol of the silken knot tied around the golden yoke.

Sitting in my office in downtown Manhattan, I often reflect back on that meeting with the Chief Justice and hope that I bring the sense of balance depicted in the crest of the Royal High Court to my practice of law here in New York.

Carrie H. Cohen is Chair of the Employment and Labor Relations Committee of the Commercial and Federal Litigation Section and a member of the Section's Executive Committee.

Recent Developments in Internet and Litigation Law

By Rajen Akalu

In *Thomas Publishing v. Industrial Quick Search, Inc.*,[1] a New York federal court (S.D.N.Y) exercised personal jurisdiction under New York's long-arm statute based largely upon the defendant's interactive Web site.

The plaintiffs published a comprehensive directory of manufacturing and industrial companies known as *The Thomas Register*. The defendant, an independent sales manager licensed to solicit advertising for the directory, operated an interactive Web site—http://www.industrialquicksearch.com (IQS). The IQS Web site gave users the option to submit company listings, track product areas and submit e-mails directly to the IQS sales department. The plaintiff alleged that this site infringed the plaintiff's directory and asserted claims based, *inter alia*, upon copyright, trademark and Lanham Act violations.

In addition to maintaining the Web site, the defendants also had daily communications and made occasional business visits to New York. The defendants, located in Michigan and Indiana, sought a dismissal on grounds of lack of personal jurisdiction.

This article discusses the significance of this case in relation to the rules on New York personal jurisdiction and Internet litigation.

Personal Jurisdiction—General

As the defendants were located outside New York, the court looked to the laws of the forum to determine if personal jurisdiction over the defendant existed. The court also was required to determine whether the exercise of its jurisdiction is consistent with the requirements of federal due process.

In order to be consistent with the requirements of federal due process, the defendant "[must] have certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[2] Jurisdictional rules may not therefore be employed to make litigation "so gravely difficult and inconvenient" that the defendant will be at a "severe disadvantage" compared to his or her opponent.[3] Thus the general rule with respect to personal jurisdiction over an out-of-state defendant is that he or she should "'reasonably anticipate being haled into court' in another jurisdiction."[4]

"Doing Business in New York"

In order for jurisdiction to be asserted over a defendant, there must be a basis of jurisdiction in the forum state. There are two bases of New York personal jurisdiction of application here.[5] The first is the "general jurisdiction" provision that subjects entities "doing business" in New York on all causes of action. The doing business provision applies where an entity systematically and continually solicits business in New York and engages in some additional commercial activity within the state.[6]

In *Thomas Publishing*, the defendants used Thomas' material for its interactive Web site. It solicited business in this fashion and also contacted sales associates in New York to persuade them to advertise on their Web site. The site listed some 269 New York entities.[7] These facts were sufficient to constitute "doing business" in New York and subject the defendants to New York personal jurisdiction.

"The court reasoned that because the IQS Web site allowed users to directly interact with the IQS sales department, there was no inequity in subjecting it to jurisdiction in New York."

The New York "Long-Arm" Statute

The "specific jurisdiction" provisions of the New York long-arm statute[8] provided the second basis of jurisdiction in this case. Under this category, personal jurisdiction was found as a result of the commission of a tortious act outside New York that caused injury inside the state.[9] Jurisdiction over the President and controlling shareholder of IQS was also successfully argued under an agency theory.[10]

The most significant application of the long-arm statute, however, was jurisdiction based on the transaction of business provision. Under this rule, the act of a non-domiciliary is subject to personal jurisdiction where he or she "transacts any business within the state or contracts anywhere to supply goods in the state."[11]

The court observed that, "given today's internet reach and capabilities,"[12] jurisdiction based on the transaction of business provision was justified. The court reasoned that because the IQS Web site allowed users to directly interact with the IQS sales department, there was no inequity in subjecting it to jurisdiction in New York. The site effectively enabled the defendants to transact business in New York, thus giving rise to a basis of jurisdiction pursuant to this provision.[13]

The interactive nature of the Web site, which was accessible in New York, subjected the defendants to jurisdiction in New York. The company could have

operated a "passive" Web site (i.e. one that did not take orders etc.); however, it did not.[14]

Discussion

Thomas Publishing provides an insight into judicial treatment of technology as it relates to the doctrine of personal jurisdiction. As Judge Owen remarks in *obiter*:

> It has long been observed that technological advances affecting the nature of commerce require the doctrine of personal jurisdiction to adapt and evolve along with those advances.[15]

It was therefore unavailing for the defendants to contend that a finding of jurisdiction based on the operation of a Web site unfairly subjects an alleged tortfeasor to personal jurisdiction in every state.[16] Technological advancements provide businesses with the ability to transact business in every state, but "[w]ith that ability, however, comes the responsibility for actionable conduct."[17]

"It makes it abundantly clear that defendants may not engage in jurisdictionally relevant transactions with impunity simply by remaining in their home state and operating via the Internet."

Conclusion

Thomas Publishing clarifies the issue of personal jurisdiction with respect to the conduct of Web sites. It makes it abundantly clear that defendants may not engage in jurisdictionally relevant transactions with impunity simply by remaining in their home state and operating via the Internet.

Endnotes

1. *Thomas Publishing Company v. Industrial Quick Search, Inc.*, 2002 WL 31844915 (S.D.N.Y) ("*Thomas Publishing*").
2. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).
3. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985), quoting Burger, C.J., in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972).
4. *Id.*, quoting White J. in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297.
5. N.Y. Civil Practice Law & Rules ("CPLR") §§ 301 and 302. Other potential bases include: presence, domicile and consent.
6. CPLR 301. Courts have held that as soon solicitation is found in any substantial degree, very little more is necessary to a conclusion of doing business. *See Beacon Enterprises. Inc. v. Menzies* 757 F.2d 757 (2d Cir. 1983).
7. *Thomas Publishing*, 2002 WL 31844915 *1.
8. CPLR 301 *et seq.*
9. *Thomas Publishing*, 2002 WL 31844915 *2. CPLR 302(a)(1)(ii) states: "a court may exercise personal jurisdiction over any non-domiciliary . . . [that] commits a tortious act without the state causing injury to a person or property within the state . . . if he expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. . . ."
10. *See* CPLR 302(a) and *Thomas Publishing, id.*
11. CPLR 302(a)(1). For a recent case concerning transactions of business by phone mail and electronic means, see *Liberatore v. Calvino*, 293 A.D. 2d 217, 742 N.Y.S 2d. 291 (1st Dept. 2002) (jurisdiction conferred in a legal malpractice action against an out-of-state lawyer who was held to have transacted business in New York solely through his use of numerous written and telephone communications with New York entities on behalf of his out-of-state client).
12. *Thomas Publishing*, 2002 WL 31844915 *2.
13. *Id.*
14. *Id. Cf. Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (for an example of a non-interactive or "passive" Web site; the mere posting of promotional material was insufficient to support a finding of long-arm jurisdiction over an out-of-state defendant).
15. *Thomas Publishing*, 2002 WL 31844915 *2, quoting Sweet D.J. in *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000).
16. *Thomas Publishing*, 2002 WL 31844915 *2.
17. *Id.*

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