

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 Outgoing Chair

It is hard to believe a year has passed. This has been such a momentous year for all of us. It has been a privilege to be your Chair. I hope this past year has been a rewarding one for you as a member of the Section. I feel I am leaving our Section in the best hands. Cathi Hession will be a great Chair. You should know that over this past year your officers, the Executive Committee, and so many members have worked as hard as any group I have known through the years.



I would like to thank each officer, Cathi, Lew Smoley, Lesley Friedman, and Richard Dodge for their support and enthusiasm. I think each member of our Executive Committee knows my gratitude. We have managed this year, hopefully, to make all our members feel appreciated and that they are a meaningful part of the Section.

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A Message from the Incoming Chair

As we start this new 2002-2003 Section year, I feel like a runner in full motion reaching back for the baton pass. This past year, under the leadership of Jerry Safer, the Section began an unprecedented experiment in looking inward and outward for ways to improve the Section and to make Section membership more rewarding for everyone.



Our hardworking Task Force, under the leadership of Steve Younger, developed a Mission Statement for both the Section and the Section's Committees, and examined in detail our Committee structure, how to make our Section more relevant and accessible to members outside the New York City area, how to enhance the value of membership in the Section, and, most recently, how to enhance our CLE efforts. We are now in the process of acting on the Task Force's rec-

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A Message from the Outgoing Chair *(Continued from page 1)*

We have increased and diversified our membership throughout the state. We have worked very closely with this past year's New York State Bar Association (NYSBA) President Steven C. Krane, and our new NYSBA President, Lorraine Power Tharp, who have spoken repeatedly at our functions. The Section has continued to have an impact on the court system. The Section was recently honored on May 7 by its participation in the opening of the Commercial Division in Albany with Chief Judge of the State of New York, Judith S. Kaye; Chief Administrative Judge of the State of New York, Jonathan Lippman; Presiding Justice of the Third Department, Anthony V. Cardona; Administrative Judge, Thomas W. Keegan; and the new Commercial Division Judge of the Supreme Court of the State of New York in Albany County, Louis C. Benza. We joined with the New York State Unified Court System and NYSBA's Judicial Section in holding the ceremony in the Albany County Courthouse, followed by a reception for the Judiciary and attorneys at the State Bar Center.

Thanks to Lew and Cathi, we had the largest turnout ever for our Annual Meeting program and our Spring Meeting weekend at Mohonk. The presentations on *The Trial of a Commercial Case: Successful Tactics and Techniques* and on *Looking Back on September 11: A Litigator's View* were stimulating, instructive, and thought-provoking. We were proud to honor Dean—and former New York State Court of Appeals Judge—Joseph W. Bellacosa with the Stanley H. Fuld Award and United States District Judge Shira A. Scheindlin of the Southern District of New York with the Robert L. Haig Award. The Section and its Committees also sponsored, and our members chaired, numerous CLE programs and wrote insightful reports this year. My thanks to each of you. Our past Chairs gave us great support with their advice and participation. Our Section liaisons from the NYSBA and the Executive Committee of the NYSBA further assisted me and the Section throughout the year.

Significantly, the support of the Judiciary this year has been overwhelming. They have participated on panels, attended Section events with record turnouts, and enthusiastically contributed their time and efforts to the Section. Our Section has promoted the appreciation and recognition of our Judges, law clerks, and court counsel. In this regard, I especially want to thank NYSBA's Judicial Section. They have co-sponsored each of our receptions throughout the state, including those in Buffalo and Albany, as well as two in Rochester and two in New York City. My special thanks to the outgoing Chair, Justice Rose H. Sconiers of the New York State Supreme Court in Erie County, and the incoming Chair, Justice Charles E. Ramos of the Commercial Division of the New York State Supreme Court in New York County, who have helped organize and coordinate our receptions, and who have

spoken at them, as well. In addition, Judge Dennis G. Jacobs of the United States Court of Appeals for the Second Circuit; Chief Judge Michael B. Mukasey of the Southern District of New York; Chief Judge Edward R. Korman of the Eastern District of New York; Chief Judge David G. Larimer of the Western District of New York; United States District Judge William M. Skretny of the Western District of New York; Presiding Justice of the Fourth Department Eugene F. Pigott, Jr.; and Justice Thomas A. Stander of the Commercial Division of the New York State Supreme Court in Monroe County spoke at our receptions. Chief Judge John M. Walker, Jr. of the United States Court of Appeals for the Second Circuit and Chief Administrative Judge of the State of New York Jonathan Lippman also contributed to the success of the receptions. Our event and membership Chairs and Committee members played key roles in the preparation of these receptions. To the many Judges who spoke at our Executive Committee meetings, were on our program panels, and are Section Executive Committee members, who are too numerous to name: thank you also for your support. As an example, 14 federal and state court Judges appeared on panels at our Annual Meeting.

A very positive event this year was the creation of two new committees: The State Court Counsel Committee, co-chaired by Tracee Davis and Kathy Kass; and the Federal Court Counsel Committee, chaired by Jessica Malman. These Chairs deserve recognition because they have started from scratch and opened the doors of our Section to a whole group of potential new members who can add so much to our Section. With the support of the Judiciary, the Judicial Section, the Second Circuit, and the New York State Unified Court System, a luncheon in Rochester and two receptions at the state and federal courthouses at Foley Square were held to introduce the Section and to honor our federal and state court counsel and law clerks.

Our Newsletter and our *NYLitigator*, edited by Mark Davies and Jonathan Lupkin, respectively, were particularly important this year. They contained informative and relevant articles. The Winter 2001 edition of the *NY Litigator*, with its beautiful heartwarming cover, was dedicated to the victims of the September 11 terrorist attack on the New York World Trade Center. The response of the bar associations, including NYSBA, and of our Section were extensive—an effort to reach out and care. Among other things, members of our Section—including Justice Walter Schackman, Lew Smoley, past Chair Mark Zauderer and I—worked with a special committee chaired by Administrative Judge Jacqueline Silbermann to deal with court problems after the September 11 attack.

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A Message from the Incoming Chair *(Continued from page 1)*

ommendations. Our focus in 2002-2003 will be to continue to make your membership more valuable to you.

We hope you are already feeling the winds of change. As Jerry notes in his farewell message, the Section has rolled out the welcome mat—sponsoring events in many parts of the state and reaching out to new members and to new constituencies within our existing membership. We will continue to try hard to make all new members feel welcome and to help you get involved. Many of you who attended our successful Spring Meeting at Mohonk Mountain House commented on the camaraderie that made the weekend especially memorable. This year, in order to provide more opportunities for members to attend Section functions and to meet other Section members, two of our Executive Committee meetings will be held outside New York City in connection with social programs or events to which all members will be invited. Our September 12 meeting will be held in Buffalo and our March 13 meeting will be in Albany. Sharon Porcellio and Carol Heckman are planning the Buffalo event; and Linda Clark, Neil Levine, and Maggie Rossi are heading up the Albany planning. We hope all of you who live and work in those areas will mark your calendars and join us! We also are considering coupling another Executive Committee meeting with a business meeting/social event open to all members. Stay tuned.

Many have volunteered for the new Social Functions, Publications, Recruitment, and Diversity Committees recommended by the Task Force, and more volunteers are welcome. We are in the process of getting those Committees up and running, as well as looking to improve our existing Committees. I urge each of you to become involved in your Section. Join a Committee or start a new Committee. (Areas in which more than 100 members practice that have no Committees are: Business Law, Insurance, Personal or Property Injury, and Product Liability—anyone interested in getting a Committee going?) Volunteer for a specific project or program. If you want to get more active, call! Expect a call from us if we don't hear from you. We also ask each of you to become an advocate for the Section. Reward an associate with a Section membership and help him or her on the road to active Section participation. Encourage colleagues in your practice areas to join the Section and a Committee. Come to Section meetings and programs and bring a friend.

In this Newsletter, you will see some new features that allow individual members and Committees to shine. Have you become a partner? Joined a new firm? Started a new firm? Gone in-house? Moved your office? Opened a new office? Had a noteworthy court victory, speaking engagement, professional honor, or appointment?

“Member News” is a forum for sharing that news with other Section members. Send a note with your news to Newsletter Editor Mark Davies at MLDavies@aol.com. Want to publicize your Committee and its work to other Section members? Let Mark or me know and your Committee can star in the “Committee Spotlight” in an upcoming Newsletter issue. We have also added a feature on “Friends from Other Sections” to share news of projects and programs sponsored by other New York State Bar Association (NYSBA) Sections that may be of interest to our members. Other new features being considered are technology and practice tips and interviews with notables in the field of commercial and federal litigation. If anyone is interested in writing or editing any Newsletter feature on an ongoing basis or in doing an interview for the Newsletter, please let us know. This is a great way to learn about the Section and other Section members and to perform a service for the Section that takes only a limited amount of time each quarter.

If you have not yet visited our Section's area on the exciting new NYSBA Web site, take a moment to click on www.nysba.org. Find us by clicking on “Sections/Committees” on the NYSBA home page. We will be putting more member content on the site in the coming months. Anyone interested in serving as Section Webmaster or otherwise helping with the Web site should contact Lesley Friedman at lfriedman@paulweiss.com. (While you are on the Web, check out the new Second Circuit Web site at www.ca2.uscourts.gov. The site includes information on court rules, on-line forms, a link to PACER, and other helpful information.)

Your other officers for 2002-2003 are Chair-Elect Lew Smoley, Executive Vice-Chair Lauren Wachtler, Secretary Bernard Daskal, and Treasurer Lesley Friedman. Craig Purcell continues as NYSBA's Executive Committee Liaison to our Section, and Lisa Bataille continues as our Section's Staff Liaison at NYSBA. Feel free to contact Lisa directly at lbataille@nysba.org if the need arises. Lew, Lauren, Bernard, and I recently attended the second annual Section Leaders Conference at the State Bar Center in Albany. The Conference covered all facets of Section life and gave us an opportunity to exchange ideas with NYSBA officers and staff, as well as leaders of other Sections. An exciting two-day program, it gave us many ideas to supplement the groundbreaking work of our own Task Force. We are committed to working hard on your behalf in the coming year. Please join us.

As Jerry Safer joins the ranks of our Section's 13 illustrious past Chairs and becomes our Section's Delegate to the House of Delegates, we extend our heartfelt thanks for his year of dedicated service to the Section as its Chair. Well done, Jerry.

Cathi A. Hession

On Writing Books About How to Try a Case

By Henry G. Miller

No, we don't do book reviews, says the editor, but we might publish your reasons for why you wrote a book on how to try a case when there are already too many books on the subject.

All right, here's why.

First. It's easier than trying cases. I have never lost a book on how to try a case but I sure have lost a trial here or there.

Second. I'm nostalgic. I remember those little books when I started out. Harry Gair and Charlie Kramer, big talents, wrote small books. You could put them in your pocket. You could pull them out when you were in a tight spot. Their wisdom was brief and to the point. Then along came the megabooks. Big, fat, and not very pocketable. Plus, you had to buy expensive yearly supplements as if how to try a case changed every season.

There are now tomes upon tomes sketching in detail the trial lawyers' every travail and trauma. Manuals on advocacy, encyclopedic in scope, saturate every law library.

But there's a problem with this mountain of erudition. Few bother to climb it. They don't have the time. Who can deal with all this information spun out by young researchers and tireless computers? In this, the "Age of More Information Than We Know What to Do With," we need to be selective. No one, and certainly not busy practitioners, can read more than a mere fraction of the available literature.

When we read great literature, we should not rush. We should dally, savor, and enjoy. But that's for Dickens and Tolstoy. When it comes to the technical texts of our trade, we need speed. There may be gold in those mountainous volumes, but we want it mined for us. Busy trial lawyers don't have the luxury of reading all the available wonderful texts on the art of advocacy.

Third. That's why we need little books on the subject. Brevity, even for lawyers, is the way to go. Take the extra time to write a short book. The books of the past which have become classics prove the point. Lloyd Paul Stryker's *Art of Advocacy* has been reprinted many times. His articles were not encyclopedic. They were not updated yearly. Rather, they were a distillation of what he learned from a lifetime in the courtroom. That was a model for me in trying to distill my experience into a few do's and don'ts like the **44 Most Common Blunders of Jury Selection** and **19 Tiny Tips on Trying Your First Case**.

Fourth. I wanted to show there's a place for common sense even after law school. For example, "Talk as if you are a human being." Please say "He lost money" not "He

suffered a pecuniary detriment." (From the chapter on **Opening—The Twenty-Seven Steps**.)

Fifth. I wanted to tell my peers when they lose a case, they're not alone and the sun will still rise in the morning.

"... let defeat come. While we will not welcome it, we will not fear it. Take it by the neck, shake it, subdue it, put it in its place. All it takes is character—the advocate's highest attribute.

... Great trial lawyers accept defeat and become stronger."

Sixth. Writing the book was great fun. I enjoyed writing **Courage, or Trying a Case When the Judge and Jury Hate You**. And I particularly enjoyed **Nine Secrets for Living with Judges**. However, I wrote that chapter under a pseudonym. I guess I should go back and reread the chapter on courage.

Seventh. Believe it or not, I was asked to write it. Some years ago, I was asked by the *New York Law Journal* to become a columnist on the subject of "Trials." This was an opportunity which I gladly accepted. I decided to write on each phase of the trial. Intending no presumption, the articles were well received. One judge, who taught a course on trial advocacy, used them in his teaching. Many asked me over the years to make a book of them.

And so I have. I don't claim to be one of the foremost authorities on how to try a case. Many trial lawyers have greater credentials and have had more celebrated cases. But, after more than four decades of actively trying cases, participating in many seminars, and exchanging with my colleagues what we hope passes for a little wisdom, I'd be dull indeed not to have drawn a few conclusions.

I wrote these articles for the young lawyer, embarking on a career in the courtroom. I also wrote them for those at the peak of their prowess. Hopefully, there is something for them to share. And I also wrote for my fellow seasoned seniors whose lives have been spent confronting demanding jurists, disagreeable witnesses, difficult jurors, and dour clients. Hopefully, my words will now and then bring a smile of recognition to their faces. That would please me most of all and be my most satisfying reward.

Eighth. And finally, I thought if I shared the secrets of survival, you might even buy my book. My favorite chapter: **The Art of Survival—Sixteen Secrets**. My favorite secret: We trial lawyers should "laugh a lot" (particularly at ourselves).

For more information on Henry's book please visit www.lawcatalog.com.

Trial Practice Techniques and a Distinguished Fuld Award Recipient Highlight Annual Meeting 2002

As our Section's contribution to Annual Meeting 2002 in celebration of NYSBA's 125th anniversary year, we presented what turned out to be one of our most successful programs: *The Trial of a Commercial Case: Successful Tactics and Techniques*.



Panelists Justice Herman Cahn, Justice Karla Moskowitz, Jay G. Strum, and Justice Thomas A. Stander at the Section's 2002 Annual Meeting.

Going back to basics, while highlighting the use of new technological advances, the program covered the process of trial practice from the initial planning stage to jury selection, witness examination and procedural matters during trial, to closing argument. We were extremely fortunate to have some of New York's finest jurists, practitioners, and jury experts as panelists, including Judges Jed S. Rakoff, Shira Scheindlin, and Loretta Preska of the U.S. District Court, Southern District of NY; New York State Supreme Court Justices Helen E. Freedman, Ira Gammerman, Leland DeGrasse, Charles E. Ramos, Herman Cahn, Karla Moskowitz, and Beatrice Shainswit (ret.) (New York County), Kenneth W. Rudolph (Westchester County), Leonard B. Austin (Nassau County), and Thomas A. Stander (Monroe County); attorneys Henry G. Miller (Clark Gagliardi & Miller); Martin Garbus (Frankfurt Garbus Kurnit Klein & Selz); Thomas J. Kavalier (Cahill Gordon & Reindel); Lauren J. Wachtler (Montclare & Wachtler); Jay G. Strum (Kaye Scholer); Mark C. Zauderer and Jonathan Lupkin (Solomon Zauderer); Stephen R. Kaye (Proskauer Rose); Kenneth E. Warner (Coblence & Warner); and a leading expert on jury selection, Sonya Hamlin. With such a stellar cast, we could do nothing but succeed. And succeed we did, with one of the largest attendances at an Annual Meeting program in the Section's history.

Highlights of the program were a fascinating demonstration by Mssrs. Zauderer and Lupkin of how to use a videotaped deposition on cross-examination

and a re-enactment of the prosecutor's closing argument in the *Alger Hiss* case, performed by the inimitable Henry G. Miller. Henry virtually stole the show with his lively and dramatic oratory.

Once again our Section presented the Stanley H. Fuld Award for outstanding contributions to commercial law and litigation to a most worthy recipient: Dean Joseph W. Bellacosa. Dean Bellacosa, currently Dean of St. John's University School of Law and a former associate judge on the Court of Appeals, is widely reputed as one of the state's most highly respected jurists. His longtime friend and associate Roy L. Reardon (Simpson Thacher & Bartlett) presented the Fuld Award to him with a few delightful, as well as moving, remarks. Dean Bellacosa praised our Section for its dedication to professionalism and its many contributions to the practice of law. Stressing the importance of engendering in the profession a sense of self-esteem free from untoward



Dean and former Associate Judge Joseph W. Bellacosa, recipient of the Section's 2002 Stanley H. Fuld Award for outstanding contributions to commercial law and litigation.

arrogance or elitist pride, Dean Bellacosa expressed concern about the conflict between our public and personal images and how much we are willing to improve the former by reconsidering how we project the latter. But far from intending to admonish, he spoke with great pride of how well the profession responded to the September 11 tragedy and how seriously it takes its responsibility to continue improving itself. His delightful sense of humor and good nature shone brightly—as they had for some many years as a prominent state court judge, of whom we can all speak with great pride.

Lew Smoley

2002 Spring Meeting Attendees Look Back on September 11

Section members enjoyed fine weather, good company, thought-provoking programming, and a special dinner in honor of former Section Chair, Hon. Shira A. Scheindlin at a sold-out weekend at beautiful Mohonk Mountain House in New Paltz. This was our first time at Mohonk. The gracious accommodations and wide-planked porches of the family-owned retreat overlooking Lake Mohonk won us all over. From traditional afternoon tea, to kids feeding fish from the porch rail, to the unspoiled trails and panoramic views, Mohonk was captivating.

The CLE program, *Looking Back on September 11: A Litigator's View*, provided a whopping nine MCLE credit hours, including 1.5 credit hours in Ethics, and something to interest everyone. After a relaxing Friday night dinner at which outgoing New York State Bar Association (NYSBA) President Steven Krane spoke, the program began with a lively point-counterpoint on "Balancing Protection of Our Civil Liberties and Our National Security," featuring Professors Mark Kleiman and Ruth Wedgwood. Lesley Friedman moderated. The Saturday morning program on "Legal Ground Zero: Litigation Arising Out of the Events of September 11" included panel discussions on recovery options available to victims, including claims against the federal Victim Compensation Fund and suits against airlines, airline security companies, and terrorists; insurance litigation brought by those seeking to obtain and preserve funds to rebuild and repair damaged and destroyed property; and efforts to prevent and control charities fraud related to the distribution of 9/11 funds and construction industry fraud in the work at Ground Zero. Victim Compensation Fund Deputy Special Master Peter Woodin explained how the Victim Compensation Fund was established; the legal, political and emotional issues faced by the Special Master in establishing fund regulations; and the status of current fund claims. Richard Campbell, Chair of the ABA TIPS Section, spoke of the lack of foreseeability of a disaster of the dimensions of the 9/11 attacks, and the enormous damages that resulted, including the tremendous blow to the economy generally—and to the airline industry specifically. Lee Kreindler, renowned airline crash specialist, spoke of his experience pursuing redress from terrorists for the Lockerbie bombing; and Slade McLaughlin, Jim Beasley, and Stephen Corr discussed their pending suits against 9/11 terrorists, including notices published in the Arab media by court order. Former Section Chair John Nonna moderated a lively presentation by Marc Wolinsky (representing the interests of the World Trade Center lessees), Mary Kay Vyskocil (representing one of the Trade Center insurers), and Harold Sofield, (a reinsurer), on pending insurance liti-

gation and claims arising out of the destruction on 9/11. Neil Getnick and Carrie Cohen were co-moderators of the fraud panel discussion, which featured Marla Simpson, section chief of the Charities Bureau in the Attorney General's Office, and Hon. Margaret J. Finerty, one of the watchdogs appointed to oversee billing by the construction companies working at Ground Zero.

The Sunday morning portion of the CLE program featured a moving presentation by lawyers from Harris Beach (Vince Chirico), Sidley Austin (Marc Silverman), and Thacher Proffit (Christopher Graham), whose offices were located in the World Trade Center on 9/11. They discussed how their firms responded to, and recovered from, the disaster. Cathi Hession, whose firm was dispossessed from its offices across the street from Ground Zero for seven weeks, moderated the panel. Hon. Denise Cote addressed how the federal courts were affected and responded. Chief Administrative Judge Jonathan Lippman discussed the impact on the state courts and their recovery efforts. NYSBA President Steve Krane, filling in for John Williamson, spoke about the response of the organized bar to help its members and the victims of September 11. The program concluded with a panel presentation by disaster recovery professionals Robyn Aldo of Automated Legal Information, Geary Sikich of Logical Management Systems Corp., and Dale Tincher of Consultwebs.com.

Saturday afternoon and evening were pure fun. Following a barbeque lunch at the outdoor skating rink pavilion at which we bade a fond farewell to Chair Jerry Safer with a gift from the Section, afternoon recreational activities included an intrepid fly fishing expedition, a tour of historic Huguenot Street in downtown New Paltz, and a companionable hike on Mohonk trails. At dinner on Saturday night, Judge David Trager presented the Robert L. Haig Award for Distinguished Public Service to Hon. Shira Scheindlin after a warm and funny tribute to his friend and colleague. Good wishes from Judge Scheindlin's family and Judge Alvin Tierstein also were read to the gathering, which included Judge Scheindlin's present and former law clerks, colleagues, friends, and family. Judge Scheindlin, not to be outdone by Judge Trager, gave a spirited, funny acceptance speech, touching on her family's public service accomplishments and the results of her top-secret investigation into formerly unknown trivia about Bob Haig, the original recipient and namesake of the Section's Distinguished Public Service Award.

Following dinner, the Ted Rosenthal Trio, featuring vocalist Nancy Marano, performed a jazz tribute to Gershwin, which prompted some dancing in the aisles.

The evening was capped by Section Treasurer Lesley Friedman's surprise violin performance with the trio. For those who stayed for late cocktails and conversation, Lesley and Ted Rosenthal later performed an impromptu encore that will long be remembered in the Section history books.

The Section applauds the planning group that worked so hard on this near-perfect weekend: Program Chair Cathi Hession, Linda Clark, Peter Craig, Bernard Daskal, Rich Dodge, Scott Greer, Lesley Friedman, Neil Levine, Maggie Rossi, and Patricia Taylor. And special thanks to Lori Nicoll of the NYSBA Meetings Department.



Judges Scheindlin and Briant
(Judge Scheindlin is a former law clerk to Judge Briant)

SCENES FROM THE
2002 SPRING MEETING
MAY 3-5, 2002
MOHONK MOUNTAIN HOUSE • NEW PALTZ



Judges Trager and Scheindlin



Lee S. Kreindler (standing)
Cathi Hession, Peter Woodin, Richard Campbell



Section Officers
Cathi Hession, Lew Smoley, Jay Safer,
Lesley Friedman, G. Richard Dodge, Jr.



Past and Current Section Chairs
Jack Auspitz, Bernie Leber, John Nonna, Mark Zauderer, Shira Scheindlin, Bob Haig, Mark Alcott, Gerry Paul, Jerry Safer



Executive Committee member **Linda Clark** of Albany announces that her firm, Iseman Cunningham Riester and Hyde, LLP, has opened a new office in Poughkeepsie, headed up by Richard A. Mitchell. Clients of the firm, which also has offices in Albany and Melville, include individuals and businesses in the health care, financial, construction, not-for-profit, retail, and service industries.

Lesley Friedman, Section Treasurer and Chair of our Internet and Litigation Committee, was an invited speaker at the recent Internet Summit at Fordham Law School. The Summit was sponsored by the New York State Judicial Institute on Professionalism and the Law. **Lesley** also recently took the lead at Paul Weiss on briefing some federalism issues in the Supreme Court, pro bono on behalf of several civil rights organizations. The case, *Verizon Maryland, Inc. v. Pub. Serv. Comm's of Maryland*, was primarily commercial in nature, involving provisions of the 1996 Telecommunications Act, but had the potential to significantly narrow the circumstances in which individuals or organizations could sue state

governments to enforce important federal laws, including civil rights laws. The Court's May 20, 2002, opinion took the position urged by the civil rights organizations on each of the points at issue, holding that *Ex Parte Young* relief is available in federal court against state court officials under the act. Congratulations to Lesley and her team.

Membership Co-chair **Margaret Surowka Rossi** was recently tapped as new General Counsel of the New York State Dental Association in Albany. Maggie leaves her practice at McNamee Lochner for this exciting in-house opportunity.

Section member **Ted Semaya** recently joined Eaton & Van Winkle, New York City, as a partner. Ted is involved in a broad range of complex commercial and international litigation at the firm. In addition to business litigation in construction, maritime, labor and employment, and trusts and estates, the firm's practice areas also include domestic and international business and financial transactions, including tax and labor and employment advice.

moving? let us know.

Notify OCA and NYSBA of any changes to your address or other record information as soon as possible!

NYS Office of Court Administration Attorney Registration Unit

PO Box 2806
Church Street Station
New York, New York 10008
212.428.2800 - tel
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Modifying Rule 68

Rule 68 of the Federal Rules of Civil Procedure has been pretty much of a dead letter for most of its existence.

Rule 68 allows a party defending a claim to serve upon the claimant at any time more than ten days prior to trial an offer “to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued.” If the claimant accepts the offer within ten days, the clerk of the court enters judgment on the offer. If the claimant does not accept the offer and if the claimant obtains a judgment that is not more favorable than the offer, the claimant is responsible for costs incurred by the offeror after the offer was made.

Several salient characteristics have limited the applicability of the Rule. First, Rule 68 is limited to offers by parties defending a claim. It is not reciprocal; claimants cannot make offers of judgment.

Second, the Rule’s deterrent effect applies only in a narrow range of situations. Costs are taxed against a rejecting offeree only if the offeree succeeds on his, her, or its claim but does not do as well as the offer. If the offeree loses outright, costs are taxed anyway, under 28 U.S.C. § 1920. If the offeree does better than the offer, no costs are assessed.

Third, statutory costs are far less than the actual expenses, including attorneys’ fees, of any party to a lawsuit. In any assessment of the risks of not settling, a recipient of a Rule 68 offer is unlikely to find a large amount relative to the underlying claim attributable to the expected value of the amount of costs incurred post-offer and the odds of winning less than the amount offered on a claim.

The importance of the limitations in current Rule 68 is emphasized in the one class of cases—civil rights cases—in which Rule 68 offers are relatively common, compared to other types of cases. In *Marek v. Chesny*, 473 U.S. 1, 9 (1985), the Supreme Court held that where the underlying statute, there 42 U.S.C. § 1988, defines “costs” to include attorneys’ fees, costs to be shifted under Rule 68 also include attorneys’ fees. Thus, the possible “costs” to be imposed on a plaintiff who, while succeeding on a claim, does not do as well as the offer, go up significantly, making the risk of rejecting a Rule 68 offer a consideration that must be taken into account in deciding whether to settle.

These considerations point the way to possible amendment of Rule 68 to revive it from its nearly dormant status. First, make the rule applicable to all parties. Second, include something more than costs as a deterrent. However, to avoid the imposition of the English rule—where the winner recovers all costs and expenses, including attorneys’ fees—the deterrent should be limited to actual expenses, not including attorneys’ fees, incurred after the offer, and a court should be given discretion to adjust the expenses to be imposed depending upon various factors, including the relative wealth of the parties.

This is the proposal that was adopted by the Executive Committee of the Section at its April 17, 2002, meeting, upon the recommendation of the Federal Practice Committee. The full report is expected to be published in a future issue of the *NYLitigator*.

Gregory K. Arenson



**Visit Us on Our
NEW
Web site:
<http://www.nysba.org/ComFed>**

Section Holds Receptions Honoring Judiciary in Buffalo and Rochester

On November 20, 2001, and February 12, 2002, the Section co-hosted receptions honoring the Judiciary in Buffalo and Rochester. The receptions were co-sponsored by the Judicial Section of the New York State Bar Association (NYSBA). The turnout at both receptions was tremendous, including federal and state court judges, as well as attorneys. The goodwill generated by the receptions was evident from the comments from the attendees, who noted the importance of holding such receptions, which reinforce the Section's support and dedication to all areas of the state. They help make our members feel they are a meaningful part of the Section. In addition, the receptions honored the Judiciary and furthered professional interaction between the Judiciary and attorneys.

The guest speakers at the Buffalo reception were United States District Judge William Skretny of the United States District Court for the Western District of New York and Presiding Justice Eugene Pigott of the Fourth Department. Additional speakers were: Hon. Rose Sconiers of the Supreme Court of the State of New

York in Erie County and then-Chair of the Judicial Section of the NYSBA; Hon. Carol Heckman, former United States District Court Magistrate Judge for the Western District of New York and the Event Chair for the reception; Sharon Porcellio, past Chair of the Section; and Jay Safer, then-Chair of the Section.

The guest speakers at the Rochester reception were Chief United States District Judge David Larimer of the Western District of New York; Presiding Justice Eugene Pigott; Justice Thomas Stander of the Commercial Division of the Supreme Court of the State of New York in Monroe County; Hon. Rose Sconiers, Hon. Carol Heckman, and Jay Safer.

Special thanks particularly go to Hon. Rose Sconiers as Chair of the Judicial Section and Hon. Carol Heckman as Event Chair for these two events. Then-President-Elect Lorraine Power Tharp was also a guest at the receptions, demonstrating her personal support and NYSBA's continuing support for the Section, the Judiciary, and attorneys throughout the state.

Scenes from the Rochester Reception February 12, 2002



(l to r) Lorraine Power Tharp, Hon. Thomas Stander, Hon. David Larimer, Hon. Carol Heckman, Hon. Eugene Pigott, Jr., Hon. Rose Sconiers, Jay Safer



Jay Safer, Hon. Rose Sconiers, Hon. Eugene Pigott, Jr.



Hon. Thomas Stander



Hon. David Larimer

2002 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals in the Court of Appeals and the Appellate Division, and Certain Other Rules of Interest to Commercial Litigators

22 NYCRR §	Court	Subject (Change)
202.69	Sup./County	Adds new section on Coordination of Related Actions Pending in More Than One Judicial District
608.2	1st Dept.	Adds new section on Practice of Law by Professional Service Corporations Pursuant to Bus. Corp. Law § 1514
Part 1215	Statewide	Adds (with subsequent amendments) Requirement for Written Letters of Engagement



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New York State Bar Association

Ceremony Honoring Commercial Division Opening in Albany



Jay Safer, Hon. Jonathan Lippman, Hon. Thomas Keegan
Hon. Judith Kaye



Hon. Anthony V. Cardona, Jay Safer,
Hon. Jonathan Lippman, Hon. Judith Kaye,
Hon. Thomas Keegan, Hon. Louis Benza

On May 7, 2002, a ceremony and reception were held honoring the opening of the Commercial Division in Albany. The New York State Unified Court System, the New York State Bar Association (NYSBA), the Judicial Section, and our Section co-sponsored the ceremony in the Albany County Courthouse and the reception at the State Bar Center. Both the courtroom where the presentation was made and the reception were packed with judges and attorneys.

At the courthouse, speeches were given by Chief Judge of the State of New York, Judith Kaye; Chief Administrative Judge of the State of New York, Jonathan Lippman; Presiding Justice Anthony Cardona of the Third Department; Justice Thomas Keegan, Administrative Judge; Justice Louis Benza, the new Commercial Division Judge of the Supreme Court of the State of New York in Albany; and Jay G. Safer. At the reception, incoming President Lorraine Power Tharp and Robert Haig spoke.

It was an honor for NYSBA, and its Sections, to participate in the ceremony and reception. Historically, our Section has played a strong role in the creation of the Commercial Division. The new Commercial Division in Albany is expected to have an important impact on the administration of cases and be as successful as the other Commercial Divisions operating throughout the state.



Hon. Judith Kaye, Hon. Thomas Keegan, Hon. Louis C. Benza
Jay Safer



Hon. Jonathan Lippman, Hon. Judith Kaye,
Hon. Thomas Keegan, Hon. Louis C. Benza
Hon. Anthony V. Cardona

Section Sponsors Depositions Program

The Section recently presented a highly successful CLE program in four cities around the state, entitled "Deposition Practice and Practicalities in State and Federal Court." This comprehensive full-day program was planned by former Section Chair Gerry Paul, who also moderated the New York City session. Other sessions were led by former Section Chair Sharon Porcellio in Buffalo, and Executive Committee members Linda Clark in Albany and Jim Wicks in Melville. The com-

bined attendance for the four sessions was the highest ever for this popular program, which featured as panelists in the four locations an impressive array of state and federal judges, law professors, and experienced litigators (among them a number of members of our Executive Committee). The New York City session, which included a mock deposition using real-time technology, was videotaped by the New York State Bar Association for future CLE use.



An Introduction to Civility and Ethics in Civil Litigation: What Every Lawyer Should Know

(For newly admitted attorneys)
(9:00 a.m. - 12:45 p.m.)



Friday, November 15, 2002
New York City

Friday, November 22, 2002
Melville, Long Island

Friday, November 22, 2002
Rochester

Friday, December 13, 2002
Albany



Statements of Material Facts on Motion for Summary Judgment

The United States District Courts for the Southern and Eastern Districts of New York have long required statements of material facts on motions for summary judgment (see current Local Civil Rule 56.1). The Commercial Division of the New York State Supreme Court in New York County has recently adopted the same requirement—and one may expect other Commercial Divisions to follow.

Commercial Division Rule 19-a requires that, upon any motion for summary judgment, except a motion pursuant to CPLR 3213, the movant annex to the notice of motion a separate, short, and concise statement of the material facts as to which the movant contends no gen-

uine issue exists to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

The papers opposing a motion for summary judgment, except a CPLR 3213 motion, must include a separate, short, and concise statement of the material facts as to which the respondent contends a genuine issue exists to be tried. All material facts set forth in movant's statement will be deemed to be admitted for purposes of the motion, unless controverted by respondent's statement.

Each statement of material fact by a movant or respondent must be followed by a citation to evidence submitted in support of, or in opposition to, the motion.



Guy Lander, Chair of the **Business Law Section**, cordially invites all interested Section members to attend the Business Law Section's Fall Meeting, Oct. 10-13, 2002, at the Ritz-Carlton in St. Thomas, Virgin Islands. Morning CLE programs (6 MCLE credits, with 2 in Ethics) are offered on "Corporate Clients in Crisis:

The Role of Counsel" and "Corporate Governance Issues." Look for their flyer in your mail.

Executive Vice-Chair Lauren Wachtler is working with both the **Corporate Counsel Section** and the **International Law Section** on a possible joint program for the 2003 Annual Meeting next January.

Notes of the Section's Executive Committee Meetings

September 25, 2001

Guest speaker Hon. Carol E. Heckman, former United States Magistrate Judge, United States District Court, Western District of New York, discussed the transition back to private practice, the commercial part in Buffalo, and training of the judiciary.

The Executive Committee discussed an initial report of the Planning Task Force on the purpose and areas of inquiry of the Task Force. The Committee also discussed a proposal to prepare a commercial law digest to be distributed by e-mail to Section members.

October 17, 2001

Guest speaker Hon. Stephen G. Crane of the Appellate Division, Second Department, gave an overview of that court.

The Executive Committee approved a report of the CPLR Committee on a proposal for the revision of CPLR Article 65 governing the filing, recording, and cancellation of written notice of pendency. The Executive Committee also discussed the Planning Task Force's proposed mission statement for the Section and proposed mission statement for Committees, and voted to support a report on a proposal to amend CPLR 2303 to require that subpoenas issued in a pending action, such as a subpoena duces tecum on a non-party, also be served on all parties who have appeared in the action.

November 14, 2001

Guest speaker Hon. Denny Chin, United States District Judge for the Southern District of New York, reviewed some of his high-profile cases.

The Executive Committee voted to support, with amendments, a report of the Federal Practice Committee on "What Should be the Precedential Effect of 'Unpublished' Decisions?" The Executive Committee also approved a revised mission statement presented by the Planning Task Force and discussed a report on the Committees of the Section.

December 12, 2001

Guest speaker Hon. Thomas A. Stander, Supreme Court, Monroe County, described practice in the Commercial Division, Monroe County.

The Executive Committee reviewed the activities of the Section. The Executive Committee also voted not to revise or otherwise supplement its previous opinion on a report of the New York State Bar Association's Standing Committee on the Civil Practice Law and Rules concerning amendments to CPLR 3408 regarding pre-trial conferences and CPLR 3402(a) regarding notes of issue.

February 20, 2002

Guest speaker Hon. Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, discussed expert testimony in civil litigation.

The Executive Committee discussed implementation of recommendations of the Planning Task Force and discussed a report on regionalization of the Section, presented by a subcommittee of the Task Force.

March 20, 2002

Guest speaker Hon. Richard B. Lowe III, Supreme Court, New York County, discussed his service on the bench.

The Executive Committee endorsed a report of the Association of the Bar of the City of New York on legislation concerning the need for New York to adopt the Uniform Mediation Act. The Committee also discussed a report of the Planning Task Force on membership enhancement.

April 17, 2002

Guest speaker Hon. Herman Cahn, Supreme Court, New York County, discussed the Commercial Division.

The Executive Committee approved a report of the Federal Practice Committee on "Providing Offers of Judgment with 'Teeth': A Proposal for the Amendment of Federal Rule of Civil Procedure 68" and directed that it be forwarded to the Advisory Committee on the Federal Rules of Civil Procedure. The Executive Committee also voted to support, with modifications, a report by the Association's Committee on the Civil Practice Law and Rules concerning a proposal to amend CPLR 3216.



Committee Spotlight

State Court Counsel Committee

This new Section Committee, co-chaired by **Kathy Kass** and **Tracee Davis**, was formed to provide programming and services to attorneys employed by the state courts, to provide a forum for court attorneys to interact with private practitioners, and to perform services of benefit to the courts and to practitioners. Initial projects and programs on the drawing board include a program for the bar—"A Practitioner's Guide: The Do's and Don'ts of Motion Practice," updating available standard orders for specific types of relief, and supplementing available training for court attorneys in the area of commercial litigation. Committee member Andrea Masley is spearheading the Practitioner's Guide program. Marcy Einhorn is working on commercial litigation CLE training programs for court attorneys. The Committee is actively seeking court attorney members, including referees, as well as a few private practitioner members.

Kathy Kass, Associate Court Attorney in the Law Department, Civil Branch, New York County, was principal law clerk to Hon. Beatrice Shainswit until Justice Shainswit's retirement from the Commercial Division in 2000. Kathy had previously been principal law clerk to Hon. David B. Saxe, followed by ten years in private practice in New York City. She is a magna cum laude graduate of the State University at Albany, and received her law degree from Hofstra University Law School and an LL.M. in International and European Community Business Law from the University of Amsterdam.



Kathy Kass

Tracee Davis joined Zeichner Ellman & Krause, LLP as an associate in the firm's Commercial Litigation Group in April 2002. She had previously served for five years as principal court attorney to Hon. Charles Ramos, Commercial Division, New York County; two years as Senior Court Attorney in the Law Department, Supreme Court, New York County, Civil Term; and three years as Staff Attorney/Deputy Chief Contracting Officer in the Office of the City Sheriff, City of New York. Tracee is a graduate of Montclair State College and received her law degree from The American University. She has studied Interna-



Tracee Davis

tional and Comparative Law at Oxford and is an adjunct professor at New York Law School.

Federal Court Counsel Committee

The Committee seeks to provide programming for federal court attorneys and to introduce them to our Section and its members and substantive work. A six-member steering committee is in the process of planning and coordinating the work of the Committee. The Committee hopes to sponsor a CLE program this summer.

Jessica L. Malman, law clerk to Hon. Shira Scheindlin, S.D.N.Y., chairs this new Section Committee. Ms. Malman graduated summa cum laude from Princeton University and received her law degree from Yale Law School, where she was a Senior Editor of the *Yale Law and Policy Review*. While in law school, she interned at the U.S. Attorney's Office, E.D.N.Y., and the Brennan Center for Justice and was a summer associate at Covington & Burling and Simpson Thacher & Bartlett. Jessica will join Covington & Burling as an associate this fall, but will continue as Chair of the Committee during its formative period.

A Message from the Outgoing Chair

(Continued from page 2)

We are looking forward to many new exciting things, thanks to our Task Force leadership under Stephen Younger, and its members around the state; and to our Committee Chairs and their members, who again are too many to name. The Committees and Committee Chairs are listed at the end of this Newsletter.

Our Task Force is considering a wide array of new ideas and suggestions to make the Section even more meaningful and responsive to our members. Among these are our Web site possibilities, which are unlimited. The new NYSBA Web site (including our Section's home page) offers incredible potential. Our Task Force and Committees are exploring Web site alternatives to communicate even better with our members and the legal community and to provide helpful information, digests, court opinions, references, amendments to statutes and rules, and updates.

We have a great Section. This coming year's officers Cathi, Lew, Lesley, Lauren Wachtler, and Bernard Daskal are dedicated to serving you, our members. Thank you so very much for allowing me to be your Chair this past year. *It was truly an honor!*

Jay G. Safer

Court Counsel Committee Receptions

On March 5, 2002, a luncheon was held in Rochester to honor the State Court Attorneys in upstate New York and to invite them to join the Section and the new State Court Counsel Committee. Speakers at this luncheon were Tracee Davis, co-chair of the Committee; former United States District Magistrate Judge Carol Heckman; and Jay Safer. The luncheon was co-sponsored by the Judicial Section of the New York State Bar Association (NYSBA).

The luncheon was made possible through the co-sponsorship of the Judicial Section and the support of Chief Administrative Judge Jonathan Lippman and the New York State Unified Court System. Tracee worked especially hard to make the event a success.

On March 19, 2002, our Section, the Judicial Section, and the State Court Counsel Committee sponsored a reception honoring downstate State Court Counsel at the Rotunda at 60 Centre Street. Speakers at this reception were: then-Chair-elect of the Judicial Committee, Justice Charles Ramos of the Commercial Division of the New York State Supreme Court in New York County; Tracee Davis; and Jay Safer. Numerous judges, court counsel, and attorneys were present. Once again, the event was made successful through the efforts of Tracee and the new State Court Counsel Committee and the assistance of Chief Administrative Judge Jonathan Lippman.

On April 15, 2002, a reception was held at the Daniel P. Moynihan United States Courthouse in Foley Square honoring the Federal Court Counsel. Court Counsel, law clerks, and Federal Judges made this reception a meaningful event. Speakers at this reception were: United States District Judge Dennis Jacobs of the United States Court of Appeals for the Second Circuit; Chief Judge Michael Mukasey of the Southern District of New York; Chief Judge Edward Korman of the Eastern District of New York; Justice Charles Ramos; Jessica Malman, Chair of the Federal Court Counsel Committee; and Jay Safer. Chief Judge John Walker of the United States Court of Appeals for the Second Circuit assisted in the success of the reception. Jessica Malman, as Chair of the Committee, worked tirelessly to meet with Federal Court Counsel and organize the reception. Particularly notable was the turnout of Judges and Court Counsel. Once again, noteworthy was the personal and organizational support shown by NYSBA and the attendance of then-President Steven Krane.

Thanks to Tracee Davis, Kathy Kass, and Jessica Malman, these new Committees should continue to grow and be beneficial and meaningful both to our new members and to the Section.

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