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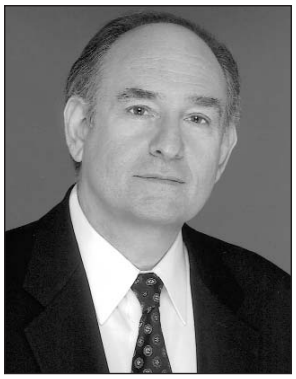
# Commercial and Federal Litigation Section Newsletter

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

## A Message from the Chair



Lewis M. Smoley

How quickly a year-term comes to an end! It seems as if it were only yesterday when I started to write my first message as Chair for our newsletter. Yet in such a short time, I am pleased to say that we have many accomplishments to our credit. Since my last message alone, our Section has presented several important seminar programs and taken the lead in specific areas of law and practice. On January 28, 2004, as part of the Association's Annual Meeting, we presented a full-day CLE program entitled "Litigating A Class Action—What Every Litigator Needs to Know." Despite the inclement weather, the attendance was high. The highlight of this in-depth analysis of class actions was a mock oral argument on class certification. I am certain that those of you who attended with us were delighted with the breadth of the topics covered and the high level of expertise of the presenters. They deserve our gratitude for a most informative and stimulating presentation. I would especially like to thank Program Chair Steve Younger for doing a highly commendable job in putting this excellent program together, and to Lauren Wachtler (Chair-Elect) and Lesley Rosenthal (Treasurer) for working closely with him from the inception to make the program a success. Special thanks also to our co-sponsors, Case Central and Greenhouse Reporting, Inc.

During the Annual Luncheon on the day of the program, we were honored to present the Section's Annual Stanley J. Fuld Award for outstanding contributions to commercial law and litigation to Second Circuit Judge Joseph M. McLaughlin. Presenting the Fuld Award to Judge McLaughlin was his colleague and close friend Judge Robert A. Katzmann. For those of us who only know Judge McLaughlin as a distinguished jurist, we were given a delightful sample of his marvelous wit during his acceptance speech.

On the state court side, our Section continues to generate programs and other activities in its efforts to improve the litigation process in the Commercial Division. On December 2, 2003, we presented the second in a continuing series of seminars for the justices of the Commercial Division, this time at Benjamin N. Cardozo School of Law. As with the previous seminar, topics were presented by experts drawn from both our Section and the business world. Peter Brown (Chair, Intellectual Property Committee) gave an excellent presentation on disputes arising under consulting agreements; Steve Younger (Section Vice-Chair) and Dan Levitt (Chair, Technology Committee) spoke on issues arising under fiduciary duties in securities transactions; and Joel Finard (Capmark Consulting), assisted by a colleague took the justices through the myriad complexities involved in discovery imposed upon a large commercial

## Inside

bank. I wish to express the appreciation of our Section to Cardozo Law School's Dean David Rudenstine and its board member (and my colleague) Rachel Warren for their willingness to let us use their excellent facilities and their cooperation in coordinating this important event. I understand that the justices were delighted with the program and want us to continue offering these seminars on a regular basis.

Our newly created Commercial Division Advisory Committee met with Chief Administrative Judge Jonathan Lippman on February 4, 2004, to discuss a variety of proposals the Committee suggests to enhance the performance of the Commercial Division. Judge Lippman has asked Assistant Chief Administrative Judge Ann Pfau to coordinate with us on the details of our proposals as part of her general review of court procedures and practices.

I am also proud to announce that two reports generated by Committees of our Section were presented to the Executive Committee of the Association and have become the policy of the Association: the Federal Judiciary Committee's Report on Public Access to Court Records (Carol Heckman and Dan Levitt); and the Class Action Committee's Report on the Federal Class Action Fairness Act (Ira Schochet). Congratulations to all who worked on these excellent reports.

While I am thanking my colleagues in the Section, I would like to express my appreciation for the extraordinary level of teamwork that the Section officers displayed throughout this term. I think that the spirit of cooperation and comradeship that the officers as a group have generated could serve as a model for how a management team can function optimally. The good news is that most of them will continue next year in new officer positions, and those who will become officers for the first time, I have no doubt, will catch the team spirit that has helped immeasurably in accomplishing our goals during the past year.

One final comment, which may sound like a broken record, but should be said as often as possible: The best way to really get something out of your membership in this Section is to take an active role in committee projects, particularly the generation of reports and CLE programs. Many of our reports result in changes in law and practice, and appear in this newsletter or in our highly-praised publication, the *New York Litigator*. If you are not yet a participant in one of our many committees, and are not sure which one or more to become active in, please call me or any of the officers, and we would be delighted to discuss the matter with you.

Of course, my next role as the Section's delegate to the House of Delegates will be a challenging one. I hope to make our Section's voice heard loud and clear when we take a position on the various matters that come before the House for consideration. Best wishes to the 2004-2005 officers. I have no doubt that they will acquit themselves well.

**Lewis M. Smoley**

# Public Access to Court Records

The New York State Commission on Public Access to Court Records, in its February report to Chief Judge Judith S. Kaye, adopted the views of the Commercial and Federal Litigation Section of the New York State Bar Association.

The Commission recommended that court records be available to the public over the Internet, so long as certain privacy interests of litigants are protected. The Commission report mirrors many of the points in the Section's recommendations, which were approved by the House of Delegates and the Executive Committee of the State Bar in January. The Section's sub-committee was chaired by Carol E. Heckman, and also included Dan Levitt and Peter Pizzi.

Both the Commission and the Section strongly endorsed remote electronic access, which, as the Section put it, "sweeps away obstacles heretofore imposed by the inconvenience of obtaining courthouse access to paper records." But both groups also noted the potential threats to privacy that such access could present. In response to such threats, both the Section and the Commission recommended that certain information simply not appear in filings, including Social Security numbers, dates of birth, financial account numbers, and the names of minor children. In addition, no records that are currently sealed—such as records in marital and juvenile cases, and trade secrets—would be unsealed under the new regime.

The Commission placed the burden of redacting prohibited information on the filing attorneys or on pro-se litigants. The Section would have had court clerks help pro-se litigants, at least initially, but both groups recommended that sanctions be provided where the privacy rules are violated.

The Section explicitly recommended that the Unified Court System adopt the equivalent of the Public Access to Court Electronic Records (PACER) system as it has been implemented by the U.S. Bankruptcy Court for the Southern District of New York. Noting that PACER varies from jurisdiction to jurisdiction, the Section called PACER's Southern District manifestation the "gold standard" for remote access, noting the numerous data available on the system as well as certain features that discourage "data mining." While not as specific in its recommendation, the Commission also described access protocols similar to PACER's, and both groups urged that any fees associated with remote access be kept to a minimum and, in any case, not exceed the actual costs to the courts of providing access.

The Section listed as its top priority for on-line access the judicial opinions and orders of all the state courts. The Commission agreed, adding such housekeeping data as court calendars, case indices, and dockets. Both groups foresaw the eventual availability of briefs and other papers filed by parties.

Giving anyone with a personal computer extensive and nearly instantaneous access to judicial records undoubtedly has complications that only experience will reveal. But both the Commission and the Section adopted a position not only practical, but consistent with the traditional case for access: that it provides a check on the activities of judges and litigants, fosters more accurate fact-finding, and ultimately helps to maintain public respect for the judicial system.

## Request for Articles

If you have written an article, or have an idea for one, please contact *Commercial and Federal Litigation Section Newsletter* Editor

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

# Commercial and Federal Litigation Section's Annual Meeting

On January 28, 2004, the Commercial and Federal Litigation Section of the New York State Bar Association held its Annual Meeting at the Marriott Marquis in New York City. Over four hundred attendees braved a blizzard for the Annual Meeting's programs and luncheon. This year's meeting, titled "Litigating A Class Action Case—What Every Litigator Needs to Know," included a full day of seminars addressing "Cutting Edge Procedural Issues Affecting Class Actions," "Developments in Securities Class Action," "Hot Topics in Product Liability and Consumer Class Actions," and "Techniques for Managing Class Actions." The panelists included experienced litigators for both plaintiffs and defendants, as well as state and federal judges. Stephen P. Younger, Program Chair, framed the day's debate by presenting two opposing views of class actions. In the view of those who criticize class action suits, class actions are out of control and only benefit the lawyers. In contrast, those who support class litigation believe that class actions provide a social benefit by holding Corporate America responsible for its transgressions, particularly in matters that are not large enough on an individual basis to justify suing.

**(l to r) Lewis M. Smoley, Hon. Joseph M. McLaughlin and Stephen P. Younger**

**Hon. Joseph M. McLaughlin (c) and his past and former law clerks**

The panelists discussed the following topics: changes to Rule 23, the choice of lead counsel, judicial approval of settlements; the impact of Sarbanes-Oxley on corporate governance issues, the impact of SLUSA on state actions, the impact of the PSLRA on securities class actions; secondary liability in the wake of the Supreme Court's decision in *Central Bank of Denver*; when products liability cases can be certified as class actions, whether New York's statutory scheme is unduly restrictive; advertising/marketing issues; overlap with criminal/regulatory investigations; bar orders and contribution issues; and insurance issues.

**Sheila L. Birnbaum**

At lunch, the Commercial and Federal Litigation Section presented its Stanley J. Fuld Award, which recognizes outstanding contributions to commercial law and litigation, to Hon. Joseph M. McLaughlin, U.S. Circuit Senior Judge for the Second Circuit. Judge McLaughlin has had a


**(l to r) Ira A. Schochet, Timothy E. Hoeffner and David A. P. Brower**

**(l to r) Lewis M. Smoley, Hon. Joseph M. McLaughlin, Hon. Robert A. Katzmann and Stephen P. Younger**

long and notable career as both a legal educator and a judge. He earned his law degree from Fordham University School of Law (1959), a master of law degree from New York University (1964), and a doctorate of law degree form Mercy College, Dobbs Ferry, New York. From 1971 to 1981, Judge McLaughlin served as professor and dean of Fordham University School of Law. Judge McLaughlin was appointed to the U.S. District Court for the Eastern District of New York in 1981 and the Second Circuit in 1990. Judge McLaughlin has authored several legal texts, including the *CPLR Practice Commentaries*, which are indispensable references in the practice of law. He is also the editor of Matthew Bender's *Weinstein's Evidence*. Judge Robert A. Katzmann, also of the Second Circuit, presented the Fuld Award to Judge McLaughlin.

**Stanley M. Grossman (l) arguing hypothetical class certification motion**

After lunch, Judge Loretta A. Preska, U.S. District Court, Southern District of New York, presided over a mock certification motion argued by Stanley M. Grossman (Pomerantz Haudek Block Grossman & Gross LLP) and Leonard A. Spivak (Cahill Gordon & Reindel). Grossman sought to certify a class of investors in a high-technology company after its stock price nose-dived following announcements that the company would not meet its earnings forecast and that its major software program was experiencing technical problems. Spivak argued that class certification would be redundant in light of an overlapping class already certified in the Northern District of California alleging similar non-disclosures by the company. Judge Preska did not rule on the motion, but after both sides presented their arguments, she suggested that she would have been hesitant to certify the overlapping segment of the class.

**Stephen P. Younger and Professor Jill E. Fisch, Fordham University**

**Hon. Loretta A. Preska**

**Hon. Joseph M. McLaughlin and his family**

At its meeting, the Section elected the following officers for the 2004-2005 term: Lauren J. Wachtler, Chair; Stephen P. Younger, Chair-Elect; Lesley Friedman Rosenthal, Executive Vice-Chair; Tracee Davis, Secretary; Vincent J. Syracuse, Treasurer; and Lewis M. Smoley, Delegate to the House of Delegates.

# Strategies for Unmasking the "Anonymous" Internet User

By Rajen Akalu and Peter J. Pizzi

The Internet poses unique challenges for litigators. Among these challenges is the identification of defendants in order to initiate legal proceedings. These issues have been brought most sharply into focus by the vigorous pursuit of alleged copyright infringement by the Recording Industry Association of America (RIAA).

This article discusses the various procedural mechanisms used by RIAA in order to compel Internet Service Providers (ISPs) to disclose the identity of its subscribers using peer-to-peer (P2P) file-sharing software such as KaZaA.

## Background

In the digital context copyright material can be reproduced and disseminated instantaneously at marginal costs and with perfect fidelity to the original. File-sharing programs such as Napster permitted users to download and share files on their computers using P2P technology. Napster operated a centralized database which served an indexing function.[1] The fact that the system was centralized allowed an injunction to be successfully obtained against Napster to enjoin it from facilitating the sharing of music files.

But as Napster closed (and resurfaced as a paid service)[2] KaZaA and other P2P file-sharing software programs emerged. Unlike Napster, KaZaA has a decentralized structure. The searching of files relies on indexing by end-users themselves.

The decentralized nature of P2P networks has made it more difficult to challenge their activities in courts of law because they are not "controlled" by any one entity. There are two factors that can overcome this obstacle, however:

(a) The lack of end point anonymity—a computer's identity or Internet Protocol (IP) address is readily available; Internet Service Providers can link the user's IP address with its customer records and subsequently reveal the identity of the user; and

(b) Free riding—the fact that users commonly set their computers to download but not share files with other users. This results in a smaller number of computers holding large collections of illicit copyrighted material which are in turn made available to other users. Targeting these users will invariably frustrate the network.[3]

These factors have led to lawsuits being filed against individuals using P2P to "share" copyright-protected works. These actions are being brought under the Digital Millennium Copyright Act (DMCA).[4]

## The *RIAA v. Verizon* Case

In *Recording Industry Association of America v. Verizon Internet Services*,[5] decided late last year, the D.C. Circuit found that subpoena provision section 512(h) of the DMCA did not authorize the issuance of a subpoena to an ISP which was alleged to have provided the means of communication but which could not be said to have control over material located on its customers' computer hard drives.

Section 512(h) permits the copyright owner (or its agent such as the RIAA) to request the clerk of any United States district court to issue a subpoena to an ISP for the identification of an alleged infringer. The issuance of the subpoena is contingent on filing of (i) a notification of the claimed infringement of copyrighted work(s), (ii) the proposed subpoena directed to the ISP, and (iii) a sworn declaration that the purpose of the subpoena is "to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting" rights pursuant to copyright law.

The Court pointed out that, irrespective of the RIAA's motion to compel pursuant to section 512(h), "the ISP can neither 'remove' nor 'disable access to' the infringing material because that material is not stored on the ISP's servers" but rather on customer hard drives.[6]

It further found that Congress could not have foreseen the application of section 512 (h) to P2P file-sharing when the DMCA was enacted. Had it anticipated this development, the subpoena provision might have been drafted more broadly.[7]

The Court sympathized with the record industry's plight but felt constrained by the language and intent of the DCMA, as Judge Ginsburg observed:

> We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights. It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen internet architecture, no matter how damaging that development has been to the music industry or threatens being to the motion picture and software industries.[8]

## Unmasking the Doe—the Record Companies' New Tactic

In response to the D.C. Circuit's decision in *Verizon*, record companies have begun to commence "Doe" suits in federal courts around the country, accusing unnamed defendants of copyright infringement on P2P networks. In January and February 2004, over a dozen such lawsuits were filed in the name of individual record companies against "Doe" defendants.[9] The complaints were accompanied by motion papers seeking a court order authorizing the service of a subpoena pursuant to Rule 45, Fed. R. Civ. P., directed to ISPs. The supporting motion papers indicated that RIAA traced file-sharing activity to "IP" addresses assigned to users who were customers of particular ISPs. The ISPs could be identified because each ISP is assigned a particular range of IP addresses.

In *Elektra Entertainment Group Inc. v. Does 1-7*, filed in the District of New Jersey,[10] the form of order tendered to the Court sought the following discovery:

> ORDERED that Plaintiffs may serve immediate discovery on RCN to obtain the identity of each Doe Defendant by serving a Rule 45 subpoena that seeks information sufficient to identify each Doe Defendant, including the name, address, telephone number, e-mail address, and Media Access Control addresses for each defendant.[11]

In *Capitol Records, Inc. v. Does 1-250*, filed in the Southern District of New York, the plaintiff sought similar relief[12] and in motion papers stressed need for the issuance of an immediate subpoena to the ISP, citing the practice of ISPs commonly erasing the identifying IP information every week or ten days.[13] In *Elektra*, the Court issued the order for discovery on February 18, 2004, the day after the action was filed. In *Capitol Records*, the discovery order was issued five days after the case was filed.

## Cybersmear to the Rescue?

How should courts respond when presented with an application for a subpoena in such Doe lawsuits? The Federal Rules of Civil Procedure are largely silent on the criteria courts are to apply in ruling on an application for discovery before the summons and complaint has been served.

Perhaps courts should look to cases in the context of cyber defamation or "cybersmear," where a body of jurisprudence has accumulated about how courts are to decide applications for "identity discovery"—discovery needed in order for the plaintiff to "identify" the defendant. First Amendment advocates such as Public Citizen and the Electronic Freedom Foundation[14] have intervened in the most notable of such cases and successfully argued as *amici* that, before disclosing any information to the record company plaintiff, an effort should be made to give notice of the lawsuit to the anonymous defendant. Further, such organizations argue that, before an order for "identity discovery" is entered, the court must be satisfied that the claims of the plaintiff against an anonymous defendant are viable when considered under the kind of scrutiny applicable to a motion for summary judgment.[15]

In *Dendrite v. Doe*, the corporate plaintiff accused the defendant of defamation based upon a message posted anonymously on Yahoo! Finance to the effect that the chairman of the company was "shopping" the company and had inflated earnings.[16] As one of the prerequisites to identity discovery, the Court required the plaintiff to post notice of the lawsuit in the Yahoo! Finance chatroom where the notice originally appeared.[17] After this prerequisite had been satisfied, the Court then considered whether the allegations in the complaint against the anonymous defendant were viable according to a *prima facie* standard.[18] The Court held that the corporate plaintiff had failed to prove *harm* to its business from the posting on Yahoo! Finance about the company. Since proof of harm is a requirement for a viable defamation claim in New Jersey, the Court denied the application for discovery.[19]

In the "cybersmear" cases such as *Dendrite*, courts have recognized that anonymous online activity implicates important First Amendment rights of free speech, association, and privacy.[20] These courts have also wrestled with the notion that identity discovery is sometimes the goal of the lawsuit itself. In the P2P context, once the file-sharer is "unmasked," the case essentially is over, given that few file-sharers will have the resources to challenge the RIAA and major record labels pitted against them. If the real battle in these cases is over the identity of the anonymous defendant, a more rigorous scrutiny is in order before the Doe defendant is unmasked.

Record companies now suing P2P file-sharers arguably will have an easier time satisfying the *prima facie* standard than did the corporate plaintiff in *Dendrite.* Still, given the First Amendment interests involved, courts should consider a three-step procedure. First, the court should order the ISP where the file-sharer operates to preserve all information relating to the IP addresses cited in the motion papers.[21] Perhaps this same order should direct the file-sharer also to preserve all data on his or her computer. Second, the court should order the ISP to give notice of the lawsuit, and the application for identity discovery, to the customer in question. Third, after a reasonable period has passed (perhaps fifteen days), the court may entertain the application for identity discovery and, if satisfied that the complaint alleges a viable claim for copyright infringement, enter an order compelling the ISP to disclose the customer's identity.

Further, an ISP facing a court order seeking discovery of customer identity should delay responding to the subpoena until after it gives notice to the customer making it aware that the subpoena had been served, regardless of whether the court has ordered such notice. This has been the routine practice of AOL, Yahoo! and other web portals when served with subpoenas in cybersmear cases. By giving such notice, the ISP can reduce the possibility that it will face some kind of later invasion of privacy lawsuit by a user alleging that the ISP erroneously or otherwise without good cause revealed the user's identity and information about the user's online behavior.

It is worth noting in this context that the protection of personal information is a central pillar of trust in the ongoing business relationship between the ISP and its customer. In addition to being a good business practice, giving notice to the customer will protect the ISP from facing possible privacy claims from customers. Subscribers may cite the Cable Communications Privacy Act,[22] which can be read as permitting a cable operator to disclose subscriber information only after the operator first gives notice to the subscriber that it has been served with a court order requiring disclosure of the subscriber's identity. Imposing a requirement that the subscriber receive notice of the request for identity discovery before his or her identity is disclosed will reduce the ISP's exposure to such a claim.

## Endnotes

1. *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1004 (9th Cir. 2002).
2. *See* http://www.napster.com/ (last visited March 10, 2004).
3. Biddle, P., England, P., Peinado, M., & Willman, B., *The Darknet and the Future of Content Distribution*, in Proceedings of the 2002 ACM Workshop on Digital Rights Management (Washington, D.C., Nov. 18, 2002).
4. Pub. L. No. 105-304, 112 Stat. 2860 (amending title 17 of the U.S.C.).
5. 351 F.3d. 1229 (D.C. Cir., Dec. 19, 2003).
6. *Id*. at 1235 *per* Ginsburg, C.J.
7. *Id.* at 1238.
8. *Id*.
9. A list of such lawsuits appears at the Electronic Freedom Foundation's web site at http://www.eff.org/IP/P2P/riaa-v-thepeople.php.
10. *Elektra Entertainment Group Inc. v. Does 1-7*, U.S.D.C., D.N.J., Civil Action No. 04-607 (GEB); *Capitol Records, Inc. v. Does 1-250*, U.S.D.C., S.D.N.Y., Civil Action No. 04-472 (LAK).
11. In a local area network (LAN) or other network, the MAC (Media Access Control) address is a computer's unique hardware number. On a local area network, the MAC is the same as the machine's Ethernet address. When connected to the Internet from your computer (or host, as the Internet protocol thinks of it), a correspondence table relates your IP address to your computer's physical (MAC) address on the local area network. *See* http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212506,00.html.
12. Order entered January 26, 2004 in *Capitol Records, Inc. v. Does 1-250*, U.S.D.C., S.D.N.Y., Civil Action No. 04-472 (LAK).
13. Where an ISP uses a system of "dynamic" (as opposed to "static") IP addresses, IP information is purged within a matter of weeks or less as IP addresses are recycled from one user to another. A data preservation demand served upon the ISP should serve to preserve a request that the ISP preserve, permitting courts to act upon the subpoena application in a more leisurely fashion.
14. Information regarding these organizations is available at http://www.citizen.org and http://www.eff.org/ respectively (last visited March 12, 2004).
15. *See La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857 (Conn. Super. Ct.); *Melvin v. Doe*, 49 Pa. D. & C.4th 449 (2000), *appeal quashed*, 789 A.2d 696, 2001 Pa. Super. 330 (2001), *appeal reinstated*, 836 A.2d 42 (Pa. 2003); *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. Div. 2001); *Columbia Ins. Co. v. Seescandy.com*, 185 FRD 573 (N.D. Cal. 1999).
16. *Dendrite v. Doe*, 775 A.2d 756, 763 (N.J. App. Div. 2001).
17. *Id*. at 760.
18. *Id*.
19. *Id*. at 764.
20. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).
21. This leads to the question of whether the expense of preserving such data (i) is measurable and (ii) should be borne by the ISP.
22. 47 U.S.C. 551.

**Rajen Akalu currently works for the Centre for Innovation Law and Policy at the University of Toronto and is the Bell Universities Lab Manager (Law). He is a member of the Internet and Litigation Committee.**

**Peter J. Pizzi is a partner in Connell Foley LLP in New York City and Chair of the Section's Internet and Litigation Committee.**


Carrie Cohen, Chair of the Section's Planning and Development Committee and former Chair of the Section's Employment and Labor Relations Committee, has been appointed Chief of the Public Integrity Unit at the Office of Attorney General Eliot Spitzer. The Public Integrity Unit is part of the Office's Criminal Division and is responsible for protecting the public's interest in honest government and the integrity of governmental officials at the state and local level. The Unit handles civil and criminal cases involving government corruption, fraud and abuse of authority. Previously, Carrie was an Assistant Attorney General in the Civil Rights Bureau.

## 2004 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 Civil Litigators

| 22 N.Y.C.R.R. § | Court | Subject (Change) |
|---|---|---|
| 202.5(c) | Sup./County | Specifies that "clerk of the court" with which papers commencing lawsuit must be filed is county clerk; requires posting of notice to that effect |

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