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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

Carrie H. Cohen

Our Section has had an outstanding past few months, culminating in record-breaking attendance at our Annual Meeting on January 30, 2008, at the Marriott Marquis in New York City. Vincent Syracuse, our Section's Vice-Chair, organized a tremendous day with thought-provoking panels and a fabulous luncheon. At the lunch, we were honored to have Chief Judge Judith S. Kaye present our Section's Stanley H. Fuld Award to the Honorable Albert Rosenblatt, New York State Court of Appeals (ret.). (A detailed article about the Annual Meeting appears on p. 5 in this *Newsletter*.)

As many of you know, NYSBA President Kate Madigan has issued a Membership Challenge, which includes a goal that each section increase its membership by 3% percent annually each year from 2008 through 2010. I am happy to report that under this Section's current leadership, our Section has not only met that goal, but exceeded it. Since June 2007, our Section has grown 16%, to more than 2,600 members. We have achieved such growth by hard work and increased emphasis on membership. With the help of former Section Chair Stephen P. Younger and Claire P. Gutenkunst, we have focused on increasing membership by, for example, making membership pitches at all Section MCLE events, sending targeted mailings to current NYSBA members who are not affiliated with any Section and to other potential membership pools, and, perhaps most importantly, getting current members involved in the work of our more than

Inside

NYSBA

30 committees, thereby decreasing attrition. We also have presented terrific MCLE programs and issued numerous reports, which has made recruiting new members that much easier. (Several of these programs and reports are highlighted in articles that appear later in this *Newsletter*.)

As President Madigan has stated, bar membership "provides value and relevance and informs who we are as lawyers, as bar and community leaders, and as human beings." Our Section is a perfect example of such value and relevance and I thank each and every one of you for contributing to our Section in so many ways and urge you to continue to do so. While President Madigan's Membership Challenge did not start officially until January 2008, I have no doubt that our numbers will continue to climb and that we will meet and even exceed this challenge each year.

Of course, if you have questions or suggestions, please email me at carrie.cohen@usdoj.gov or call me at 212-637-2264. I look forward to seeing you at our Spring Meeting, May 2-4 at The Equinox in Vermont.

Carrie H. Cohen

Individual Practices of Judges and Magistrate Judges in the Southern District of New York

A Report by the Section's Committee on the Federal Judiciary

By Jay G. Safer and John D. Winter, Committee Co-Chairs

Jay G. Safer

Rule 83(b) of the Federal Rules of Civil Procedure provides that with respect to "Judge's Directives" or "Individual Practices":

> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.[1]

There currently are forty-four active and senior judges and fourteen full-time magistrate judges in the Southern District of New York and all of them have their own Individual Practices. For the most part, the Individual Practices in the Southern District of New York can be grouped into three categories: (a) communications with Chambers; (b) pleadings and motions; and (c) pretrial procedures. A chart outlining and annotating the Individual Practices of Judges and Magistrate Judges in the Southern District of New York by these categories as of November 2007 is attached to the Report as Exhibit A.[2]

Consistent with the prerogatives and latitudes of federal judges and magistrate judges, there is some diversity in their Individual Practices. For example, certain judges in the Southern District of New York allow telephone calls to Chambers, while others discourage or prohibit them. Some judges allow faxes to Chambers and others restrict the sending of faxes. In addition, some judges require two courtesy copies of motions, while other judges require one copy to be delivered to Chambers.

With respect to these Chambers' communication-type requirements, the Bar should expect there to be differences. On procedural or substantive issues, however, because civil rules in federal court should promote "the just, speedy and inexpensive determination of every action,"[3] the Bar benefits from Individual Practices being consistent with the Federal Rules and the Local Rules of the Southern and Eastern Districts of New York;[4] that is, reasonably uniform. And to a large extent, on matters relating to motion practice and pretrial procedures, there is uniformity among the Individual Practices of the judges and magistrate judges in the Southern District of New York.

John D. Winter

With regard to the content of proposed pretrial orders and the length of memoranda of law, almost two-thirds of the judges in the Southern District have identical or nearly identical practices. While the Bar must be mindful of the nuances of each judge's Individual Practices,[5] compliance with them should make adherence to the requirements of the Federal Rules of Civil Procedure easier.

Areas where there already is significant uniformity among Individual Practices include the following:

Pretrial Orders

- Filed within 30 days of the trial date set by the Court.
- Include case caption, names, communication information (address, telephone, fax, email) of trial counsel as well as the following:
  - A statement regarding subject matter jurisdiction.
  - A statement from each party regarding the claims and defenses for a jury trial or a statement of the elements of each claim or defense together with a summary of the facts relating to each element in non-jury cases.
  - An estimate of trial days.
  - What evidentiary issues will be the subject of *in limine* motions.
  - The stipulations the parties have reached on facts or questions of law.
  - Statements by each party regarding each witness whose testimony is to be offered and whether the witness will testify in person or by deposition.
  - Designations and cross-designations with objections of depositions to be offered by each party.

– Exhibit list with authenticity objections identified.
– Proposed Requests to Charge and Voir Dire questions and a Pretrial Memoranda for jury cases.

Memoranda of Law

- Memoranda in support or opposition to a motion must be up to 25 pages in length.
- Reply memoranda must be up to 10 pages in length.
- Any memoranda 10 pages or longer must contain a table of contents.

With respect to summary judgment motions, there is a Southern District Local Rule that addresses the format of the Rule 56.1 statement.[6] Some judges have Individual Practices that also address the format of the Rule 56.1 statement. One of the Individual Practices that could be considered as an addition to the existing Local Rule or as a uniform Individual Practice is as follows:

> The Local Rule 56.1(a)(2) Statement by the party opposing summary judgment shall set forth verbatim the text of each paragraph of the Local Rule 56.1(a)(1) Statement immediately preceding its response thereto.

Such a requirement would make it easier for the parties, as well as the Court, to determine whether triable issues of fact are in dispute.

In sum, while federal court practitioners may sometimes complain that it is difficult to adhere to each judge's differing Individual Practices, on the whole, the Practices are fairly uniform and the Committee hopes that the chart provides useful guidance. In addition, the Committee hopes that its suggestion regarding Rule 56.1 Statements is helpful to both the bench and the bar.

Endnotes

1. *See* Fed. R. Civ. P. 83(b).
2. Exhibit A is too lengthy for this *Newsletter,* but the Report will be published in its entirety in an upcoming edition of the *NYLitigator* and is also available online at http://www.nysba.org/comfed. [Editor].
3. *See* Fed. R. Civ. P. 1.
4. *See Fruit of the Loom, Inc. v. American Marketing Enterprise, Inc.*, 192 F.3d 73, 75 (2d Cir. 1999) ("District court judges are bound by the Federal Rules of Civil Procedure and may not apply their individual practice rules in a manner that is inconsistent with the Federal Rules."); *see also Camacho v. City of Yonkers*, 236 F.3d 112, 117 (2d Cir. 2000) (dismissing defendant's appeal, the Second Circuit stated, "We do so with the hope, however, that this result can be avoided in the future if litigants rely on the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure when they calculate the time for taking an appeal and the district courts modify local and individual rules, so they do not lead the unwitting to believe that they have preserved a right to appeal when in fact they have not.").
5. *See Camacho*, 236 F.3d at 113 ("[W]e respectfully request that the district courts examine court rules and individual judges' rules and consider revising those that serve as a snare for the unwary litigant."); *Fruit of the Loom*, 192 F.3d at 74 ("We write to remind the bar that individual practice rules of a district judge must be read in conjunction with the Federal Rules of Civil Procedure and the Federal Rules and their jurisdictional filing dates supersede any seemingly contrary district court practice rule."). Commentary associated with an amendment to Rule 83(b) in 1995 noted:

   > [T]he amendment to this rule disapproves imposing sanctions or other disadvantage on a person for noncompliance with such an internal directive, should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular court unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practice—or attaching instructions to a notice setting a case for conference or trial—would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

   Fed. R. Civ. P. 83 advisory committee's note. While litigation associated with a party being sanctioned for noncompliance with a judge's Individual Practices has not been extensive, the Second Circuit has made it clear that sanctions cannot be imposed for noncompliance with an Individual Practice unless the alleged violator previously was furnished with actual notice of the requirement. *See Amnesty America v. Town of West Hartford*, 288 F.3d 467, 471 (2d Cir. 2002) ("To the extent that district courts in this Circuit have held otherwise, *see Murungi v. United States Dep't of Veterans Affairs*, 136 F. Supp. 2d 154, 157 n.2 (W.D.N.Y. 2001), we now clarify that under Fed. R. Civ. P. 83(b), actual notice or the existence of a local rule providing notice is a precondition to the imposition of a sanction for failing to comply with a citation requirement."). Moreover, the Second Circuit has made clear that an Individual Practice cannot impose requirements not found in federal law or the Federal Rules. *See id*. ("While district courts have considerable latitude in fashioning rules that will assist them in determining whether summary judgment is appropriate, they may not impose sanctions on litigants 'for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with *actual notice* of the requirement.'") (emphasis in original) (citing Fed. R. Civ. p. 83(b)).
6. *See* S.D.N.Y. R. 56.1.

Section's 2008 Annual Meeting Attracts Capacity Audience

By Section Chair Carrie H. Cohen and Vice Chair Vincent J. Syracuse

The Commercial and Federal Litigation Section's Annual Meeting was held at the Marriott Marquis on January 30, 2008. The event attracted a capacity audience of more than 400 litigators from across New York State. The program was chaired by the Section's Vice Chair, Vincent J. Syracuse, Tannenbaum Helpern Syracuse & Hirschtritt LLP, and featured a two-part MCLE program that addressed two "Litigation Hot Topics" faced by commercial litigators in everyday practice: electronic discovery and witness preparation ethics.

"Developments in E-Discovery in New York Federal and State Courts and in Arbitration" was moderated by the Co-Chair of the Section's Committee on Corporate Litigation Counsel, Richard B. Friedman, Dreier LLP, and focused on the different approaches to e-discovery taken by New York federal and state courts and arbitrators. The Section was honored to have as panelists the Honorable Leonard B. Austin, Supreme Court, Nassau County, Commercial Division; the Honorable Andrew J. Peck, United States Magistrate Judge, Southern District of New York; Constance M. Boland, Esq., Nixon Peabody LLP and Co-Chair of the Section's Committee on E-Discovery; Adam I. Cohen, Esq., Senior Managing Director, Electronic Evidence, FTI Consulting, Inc. and Co-Chair of the Section's Committee on E-Discovery; and Robert B. Davidson, JAMS. The panel discussed the different ways e-discovery is treated in the various dispute resolution forums. The program highlighted the issue that when litigants select a filing forum, e.g., federal or state courts or arbitration, they make a choice that may result in different resolutions of e-discovery issues. There was a lively discussion about the impact of the December 1, 2006, amendments to the Federal Rules of Civil Procedure and other topics, such as the types and sources of electronically stored information ("ESI") and the issue of what constitutes accessible versus inaccessible ESI.

Anthony J. Harwood, Labaton Sucharow LLP, and James M. Wicks, Farrell Fritz. P.C., Co-Chairs of the Section's Committee on Ethics and Professionalism, put together the morning's second program entitled "The Ethics of Witness Preparation." This program addressed various ethical issues raised in the context of preparing witnesses for depositions and trial. The program illustrated the ethical dilemmas faced during witness preparation through a live hypothetical attorney/witness preparation session followed by an engaging panel discussion. Ellen Yaroshefsky, Clinical Professor of Law and Director, Jacob M. Burns Center for Ethics in the Practice of Law at Cardozo Law School, acted as the moderator, and, in addition to Mr. Wicks and Mr. Harwood, the Section again was honored to have as panelists the Honorable Denny Chin, United States District Judge, Southern District of New York; Michael S. Ross, Esq., Law Offices of Michael S. Ross; Jeremy Feinberg, Statewide Special Counsel for Ethics and the Commercial Division; and Geri Krauss, Esq., Krauss PLLC.

These outstanding morning programs were immediately followed by a reception and luncheon attended by more than 400 attorneys and judges. During the luncheon, Section Chair Carrie H. Cohen recognized the attendance at the luncheon of more than 50 federal and state judges, including the entire New York State Court of Appeals. Ms. Cohen also reviewed the Section's numerous accomplishments during the past year and its record-setting growth to more than 2,600 lawyers from Buffalo to Montauk.

The highlight of the day was the presentation of the Section's Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation by Chief Judge Judith S. Kaye, herself a past winner of the Fuld Award, to the Honorable Albert M. Rosenblatt. Judge Rosenblatt now practices at McCabe & Mack LLP in Poughkeepsie, New York, and his twenty-five year distinguished judicial career included eight years as an Associate Judge of the New York State Court of Appeals as well as service in the Appellate Division, Second Department and in the Supreme Court, Duchess County, and two years as New York State's Chief Administrative Judge. Judge Kaye's opening remarks set the perfect tone for Judge Rosenblatt's lively discussion about the importance of civility in the profession.

Hon. Judith S. Kaye, Chief Judge of the New York State Court of Appeals; Hon. Albert M. Rosenblatt, Associate Judge, New York State Court of Appeals (ret.); Carrie H. Cohen, Section Chair.

The Section's Annual Meeting also included the introduction and election of officers for the 2008-2009 term. The Honorable Melanie L. Cyganowski, former Chief United States Bankruptcy Judge for the Eastern District of New York, who now practices at Greenberg Traurig LLP and is Chair of the Section's Nominations Committee, presented the Committee's nominations for upcoming officer positions. The following officers were duly elected by the Section's membership: Peter Brown, Thelen Reid Brown Raysman & Steiner LLP, Chair; Vincent J. Syracuse, Tannenbaum Helpern Syracuse & Hirschtritt LLP, Chair-Elect; Jonathan D. Lupkin, Flemming Zulack Williamson Zauderer LLP, Vice Chair; Victoria Zaydman, Hogan & Hartson LLP, Secretary; and Susan M. Davies, Shalov, Stone, Bonner & Rocco LLP, Treasurer. The Section also elected David H. Tennant, Nixon Peabody LLP, and David Rosenberg, Marcus, Rosenberg & Diamond LLP, as its alternate representatives to the NYSBA House of Delegates.

Following the luncheon, Section members proceeded to the Presidential Summit, where President Kathryn Grant Madigan hosted panels on youth at risk and on practicing law in a global economy.

Commercial and Federal Litigation Section Comments on COSAC Proposals

By Stefanie J. Sundel

The NYSBA's Committee on Standards of Attorney Conduct ("COSAC") has been hard at work and has produced nearly 500 pages of proposed disciplinary rules, which now have been sent to the Presiding Justices of the Appellate Division for consideration. In November 2007, the New York State Bar Association's House of Delegates unanimously approved revisions designed to transform New York's current Code of Professional Responsibility ("NYCPR") into a new, state Model Rules of Professional Conduct.[1] In a report dated September 28, 2007, which was written by the Section's Committee on Ethics and Professionalism and adopted as a report of the Section, the Section commented on the propriety of the proposed new rules governing attorney conduct.[2] The Section lent its support to the long-awaited changes, which are essentially a hybrid of the ABA Model Rules, provisions from the current New York Code of Professional Conduct (which went into effect January 1, 1970), and rules combining language from both.

Many of the proposed rules are ABA Model Rules modified by COSAC for New York application, while others are proposed rules that derive from the current NYCPR.[3] For example, the proposed COSAC *Preamble* steers away from the old NYCPR tenets and more closely mirrors the ABA Model Code *Preamble*, which speaks to the practical responsibilities and professional obligations of attorney to client as opposed to the NYCPR's discussion of lawyers as "guardian[s] of the law" playing a "vital role in the preservation" of democratic society. The Section endorsed the proposed *Preamble* because it more firmly focuses on attorneys' obligations to clients (and to the profession) rather than on the role of lawyers in society.

Another example is subparagraph (c) of proposed Rule 3.3, which deals with "Candor Toward the Tribunal" and provides express direction that has no counterpart in the current NYCPR. "The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. After the conclusion of the proceeding, the lawyer may reveal such information to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's fraud on the tribunal." The Section supported this proposed rule because such guidance provides greater certainty to the practitioner who seeks to fully comply with the Rules, by removing room for interpretation and subjective construction.

A more glaring example of an ethical loophole highlighted by the Section in its comments to COSAC manifests itself in proposed Rule 4.1, which deals with "Truthfulness of Statements to Others." The COSAC proposal imposes less restriction than both the existing NYCPR and ABA Model Code.

First, unlike the existing New York rule, proposed Rule 4.1 limits the prohibition to only "material" statements. Second, it rejects ABA Rule 4.I. ¶ (b), which requires a lawyer, if disclosure is permitted by Rule 16, "to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." Third, it replaces the phrase "criminal and fraudulent" conduct with "illegal and fraudulent" conduct.

The more narrowed focus of this rule enunciates a policy determination that weighs the confidentiality of the attorney-client relationship and privilege far more heavily than the policy concerns that militate in favor of disclosure. As this proposed rule deals directly with communications that otherwise would be privileged and because disclosure of the information generally would be harmful to the client, its application in practice can present a difficult dilemma for the attorney. The Section found that narrowing the prohibition and eliminating the need for disclosure in any event, certainly in theory, would help reduce the number of times an attorney would need to squarely face this dilemma, and this proposed change was endorsed by the Section. The Section noted, however, that in several respects the proposed rules do not provide much guidance as to what would be encompassed (and what might not be encompassed) by the narrowed prohibition.

The proposed rule prohibits a knowingly false statement of material fact or law to a third party in the course of representing a client. Thus, the terms that may raise issues regarding the actions prohibited by this proposed rule include: "knowingly," "false statement," and "material fact or law." The only one of these terms defined in 1.0 is "knowingly," which is defined as "actual knowledge" and "actual knowledge may be inferred from the circumstances." Although the other terms are addressed in the comments, those comments themselves raise additional questions; and the Section suggested that greater definitional clarity be added. Moreover, the definition of knowledge limits the scope of this proposed rule even further.

By its terms, the proposed rule does not embrace within its prohibition knowledge that the attorney "should have known"; the Section expressed a concern that this may be viewed as encouraging an attorney not to conduct full due diligence or investigate statements made by clients or others on whom they may rely, so as not to technically come within the prohibition. This limitation could prove particularly problematic where some theories of third-party liability impose or seek to impose a much higher standard. Thus, the anomalous situation may arise where an attorney has completely comported with the ethical rules, but could still face serious civil claims by a client or an adversary because the ethical rule may be less stringent than the legal rules.

Viewing the COSAC report from the perspective of litigators, the Section found that proposed rules are an improvement, as they provide more guidance for lawyers. The entire text of the Section's comments was considered by COSAC and distributed to the NYSBA House of Delegates at its November 2007 meeting.

Endnotes

1. Joel Stashenko, "N.Y. Bar Panel Urges Adoption of New Conduct Rules," *New York Law Journal*, November 7, 2007.
2. Comments of the Ethics and Professionalism Committee of the Commercial and Federal Litigation Section, drafted by A. Rebecca Adams, Anthony Harwood, Geri S. Krauss, Stefanie J. Sundel, and James M. Wicks.
3. Joel Stashenko, "N.Y. Bar Panel Urges Adoption of New Conduct Rules," *New York Law Journal*, November 7, 2007.

Stefanie J. Sundel is associated with the law firm of Labaton Sucharow LLP and a member of the Section's Committee on Ethics and Professionalism.

Committee on Ethics and Professionalism

The Committee on Ethics and Professionalism continues to play an active role in the Commercial and Federal Litigation Section. Membership in the Committee has increased to twenty-four members, including co-chairs Anthony Harwood, Labaton Sucharow LLP, and James Wicks, Farrell Fritz, P.C. Throughout this past year, the Committee worked on several key reports, as well as continuing legal education programs. These activities follow last year's work on providing comments to the then-proposed advertising rules.

The Committee's mission is to enhance the level of professionalism among lawyers and judges by: i) encouraging, recommending, and providing assistance to other sections and committees in the development and coordination of professionalism initiatives; ii) encouraging and providing assistance through continuing legal education programs and reports to improve professionalism; iii) educating members of the legal profession and the public about development of ethics and professionalism issues; and iv) identifying, evaluating, and reporting on trends and developments affecting ethics rule changes and lawyer professionalism.

At this year's Annual Meeting of the Section, the Committee chaired a program on the Ethics of Witness Preparation. Through a mock attorney-client session, panelists were asked to comment and provide guidance on various ethical issues arising out of the preparation of a witness for testifying. The program was extremely well attended and received.

Earlier, in September 2007, the Committee reviewed the draft rules proposed by the State Bar's Committee on Standards of Attorney Conduct ("COSAC") and provided comments on the proposed rules, which were adopted by the Section and provided to COSAC. In addition, this year the Committee worked hard on a project in collaboration with the Section's Committee on Class Action Litigation and wrote a Joint Report on communicating with absent class members. Specifically, the Joint Report responded to Formal Opinion 07-445 of the ABA Study Committee on Ethics and Professional Responsibility, which Opinion concluded that counsel for any party may communicate with putative class members.

Anyone wishing to get involved with the Committee should contact the Committee's Co-Chairs, Anthony Harwood at aharwood@labaton.com or James Wicks at jwicks@farrellfritz.com.

On January 29, 2008, at the Annual Meeting of the NYSBA, the President of the Association and the Chair of the Association's Committee on Attorneys in Public Service presented the Committee's 2008 Award for Excellence in Public Service to the Section's longtime Executive Committee member and newsletter editor, Mark Davies.

New York State Bar Association

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COMMERCIAL AND FEDERAL LITIGATION SECTION

2007-2008 Officers

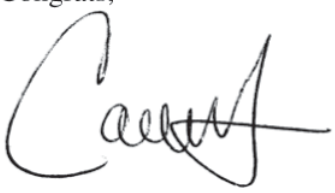
January 17, 2008

Mark L. Davies
11 East Franklin Street
Tarrytown, New York 10591

Dear Mark:

On behalf of the NYSBA Commercial and Federal Litigation Section, we congratulate you on receiving the Committee on Attorneys in Public Service's 2008 Award for Excellence in Public Service. Not only do you embody everything the public deserves in a public servant, you also honor and serve your profession, by, for example, your long and distinguished service as Editor of our Section's Newsletter. The Award you receive today has a long and distinguished history with fellow awardees including Chief Justice Judith S. Kaye, the Honorable Jonathan Lippman, and the Honorable Robert Morganthau. Our Section is well aware of how lucky we are to work with you and we are so glad that your colleagues have recognized your tremendous contribution to public service.

Congrats,



Carrie H. Cohen
Chair, Commercial and Federal Litigation Section

Mediation Advocacy for Women and Minorities

By Deborah Masucci

In the fall of 2007, the Section offered a 4-part program on Mediation Advocacy for Women and Minorities. The program was co-chaired by the Honorable Barry A. Cozier, Epstein, Becker & Green, P.C., and Chair of the Section's Committee on Diversity; and Deborah Masucci, AIG Domestic Brokerage Group and Co-Chair of the Section's Committee on Arbitration and ADR. The purpose of the program was to broaden the depth and experience of women and minorities regarding the use of mediation to effectively meet the needs of their clients. Panel members were comprised of experienced ADR professionals, attorneys, and jurists; and a theme of each part of the program was how racial, cultural, and gender diversity impacts decisions in mediation, including the choice of mediators, negotiation approaches, and organization of the mediation session. Co-sponsors of the program included the Asian Bar Association, Association of Black Women Attorneys, the Metropolitan Black Bar Association, the Puerto Rican Bar Association, and the New York City Bar ADR Committee.

The first session was held on September 27, 2007, at the offices of Patterson Belknap Webb & Tyler LLP. The presentation included a basic introduction to Mediation and Mediation Advocacy with panelists Dan Weitz, Esq., Deputy Director of the Division of Court Operations and Statewide Coordinator of the Office of Alternative Dispute Resolution and Court Improvement Programs for the New York State Unified Court System; Sandra Grannum, Esq., Partner, Davidson & Grannum, Ricardo Granderson, Esq., President, The Granderson Group, A Dispute Resolution Consulting Firm; and Joan Stearns Johnsen, Esq., Mediator and Arbitrator, JSJ Mediations.

At this first session, the concept of mediation or "facilitated negotiation" was introduced, and the panel addressed how matters get to mediation. The panel concurred that, although as recently as several years ago the debate regarding mediation concerned what type of cases should be referred to mediation, today the presumption is that all cases should be mediated unless there are extenuating circumstances. It also was the unanimous opinion of the panel that as the mediation user market grows, an initial concern that suggesting mediation is an admission of weakness will no longer be a barrier to mediation. The panel further discussed how mediation advocacy is distinct from litigation advocacy and thus requires a different skill set. Just as with litigation advocacy, there are differing styles of mediation advocacy and mediators. The theme in mediation is flexibility and adaptability to each situation; and, for example, when the clients participating in the mediation are women or minorities, alternative presentation scenarios may need to be considered.

The panel further discussed the role of the mediator, which is to facilitate a resolution as opposed to an arbitrator, judge, or jury, whose role is to resolve the dispute. Different mediators use different styles to accomplish resolution. The panelists explained that the most common terms used to identify styles are evaluative and facilitative. With the first style, the mediator analyzes the strengths and weaknesses of each side and shares his or her own predictions of likely results. The evaluation forms the basis for the ultimate resolution. The more facilitative mediator focuses more on risk and less on predicting results. Many mediators use a combination of the two forms or, in accord with the theme of flexibility, whatever is appropriate for the circumstance.

The second session was held on October 11, 2007 at Nixon Peabody LLP. This panel was chaired by Tracee E. Davis, Zeichner Ellman & Krause LLP, and included panelists Ruth D. Raisfeld, Mediator and Arbitrator; Stacey M. Gray, Esq., Stacey M. Gray, P.C.; and Simeon H. Baum, Resolve Mediation Services, Inc. The focus of the session was on how mediators and arbitrators prepare, from the pre-mediation stage through the negotiation stage. The panel first discussed the basic skills needed for effective representation of parties in the mediation and what to anticipate in the pre-mediation conference call with the mediator. Simeon Baum highlighted the mediator advice he gives to advocates in his published list of 'Ten Things Not to Do in Mediation," which describes pitfalls that advocates should avoid.

Panelists at the second session also discussed the critical importance of attorneys educating and preparing their clients so that the client is an effective participant during the joint session when both parties meet with the mediator. Further, since cultural and diversity biases can impact the process, Stacey Gray highlighted the importance of minority and women attorneys addressing stereotypes and other preconceptions that can affect the integrity of the process and the interests of their clients. Ruth Raisfeld also explained how and when in the joint session a party representative can or should take control of the agenda and outcome of the mediation.

The third session was held on October 31, 2007, at Thelen Reid Brown Raysman & Steiner LLP. This session included panelists Irene C. Warshauer, Mediator and Arbitrator, and Michael Lewis, JAMS, The Resolution Experts. The focus of the session was impasse-breaking techniques

and using relationships developed through mediation to move the matter to resolution after the mediation event. The first impasse-breaking technique discussed by Michael Lewis was not to let impasse happen in the first place. The best way to prevent an impasse is to work extensively with counsel and the parties prior to mediation so that the mediator and the parties are aware of potential trouble spots and can concentrate on getting certain issues resolved and approaching certain issues differently.

The final session was held on November 8, 2007, at Morrison & Foerster LLP. This program informed the participants of the mediation process in the United States District Courts for the Southern and Eastern Districts of New York and the Supreme Court of the State of New York, County of New York, Commercial Division. The panel included the Honorable Harold Baer, Jr., United States District Judge, Southern District of New York; the Honorable Robert Levy, United States Magistrate Judge, Eastern District of New York; the Honorable Pablo Rivera, Clerk in Charge, New York Supreme Court; and Richard Weinberger, Esq., Of Counsel, Ballon, Stoll, Bader & Nadler, P.C., Mediator and Arbitrator, Program Chair. The Panel distributed written materials and explained the alternative dispute resolution programs in their respective courts and how to apply for certification as a mediator.

The Section extends its appreciation to the law firms that volunteered their facilities for the program and to the panelists who imparted valuable tips to all participants.

Deborah Masucci of AIG Domestic Brokerage Group is Co-Chair of the Section's Committee on Arbitration and ADR.

First Ever Section-Sponsored "Upstate" Bench/Bar MCLE Program

By David H. Tennant

On November 8, 2007, the Commercial and Federal Litigation Section sponsored a Continuing Legal Education Program and reception in Rochester, New York, drawing approximately 100 commercial litigators from Central and Western New York. The program, entitled "Where the Action Is: Commercial Litigation in State Court/ Views from the Bench," included a video and panel discussion. All three "Upstate" Commercial Division Justices participated: the Honorable Deborah Karalunas (Onondaga County), the Honorable Kenneth Fisher (7th Judicial District, which includes Monroe County), and the Honorable John Curran (Erie County). The Justices talked about, among other things, their approach to settling cases and expedited discovery to support a preliminary injunction. The "Bench" also good-naturedly answered the following question: "What's one thing the bar does not know about you and would be surprised to learn?"

Mitchell J. Katz, Menter, Rudin & Trivelpiece, P.C.; David Tennant, Nixon Peabody LLP; Carolyn Nussbaum, Nixon Peabody LLP; Sharon Porcellio, Lippes Mathias Wexler Friedman LLP; Hon. Kenneth Fisher, Supreme Court, 7th Judicial District; Hon. Deborah Karalunas, Supreme Court, Onondaga County; Hon. John Curran, Supreme Court, Erie County; Carrie H. Cohen, Assistant United States Attorney, Southern District of New York.

For the MCLE portion of the program, the Commercial Division Justices were joined by experienced commercial litigators who practice in Syracuse (Mitchell J. Katz from Menter, Rudin & Trivelpiece, P.C.), Rochester (Carolyn Nussbaum from Nixon Peabody LLP), and Buffalo (Sharon Porcellio from Lippes Mathias Wexler Friedman LLP and former chair of the Section). Jeremy Feinberg, Statewide Special Counsel for Ethics and the Commercial Division, Office of Court Administration, rounded out the distinguished faculty. David Tennant from Nixon Peabody LLP (in Rochester) served as Program Chair and Moderator.

Attorneys attending the program received 2.5 hours of MCLE credit at no cost, including .5 hours of ethics credit. The regional Bench/Bar MCLE program and reception was the first of its kind for the Section. It was such a tremendous success that the Section anticipates rotating the program to Buffalo and Syracuse in coming years.

David H. Tennant is a partner at Nixon Peabody LLP and Co-Chair of the Section's Committee on Appellate Practice.

MCLE Panel on Engaging and Working with Investigative Consultants

By Evan T. Barr

Evan T. Barr

On November 14, 2007, the Section's Committee on White Collar Criminal Litigation sponsored a three-hour MCLE panel discussion at the Princeton Club in Manhattan entitled "Engaging and Working with Investigative Consultants."

The panel, moderated by Harold Gordon (Partner at Jones Day), dealt with the boundaries of permissible investigative conduct. Robert Khuzami (Managing Director at Deutsche Bank) and Arlene Semaya (Senior Managing Director at Bear Stearns) used the recent Hewlett-Packard scandal—in which phone records of board members were surreptitiously obtained—as a case study to explore the use of investigative methods such as "pretexting." Allen Applbaum (Senior Managing Director at FTI Consulting) and Christopher Falkenberg (President of Insite Security, Inc.) provided a detailed discussion of the federal and state statutes prohibiting "pretexting" and other deceptive investigative conduct.

Karen Patton Seymour (Partner at Sullivan & Cromwell LLP) and Barry Berke (Partner at Kramer Levin Naftalis & Frankel LLP) provided an overview of the *Pellicano* case, in which a prominent Hollywood private investigator and others have been charged with federal wiretapping crimes in connection with investigative work done for prominent attorneys. Mr. Applbaum and Mr. Falkenberg addressed the question of whether the boundaries of permissible investigative conduct shift if the work in question is being performed outside the United States, using Diligence LLC's alleged infiltration of a Bermuda office of KPMG as a case study.

Robert Kirshenberg (Partner at Greenberg Traurig LLP) along with Ms. Seymour and Mr. Berke led a discussion of how attorneys can best make effective and ethical use of investigators in both civil and criminal litigation. The panel discussed, for example, how to instruct investigators in conducting witness interviews and information-gathering techniques. Mr. Kirshenberg provided insight into preserving privileges in the course of an investigation and dealing with the potential discoverability of an investigation's results. Mr. Applbaum and Mr. Falkenberg offered practical tips on formally retaining and paying for an investigative consultant and on choosing whether to memorialize the results of an investigation in writing.

Mr. Khuzami and Ms. Semaya provided insights into how and when corporate boards and senior management should use investigators for due diligence and compliance purposes, anti-money laundering and FCPA issues, and addressing whistleblower complaints or other allegations of employee misconduct or fraud. They also discussed the issue of when it was appropriate for a company to retain independent outside investigators and counsel in these situations.

A lively question-and-answer session followed. The panel succeeded in demonstrating that the legal and ethical issues involving the use of investigative consultants are complex, interesting, and timely.

Evan T. Barr is a partner at Steptoe & Johnson LLP and Co-Chair of the Section's Committee on White Collar Criminal Litigation.

The Commercial and Federal Litigation Section Tackles Civil RICO

By Jonathan D. Lupkin and Michael C. Rakower

Jonathan D. Lupkin

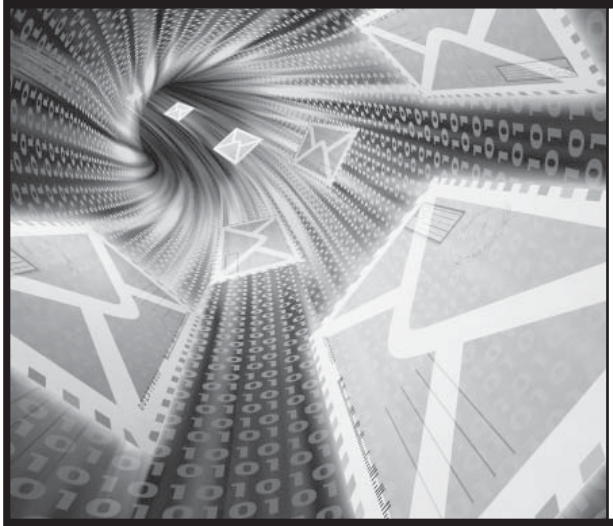
Litigation involving the Racketeering Influenced Corrupt Organizations (RICO) Act has exploded over the last several years. Initially drafted as a tool to combat organized crime, the RICO Act has become a bulwark against white-collar conspiracies. Civil RICO cases, grounded in allegations of fraudulent conspiracies and similar criminal misconduct, transfix the public and frighten big business. Facing the risk of public scorn and the prospect of paying treble damages and attorney's fees, RICO defendants will often settle cases early. So potent are the remedies afforded by the statute, that one Federal Court described civil RICO as the "litigation equivalent of a thermonuclear device."

On November 28, 2007, in an attempt to help practitioners navigate the myriad judicially created obstacles engrafted onto the RICO statute to discourage these weighty claims, the Section sponsored a program for 1.5 MCLE credits entitled "Civil RICO: Legal Overview and Tactical Considerations." Held over lunch in an intimate salon at the Columbia University Club of the City of New York, program chairs and lecturers Jonathan D. Lupkin, a member of Flemming Zulack Williamson Zauderer LLP and Co-chair of the Section's Commitee on Commerial Division Law Report, and Michael C. Rakower, a Principal of the Law Office of Michael C. Rakower, P.C., led an interactive discussion about the history of the RICO statute and its application in the business litigation context. Together, Mr. Lupkin, Mr. Rakower, and the more than twenty-five attorneys in attendance worked through a complex commercial bribery hypothetical and explored how to bring the powerful RICO statute to bear on the facts presented. Program participants were extremely engaged in the exercise, and at the end of the program, one of the participants described it as "among the liveliest CLE presentations he had ever attended."

Michael C. Rakower

The Section greatly appreciates the firm of Flemming Zulack Williamson Zauderer LLP for helping to defray the cost of this event.

Request for Submissions



If you have a submission you would like considered for publication, please contact *Commercial and Federal Litigation Section Newsletter* Editor:

Mark L. Davies
11 East Franklin Street
Tarrytown, NY 10591
mldavies@aol.com

Submissions should be in electronic document format (pdfs are NOT acceptable).

www.nysba.org/ComFedNewsletter

MCLE Program Highlight: Securities Arbitration and Mediation 2007

This seminar, sponsored by the New York State Bar Association and moderated by Planning Chairs James D. Yellen (Yellen Arbitration and Mediation Services and Co-Chair of the Section's Committee on Securities Litigation and Arbitration) and Stephen P. Younger (Patterson Belknap Webb & Tyler LLP and former Section Chair), was held at the New Yorker Hotel in New York City on November 29, 2007. This NYSBA Program has been a regular fixture for the past half-decade and was well attended this year, despite the relative lull in arbitration activity at the moment.

Messrs. Younger and Yellen applied a brisk pace to the various faculty discussions and presentations. The topics covered during the course of the day by eight separate Panels included: rule developments and new case trends; drafting arbitration pleadings; handling discovery; picking your panel; mediating disputes; executing at hearing (2 Panels); and FINRA and SICA updates.

This is the first major securities arbitration seminar since the Securities Industry Financial Markets Association issued its "White Paper on Arbitration in the Securities Industry" in late October. The White Paper was discussed by the first Panel on "Developments and New Rules," led by Mr. Yellen and comprised of George D. Sullivan, Greenberg Traurig; Ross B. Intelisano, Rich and Intelisano; and Richard Ryder, the Editor of The Securities Arbitration Commentator Report. A comprehensive work, the White Paper's timing and its focus on a Congressional audience bespeaks serious industry concern that legislation against "mandatory" arbitration could be enacted; it also removes any doubt about industry support for the process flagging.

It was interesting to hear Ross Intelisano talk about the hedge fund cases in which he is involved. Some hedge funds may have arbitration agreements, but, generally, suits against the funds or their principals need to be pursued in court. Where funds, such as the Bear Stearns hedge funds, are proprietary to a brokerage firm or sold by broker-dealers, FINRA arbitration is possible. Arbitration cases are going forward against some RIAs, who placed their advisory clients in collapsed hedge funds, but, first, there must be a pre-dispute arbitration agreement and, secondly, for FINRA arbitration to be available, there must be a nexus with a broker-dealer.

Cases arising from the subprime mortgage mess will have the same hybrid qualities in terms of whether they will end up in litigation or arbitration. George Sullivan spoke about the "advice to retire" or "early retirement (72t)" cases, which are clearly suitable for resolution in FINRA arbitration, but members of the Panel expressed doubt that, as individual claims, these cases will be a substantial source of new arbitration claims. As a general matter, they have been grouped together by Claimant's counsel and mediation has served as the medium for resolution.

"Pleading Arbitration Claims and Defenses" was the subject of the second Panel, led by Mr. Younger and comprised of John P. Bevilacqua, Merrill Lynch; Janice L. Malecki, Malecki Law; and Edward W. Larkin, Baritz and Colman. Claimant's counsel serves as the first "screen" in terms of evaluating the validity of an individual investor's claim. Whether to represent is a business proposition, making early review and close client interviewing critical steps in the process. Mr. Larkin talked more about the appropriate style to use in fashioning a Statement of Answer; he generally prefers a narrative response and likes to put the best facts up front for a "punchy beginning." Mr. Bevilacqua made the point that, with NTM 99-90 discovery, any "smoking gun" documents are best disclosed in the Answer. All speakers agreed that using one's best exhibits, as attachments to the pleadings, is effective and advisable.

"Discovery" was covered by Moderator Sandra D. Grannum, Davidson & Grannum, and Panelists Thomas E. Hommel, Lehman Brothers and Jonathan L. Hochman, Schindler Cohen & Hochman. Discovery in FINRA arbitration has a whole new face and dynamic with changes that codify the discovery guidelines and establish time limits and special sanction powers for arbitrators. Mr. Hommel made the point that, especially while the new "automatic default" provisions remain untested, counsel are best advised to confer and set their own schedules for production and time extensions. Ms. Grannum emphasized the helpful nature of comparison charts and materials relating to the new Code that are available on the FINRA Web site. With regard to document and e-mail holds during litigation, the strong advice for Respondent's counsel was to "say it early, say it forcefully and say it frequently."

The critical importance of investigating the 24 nominees for Panel positions in a regular FINRA arbitration was stressed by Romaine L. Gardner, Director of the Fordham Law School Clinic, in the "Panel Selection" workshop. The three Panelists who will decide your case will sit on the "highest tribunal" that hears your case. In other words, there is just one shot, and it pays to know your arbitrators. Mr. Gardner explained how he obtains past Awards of the nominated Arbitrators and uses the information to spot patterns and network with

others who have appeared in those past arbitrations. Christine Chung, who heads the Securities Arbitration Clinic at Albany Law School, described the new rules on list selection and some techniques for researching the Panel. Besides obtaining past Awards, she networks with colleagues and checks Internet Web sites for information about candidates. These include Google, WestLaw, PACER, Bloomberg Online, and relevant legal blogs.

Well-known mediator Howard S. Eilen, Brian J. Neville (Lax & Neville), and Brian F. Mumford (Partner, Harvey & Mumford) comprised the "Mediation" Panel. Led by Moderator Yellen, this Panel presented one of the most informative discussions of this highly subjective technique that we have seen. The insights were frequent and incisive and clearly reflected the experienced nature of the Panel. Industry preferences tending to favor evaluative mediators seem to be spreading to the Claimant's side. Mr. Neville felt that facilitative mediators were most valuable when a confidential relationship existed between broker and customer or in employment disputes, where personal dynamics are more at play. Communication between the sides and familiarity with one's adversary were key points stressed by Mr. Mumford, which drew the comment from Mr. Yellen as to how little counsel do talk to each other pre-mediation.

Two sessions were spent on "The Hearing—The Big Day, or Three, or 10?" utilizing two separate Panels. The first Panel, moderated by Jonathan L. Hochman (Schindler Cohen & Hochman LLP) and manned by Kenneth G. Crowley (UBS Financial Services), Richard A. Roth (The Roth Law Firm), and Barry R. Temkin (AIG), covered the early stages of the arbitration hearing. Credibility served as a keynote in the discussion, regarding counsel's ability to influence the shape and course of a hearing. That process begins with the opening statement, by remaining factual and minimizing one's actions and promises. No theatrics—simplify things—and work to serve the Panel. The techniques and subtleties of cross-examination were the next topic. On the defense side, you must win without being combative, at least if Claimant dishonesty is not clear and present. Cross-examination of the broker is best aimed at showing self-serving motives, shaky credibility or lapses in judgment. Getting the broker to state a position with which the Panel disagrees wins points.

The second Panel on "The Hearing" focused on damage theories and calculations, expert cross-examinations, and closing arguments. Veteran lawyer Charles J. Hecht (Hecht & Associates) moderated Panelists Steven B. Caruso (Maddox Hargett & Caruso, PC), Howard A. Fischer (Schindler Cohen & Hochman LLP), and Henry L. Ferguson (Ferguson Pollack Kern Consulting, LLC). Mr. Ferguson, an experienced securities expert, exchanged places and cross-examined lawyer Hecht, as an effective device for illustrating the art of cross-examining experts. Calculating damages was also their topic, with Mr. Hecht making the observation that defense emphasis on mitigation plays a large role in lowering recovery rates in arbitration. Mr. Yellen opined, as a segue to the subject of closing statements, that damages can be significantly impacted by a good closing statement, even when the arbitrators are fixed on there being liability. Messrs. Caruso and Fischer provided a number of helpful hints about closing statements, starting with advice on the Claimant's side to keep it personal. Mr. Caruso often addresses each Arbitrator in turn and presents each element of the Claimant's case for comparison with the defense's version of the facts. Mr. Fischer returns to the credibility theme and begins his closing with a comparison of the promises made in his opening statement with the proof presented at hearing. He advises leaving emotion to critical points in the presentation, staying flexible, focusing on what the Panel sees as important, and abandoning that which has not worked.

The final Panel of the day, captioned "Regulatory Update," involved no regulators, but did provide varying perspectives on the arbitration rulemaking process. Moderator Constantine N. Katsoris (Fordham Law School) discussed his role as a founding Member of the Securities Industry Conference on Arbitration (SICA). George H. Friedman, as FINRA Director of Arbitration, spoke about current rule developments and the implementation of the new Arbitration Codes. David E. Robbins (Kaufman Feiner) serves on the FINRA National Arbitration & Mediation Committee (NAMC) and heads the NAMC subcommittee that approves new arbitrators and, sometimes, removes existing arbitrators. Prof. Katsoris announced that SICA will be adding a new voting member, the North American Securities Administrators Association, who will join participating SROs, SIFMA, and the three Public Members. Now that there is essentially only one arbitration forum, SICA's role must change, and a new mission statement has been promised. Mr. Friedman projected an end-of-year filing for the re-worked Discovery Guide, stated that Awards of absorbed SRO arbitration forums (such as NYSE) will be available on the FINRA Website at the turn of the year, and described ongoing efforts to place the process of arbitration more in an online mode. The trio discussed their various views of the controversial Dispositive Motions Rule, with Mr. Friedman explaining that the rule is based on the elementary premise that the arbitration concept assures your "getting your day in court."

This article was reprinted with permission of The Securities Arbitration Commentator Report.

Section Meets with World Bank Representatives

By Ted G. Semaya

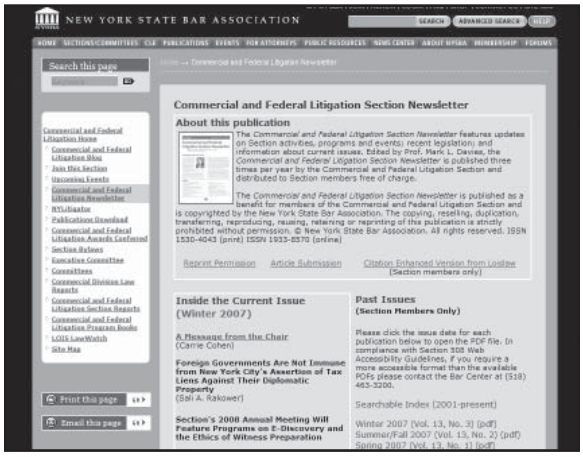
On December 10, 2007, four members of the Executive Committee of the Commercial and Federal Litigation Section met with two representatives of the World Bank/International Finance Corporation. The Section attended this meeting at the request of the Civil Branch of the Supreme Court, New York County, through the good offices of Administrative Judge Jacqueline Silbermann and Chief Clerk John Werner. Unlike other international delegation meetings in which the Section has participated, the purpose of this meeting was not to exchange ideas about judicial procedure and administration, but rather for World Bank representatives to evaluate New York for the Doing Business Project of the World Bank, which is a project that assesses the relative efficiency of contract litigation around the world.

The discussion, which took place at the 60 Centre Street Courthouse, centered on the time and cost of commercial cases. The Project staff had developed specific information measurements, referred to as metrics, to make such comparisons across the widely varying court systems of many countries. Messrs. Oliver Lorenz, a German attorney, and Lior Ziv, a Belgian attorney, were interested in specific information regarding the number of court appearances, total duration of a case, and the cost of pursuing and defending a case. Section leaders discussed these metrics and how this information could mean different things in different jurisdictions. For example, there was a discussion about whether the metrics captured the quality of justice of a given jurisdiction or the degree of satisfaction of litigants with the process. Messrs. Lorenz and Ziv also were provided with a copy of the January 1995 NYSBA report on establishing the Commercial Division.

To see a description of the Doing Business Project, more information about the metrics used to evaluate different systems, and the results of the study for many countries, see http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/. The United States is listed with specific reference to the Supreme Court of the State of New York, Civil Branch. The Section continues to extend its thanks to Justice Silbermann and Chief Clerk Werner for inviting the Section to participate in these types of meetings.

Ted G. Semaya is a partner at Eaton & Van Winkle LLP and Chair of the Section's Committee on International Litigation.

The *Commercial and Federal Litigation Section Newsletter* and the *NYLitigator* have a new online look!



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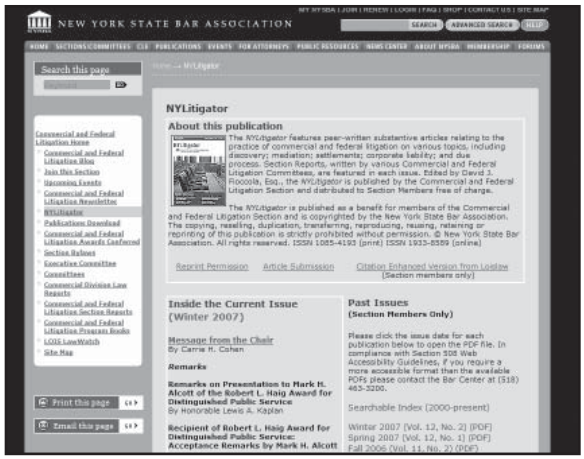

Commercial and Federal Litigation Section

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Carrie H. Cohen
U.S. Attorney's Office for the Southern District of New York
New York City

Program Chair

Peter Brown
Thelen Reid Brown Raysman & Steiner LLP
New York City

Commercial and Federal Litigation Section

COMMERCIAL LITIGATION ISSUES FOR THE 21st CENTURY

Spring Meeting

The Equinox
Manchester, VT
May 2 - 4, 2008

WITH ADDITIONAL PROGRAMMING ON

Practical Commercial Litigation Topics for Newly Admitted Lawyers

Offered in conjunction with the YOUNG LAWYERS SECTION

This program provides up to 6.5 MCLE credit hours. Experienced litigators can earn up to 3.5 credits in Practice Management, 2.0 credits in Skills and 1.0 credits in Ethics. **Junior litigators** can earn up to 3.0 credits in Skills and 1.0 credits in Ethics. Only the credits in Skills and Ethics are transitional.

NYSBA

For more information go to www.nysba.org/comfed or call (518) 463-3200

SCHEDULE OF EVENTS

Friday, May 2

3:00 p.m. **Registration**

6:30 p.m. **Cocktail Reception** - ***Rockwell Room***

7:30 p.m. **Opening Banquet** - ***Rockwell Room***

Welcoming Remarks
CARRIE H. COHEN, Section Chair
PETER BROWN, Section Chair-Elect and Program Chair
SHERRY LEVIN WALLACH, Section Chair-Elect, Young Lawyers Section

Keynote Speaker
PETER BOGDANOS, ESQ.
Assistant District Attorney
Manhattan District Attorney's Office
New York City
Author "Thieves of Baghdad" -- Mr. Bogdanos relates his personal experiences as a Marine officer in Iraq where he was in charge of the investigation of the April 2003 looting of the National Museum of Iraq.

Saturday, May 3

8:00 a.m. **Registration**

8:45 a.m. - 12:15 p.m. **General Session** - ***Rockwell ABC***

COMMERCIAL LITIGATION ISSUES FOR THE 21st CENTURY

8:45 a.m. **Welcoming Remarks**
CARRIE H. COHEN, Section Chair

TRACK A (For Experienced Litigators) - ***Rockwell BC***

9:00 a.m. - 10:15 a.m. ***How the Courts Supervise Electronic Discovery: Mock Presentations in State and Federal Court***

Speakers:

HONORABLE KARLA MOSKOWITZ
Appellate Division
First Department

CONSTANCE BOLAND, ESQ.
Nixon Peabody LLP
New York City

JOHN G. HORN, ESQ.
Harter Secrest & Emery LLP
Buffalo

NEIL L. LEVINE, ESQ
Whiteman Osterman & Hanna LLP
Albany

STEPHEN P. YOUNGER, ESQ.
Patterson Belknap Webb & Tyler LLP
New York City

10:15 a.m. - 11:10 a.m. ***Social Networks, Bloggers and Internet Jurisdiction***

Speakers:

DAVID E. McGRATH, ESQ.
Assistant General Counsel
New York Times Company
New York City

NANCY MERTZEL, ESQ.
Thelen Reid Brown Raysman
& Steiner LLP
New York City

PETER PIZZI, ESQ.
Connell Foley LLP
Roseland, NJ

Saturday, May 3 (continued)

11:10 a.m. - 11:30 a.m. **Refreshment Break**

11:30 a.m. - 12:20 p.m. ***How to Use Effective Graphics at Trial***

Speakers:
DAVID HOFFMAN
TrialGraphics/Kroll Ontrack
Chicago, IL

attorney - tbd

TRACK B (For Junior Litigators) - *Rockwell A*

10:15 a.m. - 11:15 a.m. ***Conducting An Effective Deposition***

Speakers:
PAUL D. SARKOZI, ESQ.
Hogan & Hartson LLP
New York City

LISA A. COPPOLA, ESQ.
Rupp Baase Pfalzgraf Cunningham & Coppola, LLC
Buffalo

11:15 a.m. - 11:30 a.m. **Refreshment Break**

11:30 a.m. - 12:20 p.m. ***Arguing Your First Motion in the Commercial Division***

Speakers:
HONORABLE STEPHEN G. CRANE
Associate Justice, Appellate Division
Second Department (retired)
JAMS
New York City

RICHARD A. WILLIAMSON, ESQ.
Flemming Zulack Williamson & Zauderer LLP
New York City

CAROLE E. HECKMAN, ESQ.
Harter Secrest & Emery LLP
Buffalo

12:20 p.m. - 1:45 p.m. **Buffet Lunch** - ***Colonnade***
Presentation of Section Award for Excellence in Commercial Brief Writing

1:45 p.m. - 6:00 p.m. **Recreation and Spa Activities**

6:30 p.m. **Cocktail Reception** - ***Lincoln Gardens***

7:30 p.m. **Gala Dinner** - ***Colonnade***

Presentation of the Robert L. Haig Award for Distinguished Public Service

Presenter:
HONORABLE KEVIN T. DUFFY
United States District Judge
Southern District of New York
New York City

Recipient:
HONORABLE P. KEVIN CASTEL
United States District Judge
Southern District of New York
New York City

10:00 p.m. **After Dinner Drinks and Conversation**

SCHEDULE OF EVENTS

Sunday, May 4

8:00 a.m. **Registration**

9:00 a.m. - 12:15 p.m. **General Session** - ***Rockwell ABC***

9:00 a.m. - 9:50 a.m. ***Mediation Strategies - Introduction to Mediating the Complex Case***

Speakers:

HONORABLE JOHN C. LIFLAND
United States District Judge
District of New Jersey (retired)
JAMS, New York City

JEFF KICHAVEN, ESQ.
JAMS, Inland Empire, CA

CHRISTINE LEPERA, ESQ.
Mitchell Silberberg & Knupp LLP
New York City

TRACK A (For Experienced Litigators) - ***Rockwell BC***

9:50 a.m. - 11:00 a.m. ***In-House Counsel Panel: Using Better Communications and Common Sense to Enhance the Client Relationship***

Speakers:

WILLIAM H. CROSBY, JR., ESQ.
Assistant General Counsel
The Interpublic Group of Companies, Inc.
New York City

KAREN L. DOUGLAS, ESQ.
Divisional Counsel
Corning Incorporated
Corning

STANLEY PIERRE-LOUIS, ESQ.
Associate General Counsel
Viacom, Inc.
New York City

JILL BOND, ESQ.
General Counsel
Rich Products Corporation
Buffalo

11:00 a.m. - 11:15 a.m. **Refreshment Break**

11:15 a.m. - 12:15 p.m. ***Legal Ethics - New Issues Raised by Emails, Blogs and MySpace***

Speakers:

FREDERICK LEE WHITMER, ESQ.
Thelen Reid Brown Raysman & Steiner LLP
New York City

ADAM I. COHEN, ESQ.
FTI Consulting, Inc.
New York City

GREGORY P. SILBERMAN, ESQ.
Kaye Scholer LLP
New York City

JEREMY R. FEINBERG, ESQ.
Statewide Special Counsel for
Ethics and the Commercial Division
New York City

JAMES M. WICKS, ESQ.
Farrell Fritz PC
Uniondale

TRACK B (For Junior Litigators) - ***Rockwell A***

9:50 a.m. - 11:00 a.m. ***Civil Appeals: Strategies and Process in the New York Courts***

Speakers:

JONATHAN D. LUPKIN, ESQ.
Flemming Zulack Williamson & Zauderer LLP
New York City

PREETA D. BANSAL, ESQ.
Skadden Arps Slate Meagher & Flom LLP
New York City

12:15 p.m. **Adjourn**

CPLR Amendments: 2007 Legislative Session

(Chapters 1-690)

CPLR §	Chapter (§)	Change	Eff. Date
105(e)	125(1)	Defines "clerk" in supreme and county court to mean clerk of the county	1/1/08[1]
304	125(2)	Reorganizes section; provides that the summons or petition must be filed in accordance with CPLR 2102; prohibits acceptance of filing unless required fee is paid, except in case of e-filing where fee is paid as authorized by chief administrator	1/1/08[1]
306-a	125(3)	Clarifies that summons or petition is filed with county clerk	1/1/08[1]
1101(d), (f)	56, Part C, § 18	Extends sunset from 9/1/07 to 9/1/09	4/9/07
2001	529	Adds mistake in filing summons as excusable mistake, provided that fees are paid	8/15/07
2102	125(4)	Provides that papers in supreme and county court must be filed with county clerk; provides that a paper filed in accordance with the chief administrator's rules or local court rule or practice shall be deemed filed; requires transmittal of papers to clerk of court; prohibits clerk from refusing papers except where directed to do so by statute, rule, or order	1/1/08[1]
2214(b)	185(1)	Provides that in order to require service of answering papers at least 7 days before return date, motion papers must be served at least 16 days before return date (instead of 12 days); sets same requirement for cross-motions	7/3/07[2]
2215	185(2)	Requires service of cross-motion at least 7 days before return date if demand is made pursuant to CPLR 2214(b) (10 days if cross-motion is mailed, 8 days if delivered overnight)	7/3/07[2]
2302(b)	136	Provides for production of prisoners in NYC Civil Court	7/3/07
2303-a	192	Provides for service of trial subpeonaes	1/1/08
2308(a)	205	Increases penalty for non-compliance from $50 to $150	1/1/08
2308(b)(2)	601(9)	Replaces DSS with Office of Temporary and Disability Assistance	8/15/07
3215(g)(3)(iii)	458(2)	Excepts residential mortgage foreclosure actions from exclusions from additional notice requirement	8/1/07
4518(f)	601(10)	Replaces DSS with Office of Temporary and Disability Assistance	8/15/07
5241(b)(3)(ii)	601(11)	Replaces DSS with Office of Temporary and Disability Assistance	8/15/07
5242(c)	601(12)	Replaces DSS with Office of Temporary and Disability Assistance	8/15/07
7009(a)(2)	40	Provides that the attorney general, not the corporation counsel/ county attorney, shall represent the court	5/29/07
8011(h)	36	Eliminates fee for serving order of protection	8/19/07

Notes: (1) Gen. Oblig. Law § 15-108 has been amended to add a new subdivision (d) limiting the circumstances under which a release or covenant not to sue shall be deemed a release or covenant under section 15-108. 2007 N.Y. Laws ch. 70, eff. July 4, 2007, and applicable to releases and covenants not to sue effective on or after that date. (2) The pilot program for commencement of civil actions and proceedings by fax or email has been expanded to include certain cases in Supreme Court, Livingston County, NYC Civil Court, and Surrogate's Court in Chautauqua, Monroe, Queens, and Suffolk counties. 2007 N.Y. Laws ch. 369. (3) Ct. Claims Act § 11(b) has been amended to provide that the total sum claimed need not be stated in actions to recover damages for personal injury, medical, dental, or podiatric malpractice or wrongful death. 2007 N.Y. Laws ch. 606. (4) Jud. Law § 140 has been amended to add a 13th Judicial District consisting of Richmond County. 2007 N.Y. Laws ch. 690.

Endnotes

1. Applies to actions and proceedings commenced on or after 1/1/08.
2. Applies to notices of motion served on or after 7/3/07.

2007 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(N.Y. Orders 1-31 of 2007)

22 N.Y.C.R.R. §	Court	Subject (Change)
130-1.1a	All Courts	Signing paper also certifies, where paper is an initiating pleading, that matter does not involve illegal conduct (or, if so, that those responsible are not participating or sharing in fee) and matter was not obtained in violation of DR 7-111 (soliciting case involving personal injury or wrongful death)
202.7(f)	Sup./County	Clarifies that notification requirement applies to any application for temporary injunctive relief, including, but not limited to, motion for stay or TRO; excludes from notification requirement motions for orders of protection
202.8(h)	Sup./County	Provides for reports to justices, upon request, of undecided motions pending 60 days or more
202.48(c)(2)	Sup./County	Requires that proposed counter-orders and counter-judgments be submitted with a copy marked to delineate proposed changes to the order or judgment to which objection is made
202.70(a)	Sup./County	Increases Kings County monetary threshold to $75,000; increases Suffolk County monetary threshold to $50,000; decreases Westchester County monetary threshold to $75,000; adds $25,000 monetary threshold for Onondaga County; changes Erie County to 8th Jud. Dist. ($50,000 monetary threshold)
Part 217	Trial Courts	Provides for access to court interpreter services for persons with limited English proficiency
1000.18(c)	A.D., 4th Dep't	Requires, upon penalty of sanctions, immediate notification to court if appeal/issue is mooted or if appeal is not calendared because of bankruptcy or death of a party
Part 1010	A.D., 4th Dep't	Abolishes Civil Appeals Settlement Program established in 2006

Note that the court rules published on the Office of Court Administration's website include up-to-date amendments to those rules: http://www.nycourts.gov/rules/trialcourts/index.shtml.

Notes of the Section's Executive Committee Meetings

September 19, 2007

Guest speaker Hon. Leonard Austin, Supreme Court of the State of New York, Nassau County, Commercial Division, discussed the importance of the work of the Section's Committee on the Commercial Division in creating pattern jury instruction for commercial cases, the need for adequate factual support for temporary restraining orders, and the need for Commercial Division mediators. He suggested that the Section review the current e-discovery rule, consider whether the standard Preliminary Conference Order should be modified for commercial cases, and address the need for interaction between federal and state judges.

The Section's Committee on Ethics and Professionalism presented a summary of its report on the rules of professional conduct proposed by the NYSBA's Committee on Standards of Attorney Conduct ("COSAC"), and Executive Committee members agreed to comment and vote on the final report by email. The Executive Committee also discussed a draft report of the Section's Committee on White Collar Criminal Litigation on the Independence of U.S. Attorneys.

October 18, 2007

Guest speaker Steven Cohen, Chief of Staff for New York State Attorney General Andrew Cuomo, discussed his experiences as Chief of Staff and the work of the Attorney General's Office.

The Executive Committee discussed a draft report of the Section's Committee on the Federal Judiciary summarizing individual practices of the Southern District of New York judges and requested that the report include individual practices for magistrate judges, address the issue of electronic filing of letters, and add a methodology section. The Executive Committee also discussed and suggested revisions to a draft report by the Section's Committee on Internet and Intellectual Property Litigation on Net Neutrality.

November 14, 2007

Guest speaker Hon. Charles E. Ramos, Supreme Court of the State of New York, New York County, Commercial Division, discussed how judicial case management affects the relationship between an attorney and his or her client, the importance of providing a courtesy copy to the court of e-filed documents, problems caused by the expense of e-discovery requests, and the need for practitioners to provide feedback to Commercial Division Justices about court procedures.

The Section's Committee on Bankruptcy Litigation presented a draft report on the proposed amendment to the fraudulent conveyance statute, which seeks to change the Fraudulent Conveyance Act to the Uniform Fraudulent Transfer Act. The Executive Committee approved a revised report by the Committee on the Federal Judiciary on individual practices in the Southern District of New York. The Section's Committee on Internet and Intellectual Property Litigation presented its revised report on Net Neutrality and the Executive Committee agreed it should be published as a report of that Committee in the *NYLitigator* as well as on the Committee's webpage.

December 12, 2007

The Section's Committee on Antitrust Litigation presented its draft report on four antitrust cases recently decided by the United States Supreme Court. The Executive Committee agreed the report should be published as a report of that Committee in the *NYLitigator* and on the Committee's webpage. The Executive Committee approved as the position of the Section a revised report by the Committee on Bankruptcy Litigation on the proposed amendment to the fraudulent conveyance statute. The Executive Committee also approved a draft report of the Committee on the Civil Practice Law and Rules on e-discovery rules in state court as the position of the Section, with the expectation that the report will be submitted to the Executive Committee of the NYSBA.

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