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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

Peter Brown

As Chair of the Section, I am pleased to report to you on some of the many successful activities that the Section completed in the past half year. I would also like to bring to your attention an issue of special concern to me regarding the administration of justice.

The most memorable event in the fall of 2008 was the Section's 20th Anniversary celebration. It is a rare opportunity to invite all 2,600 members of the Section to participate in a celebration of the Section's many accomplishments. The Section wanted to find a unique venue that would attract both our membership and judges. After diligently searching, our Section Treasurer, Susan Davies, recommended the Russian Tea Room. The ornate Imperial Russian style of the hall was both attractive and fun. The hor d'oeuvres had a distinct Russian twist. The open bar encouraged good cheer and networking among the more than 200 lawyers and judges who attended. We were also honored to have New York State Bar Association President Bernice Leber greet the Section members and celebrate our 20 years of accomplishments.

The Section always makes a strong showing at the Annual Meeting of the New York State Bar Association. This year's meeting in January, at the Marriott Marquis Hotel in New York City, was no exception. A fine CLE program was put together by Section's Vice Chair Jonathan Lupkin and included Section members Stephen Younger (former Section Chair), Anthony Harwood, James Wicks, and Robert Schwinger.

Our Annual Luncheon was a sellout with more than 400 lawyers and judges attending. The Stanley H. Fuld Award was given to the Honorable Loretta A. Preska, a District Court judge in the Southern District of New York. It was presented by her colleague, and former Section Chair, the Honorable P. Kevin Castel.

This is the third year that the Section organized a "Smooth Moves" program to assist minority lawyers. This year's program included a presentation on practice development featuring luminaries of the New York Bar. The Honorable George Bundy Smith Award was presented to Elaine Jones, former President and General Counsel of the NAACP Legal Defense and Education Fund.

Inside

NYSBA

These are only the highlights of the many CLE activities, reports and other work undertaken by Section members over the past few months.

The Administration of Justice

The current economic crisis is impacting both law firms and the judiciary. The large budget gap faced by New York State is forcing unwelcome decisions to cut costs.

Over the last several years, the Commercial Division in New York County has had an innovative program to attract and employ law clerks for Commercial Division judges. The law clerks are recent law school graduates with outstanding performance in their law schools. It has been viewed as the equivalent of the law clerk program traditionally used by our judicial colleagues in the federal courts.

It has come to my attention that the entire clerkship program in New York County is at risk in the coming New York State budget and may be cut in its entirety. This will impact the quality of justice in New York in several ways.

Our colleagues on the bench in New York County are already overworked by some of the most complex and challenging commercial matters. These typically include extensive motion practice and requests for injunctive relief or summary judgment. Such labor-intensive motions demand the assistance of intelligent and energetic law clerks. Without law clerks available to them, judges will be forced to personally read extensive supporting affidavits and documents on too many complex motions. This will necessarily slow the pace of justice in New York County. Once justice is delayed, the quality and reputation of our courts will be called into question. Lawyers who relied on the experience and speed of the Commercial Division will be encouraged to file in U.S. District Court.

Our New York County judges need and deserve the support of their law clerks. These clerks are not a convenience; they are an essential element in the delivery of justice to all of our community.

Peter Brown

Save the Dates

Commercial and Federal Litigation Section

SPRING MEETING

May 1–3, 2009

The Otesaga • Cooperstown, NY

See Program Schedule on pp. 10–14

Commercial and Federal Litigation Section's 2009 Annual Meeting

By Anne B. Nicholson

The Commercial and Federal Litigation Section's Annual Meeting was held at the Marriott Marquis in New York City on January 28, 2009. The blustery weather conditions did nothing to detract from the success of the event in attracting an impressive crowd of litigators from across New York State. The program was led by Section Chair Peter Brown, Baker & Hostetler LLP, and Program Chair Jonathan D. Lupkin, Flemming Zulack Williamson Zauderer LLP. It featured a two-part MCLE program that addressed two "Litigation Hot Topics" increasingly faced by commercial litigators, given our times: the *Wagoner* Rule as applied to suits by corporate plaintiffs and the ethical considerations implicated by interactions with non-party witnesses.

Robert Sidorsky; Janice A. Payne; Hon. George Bundy Smith

Jonathan D. Lupkin, Vice-Chair

Panel Chair Robert A. Schwinger, Chadbourne & Parke LLP, organized and moderated the first panel, entitled "Let He Whose Executives Were Without Sin Cast the First Stone: Using Management Wrongdoing to Bar Suits by Corporate Plaintiffs and Debtors." This program addressed the legal obstacles often faced when a company has been injured by wrongdoing that involved the participation of company management. The program highlighted the level of management participation in the complained-of misconduct as crucial in determining the ability of the company to sustain claims against third-party professionals who advised the corporation. The Section was thrilled to have as panelists the Honorable George Bundy Smith, former Associate Judge, New York Court of Appeals, and currently with Chadbourne & Parke LLP; Janice A. Payne, FINRA; Robert Sidorsky, Butzel Long; and Stephen P. Younger, Patterson, Belknap, Webb & Tyler LLP. Mr. Younger is also the President-elect Designate of the New York State Bar Association.

Hon. Melanie L. Cyganowski

The second program, entitled "Ethical Issues in the Investigation of a Civil Lawsuit," was organized by Panel Co-Chairs Anthony J. Harwood, Labaton Sucharow LLP, and James M. Wicks,

Stephen P. Younger; Robert Sidorsky

Stephen P. Younger; Robert Sidorsky; Janice A. Payne; Hon. George Bundy Smith; Robert A. Schwinger

Farrell Fritz P.C. The Section was honored to have Professor Patrick M. Connors, Albany Law School, moderate the program and to have as panelists Michael Faillace, Michael Faillace & Associates, P.C.; Cheryl Smith Fisher, Magavern, Magavern & Grimm LLP; Geri S. Krauss, Krauss PLLC; and James Q. Walker, Richards Kibbe & Orbe LLP. The panel discussed whether a lawyer for a company may interview former employees and how that lawyer should ethically plan and prepare for the interview. The program also touched upon compensation issues that arise in the non-party witness context.

Hon. Loretta A. Preska; Thomas J. Kavaler; Hon. Michael B. Mukasey

Hon. Loretta A. Preska; Hon. P. Kevin Castel

A reception and luncheon, attended by more than 400 attorneys and judges, immediately followed the excellent morning programs. During the luncheon, Section Chair Peter Brown recognized the attendance of more than 50 federal and state judges, including the Honorable Jonathan Lippman, newly appointed Chief Judge of the New York State Court of Appeals. Other distinguished guests graced participants in the luncheon with their presence, including Judith S. Kaye, former Chief Judge, New York State Court of Appeals; Sol Wachtler, former Chief Judge, New York State Court of Appeals; Michael B. Mukasey, former Attorney General of the United States, and Bernice K. Leber, President of the New York State Bar Association. Mr. Brown also applauded the efforts of Program Chair Jonathan D. Lupkin for his successful organization of the event.

The highlight of the day was the presentation of the Section's Stanley H. Fuld Award by the Honorable P. Kevin Castel to his colleague on the United States District Court for the Southern District of New York, the Honorable Loretta A. Preska. Judge Preska's impressive career has included work in private practice and more than 16 years as a distinguished District Court Judge. In his opening remarks, Judge Castel spoke of Judge Preska's wit and love of the law. These remarks segued perfectly to Judge Preska's erudite discussion of the importance of consistency and predictability in the development of commercial law jurisprudence.

Stephen P. Younger

The Section's Annual Meeting also featured the introduction of the Section's officers for the 2009–2010 term. The following officers were duly elected by the Section's membership: Vincent J. Syracuse, Tannenbaum Helpern Syracuse & Hirschtritt LLP, Chair; Jonathan D. Lupkin, Flemming Zulack Williamson Zauderer LLP, Chair-elect; David H. Tennant, Nixon Peabody LLP, Vice Chair; Paul D. Sarkozi, Hogan & Hartson, Treasurer; and Deborah A. Kaplan, Baker Hostetler, Secretary.

Commercial and Federal Litigation Section Officers (2009–2010): Peter Brown, Chair Emeritus; Jonathan D. Lupkin, Chair-Elect; Vincent J. Syracuse, Chair; Deborah A. Kaplan, Secretary; David H. Tennant, Vice Chair; Paul D. Sarkozi, Treasurer

Anne B. Nicholson is an associate in the firm of Flemming Zulack Williamson Zauderer LLP.

Second Circuit Rules That Arbitrators Must Decide Whether to Consolidate Multiple Proceedings

By Jeffrey Gross

Arbitration is frequently described as a "creature of contract." [1] But the creators of this "creature," the parties who sign contracts with arbitration provisions, may not realize that they may have to participate in multiple arbitration proceedings arising from the same events or transactions, perhaps before different arbitrators, governed by different rules, and scheduled for hearings in multiple locations. Recently, the Second Circuit held that arbitrators, not courts, must decide whether to consolidate multiple proceedings. However, there is little guidance about how arbitrators should make this decision or on addressing the practical and logistical consequences of multiple proceedings. Absent coordinated case management or guidance from the courts, multiple arbitration proceedings may turn into Dr. Frankenstein's Monster, a "creature" run amok, which may threaten to destroy the simplicity and cost-savings that may have motivated the parties to arbitrate, rather than litigate, their disputes in the first place.

Consolidation Under the Federal Arbitration Act

The Federal Arbitration Act (FAA) does not explicitly address consolidation of multiple proceedings. Historically, courts consolidated multiple arbitration proceedings based on the then-prevailing view of the FAA's goal of facilitating the swift and efficient resolution of disputes. Indeed, more than 30 years ago, the Second Circuit found that district courts had the inherent power to consolidate arbitrations based on the FAA's underlying purpose and Rules 42(a) and 81(a)(3) of the Federal Rules of Civil Procedure.[2] In the years that followed, district courts within the Second Circuit frequently consolidated arbitration proceedings when the arbitration agreements were silent about consolidation.[3]

In 1993, the Second Circuit reversed its course and ruled that courts could not consolidate arbitration proceedings absent the parties' consent. In *United Kingdom v. The Boeing Company,* the Second Circuit reversed a district court ruling consolidating two arbitration proceedings even though they involved the same legal and factual issues.[4] Neither of the underlying contracts addressed consolidation of multiple proceedings. The court held that it was powerless to consolidate the arbitrations, noting that the FAA required enforcement of agreements as they were written. Thus, the court refused to add provisions to private agreements merely to promote efficiency.[5] The *Boeing* court did not address whether arbitrators had the inherent power to consolidate arbitration proceedings.

Six years later, the Second Circuit hewed to the view expressed in *Boeing* when it addressed a similar issue in *Glencore Ltd. v. Schnitzer Steel Products Co.*[6] In that case, the plaintiff had asked the district court to consolidate related arbitration proceedings or, in the alternative, require a joint hearing before both arbitration panels. The district court had found that it did not have the authority to consolidate the proceedings but nonetheless ordered a joint hearing. In spite of plaintiff's arguments that it was subject to a risk of duplicative, more expensive, and potentially inconsistent proceedings, the Second Circuit again held that neither the FAA nor the Federal Rules of Civil Procedure authorized courts to consolidate proceedings or order a joint hearing. Once again, *Glencore* did not address whether arbitrators could decide whether to consolidate multiple proceedings.

"Absent coordinated case management or guidance from the courts, multiple arbitration proceedings may turn into Dr. Frankenstein's Monster, a 'creature"'run amok, which may threaten to destroy the simplicity and cost-savings that may have motivated the parties to arbitrate, rather than litigate, their disputes in the first place."

The U.S. Supreme Court Broadens the Scope of Arbitrators' Powers

In recent years, the U.S. Supreme Court has ruled that arbitrators, not courts, should address matters of arbitration procedure. In *Howsam v. Dean Witter Reynolds Inc.*, the Court identified a distinction between "gateway" issues of arbitrability, which should be adjudicated by the courts, and issues of arbitration procedure, which should be resolved by an arbitrator.[7] Applying this rubric, the Court found that an arbitrator, not the trial court, had to decide whether an NASD rule on the statute of limitations barred the petitioner's claim.

One year later, in *Green Tree Financial Corp. v. Bazzle*, a plurality of the U.S. Supreme Court held that an arbitrator should decide whether a dispute could proceed as a class arbitration.[8] After finding that the parties' agreement was silent about whether class-wide arbitration was permissible, Justice Breyer's plurality decision stated that the relevant question was to "what kind of arbitration proceeding" the parties had agreed.[9] Justice Breyer concluded that answering this question was the province

of arbitrators because it required knowledge of "contract interpretation and arbitration procedures."[10] Thus, the Court vacated the South Carolina Supreme Court's ruling that class arbitrations were permitted under the contract so that the arbitrator could reach his own conclusion. However, because Justice Breyer spoke on behalf of only a plurality of the Court, there was some doubt as to *Bazzle*'s precedential value.

After these Supreme Court decisions, several trial courts within the Second Circuit concluded that arbitrators, not courts, had to decide whether to consolidate multiple proceedings. For example, in *Blimpie Int'l Inc. v. Blimpie of the Keys*, Judge Leisure rejected the effort by a franchisor to compel several subfranchisors to participate in multiple proceedings.[11] Citing *Howsam* and *Bazzle,* Judge Leisure granted the defendant's motion to dismiss and found that the decision whether to consolidate was a procedural issue to be determined by an arbitrator. Until recently, however, the Second Circuit had not had the opportunity to revisit this issue.

The Second Circuit's Decision in *Stolt-Nielsen*

Finally, in late 2008, the Second Circuit reviewed its prior decisions in *Boeing* and *Glencore* in light of the Supreme Court's rulings in *Howsam* and *Bazzle.* In *Stolt-Nielsen SA v. Animal Feeds International Corp.*, a party had filed a putative class action lawsuit, alleging that Stolt-Nielsen and others engaged in a conspiracy to restrain competition in the market for shipping liquid chemicals.[12] The district court dismissed the action because the two contracts between the plaintiff and Stolt-Nielsen contained arbitration clauses which encompassed the antitrust claim. During the arbitration, the parties submitted evidence and briefing whether class arbitration was permissible given the contracts' silence on that issue. The arbitration panel concluded that the agreements permitted class arbitration and ultimately issued an award in favor of claimants.

Stolt-Nielsen persuaded the district court to vacate the arbitration award because the panel had not decided whether the dispute was governed by federal maritime law or state law. The Second Circuit found that the panel's treatment of the choice-of-law issue did not require *vacatur*, and then rejected Stolt-Nielsen's argument that class arbitration was improper under the Second Circuit's rulings in *Boeing* and *Glencore*. The court concluded that arbitrators should decide questions involving consolidation, joint hearings, and class arbitration "as issues of contract interpretation to be decided under the relevant substantive contract law."[13] Because there was no governing rule of contract construction which would prohibit class arbitration when the agreement was silent, the Second Circuit held that the arbitrator's decision was not in manifest disregard of the law.

Practical and Strategic Issues When Arbitrators Decide Whether to Consolidate Proceedings

While consolidation of arbitrations governed by the FAA is now solely an issue for arbitrators, many questions remain unsettled. First of all, it is difficult to predict whether arbitrators will consolidate proceedings when the operative agreements are silent on that point. Parties can make plausible arguments interpreting the silence of an agreement to support or oppose consolidation. For example, if an agreement contains detailed provisions about the procedures governing the arbitration, such as how arbitrators are selected and how an award should be rendered, the failure to include a provision about consolidation could arguably reflect a considered decision to avoid consolidation. On the other hand, because any party could reasonably contemplate the possibility of facing consolidated proceedings (at least with the benefit of hindsight), an arbitrator could well view the lack of a provision excluding consolidation as evidence that the parties contemplated consolidation. Arbitrators may also try to glean the parties' intent by analyzing the language of the contract, such as whether it refers to other transactions or the involvement of non-signatories, or based upon the use of defined terms, such as "party" or "dispute." At best, this evidence is often ambiguous.[14] Thus, the rules of interpreting contracts will not give consistent and satisfactory answers to whether multiple proceedings should be consolidated.

Arbitrators may also decide consolidation motions based upon equitable, non-contractual arguments. But there can be strong equitable arguments either for or against consolidation. Parties seeking consolidation may argue that consolidation reduces the risk of conflicting judgments or may reduce the expense caused by duplicative proceedings. However, parties opposing consolidation may argue that consolidation could increase their costs if they are involved in only some of the transactions at issue or involved in only a limited fashion. Furthermore, if any party to potentially consolidated proceedings did not participate in selecting the arbitrator(s) who is deciding whether to consolidate and/or the arbitrator who will preside over consolidated proceedings, it may have a persuasive argument that it has suffered prejudice.[15] Moreover, prejudice may exist if the two (or more) contracts at issue have substantially different provisions on arbitration procedures, such as how arbitrators are selected, location of the hearing, standards for admission of evidence, or the rendition of awards.[16] In such a case, the most important question may not be whether the proceedings are consolidated, but which arbitration proceeding should be the consolidated forum.

These equitable factors have been used by courts to decide whether to consolidate arbitrations that are not governed by the FAA. For example, the model state statute intended to be a counterpart to the FAA, the Revised

Uniform Arbitration Act (RUAA), states that a court may consolidate proceedings if the operative agreements do not expressly bar consolidation, after weighing: (i) whether the claims arise from the same transaction or related transactions; (ii) if there are common factual or legal issues, which creates a risk of conflicting decisions; and (iii) the risk of prejudice or undue delay versus potential prejudice from declining to consolidate the proceedings.[17] Likewise, New York state courts have applied similar factors when considering whether to consolidate arbitration proceedings that are not governed by the FAA.[18] Of course, both the RUAA and New York state rules are different in that a court, not an arbitrator, decides whether to consolidate. Nevertheless, they reflect the well-considered view that the existence of common issues and equitable concerns, not rules on how to interpret a contract's silence about consolidation, should drive the decision whether to consolidate multiple proceedings.

In any event, there are substantial strategic and practical consequences to having arbitrators decide whether to consolidate proceedings. Once multiple arbitration demands have been filed, it is unclear which arbitration panel should be empowered to decide whether to consolidate the multiple proceedings —the first panel assembled, the first to render a decision on consolidation, the panel reviewing the claim with the most at stake, or a panel selected upon other criteria. Furthermore, there can be incentives for gamesmanship if a party can selectively commence one arbitration before another proceeding in order to gain an advantage concerning consolidation in a hearing in a favorable location or under favorable rules, or a party may seek to delay the selection of an arbitrator in one panel so that another panel can first address consolidation. Procedurally, even if a panel decides to consolidate proceedings, there may be no easy way to coordinate among arbitration panels. If the parties cannot agree about which arbitrator will decide whether to consolidate the proceedings or how to resolve different decisions on consolidation by multiple arbitrators, the parties could end up litigating such disputes in court.

Conclusion

Many potential disputes over consolidation of multiple arbitration proceedings can be avoided through careful drafting. Parties whose contract may reflect only part of an overall transaction or event—such as a reinsurer who participates in one of many related insurance contracts, or contracts among owners, prime contractors, and subcontractors—may wish to explicitly address the potential for multiple proceedings, whether they are permitted, and under what circumstances. At a minimum, parties may wish to set forth procedures to be used to govern how consolidation decisions should be made and ensure that all parties can participate equally in the selection of arbitrators in a consolidated proceeding. This might contemplate having an arbitrator appointed solely to address consolidation issues. Or parties could agree that a court should decide any issue concerning consolidation. While boilerplate arbitration provisions do not address these issues, given the likelihood that an arbitrator would have nearly unfettered discretion whether to consolidate multiple proceedings, a well-drafted arbitration clause can substantially limit the potential expense and delay resulting from poorly coordinated multiple proceedings.

Endnotes

1. *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).
2. *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975).
3. *E.g., P/R Clipper Gas v. PPG Indus.*, 804 F. Supp. 570, 575 (S.D.N.Y. 1992); *Rio Energy Int'l Inc. v. Hilton Oil Transpor*t, 776 F. Supp. 120 (S.D.N.Y. 1991).
4. 998 F.2d 68 (2d Cir. 1993).
5. *Id.* at 73.
6. 189 F.3d 264 (2d Cir. 1999).
7. 537 U.S. 79, 84 (2002).
8. 539 U.S. 444 (2003).
9. *Id.* at 452.
10. *Id.* at 453.
11. 371 F. Supp. 2d 469 (S.D.N.Y. 2005).
12. 548 F.3d 85 (2d Cir. 2008).
13. *Id.* at 100.
14. For example, in *Bazzle,* the operative loan agreement contained a provision that an arbitrator would be "selected by us with the consent of you." 539 U.S. at 448. Justice Breyer's plurality decision found this provision ambiguous as to whether it permitted class arbitration. *Id.* at 453. By contrast, Justice Rehnquist's dissent concluded that this provision, along with provisions in the contract which referred to a specific loan, did not contemplate class-wide dispute resolution. *Id.* at 459.
15. *Id.* at 456–57 ("I have no hesitation in saying that the choice of arbitrator is as important a component of the agreement to arbitrate as is the choice of what is to be submitted to him.") (Rehnquist, C. J., dissenting).
16. *Continental Energy Assoc. v. Asea Brown Boveri, Inc.*, 192 A.D.2d 467, 596 N.Y.S.2d 416 (1st Dep't 1993).
17. Revised Uniform Arbitration Act, 7 U.L.A. 6 (Supp. 2002).
18. *See, e.g., Cullman Ventures v. Conk*, 252 A.D.2d 222, 682 N.Y.S.2d 391 (1st Dep't 1998) (consolidation of arbitrations in New York improper when agreements provided for hearings in Indiana and New York); *Gershen v. Hess,* 163 A.D.2d 17, 558 N.Y.S.2d 14 (1st Dep't 1990) (trial court improperly denied motion to consolidate when there were common issues, the possibility of inconsistent judgments, and no showing of prejudice arising from consolidation).

Jeffrey Gross is Of Counsel at Vandenberg & Feliu LLP, where he represents clients in complex commercial litigation. He has also represented clients in arbitration proceedings, including those concerning non-compete covenants.

Section's 20th Anniversary Celebration—What a Swell Party It Was!

By Susan Davies

More than 200 Section members and friends celebrate the Section's 20th Anniversary in the Bear Ballroom at the Russian Tea Room in New York City.

On November 18, 2008, more than 200 Section members and friends celebrated the Section's 20th anniversary at "a swellagent, elagent party"[1] at the Russian Tea Room in New York City. Honored guests at the event included Commercial Division Justices from Kings, Onondaga, Nassau, New York, Queens, and Westchester counties; other members of the state and federal judiciary; and former Chairs of the Section, including Hon. Kevin P. Castel, Hon. Shira A. Scheindlin, NYSBA President Bernice K. Leber, 2009 NYSBA President-elect Stephen P. Younger, former NYSBA President Mark H. Alcott, and the Section's founding Chair, Robert L. Haig.

In her remarks in honor of the occasion, NYSBA President Leber reminisced about the Section's first meeting in 1988, at the office of founding Chair Robert L. Haig—"the George Washington of our Section." Ms. Leber noted several of the Section's historic achievements, including the creation of the Commercial Division of the New York State Supreme Court, the elimination of exemptions from jury service for lawyers and other professionals, the creation of the Commercial Division Clerkship program in New York County, and the establishment of the Section's Minority Law Student Fellowship. Ms. Leber also acknowledged 20 years of dedicated service by Section members Gregory Arenson, Chair of the Section's Federal Procedure Committee; James P. Blair, a former Chair of the Section's CPLR Committee; and Hon. Melanie L. Cyganowski, Chair of the Section's Nominating Committee. Ms. Leber congratulated Chair Peter Brown and the Section's former Chairs on "20 years of making a difference."

NYSBA President and former Section Chair Bernice K. Leber congratulates the Section on its 20th Anniversary.

The Section thanks the following sponsors for their support of this event. **Gold Sponsors:** Baker & Hostetler LLP, Entwistle & Cappucci LLP, Flemming Zulack Williamson Zauderer LLP, Patterson Belknap Webb & Tyler LLP; **Silver Sponsors:** Connell Foley LLP, Dreier LLP, Farrell Fritz, P.C., Kelley Drye & Warren LLP, Labaton Sucharow LLP, Nixon Peabody LLP; **Bronze Sponsors:** Davidoff Malito & Hutcher LLP, Forensics Consulting Solutions, Hodgson Russ LLP, Hogan & Hartson LLP, Mintz & Gold LLP, Mitchell Silberberg & Knupp LLP, Pillsbury Winthrop Shaw Pittman, Shalov Stone Bonner & Rocco LLP, Tannenbaum Helpern Syracuse & Hirschtritt LLP, Ward Norris Heller & Reidy LLP. The Section also thanks Ellen Grauer Court Reporting Co. LLC for contributing the transcription of Ms. Leber's remarks, which will be reprinted in the Spring 2009 issue of *NYLitigator*, and NYSBA staff members Kathleen M. Heider and Joyce Kimball.

Endnote

1. Cole Porter, What A Swell Party This Is (1939).

Section Chair Peter Brown (front row, second from left) is joined by 17 former Chairs of the Section, including NYSBA President Bernice Leber (front row, third from left) at the 20th Anniversary celebration.

Section's Ethics and Civility Program Celebrates Its 10th Anniversary

By Vincent J. Syracuse

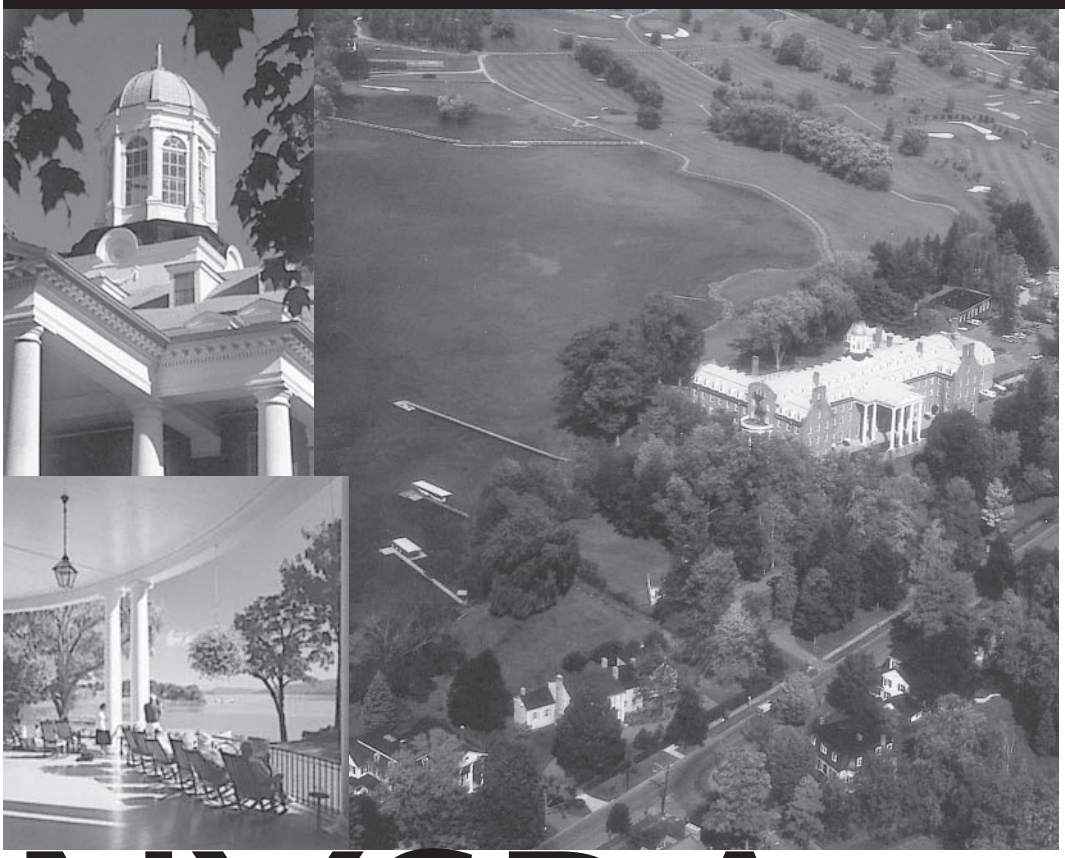
The proposal for the promulgation of civility guidelines for New York lawyers had its genesis in a report that was issued by the Commercial and Federal Litigation Section in June 1994. The Section's report commented on the growing lack of professional civility and apparent disrespect for the litigation process in the courts of our state and proposed specific guidelines on the subject of civility and professional courtesy in litigation. The Section's recommendations were subsequently enacted as Standards of Civility in Appendix A to the Disciplinary Rules of the Code of Professional Responsibility (Part 1200 of Title 22 of N.Y.C.R.R.).

"This very special program has evolved over the years but has always remained true to its original concept . . ."

The idea of a special continuing legal education program devoted to both ethics and civility issues evolved from various discussions at meetings of the Section's Executive Committee, as part of its continuing commitment to the improvement of litigation practice in New York. Larry Weiss, who was then the chair of the Section's CLE committee, and I felt that there was a need for a special CLE program that addressed both subjects. The idea was that experienced, aggressive litigators were uniquely suited to the task of educating senior and junior lawyers in a way that would affect their attitudes and behavior and underscore the important place that civility has as a part of professional responsibility. The concept was to present a two-part program where speakers first made substantive presentations outlining recent developments in legal ethics and emphasizing the importance of civility, followed by an unrehearsed colloquium based on "real world" practical fact patterns that would help guide litigators through the maze of ethical and civility dilemmas faced in everyday practice.

This very special program has evolved over the years but has always remained true to its original concept and is now being presented for the 10th time this spring in New York City, Rochester, Albany, Buffalo, and Melville. It has proven to be one of the NYSBA's most successful CLE programs, attracting capacity audiences throughout the state. Programs like this work because of the dedication and hard work of the speakers and local chairs, especially John M. Brickman, Sharon M. Porcellio, Scott N. Fein, and David H. Tennant, who have contributed their valuable time and talent over the years.

Mr. Syracuse will become the Chair of the Commercial and Federal Litigation Section in June 2009. He is senior partner in Tannenbaum Helpern Syracuse & Hirschtritt LLP in New York City, where he is the Chair of its Litigation and Dispute Resolution Practice Group. Mr. Syracuse has been the Overall Planning Chair of the Section's ethics and civility program since its inception 10 years ago.



Section Chair
Peter Brown
Baker & Hostetler LLP
New York City

Program Chair
Vincent J. Syracuse
Tannenbaum Helpern
Syracuse & Hirschtritt LLP
New York City

NYSBA

Commercial and Federal Litigation Section

In Association with the Young Lawyers Section

LITIGATION IN THE MODERN AGE

Spring Meeting

The Otesaga
Cooperstown, NY
May 1 - 3, 2009

This program provides up to 6 MCLE credit hours. Experienced litigators can earn up to 4.5 credits in Professional Practice and 1.5 credits in Ethics. **Young Lawyers** can earn up to 4.5 credits in Skills and 1.5 credits in Ethics. Only the credits in Skills and Ethics are transitional.

SCHEDULE OF EVENTS

Friday, May 1

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

6:30 p.m. **Cocktail Reception - *Hall of Fame***

Trolleys begin leaving from the front of the hotel at 6:15 p.m.

7:30 p.m. **Opening Banquet - *Hall of Fame***

Welcoming Remarks
MICHAEL E. GETNICK, ESQ. President-Elect, NYSBA
PETER BROWN, ESQ. Section Chair
SHERRY LEVIN WALLACH, ESQ. Young Lawyers Section Chair
VINCENT J. SYRACUSE, ESQ. Section Chair-Elect and Program Chair

Guest Speaker
PAUL EYRE, ESQ.
Baker & Hostetler LLP
New York City
Reminisces of an Ex-Managing Partner

Saturday, May 2

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

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

LITIGATION IN THE MODERN AGE

8:45 a.m. **Welcoming Remarks**
PETER BROWN, ESQ. Section Chair

8:55 a.m. **Program Overview**
VINCENT J. SYRACUSE, ESQ. Section Chair-Elect and Program Chair
PAUL D. SARKOZI, ESQ. Track B, Program Chair

TRACK A (For Experienced Litigators) - *Ballroom*

9:00 a.m. - 10:30 a.m. ***What To Do When the Media Calls?***

Moderator: **HONORABLE BARBARA R. KAPNICK**
Justice of the Supreme Court
of the State of New York
New York City

Speakers:

ERIC DASH
The New York Times
New York City

AARON LUCCHETTI
The Wall Street Journal
New York City

KEN SUNSHINE
Ken Sunshine Consultants, Inc
New York City

MARK C. ZAUDERER, ESQ.
Flemming Zulack Williamson
Zauderer LLP
New York City

10:30 a.m. - 10:45 a.m. **Refreshment Break**

SCHEDULE OF EVENTS

Saturday, May 2 (continued)

10:45 a.m. - 12:15 p.m. ***Sports Law and Lore***

Moderator:

JAMIE B.W. STECHER, ESQ.
Tannenbaum Helpern Syracuse
& Hirschtritt LLP
New York City

Speakers:

DAN HALEM, ESQ.
Senior VP, General Counsel - Labor
Office of the Commissioner of Baseball
New York City

JEFFREY L. KESSLER, ESQ.
Dewey & LeBoeuf LLP
New York City

BRADLEY I. RUSKIN, ESQ.
Proskauer Rose LLP
New York City

DAVID W. SUSSMAN, ESQ.
Skadden, Arps, Slate, Meagher
& Flom LLP
New York City

TRACK B (For Young Lawyers) - *Council Rock Room*

9:00 a.m. - 10:30 a.m. ***What To Do When the Prosecutor Calls: Practical Criminal Defense Tips for the Junior Lawyer***

Speakers:

JONATHAN S. ABERNETHY, ESQ.
Fulbright & Jaworski LLP
New York City

EVAN T. BARR, ESQ.
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SHERRY LEVIN WALLACH, ESQ.
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10:30 a.m. - 10:45 a.m. **Refreshment Break**

10:45 a.m. - 12:15 p.m. ***Trying Your First Non-Jury Case and Preserving Issues for Appeal: The Mechanics for Success***

Moderator:

DANA V. SYRACUSE, ESQ.
Hartman & Craven LLP
New York City

Speakers:

HONORABLE KARLA MOSKOWITZ
Associate Justice, Appellate Division
First Department
New York City

ROBERT N. HOLTZMAN, ESQ.
Kramer Levin Naftalis & Frankel LLP
New York City

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

12:15 p.m. - 1:45 p.m. **Buffet Lunch - *Templeton Lounge***
Presentation of Section Award for Excellence in Commercial Brief Writing

SCHEDULE OF EVENTS

Saturday, May 2 (continued)

3:00 p.m. **Softball Game at the Clark Sports Center**

WHO'S ON FIRST...WHAT'S ON SECOND???
Join us for an afternoon of fun and camaraderie. Equipment will be provided. Prior sign up required on the enclosed registration form. Trolleys begin leaving from the front of the hotel at 2:30 p.m.

6:30 p.m. **Cocktail Reception - *West Veranda***

7:30 p.m. **Gala Dinner - *Main Dining Room***

New York State Bar Association Welcome
STEPHEN P. YOUNGER, ESQ.
President-Elect Designee
New York State Bar Association
Patterson Belknap Webb & Tyler LLP
New York City

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

Presenter: **HONORABLE JONATHAN LIPPMAN**
Chief Judge State of New York

Recipient: **HONORABLE JUDITH S. KAYE**
Former Chief Judge
State of New York

10:00 p.m. **After Dinner Drinks and Conversation - *King Fisher Tower Room***

Sunday, May 3

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

TRACK A (For Experienced Litigators) - *Ballroom*

9:00 a.m. - 10:30 a.m. ***Strategies for Protecting Sports, Music and Publication Content on the Internet: Litigating Against Domestic and Foreign Content Pirates***

Moderators:

PETER J. PIZZI, ESQ.
Connell Foley LLP
New York City and Roseland, NJ

OREN WARSHAVSKY, ESQ.
Baker & Hostetler LLP
New York City

Speakers:

JOHN CURRAN, ESQ.
Stroz Friedberg
New York City

JOSEPH DeMARCO, ESQ.
DeVore & DeMarco LLP
New York City

LANCE R. GRIFFIN, ESQ.
Executive Counsel
Corporate Legal
The Walt Disney Company
Burbank, CA

MICHAEL J. MELLIS, ESQ.
Senior Vice President and
General Counsel
MLB Advanced Media, L.P.
New York City

10:30 a.m. - 10:45 a.m. **Refreshment Break**

SCHEDULE OF EVENTS

Sunday, May 3 (continued)

10:45 a.m. - 12:15 p.m. ***Ethical Issues in the Investigation of a Lawsuit, Part 2***

Moderators:

ANTHONY J. HARWOOD, ESQ.
Labaton Sucharow LLP
New York City

JAMES M. WICKS, ESQ.
Farrell Fritz PC
Uniondale

Speakers:

BENTON CAMPBELL, ESQ.
United States Attorney
Eastern District of New York
Brooklyn

PROF. NED CAVANAGH
St. John's University School of Law
Jamaica

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

RICHARD MARC PLANSKY, ESQ.
Kroll's Associates, Inc.
New York City

TRACK B (For Young Lawyers) - *Council Rock Room*

9:00 a.m. - 10:30 a.m. ***Beyond the MPRE: Real Life Ethics for the New Business Lawyer***

Speakers:

HON. JOHN M. CURRAN
Justice of the Supreme Court
of the State of New York
Buffalo

JEREMY R. FEINBERG, ESQ.
NYS Unified Court System
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MELINDA H. WATERHOUSE, ESQ.
DLA Piper LLP (US)
New York City

10:30 a.m. - 10:45 a.m. **Refreshment Break**

10:45 a.m. - 12:15 p.m. ***E-Discovery: What Every Junior Lawyer Needs To Know About Litigation Holds and Gathering, Reviewing and Producing Electronic Documents***

Speakers:

ERIKA J. DUTHIERS, ESQ.
Nixon Peabody LLP
Rochester

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

PATRICK G. RADEL, ESQ.
Getnick, Livingston, Atkinson,
Gigliotti & Priore LLP
Utica

12:15 p.m. **Adjournment**

CPLR Amendments: 2008 Legislative Session
(Chapters 1–652)

CPLR §	Chapter (§)	Change	Eff. Date
205(a)	156	Requires court to set forth specific conduct showing general pattern of delay in neglect-to-prosecute dismissal	7/7/08
214-b	143	Extends deadline for commencing revived Agent Orange actions to June 16, 2010	6/30/08
302(d)	66(3)	Grants personal jurisdiction to NYS courts over certain plaintiffs in foreign country defamation judgment actions	4/28/08
3001	388(1)	Authorizes declaratory judgment action directly against insurer of other party pursuant to Insur. Law § 3420(a)(6) in personal injury or wrongful death action	1/17/09
3408	472(3)	Mandates settlement conferences in certain residential foreclosure actions	8/5/08
5205(l)-(n)	575(1)	Adds exemption for banking institution accounts into which statutorily exempt e-payments are made	1/1/09
5222(b)-(e), (h)-(j)	575(2), (3)	Adds provisions on restraint on judgment debtor's banking institution account	1/1/09
5222-a	575(4)	Adds provision on service of notices and forms and procedures for claim of exemption	1/1/09
5230(a)	575(5)	Adds requirements on contents of execution notices	1/1/09
5231(b)	575(6)	Changes maximum for amount withheld	1/1/09
5232(e)-(g)	575(7)	Adds provisions relating to exemptions	1/1/09
5241(e)	94	Requires that in Supreme Court applications for mistake of fact determinations be made by motion, not by special proceeding	5/27/08
5304(a)(8)	66(2)	Requires that, to be conclusive, foreign country defamation judgment had to apply law providing at least as much free speech and press protection as U.S. and NYS constitutions	4/28/08
8012(b)(2)-(5)	441	Provides for poundage on judgment or settlement amount and attorneys' fees and court costs to sheriff	8/5/08
8019(f)(5)	223(7)	Provides for actual cost of reproducing non-paper record pursuant to Pub. Off. Law § 87(1)(c)	8/6/08
8021(a)(4)(a)	288	Authorizes county to increase fee for recording, entering, indexing, and endorsing a certificate on any instrument	7/7/08

Notes: (1) The pilot program for commencement of civil actions and proceedings by fax or e-mail has been expanded to include all cases in Supreme Court, Erie County. 2008 N.Y. Laws ch. 95. (2) All court costs or filing fees for the commencement of a civil action or proceeding relating to service in active duty in the organized militia by an active member thereof are waived. 2008 N.Y. Laws ch. 600, adding Military Law § 323–b. (3) The requirements for powers of attorney have been amended. 2008 N.Y. Laws ch. 644, amending Gen. Oblig. Law §§ 5–1501, *et seq.*

2008-2009 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 2008 and 1–2 of 2009)

22 N.Y.C.R.R. §	Court	Subject (Change)
Part 108	All	Repeals pre-8/18/2000 provisions applying to certain court reporters as to payment for and specifications of transcripts; adds proviso for an MOU with the Unified Court System on written agreements on transcripts
202.5-b	Sup.	Revises the procedure for e-filing in Supreme Court
202.18	Sup.	Requires 1st & 2d Dep't appointments be made pursuant to Parts 623 & 680
202.70(a)	Sup.	Increases monetary threshold of Commercial Division in New York County to $150,000
207.4-a	Surr. Ct.	Establishes pilot program for e-filing in Surrogate's Court
208.4-a	NYC Civ. Ct.	Establishes pilot program for e-filing in NYC Civil Court
Part 500	Ct. App.	Makes technical amendments throughout Part 500
500.1(b), (e)	Ct. App.	Clarifies definition of "papers filed"; requires affixing of original affidavits of service to inside back covers of original papers
500.5(e)	Ct. App.	Adds provision on confidential material
500.6	Ct. App.	Requires notification to clerk's office of changes in status of related litigation
500.11(e), (h)	Ct. App.	Prohibits reply in alternative review appeals, except with leave of Court; requires each § 500.11 letter to indicate status of related litigation
500.13	Ct. App.	Adds requirements for contents of briefs
500.14	Ct. App.	Adds requirement for inclusion of certain additional materials in the record
500.15	Ct. App.	Deletes deadline for requesting extension
500.16(c)	Ct. App.	Clarifies that party may seek review of dismissal and preclusion orders
500.21(h)	Ct. App.	Adds provision on orders determining motion
500.22(a)	Ct. App.	Adds indigency exception to filing original and six copies of leave to appeal papers
500.23	Ct. App.	Revises procedures for *amicus curiae* relief
730.1	A.T., 2d Dep't	Changes location of Appellate Term
730.3	A.T., 2d Dep't	Adds general provisions and definitions
731.4, 732.4	A.T., 2d Dep't	Changes procedures for perfecting appeals
731.5, 732.5	A.T., 2d Dep't	Changes procedures for preferences and adds provision on consolidation
731.6, 732.6	A.T., 2d Dep't	Changes procedures on oral argument
731.8, 732.8	A.T., 2d Dep't	Changes procedures on *sua sponte* dismissals and adds provisions on enlargement of time
Part 1200	All	Replaces Code of Professional Responsibility with Rules of Professional Conduct

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

Notes of the Section's Executive Committee Meetings

July 8, 2008

The Honorable Alan D. Scheinkman, Justice of the Commercial Division, Supreme Court, Westchester County, discussed his experiences on the bench and his insights regarding lawyering skills, discovery practice, and unique elements of the Commercial Division.

The Executive Committee discussed an update on the Section's report to the House of Delegates recommending amendments to the CPLR concerning electronic discovery and also discussed upcoming Section programs.

September 9, 2008

Guest speaker the Honorable A. Kathleen Tomlinson, Magistrate Judge of the U.S. District Court for the Eastern District of New York, discussed with the Executive Committee the scope of the magistrate judge's jurisdiction, including both how it varies by jurisdiction and how it operates in the Eastern District specifically.

The Executive Committee discussed a report of the Federal Procedure Committee on "Rule 8(a)(2) after *Twombly*" and the proposed survey of the Task Force on the State of Our Courthouses.

October 7, 2008

Guest speaker the Honorable Sidney H. Stein, U.S. District Court Judge for the Southern District of New York, engaged the Executive Committee in a discussion of the role of trials in litigation today and proposed a theoretical optional expedited track that would prohibit motion practice, limit and expedite discovery, and set a fixed trial date.

The Executive Committee discussed the upcoming revised version of the individual rules of the federal courts in New York State and also discussed the upcoming Westchester County Commercial Division program, the Annual Meeting, and the Spring Meeting and the possibility of providing podcasts on the Section's Web site.

November 20, 2008

Guest speaker the Honorable Helen E. Freedman, Appellate Division, First Department, spoke on her transition from the Commercial Division of the Supreme Court, New York County, to the Appellate Division and shared insights into several aspects of her work on the Appellate Division.

The Executive Committee debated the virtues of various mediums for CLE offerings and discussed recent and upcoming programs of the Section.

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