

# Commercial and Federal Litigation Section Newsletter

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

## Message from the Chair

In my last column, I wrote with much excitement and anticipation about my then-embryonic tenure as Chair of the Commercial and Federal Litigation Section. I suggested that with so many important initiatives to be organized and projects to be undertaken, it was essential for me to “say little and do much.”



Jonathan D. Lupkin

As I write this column, my term is more than halfway complete, and it is time to take stock of what has transpired and what we have accomplished to date. It is, in short, an Ed Koch “how are we doing?” moment. Looking back on the past eight months, I can say that, thanks to all of you, our Section continues to carry on its great tradition of excellence, innovation, and service to the legal community. Its accomplishments are many, and they speak for themselves. Allow me a moment to “schepp nachas” (Yiddish for “experience pride”) and share with you some of what we have been doing:

- In November, with press coverage and much fanfare, we launched our anticipated Mentoring Initiative. We kicked off the program at an elegant Lincoln Center reception complete with a Julliard string quartet and inspiring words of encouragement from our tireless Chief Judge *emerita*, Judith Kaye. That night, we hosted more than 20 senior commercial litigators and paired them with approximately 30 newer lawyers, all of whom signed up to be mentored and guided by these veritable denizens of the New York legal community. Despite its newness, the program has already shown signs of great success. We have had numerous

additional requests from potential mentees to join the program and, equally impressive, inquiries from several new senior attorneys looking to become mentors. Additionally, at least one mentee has already been placed with a prestigious litigation boutique for a three-month paid internship. Finally, and of particular note, NYSBA President Steve Younger has asked our Section to prepare a written “blueprint” of the program for circulation to (and possible emulation by) all of the other sections of the New York State Bar Association.

- Our Committee on the Commercial Division has issued a major report entitled “A Proposal for

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Enhanced Expert Disclosure in the Commercial Division.” The report, which was approved by our Section’s Executive Committee, has already been favorably received by many of the Commercial Division Justices throughout the state. It is our hope that judicial encouragement of enhanced expert disclosure—the report’s ultimate recommendation—will improve the quality of commercial litigation in the New York state court system while at the same time remaining consistent with the apparent strictures of the CPLR.

- Our Annual Meeting in New York City was a “sold out” affair, and the CLE offerings drew uniform accolades from those in attendance. In fact, one of our CLE programs—which took the form of a bench/bar discussion about the problems associated with data retention in the age of e-discovery—was so unique and influential that the *New York Law Journal* ran a substantive article that highlighted some of the critical issues raised and debated by the assembled panel of experts. And the luncheon that followed was equally successful. This year’s Fuld Award recipient, Hon. Robert Katzmann, brought the capacity crowd, which included approximately 50 members of the judiciary, to its

feet with his impassioned plea for members of the private bar to take on *pro bono* immigration matters as part of an ongoing effort to improve the overall quality of representation for those facing deportation.

- Our Section, in conjunction with the New York Bar Foundation, has funded minority fellowships that will provide two promising law students of color with the opportunity to intern for the esteemed justices of the Commercial Division in New York County.

These are but a fraction of our Section’s accomplishments to date. I encourage each and every one of you not simply to be content reading about our wonderful Section in print, but, instead, to get involved. Please feel free to pick up the phone and call me (212) 412-9579. I will make every effort to get you meaningfully involved in Section’s activities. It is my sincere hope that active involvement with our Section will provide you with as much personal and professional fulfillment as it has provided me for almost a decade and a half.

Jonathan D. Lupkin

NEW YORK STATE BAR ASSOCIATION

*Save the Dates*

**COMMERCIAL AND FEDERAL  
LITIGATION SECTION**

**SPRING MEETING**

***May 20-22, 2011***

**Hyatt Regency Newport  
Goat Island • Newport, RI**

*(see program brochure on pp. 21-24 in this issue)*

More information: [www.nysba.org/ComFedSpring11](http://www.nysba.org/ComFedSpring11)

# 2011 Annual Meeting: A Record Breaker

By Matthew R. Maron

With snow falling steadily outside during what had become a nearly endless winter, the Commercial and Federal Litigation Section hosted its Annual Meeting and Reception on January 26, 2011, to record-breaking attendance at the Hilton New York Hotel in midtown Manhattan.

The day started off with a two-part CLE program, beginning with “Bridging the E-Discovery Gap Between Bench and Bar.” Adam I. Cohen, senior managing director for FTI Consulting, Inc. and co-chair of the Section’s Committee on Electronic Discovery, led a candid discussion between the bench and the bar on the current legal standards for e-discovery and the issues that may arise from the disparity between law and practice in the ever-changing landscape of discoverable information, as well



**Tracee E. Davis, Vice-Chair and Program Chair**

as efforts to ameliorate any gaps, both ongoing and proposed, concerning standards for e-discovery. The panel featured some of the most prominent voices in the world of electronic discovery, including Hon. Leonard B. Austin, New York State Supreme Court Justice, Appellate Division, Second Department; Mark A. Berman, Esq., a partner at Ganfer & Shore, LLP, and a regular columnist in the *New York Law Journal* on electronic discovery issues; Andrea E. Berner, Esq., Vice President, The Miss Universe Organization; Hon. James C. Francis, United States Magistrate Judge, Southern District of New York; David J. Lender, Esq., a Partner at Weil, Gotshal & Manges LLP; Hon. Andrew J. Peck, United States Magistrate Judge, Southern District of New York; Hon. Shira A. Scheindlin, United States District Court Judge, Southern District of New York; Hon. Ira B. Warshawsky, New York State Supreme Court Justice, Nassau County, Commer-



**Robert L. Haig, Panel Chair (and former Section Chair)**



**Hon. Ira B. Warshawsky (far left); Hon. Shira A. Scheindlin; Hon. Andrew J. Peck; Mark A. Berman; David J. Lender; Hon. James C. Francis; Andrea E. Berner; Hon. Leonard B. Austin**

cial Division; and Paul Weiner, Esq., a Partner at Littler Mendelson, P.C.

This panel focused primarily on issues regarding the preservation of electronically stored information and on whether establishing rules governing preservation were feasible and necessary. Matters discussed included the timing of a “trigger” requiring a preservation obligation, the scope and duration of such a preservation obligation, issues concerning litigation hold instructions, available sanctions for violation of any proposed preservation rules, and issues concerning burdens of proof with respect to spoliation. In addition, the panel tackled issues regarding the development of bright-line procedures for both the state and federal courts in New York in the areas of electronic discovery, as well as the continuing concerns regarding which party would bear the burden for costs related to electronic discovery.

The second part of the program, entitled “How Inside and Outside Litigation Counsel Can Add Value and Reduce Costs for Corporate Clients,” was divided into two panels. Robert L. Haig, Editor-in-Chief of the critically acclaimed treatise *Successful Partnering Between Inside and Outside Counsel* and a Partner at Kelley Drye & Warren LLP, first led a distinguished panel of chief litigation counsel of major



corporations and outside counsel in a candid interactive discussion about the challenges and pressures that in-house litigation counsel now face and how outside counsel can implement practices and procedures that build strong client relationships while enhancing their corporate clients' bottom line. The opening part of this program focused on improving the quality and maximizing the value of legal services for commercial litigation, with the first panel discussing such topics as case management and staffing (including use of contract attorneys and outsourcing), bundling and unbundling of professional services and expenses, planning (including case investigation and assessment), use of technology, and settlement and ADR strategies, quality management, and benchmarking and evaluation of law firm performance. This first panel included Mitchell F. Borger,



**Mitchell F. Borger (far left) ; Wanda N. Goodloe; Bruce J. Hector; Todd Kahn; Michael W. Leahy; Elizabeth M. Sacksteder; John A. Schulman**



**Gary R. Brown (far left); Alexander Dimitrief; Steven M. Haber; Susan J. Hackett**

Esq., Group Vice President, Associate General Counsel, Macy's, Inc.; Wanda N. Goodloe, Esq., Vice President and General Counsel, CB Richard Ellis, New York Tri State Region; Bruce J. Hector, Esq., Associate General Counsel and Chief Litigation Counsel, Becton Dickinson and Company; Todd Kahn, Esq., Senior Vice President, General Counsel and Secretary, Coach Inc.; Michael W. Leahy, Esq., Deputy General Counsel, American International Group, Inc.; Elizabeth Sacksteder, Esq., Deputy General Counsel and Head of Litigation, Citigroup, Inc.; and John A. Schulman, Esq., Partner, Mitchell Silberberg & Knupp LLP.

A second panel focused on matters concerning pricing



**Margaret M. Madden; Mark C. Morrill; Jay G. Safer**

trends within the legal profession that have been adopted by in-house and outside litigation counsel, ranging from alternative fee arrangements (including risk-sharing between client and counsel, flat fees, phased billing, blended rates, retainers, and contingency fees), preferred firm/value-based billing arrangements, and realistic budgeting responses to fee expectations of in-house counsel. This panel included Gary R. Brown, Esq., Senior Vice President, Chief Counsel, CA Technologies, Inc.; Alexander Dimitrief, Esq., Vice President and Senior Counsel—Litigation & Legal Policy, General Electric Company; Steven M. Haber, Esq., Managing Director/Head of Litigation—Americas, Deutsche Bank AG; Susan J. Hackett, Esq., Senior Vice President and General Counsel, Association of Corporate Counsel; Margaret M. Madden Esq., Vice President, Assistant General Counsel, Pfizer, Inc.; Mark C. Morrill, Esq., Senior Vice President and Deputy General Counsel, Viacom Inc.; and Jay G. Safer, Esq., a Partner at Locke Lord Bissell & Liddell LLP and former Section Chair.



**Hon. Robert A. Katzmann addresses CFLS luncheon as recipient of The Stanley H. Fuld Award**

Both panels of in-house counsel sounded an almost uniform theme: in today's economic environment, clear communication between in-house and outside counsel is critical in maintaining and fostering the relationships between outside attorneys and their clients. Moreover, with businesses developing greater cost-saving measures, it is important for outside counsel to be attentive to the fact that these new developments in controlling costs are happening and are here to stay.

The day's events concluded with a luncheon reception and presentation of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation to Hon. Robert A. Katzmann, United States Circuit Judge for the United States Court of Appeals, Second Circuit. The Fuld Award was presented to Judge Katzmann by Hon. Jed S. Rakoff, United States District Judge, United States District Court for the Southern District of New York. After graciously accepting the Fuld Award, Judge Katzmann challenged the audience to take up the call of pro bono assistance for immigrants, an issue that has become of great concern in the post-9/11 world where a surge of immigration cases has occupied the dockets of the Second Circuit.

**Matthew R. Maron** is associated with the law firm of **Ganfer & Shore, LLP**, and concentrates his practice on commercial litigation, as well as white collar criminal and regulatory matters.



**Hon. Robert A. Katzmann (center) receives The Stanley H. Fuld Award presented by Hon. Jed S. Rakoff (right) and Section Chair Jonathan D. Lupkin (left)**



**Section Chair Jonathan D. Lupkin addresses CFLS luncheon**

## COMMERCIAL AND FEDERAL LITIGATION SECTION

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# Redefining the Enterprise: How Has *Boyle* Affected RICO Claimants?

By David E. Miller

## I. Introduction

On June 8, 2009, the Supreme Court of the United States issued *Boyle v. United States* (“*Boyle*”), an opinion in which it examined and appeared to broaden the definition of an “enterprise” under the Racketeering Influenced and Corrupt Organizations Act (“RICO”).<sup>1</sup> This article examines the impact of *Boyle* over the ensuing twelve months on federal circuit and district courts adjudicating dispositive motions in RICO cases.

A plaintiff seeking to bring a civil claim for violation of RICO faces several pleading hurdles in order to reach the “promised land” of treble damages and attorney’s fees.<sup>2</sup> This is because racketeering allegations have “an almost inevitable stigmatizing effect on those named as defendants.”<sup>3</sup> “As a result, courts are charged with flushing out frivolous RICO allegations at the earliest possible stage of litigation[.]” *i.e.*, upon the filing of a motion to dismiss.<sup>4</sup>

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*“A plaintiff seeking to bring a civil claim for violation of RICO faces several pleading hurdles in order to reach the ‘promised land’ of treble damages and attorney’s fees.”*

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In order to withstand a motion to dismiss for failure to state a claim, a plaintiff must allege “(1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962.”<sup>5</sup>

Section 1962 lists activities that run afoul of the RICO statute, each of which involves an “enterprise”:

- (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, *any enterprise* which is engaged

in, or the activities of which affect, interstate or foreign commerce....

- (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of *any enterprise* which is engaged in, or the activities of which affect, interstate or foreign commerce.
- (c) It shall be unlawful for any person employed by or associated with *any enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.
- (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.<sup>6</sup>

Section 1961 defines an “enterprise” as including “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>7</sup> The second type of enterprise is generally referred to as an “association-in-fact” enterprise. To plead the existence of a RICO enterprise, a party need only provide a clear and concise statement of the enterprise in a manner consistent with Rule 8 of the Federal Rules of Civil Procedure.<sup>8</sup>

## II. Supreme Court Case Law: *Turkette*, *King*, and *Boyle*

Over the past three decades, the Supreme Court has issued three substantive opinions concerning the definition of an “enterprise” for RICO purposes. Two of those cases concerned the distinction between that “enterprise” and the “pattern of racketeering activity” that is also a required element of a valid RICO claim. The third case concerned the distinction between the “person” who acts through an “enterprise” and the “enterprise” itself. As this brief summary suggests, courts have encountered some difficulty in defining an “enterprise” for RICO purposes.

In *United States v. Turkette* (“*Turkette*”), the Supreme Court distinguished a RICO enterprise from the pattern of racketeering required to establish a claim:



The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The “enterprise” is not the “pattern of racketeering activity”; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved....<sup>9</sup>

In *Turkette*, the Supreme Court also found that the foregoing definition of a RICO enterprise applied to both legitimate and illegitimate enterprises.<sup>10</sup>

In *Cedric Kushner Promotions, Ltd. v. King*,<sup>11</sup> the Supreme Court clarified that, with regard to the enterprise requirement vis-à-vis a claim brought pursuant to 18 U.S.C. § 1962(c), a plaintiff must “allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not merely the same ‘person’ referred to by a different name.”<sup>12</sup> As the Second Circuit subsequently noted, the purpose of the requirement of “distinctness” is to “weed out claims dressed up as RICO violations but which are not in fact.”<sup>13</sup>

In *Boyle*, the Supreme Court appeared to alter the playing field for plaintiffs contemplating RICO claims by virtually eliminating the requirement, expressed in *Turkette*, of pleading both an enterprise and, separately, a pattern of racketeering. *Boyle* concerned the criminal trial of an individual who had participated in a loosely and informally organized group that had conducted a series of bank heists in the 1990s.<sup>14</sup> Over petitioner’s objection, the district court instructed the jury that it could “find an enterprise where an association of individuals, without structural hierarchy [was] form[ed] solely for the purpose of carrying out a pattern of racketeering acts” and that “[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.”<sup>15</sup> Moreover, the district court refused petitioner’s request that it instruct the jury that the government was required to prove that the enterprise had “an ongoing organiza-

tion, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts.”<sup>16</sup> The Supreme Court granted certiorari to determine whether an association-in-fact enterprise must have “an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.”<sup>17</sup>

The Court decided to divide this question into three parts: (1) Must an association-in-fact enterprise have a structure? (2) Must that structure be ascertainable? (3) Must the structure go beyond that inherent in the pattern of racketeering in which its members engage?<sup>18</sup> In response to the questions it had posed, the Court held that: (1) a RICO association-in-fact enterprise must have a structure consisting of “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose”; (2) there is no need to instruct a jury that this structure must be ascertainable; and (3) while the existence of the enterprise remains a separate element that must be proved, that existence may be inferred from the same evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity.<sup>19</sup>

### III. Circuit Court Case Law After *Boyle*

To date, over sixty court opinions have cited *Boyle*. Among the Circuit Courts of Appeals, *Boyle* has been cited in opinions rendered in connection with several cases brought by the federal government against individuals accused of criminal activity, such as participating in drug rings and gangs engaged in racketeering activity. In that context, the Circuit Court for the District of Columbia and the Second, Third, and Tenth Circuit Courts have all cited *Boyle* in support of the determination that an association-in-fact enterprise exists even when the enterprise has a “loose” structure.<sup>20</sup>

*U.S. v. Hutchinson* (“*Hutchinson*”) is illustrative. *Hutchinson* concerned the challenges brought by four defendants concerning their individual convictions and sentences arising from the operation of a crack cocaine market located within the grounds of a motel.<sup>21</sup> *Hutchinson* challenged the district court’s jury instruction with respect to RICO’s enterprise element.<sup>22</sup> More specifically, *Hutchinson* argued that the district court had failed to instruct the jury properly in light of *U.S. v. Smith*, in which the Tenth Circuit had previously held that an association-in-fact enterprise must include a decision-making framework and have an existence separate and apart from a pattern of racketeering activity.<sup>23</sup> The Court upheld the district court’s instructions, noting that “[w]hatever we might have said once about the merits of Mr. *Hutchinson*’s arguments, the world looks very different now after the Supreme Court’s recent decision in *Boyle*.”<sup>24</sup> In the Tenth Circuit’s own words, “Simply put, after *Boyle*,

an association-in-fact enterprise need have no formal hierarchy or means for decision-making, and no purpose or economic significance beyond or independent of the group's pattern of racketeering activity."<sup>25</sup>

The Seventh Circuit has considered *Boyle* on three occasions, each in connection with a motion to dismiss a private litigant's RICO claim. Each of those three opinions was issued after *Ashcroft v. Iqbal* ("*Iqbal*"), in which the Supreme Court instructed that "a complaint must contain sufficient factual matter...to state a claim to relief that is plausible on its face."<sup>26</sup> In the most recent of those three opinions, the Seventh Circuit opined that, taken at face value, *Boyle* means that even a conspiracy to commit a predicate act constitutes an association-in-fact enterprise so long as the alleged conspiracy/enterprise has a purpose, relationships between the conspirators, and longevity.<sup>27</sup> In the two prior cases, both decided in early December 2009, the Seventh Circuit expressed doubt that plaintiffs had met even the relatively loose standard set forth in *Boyle*.<sup>28</sup>

#### IV. District Court Case Law After *Boyle*

With respect to criminal activity, a similar pattern appears to pervade the district courts that have cited *Boyle*. In particular, those courts have had little difficulty finding that a gang is an association-in-fact enterprise.<sup>29</sup> However, in cases involving private litigants, district courts applying *Boyle* have been reluctant to apply its holding too broadly, choosing to focus instead on the specific allegations before them.

*Elsevier, Inc. v. W.H.P.R., Inc.* ("*Elsevier*") and *Automated Teller Machine Advantage LLC v. Moore* ("*ATM*"), each of which was issued after *Iqbal*, are illustrative. The plaintiffs in *Elsevier*, who published scholarly journals, accused several sets of defendants of purchasing individual subscriptions from plaintiffs at a discounted rate, reselling them to institutions at a higher rate, and pocketing the difference.<sup>30</sup> Citing *Boyle*, the district court dismissed plaintiffs' RICO claims because plaintiffs had failed to plead any interpersonal relationships among the sets of individuals allegedly associated with the supposed association-in-fact enterprise.<sup>31</sup> In *ATM*, by contrast, the plaintiff alleged that defendants had engaged in an elaborate scheme to defraud plaintiff of millions of dollars by inducing plaintiff to purchase large numbers of automated teller machines that did not exist.<sup>32</sup> Examining the allegations before it in light of *Boyle*, the court had little apparent difficulty finding plaintiff's allegations of a common purpose, relationships among members of the alleged association-in-fact enterprise and multiple acts of mail and wire fraud over several years sufficient to plead an association-in-fact RICO enterprise.<sup>33</sup>

#### V. Conclusion

In sum, while prosecutors have reaped the benefits of *Boyle's* apparent loosening of the requirement that any RICO association-in-fact enterprise have a "structure," *Boyle* has not fundamentally altered the playing field for other RICO plaintiffs. Rather, such plaintiffs can still expect careful scrutiny of their factual allegations concerning the "structure" of any such enterprise. Thus, the "promised land" of treble damages and attorney's fees is only marginally closer after *Boyle*.

#### Endnotes

1. 129 S. Ct. 2237 (2009).
2. See 18 U.S.C. § 1964(c) (listing civil remedies available in cases brought pursuant to 18 U.S.C. § 1962).
3. *Elsevier, Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 300 (S.D.N.Y. 2010).
4. *Id.*
5. *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) (quoting *Defalco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001)).
6. 18 U.S.C. § 1962(a)-(d) (emphasis added).
7. 18 U.S.C. § 1961(4).
8. *Sony Music Ent'mt Inc. v. Robison*, No. 01 Civ. 6415, 2002 WL 272406, at \*6 (S.D.N.Y. Feb. 26, 2002); see also *Fuji Photo Film U.S.A., Inc. v. McNulty*, 640 F. Supp. 2d 300, 309 (S.D.N.Y. 2009) ("A party must plead the existence of a RICO enterprise in accordance with Rule 8(a) of the Federal Rules of Civil Procedure.").
9. 452 U.S. 576, 583 (1981).
10. See *id.* at 583-586.
11. 533 U.S. 158 (2001).
12. 533 U.S. 158, 161 (2001).
13. *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 447 (2d Cir. 2008), *rev'd on other grounds*, *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010).
14. *Boyle*, 129 S. Ct. 2237, 2241 (2009).
15. *Id.* at 2242. While the Supreme Court opinion in *Boyle* avers that the District Court "relied largely on language in [*Turkette*]" in instructing the jury, the Court offers no citation in support of that assertion. *Id.*
16. *Id.* (emphasis added).
17. *Id.* at 2241, 2244.
18. *Id.* at 2244.
19. *Id.*
20. See *U.S. v. Wilson*, 605 F.3d 985, 1020 (D.C. Cir. 2010) (rejecting challenge to jury instructions because an association-in-fact enterprise need not have any structure beyond the attendant pattern of racketeering activity); *U.S. v. Burden*, 600 F.3d 204, 215 (2d Cir. 2010) (different "styles of organization" between various defendants' narcotics business and violent acts did not negate jury's finding that defendants were part of an association-in-fact enterprise); *U.S. v. Hutchinson*, 573 F.3d 1011, 1019-1022 (10th Cir. 2009) (discussed below); *U.S. v. Cooper*, 343 Fed. Appx. 830, 831-32 (3d Cir. 2009) (rejecting challenge to conviction for RICO violation because street gang, which lacked any hierarchy, constituted an association-in-fact enterprise).



21. 573 F.3d at 1016.
22. *Id.* at 1019.
23. *Id.* at 1020 (citing *U.S. v. Smith*, 413 F.3d 1253 (10th Cir. 2005)).
24. *Id.* at 1021.
25. *Id.*
26. 129 S. Ct. 1937, 1949 (2009).
27. *Jay E. Hayden Found. v. First Neighbor Bank*, 610 F.3d 382, 388-389 (7th Cir. 2010) (Posner, J.). *Cf. Bridgetree, Inc. v. Red F Mktg. LLC*, No. 3:10-cv-228-FDW-DSC, 2010 WL 3081372, at \*3 (W.D.N.C. Aug. 6, 2010) (holding that, under *Boyle*, plaintiffs' allegation of individual defendant's intent to participate in a course of conduct with others was sufficient to make out a "common purpose" and thus a claim for RICO conspiracy for purposes of withstanding a motion to dismiss).
28. *See Rao v. BP Prods. N. Am.*, 589 F.3d 389, 400 (7th Cir. 2009) (affirming dismissal by district court pursuant to Fed. R. Civ. P. 12(b)(6) on ground that, where plaintiff's allegations concern different actors for each event, "[i]t is difficult to see an enterprise with a structure that engaged in a pattern of racketeering activity"); *Kaye v. D'Amato*, 357 Fed. Appx. 706, 711 (7th Cir. 2009) (where plaintiff's allegations concerning certain organizations did not show interpersonal relationships or a common interest within such organizations, but did establish that certain individual defendants operated collectively in their individual capacities, court would "generously infer from his allegations an association-in-fact among [d]efendants").
29. *See U.S. v. Cerna*, No. CR 08-0730, 2010 WL 1459444, at \*1-2 (N.D. Cal. Apr. 9, 2010) (denying motion to strike relevant portion of indictment because criminal gang constituted association-in-fact enterprise); *U.S. v. Harris*, No. 07-10143, 2009 WL 4059388, at \*3-5 (D. Kan. Nov. 20, 2009) (on motion for acquittal or new trial, affirming jury instructions that were similar to those issued in *Boyle*); *U.S. v. Castro*, 669 F. Supp. 2d 288, 291 (E.D.N.Y. 2009) (holding government had sufficiently proved at trial that criminal gang was an association-in-fact enterprise). *But see U.S. v. Bergrin*, Criminal No. 09-369, 2010 WL 1574196, at \*10 (D.N.J. Apr. 21, 2010) (granting motion to dismiss indictment on ground that general and conclusory allegations pled a pattern of racketeering, but not a separate association-in-fact enterprise).
30. 692 F. Supp. 2d at 301.
31. *Id.* at 305-07.
32. No. 08 Civ. 3340, 2009 WL 2431513, at \*1 (S.D.N.Y. Aug. 6, 2009).
33. *Id.* at \*6-7.

**David Miller, an attorney in New York, may be reached at [davidemiller2003@yahoo.com](mailto:davidemiller2003@yahoo.com).**

# Are you feeling overwhelmed?

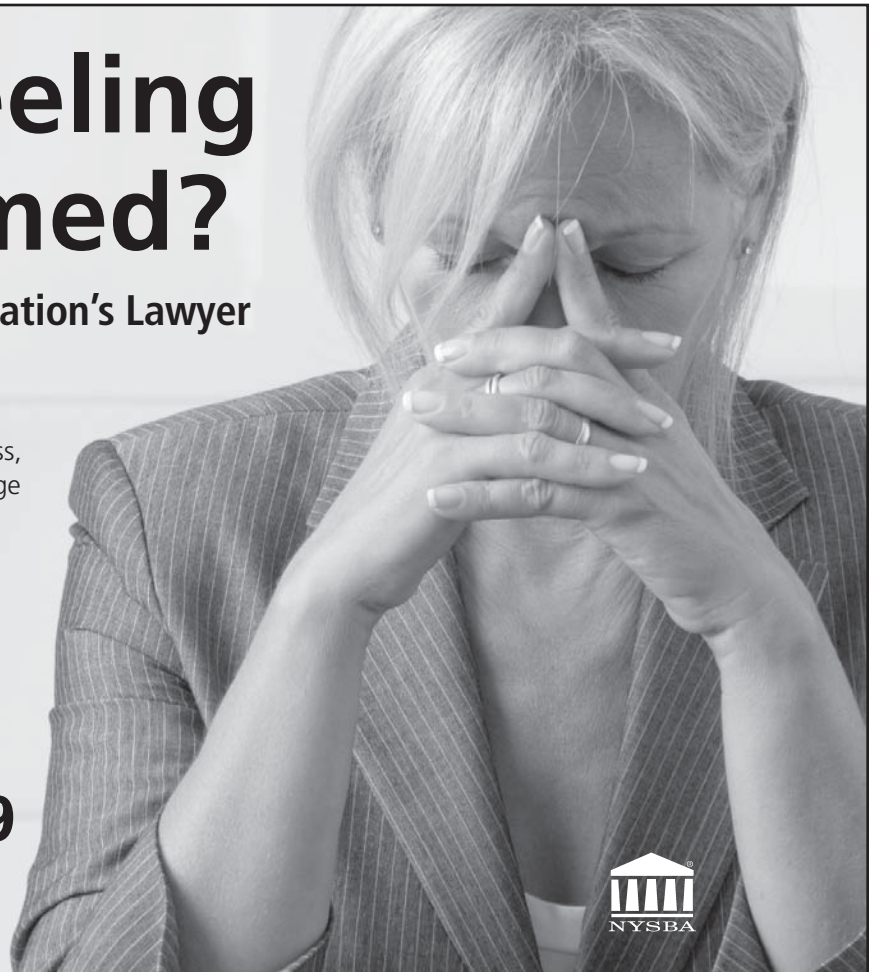
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NEW YORK STATE BAR ASSOCIATION  
LAWYER ASSISTANCE PROGRAM



## Section Hosts Internet Gambling Panel

On November 30, 2010, the New York State Bar Association hosted a program at the Cornell Club in New York City entitled "What's the VIG?: Emerging Issues in Internet Gambling & Criminal Enforcement." Over fifty attorneys attended the event, which was sponsored by the White Collar Criminal Litigation Committee of the Commercial and Federal Litigation Section. The panel was moderated by Joseph V. DeMarco of DeVore & DeMarco LLP.

The panel discussion focused on the history of prosecutions of those operating Internet-based gambling operations and those who provide ancillary services to those operations. Executive Assistant District Attorney Christopher Blank of the Kings County District Attorney's Office discussed New York state statutes applicable to Internet gambling and his experience prosecuting those operations with links to organized crime. Benjamin N. Gluck of Bird, Marella, Boxer, Wolper, Nessim, Drookst & Lincenberg P.C. discussed the federal statutes applicable to Internet gambling and recent criminal fines

and settlements between the government and payment processors who facilitate the operation of gambling websites. Michal Vatis of Steptoe & Johnson LLP concluded with remarks concerning the state of enforcement in the European Union and the potential liability of persons who are not themselves engaged in gambling businesses but whose services are used by such businesses to support their operations.

In addition to their discussion of the nuts and bolts of gaming regulation, the panelists commented extensively on the arguments for and against the legalization and regulation of Internet gambling, and why the current regulatory environment is unclear as to precisely what is and what is not permitted in this rapidly changing area. Following the panel's remarks, a lively question and answer session probed the extent of accessorial and conspiratorial liability of secondary actors, the application of existing law to new gaming e-commerce sites, and possible changes in the regulatory landscape going forward.

## *NYLitigator* Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article in the *NYLitigator* is a great way to get your name out in the legal community and advertise your knowledge. Our authors are respected statewide for their legal expertise in such areas as ADR, settlements, depositions, discovery, and corporate liability. MCLE credit may also be earned for legal-based writing directed to an attorney audience upon application to the CLE Board.

If you have written an article and would like to have it considered for publication in the *NYLitigator*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information to its Editor:

David J. Fioccola, Esq.  
Morrison & Foerster  
1290 Avenue of the Americas  
New York, NY 10104  
(212) 336-4069  
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Authors' Guidelines are available under the "Article Submission" tab on the Section's Web site: [www.nysba.org/NYLitigator](http://www.nysba.org/NYLitigator).

[www.nysba.org/NYLitigator](http://www.nysba.org/NYLitigator)

## BOOK REVIEW

# ***Commercial Litigation in New York State Courts, Third Edition***

(West Publishing Company, 2010)

Reviewed by Guy Miller Struve

More than 15 years ago, in November 1995, the New York State Supreme Court inaugurated its first Commercial Division parts. Today, the Commercial Division has grown to a total of 25 parts in ten counties: Albany, Erie, Kings, Monroe, Nassau, New York, Onondaga, Queens, Suffolk, and Westchester.

The Commercial Divisions of the Supreme Court have been an unqualified success—one of the most significantly successful improvements in the administration of justice in our time. They have been largely responsible for the noticeable shift in commercial litigation back to the New York State courts from the Federal courts, the courts of other states, and various forms of alternative dispute resolution. The burgeoning of commercial litigation in the New York State courts has created the need for an authoritative guide for practitioners engaged in such litigation.

That need has been met by Robert L. Haig, who was largely responsible for the creation of the Commercial Division. Under Bob Haig's guidance as Editor-in-Chief, the first edition of *Commercial Litigation in New York State Courts* was published in three volumes in 1995. The second edition, which had grown to five volumes, was published in 2005. The hallmark of the work from its inception has been its intensely practical approach, combining summaries of procedural and substantive law with strategic and tactical advice, checklists of issues that practitioners should consider, and model jury instructions.

The development of commercial litigation in the New York State courts over the last five years created the need for a further comprehensive revision and enlargement of the work. *Commercial Litigation in New York State Courts, Third Edition*, published in 2010, answers that need. The Third Edition comprises six volumes containing approximately 7,500 pages and 106 chapters. The 144 authors include five present and former Judges of the New York State Court of Appeals—Chief Judge Jonathan Lippman, Associate Judges Victoria A. Graffeo and Robert S. Smith, and former Judges Stewart F. Hancock, Jr. and George Bundy Smith—as well as many other distinguished jurists and a broad array of talented and experienced attorneys that reads like a Who's Who of commercial litigators in New York State.

The Third Edition contains new chapters on topics of great interest to commercial litigators, including "Comparison With Commercial Litigation in Federal

Courts," "Coordination of Litigation Within New York and Between Federal and State Courts" (by Justice Helen E. Freedman), "Sealing of Court Records," "Litigation Avoidance and Prevention," "Crisis Management," "Litigation Management by Law Firms," "Litigation Technology," and "Civility" (by Chief Administrative Judge Anne T. Pfau, Jeremy R. Feinberg, and Laura L. Smith).

The Third Edition also contains 11 new chapters on substantive areas of the law relating to commercial litigation, including "Employment Restrictive Covenants and Other Post-Employment Restrictions," "Not-For-Profit Institution Litigation," "Health Care Institution Litigation," "White Collar Crime," "The Interplay Between Commercial Litigation and Criminal Proceedings," "Privacy and Security," "Consumer Protection," "E-Commerce," "Information Technology Litigation," CPLR Article 78 Challenges to Administrative Determinations" (by Judge Victoria A. Graffeo), and "Commercial Real Estate."

Other treatises exist that cover most of the procedural and subject matter areas covered by *Commercial Litigation in New York State Courts, Third Edition*. None of them, however, covers all these areas within the confines of a single set of volumes. And few, if any, contain the wealth of practical and strategic insights and advice to be found in the work under review.

A noteworthy feature of *Commercial Litigation in New York State Courts, Third Edition* is the sequence of chapters on the trial of a commercial case in the New York State courts. Originally authored by the late Stephen Rackow Kaye, these chapters have been rewritten and updated in his memory by his former colleagues at Proskauer Rose LLP. Younger lawyers will find these chapters especially valuable, and even experienced trial lawyers can read them with profit.

*Commercial Litigation in New York State Courts, Third Edition* comes with a CD-ROM containing the more than 500 pages of forms and model jury instructions included in the set.

**Guy Miller Struve is a partner at Davis Polk & Wardwell.**

*In the interests of full disclosure, it should be noted that the authors of Chapter 47 of the Third Edition, on "Punitive Damages," are my partner Amelia T.R. Starr and our colleagues Elizabeth K. Malaspina and Gina Castellano.*



# Mentoring Initiative Kicks Off

By Matthew R. Maron

After months of planning, the Commercial and Federal Litigation Section's Mentoring Initiative hosted its Kickoff Event at Lincoln Center for the Performing Arts in New York City on November 18, 2010. The Mentoring Initiative was created in response to a challenge issued by New York State Bar President (and former Section Chair) Stephen P. Younger, who has urged NYSBA members to "serve as mentors to the next generation of lawyers, to represent our profession well and, most important, to be stewards of our profession." In response to this challenge, Jonathan D. Lupkin, Chair of the Commercial and Federal Litigation Section, enlisted Lesley Friedman Rosenthal, former Section Chair and Vice President and General Counsel of Lincoln Center for the Performing Arts, and Matthew R. Maron, an associate at Ganfer & Shore, LLP to establish a program that would match up veteran practitioners with younger attorneys. "As the legal profession continues to struggle in this difficult economy, we aim to provide newer attorneys with fundamental skills and a potent and meaningful avenue for professional development," said Lupkin upon the announcement of the Mentoring Initiative.

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*"New York State Bar President (and former Section Chair) Stephen P. Younger...has urged NYSBA members to 'serve as mentors to the next generation of lawyers, to represent our profession well and, most important, to be stewards of our profession.'"*

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The Section initiative provides newer attorneys (0-9 years in practice) the opportunity to build one-on-one relationships with seasoned practitioners (10 years and more) for the purpose of providing a new avenue for their professional development. The Section also benefits by recruiting, maintaining, and more deeply engaging participating members in Section committees, reports, events, and other activities.

At the Kickoff Event, the mentor and mentee pairs met for the first time and were joined by a very special guest, former Chief Judge Judith S. Kaye, now of counsel to Skadden, Arps, Slate, Meagher & Flom, who shared her thoughts on the importance of mentoring.

Currently, 31 mentors and 36 mentees are participating in this pilot year of the program. (Several mentors have graciously agreed to take on two mentees.) The mentors were recruited from the ranks of among the most

experienced attorneys in the Section, and they include present and former Presidents of the NYSBA, present and former Chairs of the Commercial and Federal Litigation Section, Executive Committee members, committee chairs, and other prominent commercial and federal litigators. The mentees were invited via an e-blast to all Section members, and invitations were also extended to members of the Young Lawyers Section, as well as by word of mouth.

The new mentoring program is offering several components to its participants, including:

- A one-on-one Mentoring Initiative matching experienced commercial litigators with those who are newer to practice;
- Opportunities to work together on Section programs, reports, and events that will enhance careers and the profession; and
- Continuing legal education ("CLE") programs tailored to young commercial litigators.

In addition, the mentoring relationships are to incorporate a number of different elements, encompassing a mix of formal and more "ad hoc" opportunities for mentors and mentees to collaborate. On the formal side, Section Committee Chairs are poised to welcome mentor/mentee pairs to work together on various endeavors such as committee projects, reports, and events. The mentees were invited to attend the Section's Annual Meeting Reception and Luncheon on January 26, 2011, at the Hilton New York Hotel in New York City at no cost to them. In addition, the mentees in attendance received free CLE featuring cutting-edge presentations in the areas of electronic discovery as well as relations between in-house and outside counsel in today's changing economic environment. Most recently, the mentors and mentees were given a private tour of the New York County Supreme Court and experienced first-hand and learned from key court personnel about the front and back office operations of one of the busiest and most important courts in the nation.

In keeping with the theme of furthering continuing education for younger commercial litigators, the Section we will be offering its inaugural Commercial Litigation Academy, a two-day program tailored specifically to these newer attorneys, which will be taking place in New York City on May 5 and 6, 2011. The Academy will offer a virtual primer on litigating commercial cases in the New York State and Federal courts and provide participants with the requisite number of transitional CLE credits for one full year. This groundbreaking program is being organized

under the Committee on Continuing Legal Education and its new chair, Kevin Smith, Special Counsel with Kelley Drye & Warren LLP.

Another component of the Mentoring Initiative involves a concept seen implemented in other jurisdictions: the creation of an online video library that consists of short presentations by seasoned practitioners on a variety of practice-oriented topics. These presentations, which will be available via secure web site to Section members only, will provide insight into how some of the state's most well-respected commercial litigators approach issues that arise in everyday practice. The library will also include a number of presentations by judges, which will provide practitioners with views from the bench, and will serve as a resource for attorneys in the years to come.

*"This new and exciting Initiative will foster stronger relationships between experienced and newer attorneys and will give all those involved a greater sense of satisfaction and fulfillment in the practice of law."*

The Section also plans to highlight the new Mentoring Initiative at its upcoming Spring Meeting in Newport, Rhode Island. The Spring Meeting will feature a panel discussion that will foster dialog among Section members about experiences in mentoring and the longer-term goals of mentoring for the Section and the participants. The program will include a plenary session and breakout sessions covering topics such as mentoring for young attorneys, mentoring among attorneys of color, mentoring for job seekers, and other topics. Confirmed speakers and facilitators include President Younger, former President Kenneth G. Standard, President-elect designate Seymour W. James, Jr., Section Chair Lupkin, and the Initiative's two Co-Chairs, Lesley Friedman Rosenthal and Matthew R. Maron, as well as legal profession/mentoring expert Deborah Lans.

This new and exciting Initiative will foster stronger relationships between experienced and newer attorneys and will give all those involved a greater sense of satisfaction and fulfillment in the practice of law.

**Matthew R. Maron is associated with the law firm of Ganfer & Shore, LLP, and concentrates his practice on commercial litigation, as well as white collar criminal and regulatory matters.**

# The Commercial and Federal Litigation Section Newsletter and the NYLitigator are available online



**Go to [www.nysba.org/ComFed](http://www.nysba.org/ComFed) to access:**

- Past Issues of the *Commercial and Federal Litigation Section Newsletter* (2001-present) and the *NYLitigator* (2000-present)\*
- *Commercial and Federal Litigation Section Newsletter* (2001-present) and *NYLitigator* (2000-present) Searchable Indexes
- Searchable articles from the *Commercial and Federal Litigation Section Newsletter* and the *NYLitigator* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit\*

\*You must be a Commercial and Federal Litigation Section member and logged in to access.

Need password assistance? Visit our Web site at [www.nysba.org/pwhelp](http://www.nysba.org/pwhelp). For questions or log-in help, call (518) 463-3200.



# State Court of Appeals Mandates Submission in Digital Format

By Mark Davies

Effective December 8, 2010, the New York State Court of Appeals requires that briefs (including amicus briefs) and record material (full records and appendices) be submitted in digital format as companions to the required number of copies of printed briefs and record material filed and served in accordance with the Court's rules.<sup>1</sup> The Court has also reduced from 25 to 20 the number of paper copies required to be filed in normal course appeals.<sup>2</sup> The companion briefs and record material in digital format must comply with the current technical specifications available from the clerk's office and discussed below.<sup>3</sup> The companion briefs and record material in digital format must be identical to the original printed briefs and record material, except they need not contain an original signature.<sup>4</sup> Unless otherwise permitted by the clerk, companion filed briefs and record material in digital format must be received by the clerk's office no later than the filing due date for the printed briefs and record material.<sup>5</sup> A request to be relieved of the requirements of the Court rules to submit companion briefs and record material in digital format must be made by letter addressed to the clerk, with proof of service of one copy on each other party, and must specifically state the reasons why submission of companion briefs and record material in digital format would present an undue hardship.<sup>6</sup>

**Technical specifications.** The clerk's office technical specifications are available at <http://www.nycourts.gov/ctapps/TechSpecs10.htm>. These provide:

1. Each Court of Appeals brief submitted in digital format shall be in text searchable portable document format (PDF). Lower court briefs and record material submitted in digital format pursuant to section 500.11(k) of the Court of Appeals Rules of Practice shall be in PDF, but need not be text searchable. Court of Appeals Record material submitted in digital format shall be in PDF, but need not be text searchable.
2. The PDF briefs and PDF record material shall be submitted to the Clerk's office on Compact Disc (CD) or Digital Video Disc (DVD). The CD or DVD shall be finalized and not rewriteable.
3. The CD or DVD shall be labeled with the title of the action, the name of the party on whose behalf the CD or DVD is filed and, if the party is represented by counsel, the name of counsel. The CD or DVD shall also be labeled with a description of the PDF files contained therein.
4. The PDF briefs and PDF record material shall be saved on the CD or DVD with files named in

accordance with the conventions provided by the clerk's office.

5. Each CD or DVD shall be accompanied by a statement that the PDF brief and PDF record material contained therein are identical to the filed original printed materials, except that they need not contain an original signature.
6. The Clerk's office will not remove metadata from PDF briefs and PDF record material. Removing metadata is at all times the filing party's responsibility.
7. Submitting PDF briefs and PDF record material on CD or DVD does not relieve a party of the requirements to serve and file an original and the required number of copies of printed briefs and record material under the Court's Rules and the CPLR. The CD or DVD containing the PDF briefs and PDF record material shall be received by the clerk's office no later than the filing due date for the printed briefs and record material.
8. Parties are not required to provide each other with PDF briefs and PDF record material, but may do so.

**Naming conventions.** The clerk's office has also established naming conventions, with which attorneys must comply, for briefs and record material submitted in digital format, as follows:

The appropriate title of the action can be found in the briefing letter sent to parties.

These naming conventions use the parties' designation in the Court of Appeals, not the court of original instance.

## Abbreviations

appellant: app	amicus or amici brief: amicbrf
respondent: res	appendix: appdx
amicus or amici: amic	supplemental appendix: suppappdx
brief: brf	Appellate Division brief: ADbrf
reply brf: replybrf	Appellate Division reply brief: ADreplybrf
record on appeal: Rec	Brief in response to amicus brief: BrfRspAmic



## PDF File Naming Conventions

**Briefs:** [title of action]-[party role]-[party name]-[brf].pdf

**Reply Briefs:** [title of action]-[party role]-[party name]-[replybrf].pdf

**Appendices:** [title of action]-[party role]-[party name]-[appdx].pdf

**Court of Appeal Records:** [title of action]-[party role]-[party name]-[Rec].pdf

**Multiple Volumes** (if more than one volume of a record is filed, each volume should be a separate file): [title of action]-[party role]-[party name]-[Rec-vol(1,2,etc.)].pdf

**Letter Briefs** (for Rule 500.11 appeals): [title of action]-[party role]-[party name]-[SSMltrbrf].pdf

**Appellate Division materials:** [title of action]-[party role]-[party name]-[AD(brf) (replybrf)(Rec)].pdf

## Case Example

Title of Action: Smith v Jones (as found in briefing schedule letter from clerk's office)

Appellant: Smith

Respondents: Jones and Brown

Amici: Concerned Citizens et al.

Smith (represented by Joe Black, Esq.) files a brief and record with the clerk.

The CD or DVD is labeled:

**Smith v Jones**

**Appellant Smith**

**Joe Black, Esq.**

**brief & record (four volumes)**

The PDF files on the CD or DVD would be named:

**SmithvJones-app-Smith-brf.pdf**

**SmithvJones-app-Smith-Rec-vol1.pdf**

**SmithvJones-app-Smith-Rec-vol2.pdf**

**SmithvJones-app-Smith-Rec-vol3.pdf**

**SmithvJones-app-Smith-Rec-vol4.pdf**

Jones (John Jones, appearing pro se) files a brief.

The CD or DVD is labeled:

**Smith v Jones**

**Respondent Jones**

**John Jones, pro se**

**brief**

The PDF file on the CD or DVD would be named:

**SmithvJones-res-Jones-brf.pdf**

Brown (represented by George Gray, Esq., Gray Law Firm) files a brief and supplemental appendix.

The CD or DVD is labeled:

**Smith v Jones**

**Respondent Brown**

**George Gray, Esq. Gray Law Firm**

**brief & supplemental appendix**

The PDF files on the CD or DVD would be named:

**SmithvJones-res-Brown-brf.pdf**

**SmithvJones-res-Brown-suppappdx.pdf**

Concerned Citizens et al.(represented by Roger Red, Esq., Red Law Firm) files an *amici* brief.

The CD or DVD is labeled:

**Smith v Jones**

**Amici Concerned Citizens et al.**

**Roger Red, Esq., Red Law Firm**

**amici brief**

The PDF file on the CD or DVD would be named:

**SmithvJones-amici-ConcernedCitizens-amibrf.pdf**

## Endnotes

1. 22 NYCRR § 500.2(a). See 22 NYCRR §§ 500.11(k), 500.12(h), 500.14(g), 500.23(a)(1)(ii).
2. 22 NYCRR §§ 500.12(b)-(f), 500.14(a), (d), 500.23(a)(1)(ii).
3. 22 NYCRR § 500.2(b).
4. 22 NYCRR § 500.2(c).
5. 22 NYCRR § 500.2(d).
6. 22 NYCRR § 500.2(e).

**Mark Davies is an Adjunct Professor of Law at Fordham Law School, where he teaches New York Practice, and is the lead author of West's New York Civil Appellate Practice and editor of this Newsletter.**

# CPLR Amendments: 2010-2011 Legislative Sessions

(2010 NY Laws ch. 1-568; 2011 NY Laws ch. 1-2)

CPLR	Chapter, Part (§)	Change	Eff. Date
214-b	118	Revives agent orange causes of action until 6/16/12	6/15/10
304	528	See Notes (1)-(3) below	9/17/10
1101(e)	41(1)	Replaces "law guardian" with "child's attorney"	4/14/10
1311(11)	56, A-1(47)	Corrects reference to Office of Victims Services	6/22/10
1349(4)	56, A-1(48)	Corrects reference to Office of Victims Services	6/22/10
2103(b)(5), (7)	528	See Notes (1)-(3) below	9/17/10
3102(e)	29(3)	Adds CPLR 3119 as an exception	1/1/11
3119	29(2)	Adds new section on uniform interstate depositions and discovery	1/1/11
4510(d)	56, A-1(49)	Corrects reference to Office of Victims Services	6/22/10
5011	56, A-1(50)	Corrects reference to Office of Victims Services	6/22/10
5203(c)	427(1)	Establishes date judgment awarding interest in real property is deemed entered and docketed for purposes of priority against judicial lien	8/30/10
5205(a)	568(1)	Increases types and values of personal property exempt from satisfaction of money judgment	1/21/11
5205(a)(8)	2011: 1	Adds state and municipal corporation creditors to the exceptions from the exemption	1/21/11
5206	568(2)	Increases value of real property exempt from satisfaction of money judgment	1/21/11
5253	568(6)	Adds provision on cost of living adjustment for personal and real property exempt from satisfaction of money judgment and bankruptcy	1/21/11
6205	468(1)	Adds provision on order of attachment granted in aid of execution of money judgment against foreign state	8/30/10
6211(a)	468(2)	Adds reference to CPLR 6205	8/30/10
7601	25(3)	Adds appraisal clause exception to fire insurance proviso	3/30/10
8018(a)(1)	56, K(5)	Adds an additional \$190 fee for actions to foreclose under RPAPL Art. 13	9/1/10

Notes: (1) 2010 NY Laws ch. 528, § 1, effective Sept 17, 2010, (A) limits to the court of claims the authority of the Chief Administrator to promulgate rules permitting the use of fax for commencement of actions and proceedings and for the filing and service of interlocutory papers and (B) requires that the Chief Administrator consult with the county clerk before authorizing the use of email to serve or file papers in the county. (2) 2010 NY Laws ch. 528, §§ 2 and 3, effective Sept 17, 2010, authorizes the Chief Administrator to eliminate the requirement of parties' consent to filing and service by email in supreme court in certain additional counties (Westchester, Livingston, Monroe, Rockland, and Tompkins) in certain classes of cases but requires the consent of the county clerk in all counties but New York and Westchester counties. (3) 2010 NY Laws ch. 528, § 4, effective Sept. 17, 2010, requires that the Chief Administrator (A) report to the legislature, governor, and chief judge by April 1 each year on the program to file and serve by email or fax and (B) create an advisory committee on the implementation of the act in supreme court.

# 2010-2011 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's 2010 N.Y. Court Orders 1-21, 23-30, 63, 66-68, 70, 72, 302, 304; 2011 N.Y. Court Orders No. 1-3)

22 N.Y.C.R.R. §	Court	Subject (Change)
	Sup. Ct., N.Y. Co.	Adds procedures and forms governing summary jury cases
	Sup. Ct., N.Y. Co.	Adds Protocol on Courthouse Proceedings for Electronically Filed Cases (Rev. 6/17/10)
202.5(d)	Sup.	Specifies papers that county clerk or chief clerk may refuse to accept for filing
202.5-b	Sup.	Expands electronic filing on consent
202.5-bb	Sup.	Establishes a mandatory pilot program for electronic filing and service in commercial actions in N.Y. County and in commercial and tort actions in Westchester County
202.12(b)	Sup.	Requires that attorneys appearing at preliminary conferences be prepared to discuss e-discovery
202.12-a	Sup.	Amends procedures relating to residential mortgage foreclosure actions
202.12-a(f)	Sup.	Authorizes Chief Administrator to continue to require counsel to file affirmation confirming scope of inquiry and accuracy of papers filed
202.16(f)(3)	Sup.	Changes "law guardian" to "attorney"
202.16(k)(3), (7)	Sup.	Requires additional information in support of motion for counsel/expert fees and expenses
202.16-a(c)(2)	Sup.	Amends automatic orders served with summons in matrimonial actions to provide that receipt of retirement benefits or annuity payments may continue
202.70(a)	Sup.	Raises monetary threshold of Commercial Division, Westchester County, to \$100,000
202.70(g) (Rule 1)	Sup.	Requires that attorneys appearing at preliminary conferences be prepared to discuss e-discovery
500.2	Ct. App.	Replaces section with provisions on submission of briefs and record material in digital format
500.11	Ct. App.	Requires companion submission in digital format of letters stating arguments
500.12	Ct. App.	Requires companion submission in digital format of briefs and record material and reduces number of paper copies of briefs (and respondent's supplementary appendix) required to be filed from 24 to 19 (plus original)



500.14	Ct. App.	Requires companion submission in digital format of appendix and appellate division record and appendix and reduces number of paper copies of appendix or full record required to be filed from 24 to 19 (plus original)
500.23(a)(1)(ii)	Ct. App.	Cross-references companion submission in digital format of briefs and reduces number of paper copies of brief required to be filed from 24 to 19
600.2(b)	1st Dep't	Requires that special proceedings originating in 1st Dep't be noticed for 10:00 a.m. and that proof of service be filed by 4:00 p.m. of business day preceding return date
600.10(f)	1st Dep't	Requires that indorsements (signature blocks) required by CPLR 2101(d) include an email address
600.11(b), (c)	1st Dep't	Requires that each appellant's, respondent's, and reply brief (for appeals perfected after 6/30/10) and each appendix/record on appeal (for appeals perfected after 8/31/10) be served and filed in PDF by email; provides court email addresses; reduces number of paper copies required to be filed from 10 to 8
800.7(c)	3d Dep't	Changes "law guardian" to "attorney for child"
800.9(b)	3d Dep't	Changes "law guardian" to "attorney for child"

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

## July 27, 2010

Guest speaker, the Hon. Deborah H. Karalunas, Supreme Court, Onondaga County, Commercial Division, discussed her experiences as a Commercial Division justice.

The Executive Committee discussed changes made in a proposal on mandatory notice of mediation alternatives in response to comments of the Section. The Executive Committee approved an increase in the stipend for the Minority Fellowship.

## Sept. 16, 2010

Guest speaker, the Hon. Barbara R. Kapnick, Supreme Court, New York County, Commercial Division, discussed the Commercial Division clerkship program.

The Executive Committee voted to approve proposed amendments to CPLR 3213 and 4549, as presented by the Section's CPLR Committee, with technical modifications. Upon the recommendation of the Committee on Ethics and Professionalism, the Executive Committee approved a COSAC report regarding mandatory registration in New York State of in-house counsel working in New York but licensed in jurisdictions other than New York. The Executive Committee also discussed proposed amendments to Fed. R. Civ. P. 45.

## Oct. 12, 2010

Guest speaker, the Hon. Brian M. Cogan, United States District Court for the Eastern District of New York, discussed his case management style. The Executive Committee also heard an address by Association President, and former Section Chair, Stephen P. Younger.

The Executive Committee discussed possible topics for the Section's presentation at the Judicial Institute



regarding electronic evidence in New York State courts and heard a presentation on the new E-Discovery working group.

## Nov. 9, 2010

Guest speaker, the Hon. Melvin L. Schweitzer, Supreme Court, New York County, Commercial Division, discussed his handling of cases and his rule on summary judgment motions, as well as e-discovery and expert disclosure.

The Executive Committee approved a report on Court-Appointed Receivers in Judicial Dissolutions of Limited Liability Companies and Partnerships.

## Dec. 7, 2010

The Executive Committee discussed a report on Class Action Waivers in Arbitration Agreements but decided to table the report until after decisions by the Supreme Court.

## Jan. 11, 2011

Guest speaker, the Hon. Bernard J. Fried, Supreme Court, New York County, Commercial Division, discussed the work of the Commercial Division.

The Section presented an award to Pablo Rivera, Clerk-in-Charge of the Commercial Division in New York County, for his outstanding service to the Commercial Division, which he has been serving since its inception in 1996.

The Executive Committee discussed an upcoming report on the new rule for expert disclosure in the Commercial Division. The Executive Committee also discussed a report on interlocutory civil appeals in New York State courts.



**Section Chair Jonathan D. Lupkin presents Distinguished Service Award to Mr. Pablo Rivera, for his years of dedicated tenure as Clerk-in-Charge of the New York County Commercial Division Support Office**

# Commercial Leasing

## Second Edition

Revised

Section Members  
get 20% discount\*  
with coupon code  
PUB1043N\*

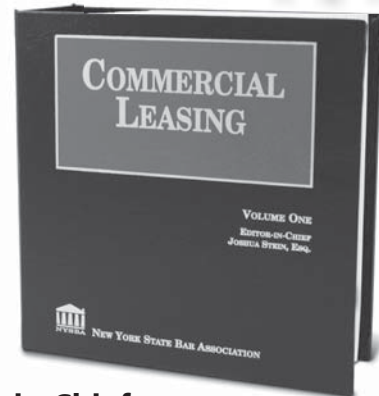
Your client's existing lease will expire soon, or they're opening a new location or consolidating some functions. What if the construction goes over budget or takes too long? What if your clients can't move out before their old lease expires? Would your clients prefer flexibility or certainty in their lease?

The owner of a building faces an entirely different set of questions: How to get the right kinds of tenants into the building? How to assure that tenants pay the highest possible rent? Would the owner trade some rent revenue for greater tenant stability?

The new edition of this two-volume, 1,584-page reference is written and edited by leading experts in the field. It addresses a multitude of issues critical to both the tenant and the landlord; focusing on practical transactions and negotiations rather than legal theory. Especially useful are the numerous sample model leases and other model documents, with helpful comments and annotations. Includes forms, instructions and charts on CD

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**Editor-in-Chief,  
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# NYSBA

## Commercial and Federal Litigation Section

In Association with the Young Lawyers Section

## Spring Meeting

Hyatt Regency Newport  
Goat Island/Newport, Rhode Island  
May 20 - 22, 2011



This MCLE program offers up to 6 MCLE credit hours. Breakdown of credit hours per individual is dependent on choice of sessions that are attended. Only the Ethics and Skills portions of this program are transitional and therefore suitable for newly admitted attorneys.

More information: [www.nysba.org/ComFedSpring11](http://www.nysba.org/ComFedSpring11)



# SCHEDULE OF EVENTS

## Friday, May 20

- 3:00 p.m. **Registration** - Hotel Lobby
- 6:30 p.m. **Cocktail Reception** - South Lawn
- 7:30 p.m. **Authentic New England Clambake Dinner** - Water Front Pavilion
- Dinner and Welcoming Remarks**  
**David H. Tennant, Esq.**, Section Chair-Elect and Program Chair  
**Stephen P. Younger, Esq.**, President, New York State Bar Association  
**Jonathan D. Lupkin, Esq.**, Section Chair  
**Philip G. Fortino, Esq.**, Young Lawyers Section Chair
- After Dinner Speaker**  
**Chris Museler**, widely-regarded yachting reporter/lecturer. America's Cup and Beyond

## Saturday, May 21

- 8:00 a.m. **Registration** - Ballroom Foyer C
- 9:00 a.m.- Noon **General Session**
- 9:00 - 9:10 a.m. **Welcoming Remarks**  
**Jonathan D. Lupkin, Esq.**, Section Chair
- Program Overview**  
**David H. Tennant, Esq.**, Section Chair-Elect and Program Chair
- General Session** - Ballroom CD
- 9:10 -10:35 a.m. **GCs' and Judges' Roundtable Discussion: View from the Corner Office and Federal Bench (1.5 Professional Practice)**  
What do GCs and federal judges have in common? More than you may think, especially when GCs take the bench. Hear in-house counsel, and former in-house counsel now on the federal bench, share their perspectives on e-discovery, pleading standards, mediation/settlement, motion practice, civility, declining civil trials, and more.
- Moderator: **Hon. Stephen C. Robinson**  
Skadden, Arps, Slate, Meagher & Flom, LLP  
New York City  
Former U.S. District Judge, Southern District of New York
- Panelists: **Hon. Paul G. Gardephe**  
U.S. District Judge  
Southern District of New York
- Karen Douglas, Esq.**  
Corning Incorporated  
Corning, NY
- Carla Miller, Esq.**  
Universal Music Group  
New York City
- Teresa Wynn Roseborough**  
MetLife  
Long Island City, NY
- Hon. Richard J. Sullivan**  
U.S. District Judge  
Southern District of New York
- Lawrence La Sala, Esq.**  
Textron, Inc.  
Providence, RI
- Lesley Friedman Rosenthal, Esq.**  
Lincoln Center for the Performing Arts, Inc.  
New York City

# SCHEDULE OF EVENTS

- 10:35 -10:50 a.m. **Refreshment Break**
- 10:50 a.m. -  
12:05 p.m. ***Ethics Game Show (Part Deux)***  
***(1.5 Ethics)***
- Panelists: **Jeremy R. Feinberg, Esq.**  
Statewide Special Counsel for Ethics  
Office of Court Administration  
New York City
- 12:05 -1:30 p.m. **Buffet Lunch** - Rose Island 2
- 1:15 p.m. **Transportation Departs to America's Cup Charters Dock**
- 1:30 - 5:00 p.m. **America's Cup Charters Sailing - The Race Begins - Rain or Shine!!**  
12 meter yacht racing "Commercials" against "Federals." Once the sails are raised you head off to The Bay for your competition. Crew positions are assigned and each guest is given instruction. The teams will practice trimming, gibing and coming about prior to your race. A race course is chosen depending on the day's conditions and laid out using government buoys as marks. There are only 12 participants (sailors) on each sail boat.  
***To participate in this fun event, you must pre-register. Cost is \$75.00.***  
***NOTE:*** Rain or shine the boats go out, foul weather gear provided. Sailing will be canceled by America's Cup Charters only if the conditions are unsafe. No refunds will be provided unless the sailing is canceled.
- 1:30 - 6:00 p.m. **Afternoon Free for Recreation and Spa Activities**
- 6:00 p.m. **Transportation Departs to Marble House**
- 6:30 p.m. **Cocktail Reception** - Marble House (Newport Mansion)
- 7:30 p.m. **Gala Dinner** - Marble House (Newport Mansion)  
**Presentation of the Robert L. Haig Award for Distinguished Public Service**
- Recipient: **Hon. Victoria A. Graffeo**  
Associate Judge, New York Court of Appeals
- 9:00 p.m. **After Dinner Gathering** - Newport Room

## Sunday, May 22

- 8:00 a.m. **Registration** - Ballroom Foyer C
- 9:00 - 9:05 a.m. **Opening Remarks**
- 9:05 - 10:30 a.m. ***Mentoring: Building Our Future (1.5 Ethics and Professionalism)***  
A distinguished panel will take stock of the State Bar's and Section's mentoring initiatives in 2011 and engage participants in a constructive dialogue about expanding mentoring in the legal profession, promoting the professional development of young lawyers, encouraging ethics and civility in the profession, and improving the quality of commercial litigation in the State. Small break-out groups will target particular issues and segments of the legal profession to promote effective mentoring programs.

# SCHEDULE OF EVENTS

Panelists:

**Stephen P. Younger**

President, New York State Bar Association  
Patterson Belknap Webb & Tyler LLP  
New York City

**Seymour W. James, Jr.**

President-Elect Designate  
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Ganfer & Shore LLP  
New York City

**Kenneth G. Standard**

Former President  
New York State Bar Association  
Epstein Becker & Green, P.C.  
New York City

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

**Dual Tracks (choose one)**

**TRACK A -**

***Introductory Track Sponsored and Presented by the Young Lawyers Section***

10:45 a.m.- Noon

***New Federal Rules You Need to Know (1.5 Skills)***

The panel will discuss the new Federal Rules of Civil Procedure, effective December 1, 2010

Moderator:

**Anne B. Nicholson, Esq.**

Flemming Zulack Williamson Zauderer LLP  
New York City

Panelists:

**Hon. Sidney H. Stein**

U.S. District Judge  
Southern District of New York

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Lippes Mathias Wexler Friedman LLP  
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**Gregory K. Arenson, Esq.**

Kaplan Fox & Kilsheimer LLP  
New York City

**Emily Stern, Esq.**

Proskauer Rose LLP  
New York City

**TRACK B -**

***Upper Level Appellate Course***

10:45 a.m.- Noon

***Everything You Always Wanted to Know About the Standard of Review But Were Afraid to Ask (1.5 Professional Practice)***

Moderator:

**Hon. Stephen G. Crane**

JAMS  
New York City

Panelists:

**Hon. Ariel E. Belen**

Associate Justice  
Appellate Division Supreme Court  
2nd Department

**David H. Tennant**

Nixon Peabody LLP  
Rochester

**Hon. Victoria A. Graffeo**

Associate Judge  
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Noon

**Adjournment**

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# New York Antitrust and Consumer Protection Law

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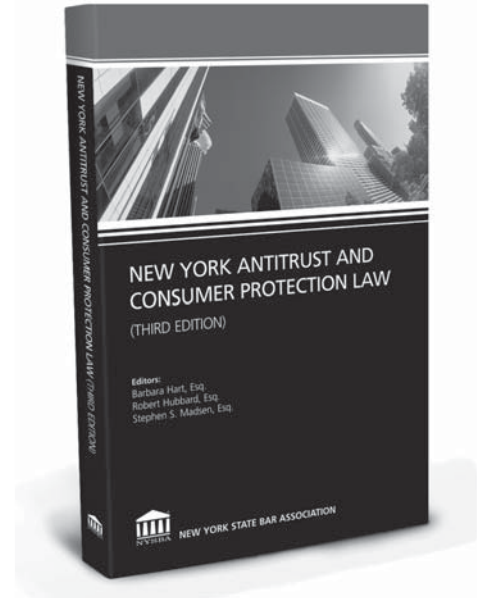
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- Settlements of Government Antitrust Cases
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