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Commercial and Federal Litigation Section Newsletter

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of the New York State Bar Association

Message from the Chair

"An informed citizenry is the bulwark of a democracy."

—Thomas Jefferson

Gregory K. Arenson

Jefferson was not referencing the latest tweets or Facebook postings. What he had in mind was knowledge about the operations of the government based on an understanding of the way it was supposed to function. The country and this state are failing to maintain Jefferson's bulwark.

At the January 31 House of Delegates meeting, the State Bar Association resolved to support the inclusion of civic education in the core K-12 curriculum nationwide. The report of the Law, Youth, and Citizenship Committee on Civic Education on which that resolution was based contains some startling statistics:

- Out of 1,001 U.S. adults who recently took a multiple choice test on basic U.S. civics and history, 83% failed.
- Out of 14,000 college students, 71% failed a basic civics test.
- Forty-five percent of Americans were unable to correctly identify the three branches of government.
- Forty percent of New Yorkers did not know that the legislative branch makes laws.
- Seventy-five percent of high-school seniors were unable to name one power granted to Congress.
- Fifty-eight percent of New Yorkers could not name either of their Senators.
- Fifty-seven percent of Americans could not name a single justice of the Supreme Court.

In light of these dismal numbers, it is not surprising that there has been an increase in partisanship. With no understanding of how the United States government is supposed to operate, people cannot rationally evaluate whether government is the problem or government is the solution. Slogans and peer pressure can be substituted for thought.

There is a crisis in education in this country. On worldwide tests of high-school students' knowledge, the United States is below average in mathematics and average at best in science and reading and is well toward the bottom in all three areas when compared to 34 developed countries. National programs to correct these

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deficiencies, such as No Child Left Behind or Race to the Top, rightly emphasize mathematics and literature. But they also emphasize testing, and they subordinate civics and history to literature. As quoted by the Civic Education report, a recent study by the Brennan Center for Justice found that "[w]hatever resources were once available for civic education are now being grossly reduced by the spread of No Child Left Behind and its emphasis on math and language arts, as is clearly the case in New York."

As attorneys, we have a special duty to uphold the rule of law, one of the cornerstones of our society. We must fight ignorance of the precepts underlying the rule of law in this country and this state. The State Bar Association resolution adopted January 31 "urges the legal profession to seek support of policy makers, educators, the media, and the general public to ensure that subject matter to advance the civic mission of schools, including the study of law, is included in the core K-12 curriculum." I urge each member of the Section to do what you can in your local school to influence the curriculum to correct the sorry state of knowledge of the basic functioning of our government. As Thomas Jefferson might have said, "Our Lives, our Fortunes, and our sacred Honor" depend on it.

Greg Arenson

International Litigation Committee at Work: Judicial Delegation from Kosovo at the New York Supreme Court

By Clara Flebus

This year, the International Litigation Committee is proud to focus on developing educational programs and materials for foreign jurists with regard to U.S. litigation and arbitration procedure. This initiative is aimed at developing confidence in, and respect for, U.S. proceedings in foreign jurisdictions and heightening the attractiveness of New York as a potential venue for dispute resolution, arbitration, and as a choice of law.[1] Our work in this area comprises two parts. First, with respect to developing countries, the aim is to assist in aspects of judicial capacity building and to promote the development of the rule of law, as we have been doing by hosting judicial delegations visiting New York Supreme Court. Second, with respect to developed countries, the object is to increase familiarity with U.S. proceedings.

In late January 2014, the Committee hosted a judicial delegation from Kosovo visiting the Commercial Division of New York Supreme Court. The delegation included six judges from the commercial section first-instance and appellate level courts,[2] the appellate court President Hon. Salim Mekaj, who oversees commercial section judges, and the head of publications and research at the Kosovo Judicial Institute. The delegates held a common interest in the issues and procedures involved in the adjudication of complex international commercial disputes. The visit, coordinated by your author and her Co-Chair Ted Semaya, included support from the Commercial Law Development Program (CLDP) of the U.S. Department of Commerce Office of the General Counsel.

Following the Kosovo War, Kosovo was plunged into dire economic, social, political, and legal turmoil. CLDP has been tasked with providing technical assistance to promote commercial law reform in Kosovo in support of Kosovo's economic development and international economic integration. As part of CLDP's judicial capacity building efforts, the consultations at New York Supreme Court aimed at providing knowledge and understanding of best practices and mechanisms by which international business disputes are resolved in the United States.

Currently, Kosovo has an evolving legal system comprising a mixture of applicable Kosovo law, United Nations Interim Administration Mission in Kosovo (UNMIK) laws and regulations, and applicable laws of

Gregory K. Arenson, Section Chair (third from right), and Clara Flebus (far right) and Ted G. Semaya (middle), International Litigation Committee Co-Chairs, and members of the Kosovo Judicial Delegation.

the Former Socialist Republic of Yugoslavia that were in effect in Kosovo as of March 1989. Members of the Committee, along with Section Chair Greg Arenson and Dan Weitz, ADR Coordinator for the New York Office of Court Administration, engaged the Kosovo delegates in discussion on a wide range of topics, including the U.S. legal system, selected aspects of U.S. litigation, and the importance of ADR as a tool for efficient resolution of commercial disputes in the courts.

The delegates were particularly interested in understanding how discovery, a procedure typical of common law jurisdictions, might affect foreign parties. Ted Semaya explained that initially all parties to a lawsuit in the United States are only required to set forth in their pleadings the allegations of fact underlying their claims and defenses. Subsequently, the parties engage in discovery, a process through which they try to obtain relevant evidence, in the form of documents or deposition testimony, to substantiate their allegations. Mr. Semaya noted that a foreign plaintiff bringing a case in New York consents to participating in the discovery process. Similarly, a foreign defendant sued in New York, on the ground that there is personal jurisdiction over it, is subject to U.S.-style discovery and must produce the documents and witnesses requested, even if they are located abroad. However, he pointed out that many civil law countries, where courts play an inquisitorial role and control the search for evidence, have taken measures to lessen the burden of discovery demands made on their citizens by U.S. litigation. For example, France has enacted a blocking statute that can prohibit a French party in a foreign lawsuit from being subject to depositions in France.[3]

Next, the discussion focused on electronic discovery. Greg Arenson emphasized that this type of discovery may lead to search and production of massive amounts of electronically stored information (ESI) and requires cooperation from the adversary to understand its computer system. Mr. Arenson explained that the cost of production of ESI typically is borne by the party with the system if the information is readily accessible. Otherwise, the party who asks for data that is not readily accessible must pay for it. An interesting point was made about e-discovery in the situation where multinational companies have interlocking electronic databases. Mr. Arenson cautioned that a company subject to the jurisdiction of a U.S. court may be compelled to produce electronic information stored by its foreign affiliates if it has access to, and control over, that information.

Another topic discussed was the implementation of court-annexed ADR programs as efficient tools to resolve a controversy early in the process. Dan Weitz explained that parties in the Commercial Division are subject to mandatory mediation at any stage of the litigation before trial. If the judge orders that the case be mediated, the parties may still choose between the mediation program directly run by the courts, which maintain a roster of trained mediators, and private mediation. Mr. Weitz noted that there is a debate about whether there should be a good-faith requirement providing that a party ordered to mediation will make an effort to actively participate in the process. However, he observed that good faith is a subjective standard, and most mediators wish to avoid being placed in the position of having to judge the parties' conduct. Mr. Weitz went on to explain that, if the mediation of a commercial case is successful, the agreement reached is enforceable as a contract and may be "so-ordered" by the court without revisiting its merits. The speakers agreed that typically attorneys will secure compliance with settlement agreements by including self-executing clauses providing, for example, that a default will be entered if a party does not discharge certain obligations under the agreement. In conclusion, Mr. Weitz also highlighted features of other court-based ADR programs, such as mediation in matrimonial and family court matters, and arbitration of small claims and attorney-client fee disputes.[4]

During the visit, the delegates also had the opportunity to meet and interact in an informal exchange with Administrative Judge Hon. Sherry Klein Heitler and a number of Commercial Division justices, including the Hon. Charles E. Ramos, the Hon. Shirley Werner Kornreich, the Hon. O. Peter Sherwood, the Hon. Melvin L. Schweitzer, and the Hon. Jeffrey K. Oing. In addition to discussing specific aspects of U.S. commercial and civil litigation, the judges emphasized that one of the aims of the Commercial Division is to produce law that is clear, consistent, and predictable, so that business people can draft enforceable contracts.

The Committee wishes to thank all members of the court system and the members of the U.S. Department of Commerce Office of the General Counsel who contributed to the consultations with the Kosovo delegation and helped to make the event a success.

Endnotes

1. *See* the NYSBA Report of the Task Force on New York Law in International Matters (April 18, 2011).
2. The Honorables Bajran Miftari, Vjolica Riza, Fetije Sadiku, Aslian Shala, Hasan Shala, and Mahir Tutuli.
3. For a fuller discussion of the French blocking statute, *see* Pierre Grosdidier, *The French Blocking Statute, The Hague Evidence Convention, And The Case Law: Lessons For French Parties Responding To American Discovery*, available at: http://www.haynesboone.com/french_blocking_statute.
4. For more information on the alternative dispute resolution mechanisms in New York, *see* https://www.nycourts.gov/ip/adr.

The Committee's activities include the development of a modular program in electronic format as well as in-person presentations. If you are interested in joining the Committee and sharing your opinion and expertise, please contact Co-Chair Clara Flebus at clara.flebus@gmail.com.

Annual Meeting 2014

By Clara Flebus

Despite an arctic blast gripping New York with copious snow and sub-zero temperatures, over 350 stalwart lawyers and judges braved the elements to attend the Commercial and Federal Litigation Section's Annual Meeting and luncheon on January 29, 2014, at the New York Hilton Midtown in Manhattan. This year the Section presented top-notch CLE programming organized by Vice Chair Jim Wicks in two distinct areas: ethical implications arising from the use of social media and the interplay of Delaware and New York law in the adjudication of commercial disputes.

Vice Chair Jim Wicks introduced the morning CLE programs he put together.

Social Media in Your Practice

The first program, entitled "Social Media in Your Practice: The Ethics of Investigation, Marketing, and More," aimed at educating attorneys on navigating the ethical minefields when using social media. Mark A. Berman, partner at Ganfer & Shore, LLP, led an interactive discussion featuring nationally recognized speakers in the field, who answered a series of questions that were posed earlier to the audience. The scenarios examined included whether an attorney may conduct social media investigations of prospective jurors, whether a lawyer may recommend that a client remove a social media posting that has negative implications for the client, and whether an attorney may "friend" a witness on Facebook. Answers are below. In addition, the panel discussed issues related to the marketing of attorneys and law firms on LinkedIn and Twitter. All panelists agreed that keeping abreast of technology developments in this rapidly evolving field is key to understanding the ethical implications of using social media.

At the outset, Mr. Berman asked the panel whether it is permissible for an attorney preparing for, or in the midst of, a trial to view a juror's public social media postings when the attorney is also a member of that social media platform. There was a consensus that sending a "friend request," attempting to connect on LinkedIn, signing up on a juror's blog, or "following" a juror's Twitter account would constitute impermissible communication with a juror.[1] However, former United States Magistrate Judge Ronald J. Hedges, who is now the principal in Ronald J. Hedges LLC, pointed out that attorneys may run into problems also by simply "Googling" a juror, because Internet searches may leave a record on the media page and generate a message that automatically notifies the juror of the search. A recent ethics opinion of the New York City Bar Association cautioned lawyers that an automated message transmitted through a social media service "may constitute a communication" even if the lawyer was unaware the message was sent.[2] "If you are looking up a juror on some type of platform, you need to know if the platform will enable the juror to know that it's you who looked at them," Judge Hedges said. For example, he advised lawyers against running a Google search of a jurors' list while they are automatically logged into LinkedIn because they will appear on a juror's LinkedIn profile as a person who has viewed the juror recently.

The first CLE panel discussed "Social Media in Your Practice: The Ethics of Investigation, Marketing and More." The moderator was Mark A. Berman, and the panelists from left to right were Southern District Magistrate Judge Lisa M. Smith, retired New Jersey Magistrate Judge Ronald J. Hedges, Touro Professor Jonathan I. Ezor, Ignatius A. Grande, and Nicole Black.

Judge Hedges also noted that a juror who is aware of an Internet search may become biased against the attorney or, as happened recently in a prominent commercial trial, complain

to the judge that the lawyer was cyberstalking her. He explained that the discovery of this type of communication may require a *voir dire* of the juror to find out whether she has been prejudiced, but would not constitute grounds to automatically grant a motion for a new trial. Southern District Magistrate Judge Lisa M. Smith emphasized that there is potential for discipline if a juror who feels she is being cyberstalked brings a complaint to the Grievance Committee. Judge Smith also recommended that any agents utilized as litigation support be aware of, and in full compliance with, the ethical obligations of the lawyers who employ them.

Next, the panel examined whether lawyers are permitted to advise clients that certain of their social media postings may have an adverse effect on their business and then recommend removing such postings. Professor Jonathan I. Ezor, who teaches cyber law at Touro Law School, commented that it is permissible to advise removal of material from social media publications to help a client reduce the risk of litigation, but not when doing so may constitute a violation of a litigation hold—which applies to social media pages and postings as it does to e-mails.[3] However, "inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer," he offered, lawyers have an ethical obligation to advise clients that removal or deletion does not mean the information cannot be recovered. Ignatius A. Grande, senior discovery attorney at Hughes Hubbard & Reed LLP, remarked on the preservation of social media evidence in the context of litigation. He recounted that a Virginia court sanctioned an attorney nearly half a million dollars for spoliation of evidence, after the attorney advised his client to take harmful photos off the client's Facebook page. In that case, Facebook had not kept copies of the photos that were deleted. Mr. Grande suggested that attorneys should be prepared to collect and preserve social media evidence by employing software that takes snapshots of the accounts and tracks any postings that are relevant to a case.

The discussion then focused on whether an attorney who wishes to "friend" an unrepresented witness on Facebook must reveal his or her real name, real profile, profession, name of law firm, name of client, and the purpose of the communication. In a 2010 opinion, the New York City Bar Association concluded that a lawyer may use her real name and profile to send a "friend request" to obtain information, without also disclosing the reasons for making the request.[4] Judge Smith observed that, although it appears that New York does not require an attorney to identify herself as such, but only to set up the social media account using her true name, other jurisdictions are more specific about potential deception and require attorneys to reveal whatever role or interest they have in the legal matter before initiating communication.

The Commercial Division was well represented at the Section's Annual Meeting. Attending were: Top row: Justices Richard Platkin, Carolyn E. Demarest, Orin R. Kitzes, Timothy S. Driscoll, Melvin L. Schweitzer, Thomas F. Whelan, O. Peter Sherwood, Lawrence K. Marks, Vito M. DeStefano, Charles E. Ramos, and Deborah H. Karalunas. Bottom row: Justices Marcy S. Friedman, Barabara R. Kapnick, Eileen Bransten, Elizabeth H. Emerson, Shirley W. Kornreich, and Marguerite A. Grays.

Judge Smith made the point that a New York attorney reaching out to a witness residing in those jurisdictions should comply with the applicable ethical limitations.

Panelists also explored ethical and marketing concerns that may arise when an attorney or law firm identifies areas of expertise on LinkedIn under the categories of "specialty" or "skills & expertise." Nicole Black, director of business development and community relations at MyCase.com, explained that social media websites are constantly changing. As a result, ethics opinions may quickly become obsolete. In June 2013, for instance, the New York State Bar Association issued an opinion advising that listing areas of law practice on a website with a "specialty" section would violate ethics rules that prohibit lawyers from stating that they "specialize" in a particular area of law, absent a certification to that effect approved by the state bar.[5] However, by the time the opinion became available, the "specialty" section on LinkedIn had been eliminated. It was replaced by a section labeled "skills & expertise."

The second CLE panel discussed "The Interplay of Delaware and New York Law in Resolving Corporate and Commercial Disputes." The moderator was Peter A. Mahler and the panelists from left to right were Kurt M. Heyman, Jeffrey M. Eilender, Delaware Vice Chancellor J. Travis Laster, and First Department Associate Justice David Friedman.

Even though the NYSBA opinion expressly declined to address the "skills & expertise" feature, Ms. Black advised lawyers to avoid listing their practice areas under any category, because it is difficult to monitor platform changes. She stressed that policing information posted online for fear that it may become an ethical violation can be challenging and time-consuming. However, she emphasized that New York, unlike other jurisdictions, does not impose a firm obligation to keep abreast of changes in the social media platform. As a related topic, Mr. Berman asked about potential ethical implications of professional "endorsements." Although this feature has not yet been addressed by any ethics opinions, Ms. Black recommended removal of practice areas from all endorsements because an endorsement can be construed as holding oneself out as specializing in a particular practice, which is not permitted.

Finally, Mr. Berman asked the panelists what course of action would be most appropriate if a juror "tweeted" that one lawyer was much more convincing than the other side at trial, and the marketing department of that lawyer's firm decided to "re-tweet" the juror's "tweet," sending it to thousands of followers. Judge Smith observed that jury instructions "now include very specific directions not to communicate by any form of social media, e-mail, text, instant messaging, or anything of that nature." Nonetheless, there are still jurors who do their own Internet research and use social media to communicate with outsiders about the case on trial. She stated that an attorney from the firm who has "re-tweeted" the juror's "tweet" should immediately call the judge's chambers and report the juror. Judge Hedges confirmed that the court would have an obligation to find out from the juror what happened and whether the entire jury was affected. From a practitioner's perspective, Mr. Grande noted that there is pressure on law firms to increase their exposure on popular and effective social media such as Twitter. "In doing so," he said, "you need to make sure that you have policies and guidelines in place to help prevent this sort of re-tweeting from happening." In closing, Mr. Grande commented on the cultural aspect of social media. He observed that people might unintentionally violate jury instructions, and cause a mistrial, because social media have become such an integral part of everyone's life.

Commercial Disputes: Delaware and New York

The second program, entitled "The Interplay of Delaware and New York Law in Resolving Corporate and Commercial Disputes," addressed, among other areas, the influential role of Delaware law in the adjudication of business disputes in New York courts. A panel of distinguished attorneys and jurists from both Delaware and New York examined some of the key differences in the two states' approaches to fiduciary duties in closely held entities, advancement and indemnification of corporate officers and directors, and other corporate governance issues.

The program began with an overview of Delaware law on the highly debated topic of fiduciary duties owed by managers and managing members of a limited liability

company. Kurt M. Heyman, a founding partner of Proctor Heyman LLP in Wilmington, Delaware, discussed the case of *Auriga Capital Corp. v. Gatz Properties, LLC*,[6] in which the court held that, under the Delaware LLC Act, "default" traditional fiduciary duties of loyalty and care apply to managers of LLCs, to the extent that they are not restricted or eliminated by the LLC operating agreement. On appeal, the Delaware Supreme Court criticized *Auriga* for addressing an issue that was not squarely before the court, but noted that LLC Act was "ambiguous."[7] Shortly thereafter, another case from the Chancery Court[8] construed the LLC Act as contemplating that managers owe default fiduciary duties. Mr. Heyman explained that this issue was finally settled by the Delaware General Assembly, which amended the LLC Act in 2013 to include a specific reference to equitable fiduciary duties.[9]

Vice Chancellor J. Travis Laster of the Delaware Court of Chancery, who authored the opinion in *Feeley*, remarked that "when you give money to someone to manage, there must be fiduciary duties." He explained that LLC members with managerial functions owe default fiduciary duties to members who are passive investors, in the same manner that general partners in a limited partnership owe fiduciary duties to passive limited partners. He stressed that default fiduciary duties serve an important equitable gap-filling role.

The discussion then focused on the status of New York law on this issue. Mr. Heyman observed that although the New York LLC Law does not expressly state that traditional fiduciary duties of loyalty and care apply to managers of LLCs,[10] many decisions from New York courts have simply assumed that managers owe those duties. In addition, he noted that in the case of *McGuire Children, LLC v. Huntress*,[11] the court concluded that the managing member also owed a duty to disclose all material facts involving the LLC.

Next, the panelists explored the issue of elimination of fiduciary duties. Peter A. Mahler, partner at Farrell Fritz, P.C., explained that the Delaware LLC Act expressly provides for the ability to eliminate fiduciary duties in the operating agreement, and contractual provisions eliminating fiduciary duty liability have been consistently upheld by the Delaware courts based on the public policy principle of freedom of contract enshrined in the Act.[12] He stated that these claims are litigated differently in New York, where the law is not settled on this point.[13]

The Hon. David Friedman, Associate Justice of the Appellate Division, First Department of the New York Supreme Court, agreed that the issue of whether fiduciary duties may be contractually eliminated has not been finally resolved in New York; but he pointed to the case of *Pappas v. Tzolis*,[14] which held that fiduciary duties could be eliminated in a release. In *Pappas*, the court found that it was not reasonable for members of an LLC, who were selling their interest to a co-member, to rely on certain representations made by the co-member, as a fiduciary, because all parties were sophisticated business people and their relationship was not one of trust but instead had become antagonistic and involved numerous disputes.

The panel also discussed indemnification and advances of corporate officials' legal expenses when they are sued by their own company for misconduct. Jeffrey M. Eilender, partner at Schlam, Stone & Dolan LLP, explained that the statutory standard for indemnification and advancement of a corporation's fiduciaries is the same in Delaware and New York. As to LLC fiduciaries, the statutes in both states vest broad authority in the company's operating agreement to deal with these issues. He observed that, traditionally, Delaware courts have interpreted indemnification and advancement provisions in statutes, by-laws, and operating agreements broadly to further certain public policy goals. Conversely, New York law has construed those provisions narrowly, on the ground that indemnification represents a departure from the "American Rule" that each party to a litigation is responsible for its own legal fees.

However, Mr. Eilender emphasized that New York courts have begun following Delaware's lead in strictly enforcing contractual provisions on advances. By way of example, he cited to the case of *Ficus Investments, Inc. v. Private Capital Mgmt., LLC*,[15] in which the court upheld the officers' right to receive advancement of legal expenses under the operating agreement, although they ultimately might not be entitled to indemnification. In *Ficus*, the court found persuasive Delaware law's distinction between advancement, the purpose of which is to provide corporate officials with immediate financial interim relief, and the right to indemnification, which is decided at the conclusion of the matter.

Panelists also commented on differences in court procedures to seek advances. In Delaware, the issue of whether an officer is entitled to advancement is determined in a separate summary proceeding. Judge Laster stated that, in this type of proceeding, typically the court issues an order directing the attorneys to certify and submit their legal bills periodically to opposing counsel, who must review them and certify in good faith which ones are not entitled to advancement. Then the judge determines what percentage gets paid. Mr. Eilender observed that there is no such expedited procedure in New York; a party must either make a claim for advances in the underlying action or bring a separate action. Typically, the dispute will be heard by a referee, and a motion will be made to confirm or reject the referee's report. As a practice pointer, Mr. Eilender suggested that lawyers should consider whether they could bring a summary proceeding for advances in Delaware even when the underlying action is pending in New York.

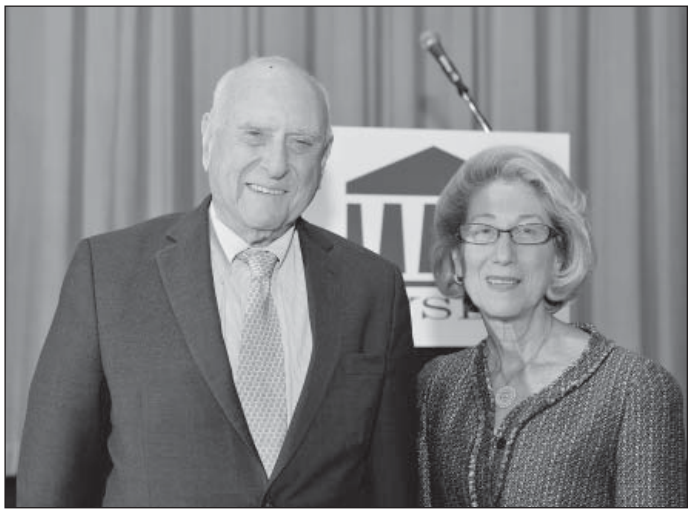
Another important tip came from Judge Friedman, who cautioned lawyers that New York and Delaware courts disagree on the issue of whether corporate officials should be permitted to recover legal expenses incurred in successfully litigating their right to indemnification or advances, absent a contractual provision expressly providing for such expenses. He stated that New York courts have rejected claims for "fees on fees," while in Delaware those fees are routinely awarded.

This panel's presentation concluded with a brief discussion of the standard of review of freeze-out mergers under both Delaware and New York law. The breadth of the panel background, addressing sophisticated and timely issues, from the viewpoints of New York and Delaware members of the bench and practitioners, was a welcome approach to the program. The panelists also provided very helpful materials as a supplement to their discussion.

The Stanley H. Fuld Award

The highlight of the day's events was the presentation of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation to the Hon. Shira Scheindlin, United States District Court Judge for the Southern District of New York. Judge Scheindlin was recognized for her unwavering commitment to the development of commercial law and litigation, particularly in the area of e-discovery. The award was presented to Judge Scheindlin by the Hon. Jack B. Weinstein, United States District Court Judge for the Eastern District of New York. Upon accepting the Fuld Award, Judge Scheindlin spoke about the way in which digital technology has changed the practice of law. Since the amount of information people can store or communicate has increased exponentially in the past few decades, lawyers and judges today are required to utilize new concepts such as big data, data analytics, information governance, and cybersecurity. Judge Scheindlin emphasized that with the ability to access vast amounts of information also comes a potential for great loss of privacy. "Finding the balance between the two will be the great challenge of the next 25 years," she said.

Chair Greg Arenson introduced Judge Jack B. Weinstein to present the Section's Fuld Award.



Eastern District Senior Judge Jack B. Weinstein presented the Fuld Award to Southern District Judge Shira A. Scheindlin.

Endnotes

1. *See also* NYCLA Op. 743 (May 18, 2011).
2. *See* NYCBA Op. 2012-2.
3. *See also* NYCLA Op. 745 (July 2, 2013).
4. *See* NYCBA Op. 2010-2.
5. *See* NYSBA Op. 972 (June 26, 2013).
6. 40 A.3d 839 (Del. Ch. 2012).
7. *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1219 (Del. 2012).
8. *Feeley v. NHAOCG, LLC*, 62 A.3d 649 (Del. Ch. 2012) (Laster, J.).
9. *See* 6 Del. C. § 18-1104 ("In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties…shall govern").
10. *See* N.Y. LLC Law § 409(a).
11. 24 Misc.3d 1202(A) (Sup. Ct., Erie County 2009).
12. *See* 6 Del. C. § 18-1101(b) and (c).
13. *See* N.Y. LLC Law § 417(a).
14. 20 N.Y.3d 228 (2012).
15. 61 A.D.3d 1 (1st Dep't 2009).

Clara Flebus is an appellate court attorney in New York Supreme Court and the Co-Chair of the Section's International Litigation Committee. She has clerked in the Commercial Division of the court and holds an LL.M. degree in International Business Regulation, Litigation and Arbitration.

Remarks of Chief Judge William M. Skretny

At the meeting of the Section's Executive Committee on November 13, 2013, the Hon. William M. Skretny, Chief United States District Judge for the Western District of New York, made the following remarks.

Good evening everyone. Tonight I want to share with you some observations about what I see as a fairly recent and ongoing evolution in the federal judiciary. Before I get started though, I do want to take a moment to recognize Sharon Porcellio, a past Chair of this Section, a recent recipient of the coveted Inns of Court award in the Southern District of New York, the current co-chair of the advisory group to the New York State/Federal Judicial Council on which I sit, and a tireless member of the bar. On behalf of the judiciary, thank you for all you do for our profession and for arranging this statewide video conference.

By the way, I don't know if all of you began with a cocktail reception this evening, as we did here in Buffalo? But, if so, I'm going to try *not* to read too much into Sharon's decision to dispense alcohol *before* my remarks, rather than after.

I want to begin by highlighting a more proactive and feistier federal court in the Second Circuit than ever before.

Over the past few years, more than at any time in recent history, the federal budget process, or the lack thereof, has been headline news. From 2011 to 2013, our federal court system was required to absorb flat funding. This was followed by sequestration cuts in March of this year of nearly 350 million dollars and, most recently, the government shutdown.

Of necessity, federal courts throughout the country have become proactive in ways most would not previously have imagined. We have been forced to consider how, in the face of quite onerous fiscal restraints, we can effectively carry out the duties assigned to us by the Constitution and federal statutes.

Whatever its merits, the rallying cry of "smaller government" simply is not applicable to the courts. We do not have the discretion to respond to a budget cut by eliminating a project, program, or service. Our work is constitutionally mandated. Our only avenue for cuts is people.

In the face of these circumstances we have had to consider what we can do, within the confines of our positions, to press for sufficient funding, to function effectively with reduced staffing, and to take what steps are essential to assure practitioners and the public that the quality of our justice system and access to justice will not be undermined.

The threat underfunding poses to the federal judicial system has united federal judges in unprecedented ways.

In August of this year, 87 of the nation's 94 Chief District Judges, myself included, issued a joint letter to the U.S. Senate that detailed the impact reduced funding is having on the judiciary's ability to carry out its constitutional and statutory responsibilities. District judges also have met with individual legislators and bar groups to discuss the dramatic impacts on litigants and the public at large.

For instance, while courts have been forced to reduce our staffing to 1999 levels, our civil workload has grown steadily and significantly. Our civil case filings have risen by 10.1 percent in the past year alone, and our social security appeals have risen by an astounding 43.4 percent. Staffing losses inevitably result in slower processing of civil and bankruptcy cases, which directly impacts you and your clients.

"Whatever its merits, the rallying cry of 'smaller government' simply is not applicable to the courts. We do not have the discretion to respond to a budget cut by eliminating a project, program, or service. Our work is constitutionally mandated. Our only avenue for cuts is people."

Staffing in probation and pretrial services offices is down seven percent since 2011. Yet, the number of individuals supervised by these offices—parolees and criminal defendants awaiting trial—is at a record high. Without sufficient staff to monitor these individuals, by way of in-person meetings, premises searches, drug testing, GPS-tracking, and the like, the risk to public safety increases.

For criminal defendants awaiting trial, we must fulfill the mandates of the Sixth Amendment and the Criminal Justice Act by providing counsel to those who cannot afford it. This is done through the public defender's office and our panel of private attorneys. Cuts here may have the most significant impact of all because the allocated funds were modest to begin with, and courts have no control over the number of individuals for whom a defense must be provided.

We are fortunate that legislators and bar groups have been sensitive to these concerns and have followed our lead in pressing for adequate funding.

Just a month ago, chief judges throughout the Northeast again united to protest the planned conversion of the federal women's correctional facility in Danbury,

Connecticut, to a men's facility. You may wonder why we would comment on a post-sentencing matter such as this. There are two main reasons. Danbury is the only women's federal facility in the northeast. Most of the women housed there were sentenced by our courts and have ties to the Northeast. The Bureau of Prisons plans to move many of them to Alabama. Yet research has shown that offenders whose family and friends can regularly visit are less likely to have discipline issues in prison or to recidivate after release. Also, approximately 59 percent of inmates there have a child under age 21. We are deeply concerned that we will lose the only facility where it is likely the parent-child relationship can be maintained through visitation.

As I mentioned earlier, these united efforts are a very new development, but are compelled by current circumstances.

Efforts to Stay the Course

So, this raises the next question. What are we doing in the meantime to process cases as effectively as possible? Here, too, we have been both proactive and creative. While I am going to talk specifically about what we have done in the Western District of New York, courts throughout the circuit and country are taking initiatives to do more with less. In our district, we have focused on, and made significant progress in, reducing the number of civil cases pending for three years or more. We have been diligent in our efforts to become more current, including trying more civil cases than at any time in recent memory. We are very cognizant of your clients' Seventh Amendment right to a jury trial, and have made a concerted effort to move trial-bound cases to conclusion.

For cases in which settlement is possible, our district has implemented a very robust alternative resolution program. In fact, this very program will start in January of 2014 in the Northern District of New York. Currently, more than 1,250 of our civil cases are in ADR. Mediation is scheduled automatically as an integral part of civil case processing. An initial mediation session occurs quite early in the case. While not all cases are positioned for early settlement—or for settlement at all—these early sessions often clarify and narrow the issues, which helps expedite the cases going forward.

The Western District of New York is the seventh busiest district court in the nation, and the busiest in the Second Circuit, based on weighted cases per judgeship. I am proud to say that our district also ranks first in the circuit in dispositions per judgeship. This ranking, more than any other, reflects our commitment to processing cases as expeditiously as possible.

Judges in less congested courts can, with permission from their circuits, offer their services to other districts. Our district has used two visiting judges in the past year, and we intend to expand our use of this valuable resource.

We also analyzed our district's caseload and found we had a disproportionate backlog of certain types of cases—in particular, social security appeals and habeas corpus petitions. Judge Telesca, one of our senior judges in Rochester, took on the management of these cases and has succeeded in significantly reducing the backlog. I am particularly relieved that we were able to become current with social security cases *before* experiencing a more than 40 percent increase in filings.

There is another set of civil cases that can be time-consuming for the court for a variety of reasons—and that is any case in which a litigant is proceeding *pro se*. They are in the 21 prison facilities in the 17 counties of the Western District of New York. These represent about 30% of our caseload.

Our next initiative will focus on these cases and is designed to assist the court, the *pro se* litigants, and also the next generation of attorneys. Beginning in January, we will be launching with the University of Buffalo Law School a *pro bono* practicum. Students registered for the practicum will meet with *pro se* litigants in space at our Buffalo courthouse under the supervision of volunteer attorneys. *Pro se* litigants will benefit from substantive guidance in their cases, and law students will accrue time toward the 50-hour *pro bono* requirement Chief Judge Lippman has made mandatory for all New York law students. Moreover, we hope to have a video link to our Rochester courthouse, so that assistance to *pro se* litigants is not limited to Buffalo.

Once a *pro se* case progresses, another consideration is whether and when *pro bono* counsel should be assigned. Attorneys admitted to practice in our district must agree to make themselves available to accept one *pro bono* appointment from the court per year. In years past, we appointed counsel sparingly, generally only for purposes of trial, and relied disproportionately on a small number of the largest area firms to supply representation. We are considering changes in both practices. First, we recognize that assigning counsel earlier in a potentially meritorious case generally helps expedite the case. We also are updating our database of admitted attorneys and will be putting in place a system of random selection that will ensure a more equitable distribution of *pro bono* assignments. Second, we are considering limited assignments, *i.e.*, for filing or discovery, dispositive motion practice, ADR, or trial.

As for future projects, we are researching the possibility of creating specialized courts for the prosecution of drug and child pornography cases.

And, we are looking to share staff and shrink our footprint to the greatest extent possible. To that end, it

is likely that the Buffalo Bankruptcy Court, currently in rented space, will move into the Buffalo courthouse, where certain staffing functions can be consolidated.

So, on all fronts, the district courts are looking to maximize available resources to ensure we can carry out our responsibilities in a timely and effective manner.

Connecting with the Community

Finally, I believe it is extremely important, now more than ever before, for the judiciary to connect with the community. Particularly when the public is questioning the government's overall ability to function, we do not want to be viewed as sitting in an ivory tower, out of touch with the community we serve.

In Buffalo, we are fortunate to work in a newly constructed courthouse. The building's glass facade is meant to signify the court's transparency in dispensing justice. We have taken that symbol of transparency to heart, and have used the move to our current location as an opportunity to deepen our connections to the legal community and the public at large through a more community-friendly and open courthouse.

In the past 18 months or so, we have co-sponsored, or made space available for, attorney CLE programs.

We have provided space for community non-profits, such as the United Way and the Robert H. Jackson Center, to put on seminars, present awards, or hold meetings.

We worked with a handful of local practitioners to establish a Federal Bar Association chapter in our community, a very positive development for our district.

Advanced technology and better security in our new building have allowed us to provide greater attorney access to cell phones and notebooks in the courthouse. We have also provided workshops on our new courtroom technology to trial attorneys.

In September of this year, on Constitution Day, we, along with the Buffalo chapter of the American Board of Trial Advocates (ABOTA) and the Robert H. Jackson Center, offered a presentation on the *Koramatzu* case and small-group discussion that followed for area high school students on their rights as guaranteed by the U.S. Constitution.

Now, more than ever, these sometimes tangential connections to the community help to reinforce our ongoing commitment to the prompt and impartial administration of both civil and criminal justice.

Thank you for giving me this opportunity to address you this evening.

CPLR Amendments: 2013 Legislative Session

(2013 N.Y. Laws ch. 1-558)

CPLR §	Chapter, Part (Subpart, §)	Change	Eff. Date
217-a	24(1)	Clarifies cross-references to notice of claim provisions	6/15/13
1101(f)	55(E)(16)	Extends expiration of CPLR 1101(f) until Sept. 1, 2015	3/28/13
3012-b	306(1)	Adds provision on certificate of merit in certain residential foreclosure actions	8/30/13
3015(e)	21	Repeals proviso	5/2/13
3101(d)(1)(iv)	23(4)	Repeals CPLR 3101(d)(1)(iv)	2/17/14
3103(a)	205	Authorizes anyone about whom discovery is sought to move for a protective order	7/31/13
3408	306(2)	Requires filing of proof of service within 20 days regardless of method of service	8/30/13
4106	204	Changes selection, deliberation, and discharge of alternate jurors	1/1/14
5241(a)(13)	270(1)	Adds definition of "issuer"	4/27/14
5241(b)(1), (d), (f)	270(2), (4), (5)	Changes "creditor" to "issuer"	4/27/14
5241(c)(1)	270(3)	Changes contents of income execution	4/27/14
5241(g)	270(6)	Changes contents of remitted payments and requires notification to issuer when debtor no longer receives income	4/27/14
5242(c)-(g)	270(7)	Reletters paragraphs; changes "respondent earns wages" to "debtor has income"; changes contents and transmittal of income deduction order; adds income payors and changes contents and recipient of payments; requires notification to issuer when debtor no longer receives income	4/27/14
8012(d)	532	Increases mileage fees in NYC for NYC sheriffs	1/17/14

Notes: (1) 2013 N.Y. Laws ch. 22, deemed eff. as of 11/1/13, makes technical changes to Jud. Law §§ 478, 484, and 485-a, as amended by 2012 N.Y. Laws ch. 492, relating to practicing or appearing as an attorney-at-law without being admitted or registered. (2) 2013 N.Y. Laws ch. 113, eff. 7/12/13, adds Nassau County to the list of counties in which certain classes of cases in supreme court may be commenced by electronic means.

2013 and 2014 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's N.Y. Orders 1-31 of 2013 and 1-12 of 2014)

22 NYCRR §	Court	Subject (Change)
137, App. A, 8(B)	All	Increases to $10,000 threshold for submission of attorney-client fee disputes to panel of three arbitrators
202.5-b(b), (d)-(f), (h)	Sup.	Adds provisions on signatures, proof of service, format of e-filed documents, notification of e-filing, filing in NYSCEF system, service of interlocutory documents, service of notice of entry; adds provisions on e-filing in small claims assessment (SCAR) proceedings
202.5-bb(a), (b), (e)	Sup.	Deletes certain definitions; permits SCAR representatives to claim exemption from e-filing; authorizes court to require additional hard copy from persons exempt from e-filing; adds RPTL to service alternatives
202.6	Sup.	Amends Foreclosure RJI
202.10	Sup.	Adds provision on requesting appearances at conferences by telephone or other electronic means
202.12(b), (c)	Sup.	Adds a non-exhaustive list of considerations for determining whether a case is reasonably likely to include electronic discovery and amends the provision on the non-exhaustive list of considerations for the court in establishing the method and scope of electronic discovery
202.12-a(b)(1)	Sup.	Requires notice of change of mortgage servicer
202.12-a(b)(3)	Sup.	Adds provision on consequences of plaintiff failing to file proof of service of summons and complaint within 120 days after commencement of action in certain counties
202.16-a(1)	Sup.	Amends provisions on automatic orders
202.28	Sup.	Adds provision requiring notification to court of discontinuation of actions in certain instances
202.58(b), (e), (f)	Sup.	Adds provisions on e-filing
202.70(a)	Sup.	Increases monetary threshold for NY County to $500,000
202.70 (Rule 8)	Sup.	Amends provision on electronic discovery issues to be addressed at preliminary conferences
202.70 (Rule 13)	Sup.	Adds a provision on expert disclosure
500.1(h), (o)	Ct. App.	Requires submission of other cited materials not readily available; requires request for acknowledgement of receipt be accompanied by additional copy of papers
500.2(a), (b), (f)	Ct. App.	Adds cross-reference to § 500.27(e); requires compliance with clerk's instructions for submission; authorizes clerk to reject non-complying briefs and record material
500.5	Ct. App.	Changes procedures for sealing documents
500.9(a)	Ct. App.	Clarifies that appeal is taken by serving as well as filing notice of appeal
500.10	Ct. App.	Adds that Court may transfer appeal

500.11(k), (l)	Ct. App.	Requires material submitted digitally pursuant to § 500.11 to comply with clerk's specifications and instructions and changes reference from Appellate Division to intermediate appellate court; requires compliance with sealing and redaction requirements of § 500.5
500.12	Ct. App.	Reduces number of copies of brief required to be filed from 19 to 9 (plus original); clarifies that appeal is taken by serving as well as filing notice of appeal; requires that material submitted digitally comply with clerk's instructions; requires compliance with sealing and redaction requirements of § 500.5
500.13(a)	Ct. App.	Requires that briefs also contain questions presented and point headings; deletes authorization for supplementary appendix in respondent's brief
500.14	Ct. App.	Reduces number of copies of appendices or full records required to be filed from 19 to 9 (plus original); encourages appendices and supplementary appendices to be separately bound; requires that full records contain the CPLR 5531 statement; requires full records be authenticated or stipulated to; changes reference from Appellate Division to intermediate appellate court; requires that material submitted digitally comply with clerk's instructions; requires compliance with sealing and redaction requirements of § 500.5
500.17(c)	Ct. App.	Deletes reference to Albany sessions
500.23	Ct. App.	Reduces from 19 to 9 copies of briefs required to be filed; transfers provision on contacting Clerk's Office and on website; deletes authorization for amicus movant on motion for leave to appeal to also request permission to submit amicus brief on appeal itself (a new motion is required)
500.26	Ct. App.	Reduces from 25 to 10 number of copies of appellant's Appellate Division brief and record or appendix and of respondent's brief; reduces from 24 to 9 number of copies of appellant's letter with arguments (plus original) and of respondent's letter in opposition
500.27(e)	Ct. App.	Requires clerk to notify parties of time periods for filing briefs in digital format
800.24-b	3d Dep't	Requires presiding justice to appoint departmental advisory committee on civil appeals management program
1210.1	All	Amends content of Statement of Client's Rights

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

October 8, 2013

Guest speaker, Ruby J. Krajick, Clerk of the Court for the Southern District of New York, discussed the work of the Clerk's Office, the impact of the federal government shutdown, and recent changes in the Southern District's ECF and local rules.

The Executive Committee approved the Report on the Proposed Amendments to the Federal Rules of Civil Procedure and the Report on the Proposed Amendments to CPLR 4547.

December 11, 2013

Guest speaker, Justice Orin R. Kitzes, Commercial Division, Supreme Court, Queens County, discussed the work of the Commercial Division, including the role of court interpreters, and practice in his Court.

The Executive Committee discussed the upcoming annual meeting, the Section's use of social media, CLE programming, an upcoming symposium, and officer nominations for the Section.

November 13, 2013

Guest speaker, Chief Judge William Skretny, United States District Court for the Western District of New York, discussed a number of issues facing the Court. His remarks are set forth elsewhere in this issue.

The Executive Committee discussed the Section's upcoming annual meeting, a report of the Section's Membership Committee, and upcoming CLE programs.

January 14, 2014

Guest speaker, Judge Pamela K. Chen, United States District Court for the Eastern District of New York, discussed four hypotheticals based on cases on which she had ruled, the management of cases with pro se civil litigants, and pre-trial and discovery practice in her Court.

The Executive Committee approved a report of the Section's Commercial Division Committee on proposed changes to the Commercial Division rules.

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