NYSBA SPRING 2016 | VOL. 22 | No. 1

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

"The achievements of an organization are the results of the combined effort of each individual."—**Vince Lombardi**

James M. Wicks

This year's Annual Luncheon was a hit in all respects. Its success was due to the combined effort of many individuals.

An active Bar organization should make an impactful difference. It should make a difference in continuously trying to better our profession. It should make a difference by being cognizant of and commenting on developing law. It should make a difference by recognizing those who do great things to advance the standing of our profession. It should make a difference in mentoring younger lawyers and promoting diversity.

We should be proud of our Section. With over 2,100 active members, we do make an impactful difference. This year's Annual Luncheon is just an example.

The programming for the morning CLE's—masterfully orchestrated by Mitch Katz— covered practical, informative topics: *The Psychology of Perception* and *Commercial Litigation in NY: Choosing Between State and Federal.* Between those two programs, we were particularly grateful to our esteemed group of women former Section Chairs, who put together a very dynamic panel discussion on *Advancing Women in the Profession*—consisting of candid, frank, and diverse opinions, guidance, and advice.

As you are aware, our Section developed the *Social Media Guidelines* through our Social Media Commit-

Inside

tee led by the indefatigable Mark Berman and Ignatius Grande. Our Guidelines became a topic for the Presidential Summit at the Annual Meeting. They continue to gain national attention. Our State Bar has now become a leader in this area because of our members' efforts.

At our Annual Luncheon we were so proud to bestow the Stanley H. Fuld Award on the Hon. Sheila Abdus-Salaam, Associate Judge of the Court of Appeals, for her outstanding contributions to commercial law and litigation. Judge Abdus-Salaam is truly a remarkable person and jurist. She has served on trial and appellate level courts, having made important rulings on key commercial issues that continue to help the development and evolution of commercial law. She deeply guards individual rights and liberties. She epitomizes what the Award stands for. I urge you to take the time to read Mark Zauderer's wonderful introduction of Judge Abdus-Salaam, and our honoree's remarks, both of whom were gracious to allow us to reprint them in this issue.

As if that's not enough.

Immediately upon learning of the untimely death of our great Chief Judge Judith Kaye, former Section Chair Carrie Cohen wasted no time to create a remarkable video presentation of Judge Kaye to honor her legacy. We were privileged to have Judge Kaye's daughter Luisa join us for the event. In addition, I was proud to announce on behalf of the Section that we are establishing a scholarship through the NY Bar Foundation in Chief Judge Kaye's honor, to pay for women attorneys to participate and attend the Commercial Division Academy, an intensive CLE program to train commercial litigators. We want more women commercial litigators to follow in the footsteps of Judge Kaye.

These achievements of our organization—our Section—are the direct result of you, our members: those active in committees and those who support and attend our programs. We make a difference because of that.

Please keep an eye out for announcements for our Spring Meeting, this year being held in Cooperstown from May 13-15, 2016!

James M. Wicks

NYLitigator Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article published 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:

Daniel K. Wiig, Esq.
Municipal Credit Union
Legal Department
22 Cortlandt Street
New York, NY 10007
dwiig@nymcu.org

Authors' Guidelines are available under the "Article Submission" tab on the Section's Web site: www.nysba.org/NYLitigator.

www.nysba.org/NYLitigator

What Psychology Teaches Us About Juror Decision Making—Tell Stories and Talk About Damages

By Julie Howe, Ph.D., Richard Waites, J.D., Ph.D. and Valerie Hans, Ph.D.

James M. McGuire
Moderator

We are pleased to have participated as panelists in the January 27th Annual Meeting program— "The Psychology of Perception in Litigation—What Do Arbitrators, Judges and Jurors Hear?" Our presentations highlighted the influence of fundamental biases, personal schema, and cognitive shortcuts on juror decision making. Understanding these psychological influences support the importance of storytelling and talking about specific damages figures when presenting your case to a jury, a judge, or an arbitrator.

Jurors, arbitrators and judges, like the rest of us, have biases, prior experiences, beliefs, expectations, and values that color the way they look at the world and specific cases. Like the rest of us, they rely on cognitive shortcuts to make decisions. Understanding how decision makers process information informs the development of effective case themes, compelling stories, and persuasive damages theories.

Psychological Influences: Biases, Schema and Heuristics

Julie E. Howe
Panelist

Julie Howe, Ph.D., Principal Trial Consultant at J. Howe Consulting, provided a primer and examples of how fundamental biases, personal schema, and cognitive shortcuts called heuristics influence juror decision making. She offered examples of how these factors play out in complex corporate litigation and suggested ways to work with these psychological influences for trial preparation. In short, effective communication means meeting jurors (judges and arbitrators) where they already are with regard to fundamental biases, personal schema, and information processing.

One example of a fundamental bias is what psychologists call the "fundamental attribution error" in which people are more likely to blame or place responsibility on internal traits or dispositions as opposed to situational factors. Jurors in corporate litigation do the same whether it's an attribution about a corporate executive or about a company. Dispositional attributions about large corporations tend to be one of greed, executives lining their own pockets and putting profits over people. Rarely do jurors' first instincts go to situational factors affecting corporate executives' decision making, such as the need to turn a profit to maintain jobs, to put money back into research and development, and to answer to shareholders. Dr. Waites, in his presentation on storytelling, explained the best stories in business cases have to do with the seven deadly sins. Thus, it's critical that every corporate defendant find and present the positive corporate story. It doesn't have to be one of perfection, but it should include elements of being a good corporate citizen, being responsive to the community, and acting to minimize harm or loss. Who you select as a corporate representative is a key element of that story. Attorneys should consider alternatives to the corporate executive, someone who might

present a better face of the company, perhaps select the scientists in a pharmaceutical case or a claims adjuster in an insurance matter, etc.

Valerie Hans, James McGuire, Julie Howe, Richard Waites and Michael J. Katz

Research shows there are two ways of processing information. One tends to be more critical, logical, and slow; the other way tends to be more intuitive, emotional, and quick. In his book *Thinking, Fast and Slow,* Daniel Kahneman talks about these processes as System 1 and System 2. While there are some individual differences, for the most part people are "cognitive misers." When presented with a great deal of new and complex information people rely on their own shortcuts for processing. Given the enormity of information and evidence jurors are required to sift through and make meaning of in commercial litigation cases, it's not surprising that they also tend to rely on cognitive shortcuts or what psychologists call "heuristics."

One cognitive shortcut is the "availability heuristic," in which jurors tend to overestimate the importance of information that is readily available or easy to remember. Most often what is readily available to jurors are their own prior attitudes, experiences, and beliefs (what psychologists call a person's "schema"). Jurors and other legal decision makers have a tendency to pay attention to evidence that confirms what they already believe ("confirmation bias") and to discard what does not fit into their personal schema. New information that does not fit with previously held beliefs causes tension or what psychologists call "cognitive dissonance," which is resolved by rejecting the new information. Schemas facilitate a person's ability to make inferences and judgments more easily, quickly, and with greater confidence. Thus, attorneys will benefit by developing themes and narratives that fit in with what jurors already believe. One way to do this is to think about overarching themes like fairness, honesty, or broken promises that are likely to resonate with everyone. Another way is to conduct pre-trial jury research, focus groups, or mock trials, to understand attitudes, beliefs, and experiences that exist among jurors in your venue and will influence decision making.

A related cognitive shortcut is the "representativeness heuristic" where people tend to estimate the likelihood of an event by comparing it to a prototype that already exists in their minds. The prototype is whatever they think is typical. For example, in an employment discrimination case, jurors are more likely to believe discrimination against a woman or a minority as opposed to discrimination against a white male, which is not prototypical. Often in commercial litigation jurors don't have a prototype to rely upon. The subject matter or issues are not familiar to the average juror. Thus, it's always important for attorneys to educate jurors about what is "typical," e.g., what are the rules, standards, policies, procedures, etc., for a particular industry.

As Dr. Hans discusses below, heuristics can also influence decisions about liability and damage awards. In her presentation she highlighted yet another cognitive shortcut known as the "anchoring heuristic," explaining that providing a number (even an irrelevant number) influences actual damage awards.

The above are just a few psychological factors affecting decision making that we observe in focus groups and mock trials and in interviews with actual jurors. We know from research these factors make a difference and we have learned from experience how to work with them to inform trial preparation and trial strategy. For example, we know storytelling is powerful and we know jurors grapple with and need guidance about damages figures.

The Power of Storytelling

Richard Waites
Panelist

Richard Waites, J.D., Ph.D., Attorney and Chief Trial Psychologist for The Advocates, explained that storytelling is one of the most important advocacy tools for attorneys to use in persuading jurors. An attorney's version of the story of the case provides jurors with a vision of the important meaning and understanding of the case from the attorney's point of view in live detail. A story provides jurors a framework to evaluate the case as each juror forms a vision of the case narrative in their minds. The story of the case is a fundamental element of understanding necessary for jurors to comprehend a client's side of the case and why the client should (or should not) prevail.

People are wired to see everything in context—how things are connected to one another and to attribute meaning to what they hear and see. Helping jurors see the connections and understand the meaning of evidence is key to persuasive communication. Stories elicit emo-

tion, which is the fast lane to the brain. Stories are easy to remember, whereas the details of the evidence and testimony may be confusing, conflicting, and incomprehensible to a juror.

Storytelling fits in with jurors' tendency to use cognitive shortcuts, i.e., relying on emotion and on what's available to them. An interesting story also engages the listener and therefore makes the information more memorable. Given the importance of juror schema (based on prior attitudes, experiences, and beliefs), the story needs to be one that resonates with what jurors already know and believe and it should have a moral point.

The story an attorney tells in the courtroom must also have a clear message without too many sub-points that overwhelm the main point. It is wise to use headlines to let the jury know where the story is headed and to keep the story simple. When jurors are overwhelmed with new information they incorporate what fits and they discard evidence or arguments that do not fit with what they already know.

Ultimately, an attorney wants the jurors to see the same movie in their minds that the attorney has in his or her mind.

Decision Making About Damages

Valerie Hans, Ph.D., Law Professor at Cornell Law School, took a psychological perspective on the subject of damage award decision making in her presentation. The legal framework for damages is couched in broad general terms: Determine a "fair and reasonable" damage award that will make the plaintiff "whole," that will be "neither inadequate nor excessive," in the words of federal jury instructions. In her research interviewing jurors in cases with business and corporate parties, Hans discovered that jurors complained about the insufficient guidance they received from the court. In addition to limited guidance, it's often difficult to project the financial and other consequences of an injury. And some injuries are intangible, making it harder to determine a dollar figure that is adequate compensation.

Dr. Hans asked NYSBA attorneys to complete a short online study in advance of our presentation. The attorneys who were surveyed weighed in on the challenges of presenting damage award figures in court. Attorneys observed that there is "no clear standard or protocol for a jury to follow in reaching a determination" and "there are no metrics for the cost of pain." One pointed out that "jurors, unlike judges and lawyers, do not have a jury verdict reporter to guide their decision making."

Valerie Hans
Panelist

Dr. Hans is working with Cornell University cognitive psychologist Valerie Reyna to develop and test a model of how people, including jurors, put a price on injury. In recent experiments, they are examining how the cognitive shortcut of anchoring influences damage award decisions. Offering anchor numbers in the courtroom—whether in expert testimony or as an ad damnum or even in an irrelevant comment—can have a pronounced effect on the awards. Hans and Reyna are discovering in their experiments that the more these anchor numbers are made to seem meaningful in the context of the case, the stronger the impact. Dr. Hans is eager to talk to attorneys about the approaches they use in conveying the meaning and significance of damage award amounts. Ultimately, the research could contribute to more effective advocacy and more predictable damage awards.

Conclusion

Understanding the viewpoints of jurors, judges, and arbitrators and how they process information is the essential to persuasive communication at trial. This understanding highlights the importance of telling a story and providing guidance with regard to damages figures.

Julie E. Howe, Ph.D., is the Principal Trial Consultant at J. Howe Consulting, based in New York City (jhowe@jhoweconsulting.com). Richard Waites, J.D. and Ph.D., is an Attorney and Chief Trial Psychologist for The Advocates, with an office in New York City (rwaites@theadvocates.com). Valerie Hans, Ph.D, is a Law Professor at Cornell Law School (valerie.hans@cornell.edu).

Richard Waites, Valerie Hans, Julie Howe and James McGuire

* * *

The Message Was Empowerment

By Lauren J. Wachtler

The kickoff for the Section's Women's Initiative began at the Annual Meeting of the New York State Bar Association with the panel: "Advancing Women in the Profession: A Conversation Among Former Women Section Chairs." The Women's Initiative was an idea conceived by the female Section Chairs to bring the next generation of women in the Section, and the profession, into leadership positions. Rather than focus on the usual "glass ceiling" or "cement floor," which is sometimes the cornerstone of panels dealing with women and the challenges they often face in the workplace, the panel took a more positive outlook and focused on mentoring, creating opportunity for young and upcoming women in the Section and the profession, and how, by providing them with the right tools, they can succeed.

Carla Miller, Lesley Rosenthal, Lauren Wachtler, Sharon Porcellio, Carrie Cohen, Bernice Leber, Shira Scheindlin and Tracee Davis

Moderated by the incomparable Carla Miller, Vice President, Business & Legal Affairs at Universal Music Group, and Co-Chair of the Section's Corporate Litigation Counsel Committee, the panel, consisting of Section former Chairs, the Honorable Shira Sheindlin, Bernice K. Leber, Sharon Porcellio, Lauren J. Wachtler, Lesley Freidman Rosenthal, Carrie Cohen, and Tracee Davis brought together a vast reservoir of experience from the judiciary, the public and not-for-profit arena, and the private sector in both the upstate and downstate communities. The Panelists engaged each other and the audience, which, as noted by Judge Sheindlin, remarkably, consisted mostly of men, in an exchange of ideas, experiences, and advice on ways in which their experiences helped them succeed. The discussion ranged from seeking mentors—both men and women—early in their careers, stepping up to the challenges by asking for and taking on tasks and responsibilities that might ordinarily be given to men, and having the confidence to know that it can be done. Judge Sheindlin noted the paucity of women who argue substantive motions in her courtroom, while also noting that based on the whispered exchanges between the Partner in charge and the (usually) female associate, it is the associate who knows what the case is about and really should be arguing the motion or examining the witness at trial. In those cases, Judge Sheindlin has taken the bull by the horns, so to speak, and invited the associate to make the arguments she was obviously capable of making on her own.

Carla Miller
Moderator

The panelists also discussed the age-old "work-life balance" issue, which Lesley Rosenthal said should really be called "work-life synergy," as balance connotes compromise, and synergy brings a better perspective to those of us who work and have families. Lesley and Carrie both gave examples of how bringing one's family into one's work-life can be a benefit and not the ominous doom that so many say it inevitably portends. Carrie brought her children to watch her try a very high visibility criminal case; Lesley listens to some of the practical solutions her children, who are musicians, offer to solve some very

Bernice Leber, Sharon Porcellio, Lesley Rosenthal, Tracee Davis, Carla Miller, Carrie Cohen, Lauren Wachtler and Shira Scheindlin

human issues at Lincoln Center; and my daughter, who is now 25, attended so many Spring meetings of the Section, from the time she was 7 that she had her own badge and ribbon designating her as "Mascot since 1998."

Both Sharon and Tracee noted the support their Law Firms have given in their respective career paths and how, when the Firm (and male partners in particular) is invested in female partners and associates succeeding, women can be a very valuable business asset. When that happens, everyone, including clients, benefits. Bernice, a former State Bar President, noted that her consistent Bar involvement has provided her with an extraordinary platform for networking and creating a personal brand.

While many of us on the panel were "firsts"—whether first female Chair of the Section or first female partner at a law firm—it was generally agreed that as "firsts" we certainly do not want to be the "lasts," and that it is our obligation to ensure that the next generation meets the challenges of the profession head-on with the right tools to give them the skill, and most of all the confidence, they need to succeed.

The panel closed with words of advice from each of the former Chairs and a quote from Gloria Steinem: "Power can be taken, but not given. The process of the taking is empowerment in itself."

For inquiries, or if you would like to get involved with the Section's Women's Initiative, contact Lauren Wachtler at ljw@msk.com.

* * *

Commercial Litigation in New York—Choosing Between State and Federal Courts

By Timothy S. Driscoll

Federal court versus the Commercial Division—not an athletic contest or a reality television show, but rather a decision that commercial litigators in New York must make every time they decide the forum in which to bring an action in our state. There are myriad factors to consider in making this decision, which were the focus of a panel moderated by former CFL Section Chair Bob Haig at the January NYSBA meeting. Federal District Judges Margo Brodie (E.D.N.Y.), former Section Chair P. Kevin Castel (S.D.N.Y.), and Mae D'Agostino (N.D.N.Y.), along with Commercial Division Justices Timothy S. Driscoll (Nassau), Deborah Karalunas (Onondaga), and Jeffrey Oing (New York), answered various questions regarding commencement of the action, provisional remedies, discovery, dispositive motions, and trial. Those areas, and others, are addressed in Chapter 12 (Comparison with Commercial Litigation in Federal Courts) in the recently published Fourth Edition of *Commercial Litigation in New York State Courts*, of which Bob Haig is the editor.

The initial question, of course, is where a plaintiff or petitioner should file the action. Judge Castel initially discussed concurrent jurisdiction and concluded that practitioners should first ensure that their case could in fact be filed in their choice of venue before choosing the incorrect forum. If the plaintiff indeed chooses state court, the Commercial Division judges highlighted their experience and specialization in business litigation, as well as the various innovations spearheaded by the Commercial Division Advisory Council, such as summary jury trials. To the extent that counsel choose state court because they fear stricter scheduling orders in federal court, Judge D'Agostino quickly allayed that concern by assuring that the scheduling orders are not meant to be punitive. Nevertheless, following the adage that "it is better to ask permission than beg forgiveness," she cautioned that counsel should request any deviation from a scheduling order before a deadline expires.

The second discussion area revolved around the fact that many commercial cases are initiated upon a party requesting provisional relief. As federal practitioners are readily aware, a temporary restraining order (TRO) expires 14 calendar days after its entry, with the possibility of renewal for an additional 14 days. There is no analog in the CPLR, and thus a TRO in the Commercial Division could theoretically last far longer. Nevertheless, the Commercial Division judges noted that they will use an application for a TRO as an opportunity to shape the course of the entire litigation, and explore settlement then if at all possible.

The differences amongst any two judges, much less an entire system, in the management of discovery are worthy of an entire seminar, and Bob Haig spent some time exploring that subject with the panelists. Although state courts have had some recognized budget challenges, the Commercial Division judges assured the litigators present that the changes to the Commercial Division rules ensure that discovery issues will be addressed with the same expeditiousness and innovation that characterizes the division. For example, Rule 14, as the author pointed out during the panel, creates a "3-4-3" formula for informal resolution of discovery disputes, in which a party may send a letter to the Court that is no more than 3 pages in length outlining the particular controversy. Within four business days thereafter, opposing counsel may send a letter of similar length expressing her position. The Court has the choice of whether to address the dispute through a telephone conference, in-person conference, or other mechanism. And, as Judge Karalunas recognized, Commercial Division judges also have the benefit of other new discovery rules, including limitations on the type and number of interrogatories, elimination of boilerplate objections to discovery requests, and the opportunity to limit the number of depositions and the time period for each deposition. Finally, Judge Oing stressed that cost-shifting in commercial cases may be a new beachhead for state court jurisprudence.

The federal judges recognized that federal practice poses its own challenges surrounding discovery. As Judge D'Agostino succinctly stated, the emphasis on proportionality in the recently amended Federal Rules of Civil Procedure allows federal judges to ask counsel the simple question "Do you really need that?" when resolving discovery disputes. She further emphasized that, particularly when costly electronic discovery is at issue, counsel should have a "good frank discussion" about costs prior to requesting judicial intervention.

Perhaps equally worthy of an entire seminar is the potential intersection of stays on discovery during the pendency of a decision on a dispositive motion with the need to move a case forward. There is, of course, no such automatic stay in federal court, while there is such a provision in CPLR 3214(b) unless the Court orders otherwise. Nonetheless, as Judge Brodie described, a "one size fits all" approach may not be the best way to ensure that cases are properly and promptly resolved. Furthermore, while New York State not only presumes an automatic stay but also provides for interlocutory appeal, Judge Oing recognized that the trial judges' role in resolving business disputes may nevertheless require ensuring that the case moves forward even in the face of a dispositive motion.

Finally, the basic differences between state and federal trial practice were introduced by Judge Castel. These include the number of jurors (always six deliberating jurors in state court, but between six and twelve in federal court at the judges' discretion), geographic diversity of the jury pool (such as including the area from Putnam to Manhattan in the Southern District, while obviously only Manhattan in New York County Supreme Court). Those differences may also include the ready availability of technology (likely more accessible in federal court, although state judges can permit counsel to "wire" the courtroom at their own time and expense).

While the panel stressed the differences between federal and state courts, all of the panelists agreed throughout their remarks that, regardless of forum, the judges' job is to use all of the tools at her disposal to ensure the expeditious resolution of the dispute before her.

The Hon. Timothy S. Driscoll is a Justice of the Supreme Court, Commercial Division, Nassau County.

* * *

Commercial and Federal Litigation Section Luncheon

President David Miranda and Luisa Kaye

Melanie L. Cyganowski

Section Chair James M. Wicks

Carrie Cohen introducing video tribute to Chief Judge Kaye

Lauren Wachtler on behalf of NY Bar Foundation

Introductory Speech for Judge Sheila Abdus-Salaam: Stanley H. Fuld Award

By Mark C. Zauderer

For any judge or lawyer practicing in the second half of the 20th Century, Judge Stanley Fuld was an admired and respected figure known for his important role in the development of American common law. For over four decades, Judge Fuld and his contemporary, Roger Traynor, Chief Judge of the California Supreme Court, were regarded throughout the country as powerful intellectual leaders, whose influence extended far beyond the boundaries of their home states. Shortly before Judge Fuld's mandatory retirement as Chief Judge of the State of New York at the end of 1973, the *Columbia Law Review* dedicated its entire edition to Judge's Fuld jurisprudence. Contributors included Supreme Court Justices William O. Douglas and John M. Harlan, as well as former Governor and Presidential candidate, Thomas E. Dewey.

Born in 1903, Stanley Fuld grew up in modest circumstances, attended City College—which was then regarded as the poor person's Harvard—and attended Columbia Law School, where he served as an editor of the *Columbia Law Review.*

When Thomas Dewey was elected District Attorney in New York County in 1937, he named Fuld as his Chief of the Indictment Bureau. A series of promotions followed, and in 1946, after Dewey had been elected Governor, he named Fuld to the New York Court of Appeals to fill the remainder of the term of a judge who had died. At age 42, Fuld was at that time the youngest person ever to serve on the Court of Appeals. He later served for a total of over 27 years on the Court, including as Chief Judge in 1966, prior to his mandatory retirement at the end of 1973.

Beginning in 1974, I had the privilege to work for Judge Fuld in private practice along with my future law partner, Judge Sidney Stein, who had been Judge Fuld's last law clerk. As Judge Stein so succinctly put it, "During Fuld's lengthy tenure on the Court, he had a *breathtaking* impact on the development of the law." Few would disagree with that. His trailblazing opinions extended to criminal law, First Amendment law, conflict of laws, and civil rights.

If one could say there was a most important opinion Fuld authored, it might be his dissent in the 1949 case of *Dorsey v. Stuyvesant Town*. Little known today to most New Yorkers, when Stuyvesant Town was constructed after World War II, it was racially restricted to whites only. The New York Court of Appeals, by a 4 to 3 vote, upheld the legality of the racial restriction. Judge Fuld's dissent in disagreement has often been credited with anticipating the 1954 Supreme Court decision of *Brown vs. Board of Education*.

In 1995, when the Commercial and Federal Litigation Section created this award in Judge Fuld's name, I asked Judge Fuld, who was then 92 and had been retired from the Court for over twenty years, of the hundreds of opinions he authored over a judicial career, which one, if any, stood out in this mind? He thought for a moment and then responded, "My dissent in the *Stuyvesant Town* case."

Mark Zauderer introducing Stanley H. Fuld Honoree

* * *

In 1973, as Judge Fuld was retiring as Chief Judge, a young Sheila Turner, later known as Sheila Abdus-Salaam, was then polishing up her superb record at Barnard College and about to enter Columbia Law School, following in Judge Fuld's footsteps at Columbia 50 years later. Her graduation from Columbia in 1977 was the precursor to a stellar legal career that took her on a journey from staff attorney at East Brooklyn Legal Services to the Attorney General's Office, where her appellate advocacy skills were so highly regarded, she was asked to argue many appeals normally assigned to the State's Solicitor General. She then served on the New York City Civil Court, Supreme Court, the Appellate Division, First Department, and then in 2013, she was appointed to the New York Court of Appeals, where she became the first African-American woman to serve on the Court.

But the judicial offices Judge Abdus-Salaam has held tell us little about her character or her contributions to the public. Raised in D.C., she was nurtured by her mother, whom she describes as not well-educated but very smart. Growing up, she shared a bedroom with three of her five siblings as her family struggled to make ends meet. Recognizing her daughter's intellectual curiosity, her mother invested in a set of World Book Encyclopedias and ensured that three newspapers were read by her children every day from elementary school on. Sheila did it the hard way—beginning work at age 16 to help pay for her education.

Many of you know of the website called The Robing Room, which reports lawyers' comments about judges—some of which, as you might expect, are not flattering, since it is mostly dissatisfied lawyers who express them-

selves in this medium. But if you were to look up Judge Abdus-Salaam, you would find something strikingly different. Here are the unedited comments on the Robing Room:

Annual luncheon attendees

"A truly excellent judge who is very bright and fair. On trial she allows both sides to try their cases without interference or bias. She is very knowledgeable about the law and will take the time to research an issue to make sure that she gives the right ruling."

Another:

"Deceptively soft-spoken at first appearance. Very knowledgeable, industrious and acute."

And yet another:

"Excellent, high-quality judge. Bright, hardworking and even-handed. One of Manhattan's best."

And this:

"Judge Abdus-Salaam is one of the most competent and pleasant judges that I have appeared before in the past 25 years. She is strictly 'down the middle.' That is, she is neither plaintiff oriented nor defendant oriented. She is simply fair. Her demeanor couldn't be more perfect. Judge Abdus-Salaam listens intently and carefully ponders her rulings. If all judges would be more like Judge Abdus-Salaam, the world would be a better place."

And this is my favorite:

"Brilliant. Always prepared and totally unbiased. We need a judge like this in central NY, Syracuse, Utica, Auburn or even Skaneateles."

Now, Judge Abdus-Salaam, perhaps you would be willing to take a sabbatical from the Court of Appeals and sit at Special Term for a few weeks in Skaneateles. I'm sure you would be very much appreciated.

* * *

In her service on Courts at every level, Judge Abdus-Salaam has made an impact in areas of law that have significantly affected the lives of citizens. In a decision she wrote while on the New York Supreme Court, she held in a class action that a provision of the New York Social Services Law was unconstitutional because it denied State Medicaid benefits to plaintiffs based on their status as legal aliens. The Appellate Division reversed her, but then the New York Court of Appeals reversed, upholding Justice Abdus-Salaam's decision. The result was to help a class of persons with chronic illnesses to get the treatment they needed to avoid life-threatening deterioration of their health.

Years later, in 2013, when she was on the Court of Appeals, the Court heard cases involving foreign born non-citizens who pled guilty to felonies, which under Federal Law subjected them to deportation. The trial court did not issue the warning claimed to be required by state statute that if they were not American citizens, they might be deported as a result of their pleas. Overruling an earlier precedent and writing for the majority of the Court of Appeals, Justice Abdus-Salaam found that "deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to a defendant as a matter of fundamental fairness."

And in a more recent case, Judge Abdus-Salaam wrote for the Court addressing an unsettled question on which the Appellate Division Departments were split: whether in a defamation case, statements made by a lawyer on behalf of the client in connection with prospective litigation are privileged—an issue not previously addressed by the Court.

If you were to ask Judge Abdus-Salaam's Law clerks and colleagues who have known her over the years what she is like, the picture that would form in your mind's eye is that of a wonderfully kind, considerate and even humble person. Unaffected by title or the trappings of office, she relates to both her colleagues and court staff at every level the same way: with courtesy and a smile and a patient ear for whoever is speaking.

If Judge Fuld were here today, I know that he would feel honored that an award in his name was being conferred upon Judge Sheila Abdus-Salaam.

Now, therefore, on this 27th day of January, 2016, by the authority conferred upon me by the officers of the Commercial and Federal Litigation Section, I hereby confer upon you, Judge Sheila Abdus-Salaam, with the affection and well wishes of your colleagues, the Stanley H. Fuld Award for Outstanding Contributions to the Development of Commercial Law and Jurisprudence. Congratulations.

* * *

Remarks of Hon. Sheila Abdus-Salaam Upon Accepting the Stanley H. Fuld Award at the NYSBA Commercial and Federal Litigation Section Luncheon

Fuld Award Recipient Hon. Sheila Abdus-Salaam

Thank you all for that warm welcome. Thank you, Mark, for that overly generous introduction. I am honored that a former chair of this Section and someone who helped to establish this award would so readily agree to present it to me. Although Mark didn't mention it, he and I have a history that dates back to the 1990s when I was a trial justice in the Civil Term of Supreme Court and he was representing the plaintiffs in a bench trial that I was forced to recuse from after he had put on his clients' case but before the other side's case began. I think we both learned some valuable lessons from that experience. I know I certainly did.

When Jim Wicks called me to tell me that the Section's Officers had voted unanimously to bestow this year's Stanley Fuld Award on me, I had the same reaction that President Obama had when he was told that he had won the Nobel Peace Prize: I was both surprised and deeply humbled. That feeling doubled—no, tripled—when I reviewed the list of prior recipients.

I join an illustrious group of individuals who have received this award since it was first bestowed, including Chief Judge Fuld himself, two other Chief Judges of the Court of Appeals, a Justice of the United States Supreme Court, and several other giants of the bench and bar. Never in my wildest dreams did I think I would be in such company. But then again, I never thought I would ever be on the Court of Appeals either.

As it turns out, Judge Fuld and I got there under similar circumstances. He filled the vacancy left by the unfortunate death of Judge George Z. Medalie and I filled the vacancy created by the untimely death of Judge Theodore T. Jones. But Judge Fuld had to stand for election to get a full 14-year term on the Court. He was re-elected for a second full term and elected again as Chief Judge a few years later. Fortunately, elections to the Court of Appeals were replaced by appointments decades ago and I will reach the age of retirement before my term ends. That means, I will serve only a fraction of the time Judge Fuld spent on the Court, an unmatched, thus far, 27 years and 8 months. Our beloved, recently departed former Chief Judge Judith S. Kaye, may she rest in eternal peace, came close with nearly 26 years. And, yes, I wore this red suit today in tribute to her. I haven't yet completed my third year on the Court of Appeals. So you can understand why I might be surprised and humbled by this award.

I am told that I merit the award because of my entire 24-year judicial career, which began when I was 39. Parenthetically, in that regard, and only in that regard, I just may surpass Judge Fuld, since he was 42 when he started his judicial career. But there is not even the slightest chance that I would, even if I could, match his perfectionist passion for multiples of 10 drafts of his opinions or his vast compendium of multiple thousands of decisions—both those he authored and those that he participated in deciding—that contributed to his breathtaking impact on the development of the law. I can only hope that one day even a few of my opinions might be deemed to have influenced our jurisprudence in anywhere near the same way as a Stanley Fuld opinion.

One of Judge Fuld's opinions that had a profound impact on my life and the lives of literally millions of non-white citizens of this state and country is his dissent in *Dorsey v. Stuyvesant Town Corp.*, which he authored in 1949, a few years before I was born. As Mark mentioned, in his recent NYSBA *Journal* article about the case entitled "Only Whites Need Apply: The Strange Case of Stuyvesant Town," Mark recounts that when Judge Fuld agreed to accept the inaugural award bearing his name, Mark asked the Judge if there was an opinion that Fuld had authored that he deemed the most memorable. The one the Judge cited was his *Stuyvesant Town* dissent. If you are not familiar with the case and have not yet read Mark's article (which I highly recommend), you can guess by the article's title that the case involved discrimination on the basis of race and that the majority of the Court of Appeals (two judges joined the dissent) held that Stuyvesant Town, one of New York City's largest housing developments, was a private entity that had the right to exclude blacks from consideration as tenants. As Jack Weinstein, one of Fuld's early clerks, has written, the *Stuyvesant Town* dissent "established a rule" that the United States Supreme Court in *Brown v. Board of Education* and many other cases "mimicked years later."

Judge Fuld's passion for justice, fairness, and equality of treatment for all under the law fueled the legal revolution that led to the dismantling of government-sanctioned discrimination in education, housing, employment, voting, public accommodations, and every other aspect of life for this nation's non-white citizens and residents, removing legal obstacles to the tremendous opportunities America has to offer. I believe it would not be an exaggeration to say his prescience led indirectly to me becom-

ing the first African American woman to serve on the Court of Appeals in its 168-year history.

During the past six-and-a-half decades since *Stuyvesant Town* was decided, people of color, women, and other disadvantaged groups have made tremendous strides in nearly all areas of life, and especially in the legal profession. As an aside, I learned that even before *Stuyvesant Town*, Judge Fuld himself was concerned enough about the advancement of women lawyers to employ Virginia Hughes as his permanent law clerk. She was a part of his chambers during his entire tenure on the Court. Yet, we still have a long way to go. With my appointment in 2013, I became only the fifth African American and the sixth woman to serve on our venerable Court. The appointment of Leslie Stein last year and the confirmation last week of our new Chief Judge, Janet Di Fiore, bring the number of women to eight out of a total of 112 judges. All of us women were appointed in the last 32 years. Our newest colleague, Michael Garcia, nominated by Governor Cuomo last week, has yet to be confirmed by the New York Senate. But when he is confirmed, he will be the 113th Court of Appeals judge and the first Hispanic man.

Stanley H. Fuld Honoree Hon. Sheila Abdus-Salaam and Mark Zauderer

There are still several groups that as yet have had no members appointed to our Court. Among them are: Asians or South Asians, the Variously Abled, LGBTs, Native Americans, and Pacific Islanders. Through efforts of Bar Associations such as this, and other legal and civic organizations, as well as law firms throughout the state, we might expect that by the time the Court of Appeals celebrates its 200th anniversary, most of these groups will be able to point proudly to at least one of its members who is or has been one of the Court's magnificent seven.

As with other areas of life,—the Oscars, for example—diversity and inclusion at all levels of the legal profession is a hot topic, as it should be. Several programs on this week's Annual Meeting agenda are devoted to various aspects of this topic: Monday night's "Celebrating Diversity in the Bar" networking reception, this morning's "Advancing Women in the Profession—A Conversation Among Former Women Section Chairs of this ComFed Litigation Section, and tomorrow night's program on "The Impact of Implicit Bias on Lawyers and the Legal Profession," a joint effort of the Committees on Civil Rights and Diversity and Inclusion.

Hon. Sheila Abdus-Salaam addresses attendees

And no wonder. Women and people of color have made significant progress in our profession but that progress seems either to have stalled or, actually, in some cases, begun to erode. I refer to the declining law school enrollment of blacks and Hispanics, and the decrease in African American lawyers in large law firms, as well as the trend of women leaving the profession in significant numbers. Recent studies of women lawyers like last year's ABA report entitled "First Chairs at Trial: More Women Need Seats at the Table," describe the huge gap in gender equality of those identifying as lead counsels or trial counsel in litigation. One author commenting on the report suggests that a major reason is the pervasiveness of the lawyer as warrior metaphor. He posits that if we want greater gender equality, we must change this stereotyping in addition to any changes in policy such as the ones suggested in the ABA report. Of course, only time will tell if he is right. To increase racial, ethnic and other equality we will have to address other implicit biases.

It is also concerning that relatively few women and lawyers of color are handling complex commercial cases in the appellate courts of this state, for such cases often help to advance the careers and earning power of the attorneys involved. And we still have more work to do to increase diversity on the bench, particularly in parts of the state that lack a substantial number of female and minority judges.

In fact, in this state, we need more appellate judges, period. As mentioned, maybe as soon as next month, the Court of Appeals will be back up to full strength. But the four Appellate Division departments are sorely hurting. A front page article in yesterday's *New York Law Journal* chronicles the effects of the loss to our colleagues and the public since 2012 of several justices from the First Department. With six vacancies, it has gone from over 20 justices to only 14. One of the seats that remains unfilled is the one I vacated nearly three years ago. We all hope that the Governor soon will fill some, if not all, of these vacancies and those in the other departments. As he does so,

I hope he continues to be mindful (as he has been in filling Court of Appeals vacancies) of the need for a variety of views and experiences that add to the intellectual heft and sensibilities of our intermediate appellate courts, while reflecting the rich diversity of our state.

I thank the Commercial and Federal Litigation Section for honoring me with such a distinguished award. But there would be no Fuld award or other distinctive recognition without the invaluable contributions of my law clerks, Debbie Woll—my own Virginia Hughes, who has been with me for nearly 20 years—John Martin and Dominique Saint-Fort, and my administrative assistant Genny Villaronga. Finally, I would like to acknowledge my fiancé, Greg Jacobs, who is a constant reminder of life's never-ending surprises.

Deborah Edelman, Hon. Sheila Abdus-Salaam, Jeremy Corapi, James Wicks and Mitch Katz

* * *

Section Is Highlighted in This Year's Presidential Summit

By Mark A. Berman

State Bar President David P. Miranda designed this year's Presidential Summit presented at the State Bar's Annual Meeting to, among other things, embrace cutting edge legal issues posed by social media and its many platforms. President Miranda noted that social media has had as much of a significant impact on the practice of law as it has had on the nation's public culture.

Section Chair-Elect Mark Berman was a member of the panel for the Presidential Summit on "Social Media and the Legal Profession"

In introducing the panel entitled "Social Media and the Legal Profession: Considerations for Attorney Advertising, Ethics, Trials and Tribulations," President Miranda expressly thanked the Section for making the State Bar the leading bar association in the country in addressing social media issues and "shouted out" its Social Media Committee co-chairs, Ignatius A. Grande and Mark A. Berman, for their work in putting together the Section's reports on social media legal ethics and jury instructions.

The panel included, among others, Mark A. Berman, Section Chair-Elect, as one of its speakers, and it explored new legal issues and offered best practices to lawyers in the use social media in developing new business via social media channels or utilizing social media at trial. The panel focused on the use of Facebook, Twitter, LinkedIn, and YouTube and how it has changed how lawyers communicate, share, and react to information. Also on the panel was Nicole Black of MyCase, who has been a frequent speaker for the Section during the CLEs it has presented upstate during the past two years on social media legal ethics. The panel opened with a broad overview of the importance of lawyers staying current on social media and how it affects lawyers, in terms of both marketing their practices and using social media as a tool to provide better representation to clients.

Adopting the technology used by the Section two years ago at its Annual Meeting, the Presidential Summit utilized live surveying of the audience as hypotheticals were presented to it. The survey results were tallied and incorporated directly into the ongoing presentation as the hypotheticals were discussed. In addition, Mark A. Berman presented an analysis of collected public tweets from the prior two days of the Annual Meeting in order to highlight the power of social media technology when, for instance, seeking to monitor jurors' social media posts during trial and deliberations, and its use in potentially profiling prospective jurors. The analysis presented to the audience included, as an example, tweets from President David P. Miranda and President-Elect Claire P. Gutekunst, who is also a member of the Section's Executive Committee, neither of whom knew that their tweets would be captured and displayed and what they each had posted about the Annual Meeting. The audience was fascinated by this presentation. The Section intends on following up on this panel with its own panel at its Spring Meeting addressing more specifically social media jury instructions.

Chief Judge Lippman's Vision Coming to Life—The ~~Third~~ Fourth Installment

By Rebecca C. Smithwick

In the Summer/Fall 2014, Winter 2014, and Spring 2015 editions of this newsletter, I reported on the significant changes in Commercial Division practice since the establishment of the Commercial Division Advisory Council in 2013. At the time of my last article, these changes included:

1. amending Rule 13 to provide for robust expert disclosure;
2. increasing the jurisdictional threshold in New York County from $150,000 to $500,000;
3. promulgating Rule 11-a, which sets the presumptive limit on interrogatories at 25;
4. enacting Rule 9, which permits litigants to consent to streamlined procedures for expedited adjudication;
5. establishing a pilot mandatory mediation program;
6. rolling out a new (optional) Preliminary Conference Order Form;
7. promulgating Rule 11-b, which creates a preference for the use of categorical privilege logs;
8. promulgating Rule 11-c, which provides guidance regarding discovery of ESI from nonparties;
9. promulgating Rule 34, which mandates staggered court appearances;
10. amending Rule 8(a), which addresses settlement-related disclosures;
11. amending §§ 202.70(d) and (e), which address the assignment and transfer of cases into and out of the Commercial Division;
12. adopting a pilot program in New York County, which involves the referral of complex discovery disputes to Special Masters;
13. enacting Rule 11-d, which sets presumptive limits on both the number (10) and duration (7 hours) of depositions;
14. enacting Rule 11-e, which requires parties to provide increased specificity when responding and objecting to document requests;
15. promulgating Rule 14, which requires the submission of three-page letters regarding discovery disputes (in the absence of Part Rules to the contrary);
16. amending the Preamble to the Rules concerning the imposition of sanctions; and
17. adopting a new (optional) Model Compliance Conference Order Form.

Adding to this impressive list, five further amendments have recently been given the seal of approval, all of which became effective on December 1, 2015:

1. New Rule 11-f (and amendment to Rule 11-d), relating to entity depositions;
2. Amendments to §§ 202.70(b) and (c), relating to eligibility criteria for commercial cases;
3. Amendment to the Preamble to the Rules, relating to proportionality in discovery;
4. Amendment to Rule 3, relating to summary jury trials; and
5. Amendment to Rule 6, relating to bookmarks in e-filed papers.[1]

In addition, the Court also adopted a new (optional) Model Status Conference Order Form to be used in the Division (also effective December 1, 2015).[2]

Entity Depositions

New Rule 11-f—relating to entity depositions—"is intended to…reduce the likelihood of a mismatch between the information sought and the witness produced,"[3] and, in the words of the Advisory Council, "provide[s] litigants with another arrow in the quiver of efficiency."[4] As with a number of the recent changes to the Rules (*e.g.*, presumptive limits on interrogatories and the number and duration of depositions), this Rule aligns the Division's practices with those in the federal courts; although not identical to the familiar 30(b)(6) process, the new Rule is modeled on that paradigm. The Rule provides that a deposition notice (or subpoena) issued to an entity may include a list of matters on which the entity will be questioned.[5] Assuming that it does, the Rule then takes the practitioner down one of two tracks. The first addresses the situation where the notice or subpoena *does not* identify a specific individual to testify on the entitiy's behalf. In that case, the entity must designate the specific individual no later than 10 days before the deposition. The entity may designate more than one person and, if it does, it must set out the matters on which each individual will testify. The second track addresses the situation where

the notice or subpoena *does* identify a specific individual to testify. In that case, the entity has two options: either it produces the specified person or it counter-designates someone else (which again must be done no later than 10 days before the deposition). Again, the entity may designate more than one person and, if it does, it must set out the matters on which each individual will testify. Either way, the deposing party will know the identity of the witness at least 10 days before the deposition.

The fact that more than one person may testify on behalf of an entity raises the question of whether, for the purposes of newly enacted Rule 11-d (which sets a presumptive 7-hour limit on depositions), *each witness* may be deposed for 7 hours, or whether the deposition of the *entity* will be limited to 7 hours in total. The answer is the latter, and Rule 11-d has been amended to make that clear. This said, in recognition of the "sheer number of topics of examination and the complexity of some [entity depositions]," [6] Rule 11-d also provides that any application to the Court for an enlargement of time shall be "freely granted."

Two other aspects of new Rule 11-f warrant a quick mention. First, the Rule provides that deposition testimony will be usable against the entity on whose behalf the testimony is given to the same extent provided in the CPLR and the rules of evidence.[7] According to the Advisory Council, this means the testimony will be deemed a rebuttable evidentiary admission of the entity, not a dispositive concession.[8] Second, although the Rule does not expressly require the entity to educate its designated witness(es), the Advisory Council is of the view that New York law already requires entities to produce witnesses with sufficient knowledge to provide adequate testimony.[9]

The take-away? Expending time carefully crafting the list of matters for inclusion in your deposition notice (or subpoena), and carefully preparing witnesses deposed under this new Rule, will be time and money well spent.

Eligibility Criteria

Sections 202.70(b) and (c) of the Rules have been amended to (1) limit domestic arbitration proceedings (*i.e.*, actions to affirm/disaffirm awards or to compel/stay arbitrations) that may be heard in the Division to those that meet the applicable monetary threshold, and (2) add home improvement contracts involving certain residential properties to the list of matters that are *not* eligible for Commercial Division treatment.

The former amendment (re arbitration), expressly exempts international arbitration disputes from having to meet the monetary threshold. The thinking behind this exemption was twofold: first, the drafters believed that virtually all international arbitrations filed in New York Supreme Court will involve amounts above the applicable threshold, and second, that failing to carve out international arbitrations from the monetary threshold requirement may be perceived as a retreat from the policy underlying the newly promulgated rules concerning such arbitrations[10] (*i.e.*, to encourage the use of New York courts for proceedings ancillary to international arbitrations).[11]

The latter amendment (re home improvements) carved out such cases because they "are not true commercial cases, even if the amounts in dispute exceed the monetary threshold."[12]

The drafters considered a third amendment which would have added *Yellowstone* injunction cases to the list of cases that may not be heard in the Division. The drafters ultimately decided against it, given the negligible impact such a rule would have on the Division's docket.[13]

Proportionality

With another nod to the federal rules,[14] the Preamble to the Rules has been amended to explicitly confirm that principles of proportionality apply in conducting discovery in the Division. The reference appears alongside several other key concerns that impact commercial litigants (such as dilatory tactics and conservation of client resources). The subcommittee responsible for the amendment notes the dire consequences of litigants' views that the cost of discovery is out of proportion to the issues at stake—parties choosing other jurisdictions, settlements being made regardless of merit, and cases simply not being filed.[15] The subcommittee considered that, although principles of proportionality are already contained in existing standards, a "reminder of its presence will help to streamline the process."[16] Reference to proportionality in the Preamble (*i.e.*, rather than a Rule change or amendment to the CPLR) was considered to be the appropriate response.[17]

Summary Jury Trials

The amendment to Rule 3 provides that parties may stipulate to having their case determined by a summary jury trial (which would be governed by local rules[18] and, if none exist, by court-approved procedures). Summary jury trials generally involve a one-day, binding jury trial with relaxed rules of evidence, limited time for jury selection and opening statements and summations, a maximum of two (2) live witnesses apiece, and waivers of appeals and motions for directed verdicts.[19] Given their brevity, summary jury trials undoubtedly have the potential to "facilitate the cost effective resolution of disputes"[20]—an issue of primary importance to the Chief Judge's Task Force on Commercial Litigation in the 21st Century, and the common thread linking the flurry of changes to the Rules since the issuance of the Task Force's 2012 report.

Bookmarks

The amendment to Rule 6 provides that each e-filed memorandum of law, affidavit, and affirmation must include "'bookmarks'[21] providing a listing of the document's contents and facilitating easy navigation by the reader within the document." According to the Rule's drafters, bookmarking is "quite easy to learn and perform,"[22] and "[t]he convenience and efficiency promised by the effective use of bookmarks…is obvious; the time and energy needed to find a physical copy of the target section, reference or document is reduced to the click of a mouse."[23] The subcommittee responsible for the amendment to Rule 6 also considered the imposition of a requirement that all briefs be hyperlinked.[24] It ultimately considered such a requirement to be premature given concerns regarding, among other things, the costs associated with preparing hyperlinked documents, issues concerning Westlaw and Lexis charges, and the fact that any rule may quickly become obsolete.[25]

Model Status Conference Order Form

Lastly, a new Model Status Conference Order Form has been promulgated for use in the Division. It is the final form in the triumvirate of new forms, the other two being the Model Preliminary Conference Order Form and the Model Compliance Conference Order Form (which became effective on June 2, 2014, and April 1, 2015, respectively). As with the Model PC and Model CC Forms, the Model SC Form is just that—a *model*, not a *mandate*. The form presumes that the parties have (1) filled out the Model PC Form, (2) returned to Court to report on the progress of discovery, using the Model CC Form, and (3) are now returning to the Court to identify final discovery matters, using the Model SC Form.[26]

As with the Model PC and CC Forms (which, as I reported in earlier editions of this newsletter, each contain new sections on ADR), the Model SC Form provides the Court with yet another opportunity to push litigants towards ADR: the form requires counsel to affirmatively explain themselves if ADR efforts have not begun by the time of the status conference.

On the Horizon

At the time this article was submitted for publication, four proposed Rules are open for public comment, relating to (1) settlement conferences before a justice other than the justice assigned to hear the case, (2) a revised Model Preliminary Conference Order Form, (3) memorialization of rulings in disclosure conferences, and (4) an updated standard form of confidentiality order. As always, we await with interest the outcome with respect to these proposed rules.

Watch this space.

Endnotes

1. The amendments to Rules 3 and 6 were announced in the New York Law Journal on November 3, 2015, and were subsequently reported on by a number of commentators. At the time this article was submitted for publication (February 22, 2016), the orders adopting these amendments had not yet been posted to the court's website.
2. Subject to footnote 1, copies of the rules and model order, and the Advisory Council's recommendations in support of the changes, are available from the New York State Unified Court System website at http://www.nycourts.gov/RULES/comments/index.shtml.
3. Memorandum from John W. McConnell dated April 7, 2015 ("Proposed adoption of new Commercial Division Rule and amendment of Commercial Division Rule 11-d, relating to depositions of entity representatives") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/CD-EntityDepositions.pdf.
4. Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council dated March 10, 2015 ("Depositions of Entity Representatives in the Commercial Division of the Supreme Court of New York") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/CD-EntityDepositions.pdf.
5. If the notice or subpoena includes such a list, the matters must be described with "reasonable particularity."
6. *See* note 4 at p. 11.
7. Rule 11-f(g).
8. *See* note 4 at pp. 5-6.
9. *See* note 4 at pp. 7-9.
10. *See* AO/224/13, a copy of which is available at https://www.nycourts.gov/courts/1jd/supctmanh/AO-CIAM-aj.pdf.
11. *See* Memorandum from the Subcommittee on The Role of the Commercial Division in the Court System to the Commercial Division Advisory Council dated March 2, 2015 ("Amendments to NYCRR § 202.70(b) Eligibility Criteria for Commercial Cases") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/Rule202-70b-c.pdf.
12. *See* note 11 at p. 2.
13. *See* note 11 at p. 1-2.
14. *See* newly enacted FRCP 26(b)(1).
15. *See* Memorandum from Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council dated March 6, 2015 ("Proposal to Amend the Preamble of the Commercial Division Rules to Mention Proportionality") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/CD-Proportionality.pdf.
16. *See* note 15 at p. 3.
17. *Id*.
18. Currently, the following counties and judicial districts have rules governing summary jury trials: New York, Kings, Queens, Westchester, Suffolk, and the 8th Judicial District. *See* Memorandum from the Alternative Dispute Resolution Subcommittee to the Commercial Division Advisory Council dated June 11, 2015 ("Proposed Amendment to Commercial Division Rule 3 Concerning Summary Jury Trials") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/PC-Packet-Comm-Div-SJ-Trials.pdf.

19. *See* Memorandum from John W. McConnell dated July 14, 2015 ("Proposed amendment of Commercial Division Rule 3 (22 NYCRR § 202.70(g)), relating to summary jury trials") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/PC-Packet-Comm-Div-SJ-Trials.pdf. *See also* note 18 at p. 1.

20. Chief Judge's Task Force on Commercial Litigation in the 21st Century, Report and Recommendation to the Chief Judge of the State of New York, June 2012 at p. 25, a copy of which is available at https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.

21. "Bookmarks" are "an electronic functionality built into a document that provides, adjacent to the body of the displayed document or otherwise readily accessible, a listing of the contents of the document and facilitates easy navigation by the reader within the document and exhibits thereto." Memorandum from the Subcommittee on the Use of Technology in the Commercial Division to the Commercial Division Advisory Council dated June 15, 2015 ("Advancing 21st Century Technology in the Commercial Division") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/PC-Packet-Comm-Div-Bookmarks.pdf, quoting the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (revised March 17, 2014).

22. *See* note 21 at p. 2.

23. *See* note 21 at p. 1.

24. "Hyperlinks" are "an electronic functionality built into a memorandum of law, for instance, that permits the reader, by clicking on the name of a case, statute, etc. in a table of authorities or in the body of the brief to be immediately connected or 'linked' to a copy of the authority, which automatically opens up for viewing. Material made accessible by hyperlinking does not constitute a part of the formal record. Hyperlinks merely provide efficiency and convenience in the accessing of cited material." *See* note 21 at p. 1, quoting the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (revised March 17, 2014).

25. *See* note 21 at p. 3.

26. *See* Memorandum from the Subcommittee on Best Practices for Judicial Case Management to the Commercial Division Advisory Council dated March 16, 2015 ("New Model Status Conference Order") at p. 1, a copy of which is available at https://www.nycourts.gov/rules/comments/PDF/CommDiv-SC-Form.pdf.

Rebecca C. Smithwick is associated with the law firm of Lupkin & Associates.

8th Judicial District Commercial Division Bench-Bar Forum

By Riane Lafferty

The New York State Bar Association's Commercial and Federal Litigation Section presented a Bench-Bar Forum on December 8, 2015. The forum was one of several held across the state following the promulgation of new rules for the State's Commercial Divisions. The event took place in the CLE room at Nixon Peabody, LLP's Buffalo office. More than 75 people attended—the largest group of attendees statewide.

The discussion moderated by James Wicks (standing), with the panel (left to right, Mark Berman, the Hon. Timothy J. Walker, and the Hon. John M. Curran

The CLE involved a panel discussion about Commercial Division best practices, as well as the recent and proposed Commercial Division rules concerning privilege logs, electronically stored information, discovery limitations, and more. Section Chair James M. Wicks of Farrell Fritz, PC, led the discussion with panelists, the Hon. Timothy J. Walker, A.J.S.C., Hon. John M. Curran, J.S.C., and Mark A. Berman of Ganfer & Shore, LLP.

Justice Walker was appointed to hear cases in the Commercial Division of the 8th Judicial District in 2013. He just completed his three-year term at year-end. Justice Curran was the Commercial Division Justice from 2007 to 2009. He currently handles medical malpractice cases in the 8th Judicial District. Mark Berman is a partner in Ganfer & Shore's litigation practice group. He also heads the firm's e-discovery counseling practice and is Chair-Elect of the Section. James Wicks is a partner in Farrell Fritz's commercial litigation group.

Sheldon Smith of Nixon Peabody, LLP, and Sharon Porcellio of Bond Schoeneck & King, PLLC, former Section Chair, helped organize the event. The program and reception drew a wide-ranging crowd, including current NYSBA President, David P. Miranda, former NYSBA President Vince E. Doyle III, Former Section Chair David H. Tennant, and Hon. Henry J. Nowak, J.S.C., who recently began a three-year term as Justice of the Commercial Division for the 8th Judicial District. Bond Schoeneck & King, Nixon Peabody, and AppealTech sponsored the event.

During the panel discussion, Justices Curran and Walker addressed the new language in the preamble to the Commercial Division rules regarding proportionality in discovery. They categorized the proportionality rule as one of practicality. The two Justices also addressed issues surrounding categorical privilege logs, which, they maintained, are still a relatively new concept within the court system. Mark Berman added that appropriate compliance with the new rules concerning categorical privilege logs are perplexing practitioners. However, Berman noted that the new limitations on discovery are taking flight. The audience also weighed in on the use of deposition and interrogatory limitations in current practice, including expansion of discovery directed toward experts.

New York's Commercial Division courts are a special venue in that they are truly "business courts." They were established with the goal of promoting efficiency and consistency in the disposition of commercial cases. The predominant theme of the panel discussion focused on the implications of the new and proposed rules, which mark a shift in the State's Commercial Divisions. The rules are moving the State's Commercial Divisions more in line with Federal practice, in furtherance of the underlying goal to promote efficiency in resolving commercial cases.

From left to right David Miranda, Sharon Porcellio, Anne Rutland, James Wicks, and Mark Berman

Following the forum, the Section held a reception to honor Anne Rutland, who served as court attorney for the 8th Judicial District Commercial Division for over ten years, retiring at year-end. Throughout her career, Anne served as a law clerk to virtually every Justice presiding in the 8th Judicial District's Commercial Division since its inception, including Court of Appeals Judge, Eugene F. Pigott Jr., who attended the event to celebrate Anne's career.

Justice Curran delivered remarks about Anne's career before Section Chair James Wicks presented her with a plaque on behalf of the Section recognizing her outstanding service. Justice Curran noted that Anne was well-skilled in the art of diplomacy (jokingly suggesting that she protected attorneys from the Justices more than insulating the Justices from the attorneys). The overwhelming consensus among the attorneys who had the opportunity to conference with her is that she was extremely knowledgeable, fair, and effective in the management, resolution, and disposition of a heavy and complicated Commercial Division caseload. The event's record turnout, as noted by Justice Curran, was no doubt attributable to Anne Rutland's reputation and the gratitude of the Bar for her exemplary service to the Commercial Division. She certainly will be missed.

The program was well received by all. Indeed, the strong showing from the local bar, the New York State Unified Court System, and NYSBA leadership was a demonstration of support to the 8th Judicial District, the Commercial Division itself, and Anne Rutland. The time and expertise contributed by each participant were greatly appreciated by all who attended.

Riane Lafferty is an associate of Bond Schoeneck & King, PLLC.

Book Review

Commercial Litigation in New York State Courts, Fourth Edition

Reviewed by Guy Miller Struve

More than 20 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 28 parts in ten counties spread across the State: Albany, Erie, Kings, Monroe, Nassau, New York, Onondaga, Queens, Suffolk, and Westchester.

The Commercial Divisions of the New York State Supreme Court have been an unqualified success—one of the most signally successful improvements in the administration of justice in our time. The Commercial Divisions 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 third edition, comprising six volumes, appeared in 2010. The hallmark of the work from its inception has been its intensely practical approach, combining summaries of the governing procedural and substantive law with strategic and tactical advice, checklists of issues that practitioners should consider, and model jury instructions and verdict sheets.

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, Fourth Edition*, published in 2015, answers that need. The Fourth Edition comprises eight volumes containing approximately 10,180 pages and 127 chapters. The 182 authors include six present and former Judges of the New York State Court of Appeals—former Chief Judges Judith S. Kaye and Jonathan Lippman, Judge Eugene M. Fahey, and former Judges Victoria A. Graffeo, Robert S. Smith, and George Bundy Smith—as well as numerous Justices of the Appellate Division and the Commercial Division, and a broad array of talented and experienced attorneys that reads like a Who's Who of commercial litigators in New York State.

The Fourth Edition contains seven new chapters on topics of great interest to commercial litigators, including "Internal Investigations," "Preliminary and Compliance Conferences and Orders," "Negotiations," "Mediation and Other Nonbinding ADR," "Arbitration," "International Arbitration" (by former Chief Judge Judith S. Kaye, John L. Gardiner, and Jonathan L. Frank), and "Pro Bono."

The Fourth Edition also contains 15 new chapters on substantive areas of the law relating to commercial litigation, including "Reinsurance," "Workers Compensation," "Trade Associations," "Securitization and Structured Finance," "Derivatives," "Medical Malpractice," "Licensing," "Social Media," "Tax," "Land Use Regulation," "Commercial Leasing," "Project Finance and Infrastructure," "Entertainment," "Sports," and "Energy."

In addition to these new chapters, the existing chapters of *Commercial Litigation in New York State Courts* have been revised and enlarged to bring them up to date.

Other treatises exist that cover many of the procedural and subject matter areas covered by *Commercial Litigation in New York State Courts, Fourth 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, Fourth Edition* is the sequence of chapters on the trial of a commercial case in the New York State courts. Originally authored for the first edition by the late Stephen Rackow Kaye, these chapters have been rewritten, expanded, and updated in his memory by his former colleagues at Proskauer Rose LLP. Younger lawyers will find these chapters especially valuable for their insights into effective trial preparation, strategy, and tactics, and even experienced trial lawyers can read them with enjoyment and profit.

Commercial Litigation in New York State Courts, Fourth Edition comes with a CD-ROM containing more than 500 pages of model forms and model jury instructions included in the set, facilitating the practical use of the forms in a timely and efficient manner.

Guy Miller Struve is Senior Counsel at Davis Polk & Wardwell. In the interests of full disclosure, it should be noted that the author of Chapter 49 of the Fourth Edition, on "Punitive Damages," is Amelia T.R. Starr, a partner at Davis Polk & Wardwell LLP.

Judge Platkin and Local Practitioners Discuss Amendments to the Commercial Division Rules at Bench-Bar Forum

By Joseph M. Dougherty

On December 7, 2015, the New York State Bar Association's Commercial and Federal Litigation Section presented a bench-bar forum in the Great Hall at the State Bar Center in Albany. The CLE, entitled New Commercial Division Rules in Albany County, was attended by over fifty practitioners from the Capital Region.

Judge Richard Platkin and James Potter field questions on the new Commercial Division rules

The featured speaker was the Hon. Richard Platkin, the sole Commercial Division Judge in Albany County. James T. Potter, of Hinman Straub, served as the moderator, summarizing recent rule changes in the Commercial Division and starting questions for Judge Platkin on their application in Albany County. A lively discussion about several recent rule changes followed.

Judge Platkin agreed that the $50,000 threshold for cases in the Albany Commercial Division strikes the right balance between providing access to the court for a broad range of commercial disputes, while placing some limits on a busy caseload. His cases have included disputes ranging from litigation over failed Workers' Compensation Trusts involving damages claims exceeding $100 million, to a lawsuit involving $50,000 in farm equipment.

The Judge supported Rule 11-a's limitation on the number of interrogatories, recalling with great fondness the long hours he spent as an associate at Pennie & Edmonds answering interrogatories in patent litigation. Several practitioners questioned the limitations on contention interrogatories and voiced their belief that contention interrogatories can effectively identify relevant issues in a case at its early stages. Judge Platkin observed that the Court has discretion to depart from this rule, like most of the new rules, where circumstances warrant.

As the new rules encourage, the Judge expressed his preference for the parties to cooperate early in the case to identify what depositions and discovery may be needed and whether variations from the limitations imposed by the Commercial Division rules may be required. Nevertheless, he recognized that the parties may determine after discovery is under way that additional depositions, beyond the ten provided in Rule 11-d, might be necessary. He expressed that requests for extensions and variations from the case management order should be made before deadlines are reached and noted that variations from the order are much more likely to be permitted where the parties can agree.

The forum concluded with a lively discussion among attending practitioners and Judge Platkin regarding expert disclosure, discovery, and the most effective way to deal with burdensome privilege logs.

Following the forum, the participants enjoyed the camaraderie of their colleagues at a cocktail hour sponsored by the New York State Bar Association's Commercial and Federal Litigation Section in the Great Hall.

Joseph M. Dougherty is a principal of the firm Hinman Straub P.C.

Report of the Commercial and Federal Litigation Section[1]

Use of Expert Affidavits in Summary Judgment Motions

On December 11, 2015, Governor Cuomo signed into law an amendment to CPLR 3212(b). This amendment expressly allows an expert's affidavit in support of, or in opposition to, summary judgment motions—whether or not the expert was disclosed prior to the submission of the affidavit. The measure was introduced at the request of Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. The amendment reads:

> Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of Section 3101 was not furnished prior to the submission of the affidavit.

Prior to this amendment, a line of First and Second Department cases had permitted trial judges to exercise their discretion in deciding whether to consider an expert affidavit submitted in support of or opposition to a summary judgment motion where the proponent of the affidavit did not serve a CPLR 3101(d)(1)(i) exchange prior to the filing of the note of issue. In *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861 (2d Dep't 2008), for example, the Second Department stated that "[t]he Supreme Court did not improvidently exercise its discretion in declining to consider the affidavits of the purported experts proffered by Lowe [on summary judgment], since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter." The court logically noted that the purpose of summary judgment is to determine whether there are genuine issues necessitating a trial, and that if the expert had not been named in pretrial disclosure as an expert to be called at trial, "it was not an improvident exercise of discretion for the Supreme Court to have determined that the specific expert opinions set forth in the affidavits submitted in opposition to the motion for summary judgment could not be considered at trial."

The Second Department clarified its *Singletree* position in *Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dep't 2012), noting that CPLR 3101(d)(1)(i) requires a party to disclose its expert witnesses for trial, but also noting that such disclosure could happen shortly before trial, and the court recognized that frequently parties waited until it appeared that settlement was unlikely to retain an expert. On the other hand, the court further noted that courts retain discretion to appropriately sanction a party that failed to comply with a court-ordered deadline for expert disclosure. The *Rivers* court stated:

> [T]he fact that the disclosure of an expert pursuant to CPLR 3101 (d) (1) (i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101 (d) (1) (i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction.

The newly amended CPLR 3212(b) overrules this line of cases and explicitly allows an affidavit to be submitted during summary judgment briefing by an expert that had not been disclosed pursuant to the expert disclosure rules. The Memorandum submitted in support of this legislation states that the rule is designed to aid in establishing uniformity in practice statewide, reduce confusion among members of the bench and bar as to the timing of expert disclosure, and make certain that where expert testimony is required or desired in support of or opposition to summary judgment—the functional equivalent of a trial—that parties have the same latitude to utilize expert testimony as they do at trial.

Practitioners should note, however, that there is now a different practice for experts on summary judgment motion practice than there is from those experts testifying at trial.

Finally, practitioners should also keep in mind that the Commercial Division has its own rules on expert witness disclosure. *See* Commercial Division Rule 13(c). That rule requires that a party notify an opposing party of expert testimony it intends to introduce at trial at least 30 days before the end of fact discovery, and that the parties confer on a schedule for expert disclosure. It further requires that expert disclosure be accompanied by a written report by the expert, and that the note of issue and certificate of readiness may not be filed until the completion of expert disclosure. It concludes that "Expert disclosure provided after these dates without good cause will be precluded from use at trial." Commercial Division Rule 13(c).

Endnote

1. This report was prepared by Tom Bivona and Helene Hechtkopf of the Civil Practice Law and Rules Committee to the Commercial and Federal Litigation Section.

Supreme Court Commercial Division Celebrates 20 Years

By Nora A. Jones, Special to *The Daily Record*

In 1995, the New York Court system blazed a trail when it launched the first commercial court of its kind. The number and complexity of cases has grown dramatically over the past two decades.

The New York State Bar Association hosted an "Evening with the Commercial Division for the Seventh Judicial District" on Nov. 4 at the offices of Ward Greenberg Heller & Reidy LLP in honor of the 20th anniversary of the court.

The Commercial Division panel included Aimee Allen (second from left), Justice Matthew Rosenbaum and Ed White. Far left is Mitchell Katz, who is a permanent member of the NYS Commercial Division Advisory Council, and far right is Jeffrey Harradine, program chair for the NYSBA Commercial and Federal Litigation Section

Jeffrey Harradine, partner at Ward Greenberg, served as moderator for the panel consisting of NYS Supreme Court Justice Matthew Rosenbaum and his two court attorneys, Aimee Allen and Edward White.

David Tang and Melanie Wolk were credited with pulling the event together, and nearly 40 attorneys filled the room for the one-credit CLE, which included a cocktail hour immediately following the panel discussion.

In addition to Harradine's questions, members of the audience interjected questions about specific concerns.

E-filing was one such topic, which was described as currently being in a holding pattern for Monroe County.

"How often has oral argument changed your mind on a case?" one attendee asked.

"Rarely," admitted Justice Rosenbaum. "But if it changes my mind once in a year, it is worth it. Sometimes oral argument can clarify a point that comes across differently in writing."

Court attorneys Ed White and Aimee Allen are greeted by Carolyn Nussbaum as they gather for the NYSBA hosted Evening with the Commercial Division of the Seventh Judicial District

Jenny Lewis, Brian Jacek and Terence Robinson (co-chair of MCBA's Litigation Section) were on hand from Nixon Peabody

Jeremy Sher from Leclair Korona Giordano Cole LLP pauses for a photo with David Tang and Ron Hull of Underberg & Kessler

Allen, who has been with the court since 1999, welcomes email communications to tell her paperwork is on the way. She can specifically watch for the matter to come through intake.

Rosenbaum was appointed to the NYS Supreme Court in 2005 and elected to a full term later that year. He gained experience in lead paint litigation, medical malpractice, and other civil matters. In 2011, he was appointed as the Seventh Judicial District's first coordinating judge for civil supreme courts, and serves on multiple leadership panels within the district.

This article was originally in The Daily Record. *Reprinted with permission. Copyright 2015 by* The Daily Record.

Photos by Nora A. Jones.

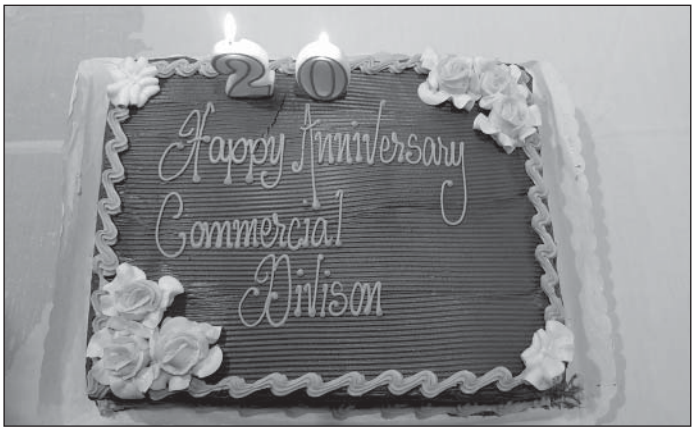
From Leclair Korona Giordano Cole LLP, Stacey Trien and Alissa Fortune-Valentine attended, along with Jessica Clemente and Abby Giarrusso from Ward Greenberg

Chris Thomas (Nixon Peabody), Roy Rotenberg (Underberg & Kessler) and Steve Cole (Leclair Korona) chatted before the CLE got under way

Judicial Institute Reception

On November 20, 2015, the Section sponsored a Judicial Institute Reception following the Institute on Complex Commercial Litigation program for the Commercial Division Judges.

The Reception also celebrated the 20th "birthday" of the Commercial Division.



From left to right: Special Referee Jeremy R. Feinberg, Justice Sylvia G. Ash, Justice Sylvia Hinds-Radix, Justice Shirley Werner Kornreich, Justice Linda S. Jamieson, Justice Saliann Scarpulla, Justice Eileen Bransten, Kathy Hirata Chin, Esq., Justice Peter Sherwood, Justice Marguerite A. Grays, Justice Marcy Friedman

CPLR Amendments: 2015 Legislative Session

(2015 N.Y. Laws ch. 1-589)

CPLR §	Chapter (Part) (Subpart, §)	Change	Eff. Date
212(e)	368(31)	Adds a new subdivision (e) providing a ten-year statute of limitations and a tolling period for certain actions brought by victims of sex trafficking, compelling prostitution, or labor trafficking	1/19/16
1101(f)	55(B)(16)	Extends expiration of CPLR 1101(f) until Sept. 1, 2017	4/13/15
2103(b)(2), (f)(1)	572	Provides that interlocutory papers may be served by mail within the U.S. (instead of just within NYS) and creates a six-day rule for mail service outside NYS but within the U.S.	1/1/16
Art. 21-A	237(2)	Adds a new Article 21-A regulating filing of papers in courts by fax and electronic means, including § 2110 (definitions), § 2111 (filing of papers in trial courts by fax and electronic means), § 2112 (filing of papers in appellate division by electronic means)	8/31/15
3016(i)	76(2)	Adds provision on privacy of names in certain legal challenges to college/university disciplinary findings	10/5/15
3212(b)	529	Provides that affidavit of expert shall not be rejected because of lack of expert exchange under CPLR 3101(d)(1)(i)	12/11/15
5231(a), (d), (e), (j)	550	Expands types and locations of those upon income execution may be served	12/11/15
8604	439	Changes the filer (Dept. of Law) and recipients (temporary president instead of majority leader) of the annual report	11/20/15

2015 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 1-20, 23-31 of 2015)

22 NYCRR §	Court	Subject (Change)
202.5(e)(1)	Sup.	Adds certain documents and testimony in matrimonial actions to confidential personal information
202.6(b)	Sup.	Deletes application for default judgment in consumer credit matter pursuant to 202.27-a
202.16(m)	Sup.	Adds a new provision on omission or redaction of confidential personal information from matrimonial decisions
202.70(b)(12), (c)(4)	Sup.	Provides that, regardless of amount, arbitration cases will be heard where the agreement provides for arbitration outside U.S. and that certain home improvement contract cases will not be heard even if threshold is met
202.70(g)	Sup.	Adds and amends preamble on dilatory practices
202.70(g), Rule 3	Sup.	Provides for stipulation of counsel to summary jury trial
202.70(g), Rule 6	Sup.	Requires bookmarking of e-filed memoranda of law and, where appropriate, affidavits and affirmations
202.70(g), Rule 8(b)	Sup.	Adds need to vary presumptive number and duration of depositions set forth in Rule 11-d as matter to be considered by counsel in regard to e-discovery issues prior to preliminary conference
202.70(g), Rule 11(c)	Sup.	Adds consideration by court of appropriateness of altering presumptive limitations on depositions set forth in Rule 11-d
202.70(g), Rule 11-d	Sup.	Adds and amends new rule governing limitations on depositions
202.70(g), Rule 11-e	Sup.	Adds rule on response and objections to document requests
202.70(g), Rule 11-f	Sup.	Adds rule on depositions of entities and identification of matters
202.70(g), Rule 14	Sup.	Amends rule on resolution of discovery disputes
202.71	Sup.	Establishes procedure for recognition of tribal court judgments, decrees, and orders
520.2(a)	Ct. App.	Adds cross reference to 520.17
520.3(b), (c), (d), (e)	Ct. App.	Amends definition of approved law school, instructional requirements, course of study, and credit for law study in foreign country
520.6(b)	Ct. App.	Amends educational requirements for legal education in study of law in foreign country

Notes: 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.

2016 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 1-8, 10-13 of 2016)

22 NYCRR §	Court	Subject (Change)
202.5(e)(1)(v)	Sup.	Adds certain documents, testimony, and evidence in matrimonial actions to categories of confidential personal information
202.16(m)	Sup.	Adds a provision on omission or redaction of confidential personal information from matrimonial decisions
800.23(c)	3d Dep't	Increased fees for admission certificates

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

Notes of the Section's Executive Committee Meetings

September 9, 2015

Guest speaker Hon. Stephen G. Crane, JAMS member and former Senior Associate Justice of the Appellate Division, Second Department, and Justice of the Supreme Court, New York County, Commercial Division, discussed mediation in the Commercial Division and his style of mediation.

The Executive Committee approved the adoption of an Addendum as an appendix to the Federal Procedure Committee's Rule 68 Report, subject to the addition of a provision in the Addendum setting forth the outcome of the Seventh Circuit's decision in *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015). The Addendum addressed developments that had occurred since the Executive Committee approved the original Report.

The Executive Committee discussed Commercial Division Bench-Bar Programs and the 2016 Annual Meeting.

October 13, 2015

Guest speaker Hon. Jerry Garguilo, Justice, Appellate Term, Second Department, and Justice of the Supreme Court, Suffolk County, Commercial Division, discussed his views of practice in the Commercial Division.

The Executive Committee discussed a report of the Ethics and Professionalism Committee on *Threatening Disciplinary Action against Attorneys in New York.* The Executive Committee also discussed the Buffalo Bench-Bar Program and the January 2016 Annual Meeting.

November 10, 2015

Guest speaker Hon. Glenn T. Suddaby, Chief U.S. District Judge, Northern District of New York, discussed the presentation of contract provisions to the court, his position on oral argument, emergency requests for relief, stipulation to the admissibility of evidence, the local rules of practice that are most abused, ignored, or misused, the usefulness of party consent in response to an inquiry regarding changes in the briefing schedule, and bifurcation of contract cases.

The Executive Committee adopted the report of the Ethics and Professionalism Committee on *Threatening Disciplinary Action against Attorneys in New York.* The Executive Committee also discussed the Commercial Division Bench-Bar Programs and the 2016 Annual Meeting.

December 8, 2015

The Executive Committee adopted the Social Media Committee's *Social Media Jury Instruction Report.* The Executive Committee also discussed the Annual Meeting and the January 2016 Executive Committee meeting.

January 13, 2016

Guest speaker Hon. Loretta A. Preska, Chief Judge of the United States District Court for the Southern District of New York, discussed the construction taking place on the federal court buildings in lower Manhattan, the S.D.N.Y.'s mediation program, the impact of the federal budget on the S.D.N.Y., and advice for seasoned attorneys.

The Executive Committee adopted the Federal Procedure Committee's Rule 19 Report. The Executive Committee also discussed the Annual Meeting and Spring Meeting and the Section's federal district programs.

The Section's District Leaders

County (District)	District Leader	Firm
Albany (3rd)	Jim Potter	Hinman Straub P.C.
Erie (8th)	Sheldon Smith	Nixon Peabody LLP
Kings (2nd)	Richard Klass	Richard Klass, Esq.
Nassau/Suffolk (10th)	Laurel Kretzing	Jaspan Schlesinger, LLP
Onondaga (5th)	Jonathan Fellows	Bond Schoeneck & King PLLC
Monroe (7th)	Jeff Harradine	Ward Greenberg Heller & Reidy LLP
New York (1st)	Joseph Drayton	Cooley LLP
Queens (11th)	John Mitchell	Mitchell & Incantalupo
Queens (11th)	Samuel Freed	Farrell Fritz, P.C.
Westchester (9th)	Courtney Rockett Patrick Rohan	Boies, Schiller & Flexner LLP

Section Committees and Chairs

ADR
Charles J. Moxley Jr.
MoxleyADR LLC
850 Third Avenue, 14th Fl.
New York, NY 10022
cmoxley@moxleyadr.com

Jeffrey T. Zaino
American Arbitration Association
150 East 42nd St., 17th Fl.
New York, NY 10017
zainoj@adr.org

Antitrust
Jay L. Himes
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
jhimes@labaton.com

Andrew C. Finch
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Avenue Of The Americas
New York, NY 10019-6064
afinch@paulweiss.com

Appellate Practice
James M. McGuire
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797
james.mcguire@dechert.com

Mary Kay Vyskocil
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
mvyskocil@stblaw.com

Bankruptcy Litigation
Douglas T. Tabachnik
Law Offices of Douglas T. Tabachnik, PC
63 West Main Street, Suite C
Freehold, NJ 07728
dtabachnik@dttlaw.com

Civil Practice Law and Rules
Thomas C. Bivona
Milbank Tweed Hadley McCloy LLP
28 Liberty Street, 45th Fl.
New York, NY 10005-1413
tbivona@milbank.com

Helene R. Hechtkopf
Hoguet Newman Regal & Kenney, LLP
10 East 40th Street
New York, NY 10016-0301
hhechtkopf@hnrklaw.com

Civil Prosecution
Neil V. Getnick
Getnick & Getnick LLP
521 Fifth Avenue, 33rd Fl.
New York, NY 10175
ngetnick@getnicklaw.com

Richard J. Dircks
Getnick & Getnick
521 5th Ave., 33rd Fl.
New York, NY 10175
rdircks@getnicklaw.com

Commercial Division
Teresa M. Bennett
Menter, Rudin & Trivelpiece, P.C.
308 Maltbie Street, Suite 200
Syracuse, NY 13204-1498
tbennett@menterlaw.com

Isaac Berkman Zaur
Clarick Gueron Reisbaum, LLP
220 5th Avenue, 14th Fl.
New York, NY 10001-7708
izaur@cgr-law.com

Commercial Jury Charges
Andrea Masley
New York City Civil Court
111 Centre Street
New York, NY 10013
amasley@nycourts.gov

Corporate Litigation Counsel
Robert J. Giuffra Jr.
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004-2400
giuffrar@sullcrom.com

Michael W. Leahy
American International Group, Inc.
80 Pine Street, 13th Fl.
New York, NY 10005
michael.leahy2@aig.com

Creditors' Rights and Banking Litigation
Michael Luskin
Luskin, Stern & Eisler LLP
Eleven Times Square
New York, NY 10036
luskin@lsellp.com

S. Robert Schrager
Hodgson Russ LLP
1540 Broadway, 24th Fl.
New York, NY 10036
rschrager@hodgsonruss.com

Diversity
Sylvia Ometa Hinds-Radix
Supreme Court Kings County
360 Adams, Room 1140
Brooklyn, NY 11201
shradix@nycourts.gov

Carla M. Miller
Universal Music Group
1755 Broadway, 4th Fl.
New York, NY 10019
carla.miller@umusic.com

Electronic Discovery
Sandra J. Rampersaud
Cravath, Swaine & Moore LLP
825 8th Avenue
New York, NY 10019-7416
sjrampersaud@cravath.com

Steven Carl Bennett
Park Jensen Bennett LLP
40 Wall Street, 41st Fl.
New York, NY 10005
sbennett@parkjensen.com

Employment and Labor Relations
Gerald T. Hathaway
Drinker Biddle & Reath
1177 Avenue of the Americas, 41st Fl.
New York, NY 10036
gerald.hathaway@dbr.com

Robert N. Holtzman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036-2714
rholtzman@kramerlevin.com

Ethics and Professionalism
Anthony J. Harwood
Harwood Law PLLC
488 Madison Avenue, 18th Fl.
New York, NY 10022
tony.harwood@aharwoodlaw.com

Anne B. Sekel
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016-1314
asekel@foley.com

Federal Judiciary
Jay G. Safer
Locke Lord LLP
3 World Financial Center, 20th Fl.
New York, NY 10281
jsafer@lockelord.com

Dawn Kirby
DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
One North Lexington Ave, 11th Fl.
White Plains, NY 10601
dkirby@ddw-law.com

Federal Procedure
James F. Parver
Margolis & Tisman LLP
280 Madison Avenue, 5th Fl.
New York, NY 10016-0801
jimparver@hotmail.com

Michael C. Rakower
Rakower Law PLLC
488 Madison Ave, 18th Fl.
New York, NY 10022
mrakower@rakowerlupkin.com

Hedge Fund and Capital Markets Litigation
Benjamin R. Nagin
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019-6018
bnagin@sidley.com

Immigration Litigation
Jill A. Apa
Barclay Damon LLP
Avant Building, Suite 1200
200 Delaware Avenue
Buffalo, NY 14202-4005
japa@damonmorey.com

International Litigation
Clara Flebus
New York Supreme Court, Appellate Term
60 Centre Street, Room 401
New York, NY 10007
clara.flebus@gmail.com

Internet and Intellectual Property Litigation
Joseph V. DeMarco
DeVore & DeMarco, LLP
99 Park Avenue, Room 1100
New York, NY 10016
jvd@devoredemarco.com

Peter J. Pizzi
Connell Foley LLP
888 7th Avenue
New York, NY 10106
ppizzi@connellfoley.com

Legislative and Judicial Initiatives
Vincent J. Syracuse
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue, 17th Fl.
New York, NY 10022-4728
syracuse@thsh.com

Membership
Nicole F. Mastropieri
Nixon Peabody LLP
437 Madison Ave
New York, NY 10022-7001
nmastropieri@nixonpeabody.com

Mentoring
Jonathan D. Lupkin
Lupkin & Associates PLLC
26 Broadway, 19th Fl
New York, NY 10004
jlupkin@lupkinassociates.com

Matthew R. Maron
The Trump Organization
725 Fifth Avenue
New York, NY 10022
mmaron@trumporg.com

Securities Litigation and Arbitration
Jonathan L. Hochman
Schindler Cohen & Hochman LLP
100 Wall Street, 15th Fl.
New York, NY 10005-3701
jhochman@schlaw.com

Social Media
Mark Arthur Berman
Ganfer & Shore LLP
360 Lexington Avenue, 14th Fl.
New York, NY 10017-6502
mberman@ganfershore.com

Ignatius A. Grande
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
grande@hugheshubbard.com

State Court Counsel
Deborah E. Edelman
Supreme Court of the State of New York
60 Centre Street, Rm 232
New York, NY 10007
dedelman@nycourts.gov

State Judiciary
Jeffrey Morton Eilender
Schlam Stone & Dolan
26 Broadway
New York, NY 10004-1703
jme@schlamstone.com

Charles E. Dorkey III
Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020
charles.dorkey@dentons.com

White Collar Criminal Litigation
Joanna Calne Hendon
Spears & Imes LLP
51 Madison Avenue
New York, NY 10010-1603
jhendon@spearsimes.com

Evan T. Barr
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza
New York, NY 10004
evan.barr@friedfrank.com

NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

Former Chairs

Robert L. Haig
Michael A. Cooper
Hon. Shira A. Scheindlin
Harry P. Trueheart III
Hon. P. Kevin Castel
Mark H. Alcott
Gerald G. Paul
Mark C. Zauderer
Bernice K. Leber
John M. Nonna
Jack C. Auspitz
Sharon M. Porcellio
Jay G. Safer
Cathi A. Baglin
Lewis M. Smoley
Lauren J. Wachtler
Stephen P. Younger
Lesley F. Rosenthal
Carrie H. Cohen
Peter Brown
Vincent J. Syracuse
Jonathan D. Lupkin
David H. Tennant
Tracee E. Davis
Gregory K. Arenson
Paul D. Sarkozi

ISSN 1530-4043 (print) ISSN 1933-8570 (online)

Upcoming Executive Committee Meetings

May 18	June 7

Note: All meetings will be held at the offices of Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York City.

COMMERCIAL AND FEDERAL LITIGATION SECTION NEWSLETTER