

Commercial and Federal Litigation Section Newsletter



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



Upcoming Commercial and Federal Litigation Section Events and Co-Sponsored Events

Thursday, March 30, 2017

Legal Ethics in the Digital Age: Practical Strategies for Using Technology Ethically in Your Practice

Live CLE Program and Webcast | 9:00 a.m. to 1:00 p.m. | Executive Conference Center | NYC

Renowned speakers on ethics, social media and electronic discovery. Learn the ins and outs of protecting privilege in electronic communications. Speakers will also cover managing records in the cloud and organizing client files. A panel discussion on the do's and don'ts of attorney social media use and advice to clients. 4.0 MCLE Credits in Ethics.

Co-Sponsored by the Commercial and Federal Litigation Section, the Committee on CLE and the Law Practice Management Committee.

Basic Lessons on Ethics and Civility 2017 (held in 5 locations)

Live CLE Program and Webcast | 9:00 a.m. to 1:00 p.m.

Wednesday, April 5, 2017 in NYC | **Friday, April 7, 2017** in Albany | **Friday, April 7, 2017** in Rochester
Friday, April 28, 2017 | in Amherst | **Friday, April 28, 2017** in Melville

A sound ethical compass and a civil and professional demeanor are the hallmarks of successful and respected attorneys in all areas of practice. This four hour program will provide attendees with an update on developments in the area of attorney ethics, including the most recent case law. The rules of civility will be discussed, with emphasis on practical pointers for dealing with the uncivil adversary and civility issues within the law firm. The program concludes with a discussion of real life hypotheticals by a panel of distinguished practitioners and jurists—certain to benefit attorneys in all substantive areas of practice.

Don't miss this opportunity to obtain 4 MCLE Ethics credits at this lively and thought-provoking program, which is annually one of NYSBA's best attended CLE seminars.

Co-Sponsored by the Commercial and Federal Litigation Section, the Torts, Insurance and Compensation Law Section, the Committee on Continuing Legal Education and the Committee on Attorney Professionalism.

Thursday, April 6, 2017

Securities Arbitration and Mediation 2017: The Courage to Simplify

Live CLE Program and Webcast | 9:00 a.m. to 4:30 p.m. | New York Society of Security Analysts | 1540 Broadway | NYC

The key to successful securities arbitration and mediation is telling your story in memorable and persuasive fashion. This program will help you master those skills while also bringing you up-to-date on recent developments in the law. Gathered from the "best and brightest" of the New York State Bar, this program will, in one day, highlight the most critical advancements in securities arbitration and mediation since this program was last presented.

Co-Sponsored by the Securities Litigation and Arbitration Committee of the Commercial and Federal Litigation Section and the Committee on Continuing Legal Education.

Wednesday, April 19, 2017

Bench and Bar Commercial Division Meet and Greet

6:00 p.m. to 7:30 p.m. | Brooklyn Law School | Subotnick Center | 250 Joralemon Street | Tenth Floor | Brooklyn

Join the Commercial and Federal Litigation Section for cocktails and hors d'oeuvres with the Commercial Division Justices of Kings County.

Monday, April 24, 2017

Smooth Moves 2017: Career Strategies for Attorneys of Color

CLE Program | 5:00 p.m. to 8:00 p.m.

Lincoln Center for the Performing Arts | Kaplan Penthouse, The Rose Building | 165 W. 65th Street, 10th Floor | NYC

The evening will begin with the CLE Program—Diversity Works: The Business Case For Aligning Law Firm Diversity Initiatives With Client Supplier Goals a thought-provoking discussion among law firm Chief Diversity Officers and diverse General Counsel, or high-level legal executives, from major corporations with forward-thinking employee and vendor diversity initiatives. The panelists will identify synergistic ways for corporate legal departments and law firms to work together in order to meaningfully improve diversity within the legal profession.

The Section will confer **The Honorable George Bundy Smith Pioneer Award** on **The Honorable Jeh C. Johnson** in honor of his considerable career achievements. **The Honorable Colleen McMahon**, Chief Judge of the U.S. District Court for the Southern District of New York, will present the award. The Pioneer Award is presented annually to a jurist or attorney of color whose career accomplishments exemplify those of Judge Smith in the areas of legal excellence, community involvement, and mentoring.

Thursday, May 4, through Friday, May 5, 2017

Commercial Litigation Academy 2017

CLE Program and Webcast | 9:00 a.m. to 5:00 p.m. | NY Society of Security Analysts | 1140 Broadway | NYC | 16.0 MCLE

An extraordinary panel of distinguished and well-known commercial litigators and judges will take you step by step through federal and state commercial litigation practice. This two-day Academy program brings together an outstanding panel of distinguished and well-known commercial litigators, current and former in-house counsel, and judges who will provide you with valuable insights on federal and state commercial litigation—from choosing the proper venue through the appellate process. The program will focus on litigating commercial cases efficiently. You will receive training and enhance your skills in all aspects of commercial litigation; from drafting the pleadings and seeking injunctive relief, through disclosure and discovery (including expert discovery and e-Discovery), and finally to the trial and the appeal. The expert faculty will also discuss key ethical and evidentiary issues confronted by the commercial litigator.

The Commercial Litigation Academy provides attorneys with one full year of required MCLE credits (16.0 credits, 7.0 in professional practice, 6.0 in skills and 3.0 in ethics.) This program qualifies for newly admitted attorneys.

Friday, May 19, through Sunday, May 21, 2017

2017 Commercial and Federal Litigation Section Spring Meeting

The Gideon Putnam Hotel | 24 Gideon Putnam Road | Saratoga Springs

CLE panels will include the latest on trade secrets litigation and the implications of the Defense of Trade Secrets Act; the prosecution and defense of actions involving restrictive covenants and implied duties of confidentiality and loyalty; how to deal with the authentication of electronic evidence at trial and to address the proliferation of “fake evidence”; and an update on changes to the federal rules and rules of the Commercial Division—a discussion of the convergence of the rules of practice and a “heads up” on potential rule changes. The Robert L. Haig award will be conferred on Seymour W. James, Jr. Esq., former President of NYSBA and the Attorney-in-Chief of The Legal Aid Society in New York City.



**Seymour W.
James, Jr. Esq.**

Tuesday, May 23, 2017

The Section will be hosting a free cocktail hour at the library of the Court of International Trade located at One Federal Plaza from 5:15 p.m. to 6:45 p.m., to introduce itself to the law clerks of the United States Court of Appeals for the Second Circuit, the United States District Court for the Southern and Eastern Districts of New York, the Court of International Trade and the United States Bankruptcy Court for the Southern and Eastern Districts of New York.

Wednesday, November 15, 2017

Shira A. Scheindlin Award for Excellence in the Courtroom

The Shira A. Scheindlin Award for Excellence in the Courtroom was created by the Commercial and Federal Litigation Section in honor of the Section’s former Chair, who served as a United States District Judge for the Southern District of New York from September 1994 through April 2016. Prior to serving as a United States District Judge, Judge Scheindlin served as a Magistrate Judge for the Eastern District of New York, an Assistant United States Attorney for the Eastern District of New York, the general counsel for the New York City Department of Investigation and a commercial litigator in private practice.

The Scheindlin Award will be presented in November, on or around the date when women received the right to vote in New York State in 1917. The Award will be given to a female litigator who has distinguished herself in the courtroom in either the Federal or State Courts in New York and who has shown a commitment to mentoring young attorneys in the legal community.

Upcoming Commercial and Federal Litigation Section Executive Committee Meetings



Tuesday, April 4, 2017, 6:00 p.m.

Location:
Kramer Levin Naftalis & Frankel LLP
Guest Speaker: Robert L. Haig,
Chair of the Commercial Division
Advisory Council



Wednesday, May 10, 2017, 6:00 p.m.

Location:
Kramer Levin Naftalis & Frankel LLP
Guest Speaker: Michael A. Cardozo,
Partner, Proskauer, and former Corporation
Counsel for the City of New York City

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Message from the Chair

The Section Is Working Toward Better Diversity



Mark A. Berman

We created remarkable programming this year seeking to involve more women in the Section ranging from the creation of the *Shira A. Scheindlin Award for Excellence in the Courtroom* to *The Honorable Judith S. Kaye Scholarship* that funds junior women attorneys to attend the Section's Commercial Litigation Academy. How-

ever, *diversity* means more! *Diversity* means inclusion of members from minority bars in the Section. It means geographic diversity so that the Section fully serves the needs of upstate practitioners. It means reaching out to soon-to-be lawyers and young lawyers. It means developing programming geared to small firm litigators as well. To that end, the Section has spread its wings this year.

Our *Smooth Moves* program this year will honor a national leader, Jeh Charles Johnson, the country's prior United States Secretary of Homeland Security, with the *George Bundy Smith Pioneer Award*, who will no doubt draw a great audience and will stimulate and encourage minority participation in the Section. I personally have met and communicated with leaders of minority bar associations, encouraging them to have their members join our Section, and have offered them free Section membership. I have also spoken at one diversity bar association's annual meeting. The Section has marketed programs created by diversity bars and they have marketed Section programs to their members! Next year, the Section intends to work with upstate bar associations to bring the spirit of the *Smooth Moves* program north, encouraging a wide reaching discussion on diversity in the profession in upstate communities. The Section also proudly approved a report that endorsed the Report of NYSBA's Committee on Legal Education regarding the proposed diversity and inclusion and elimination of bias CLE requirement.

After awarding its first annual Scheindlin Award and presenting its Kaye scholarships to young women, the Section's women's initiative is moving full steam ahead. Soon the Section will be publishing the results of

the survey it distributed to the federal and state courts throughout New York as well as to arbitral forums seeking to document the role of women as first chairs in trials and arbitrations. Our *ad hoc* women's initiative met at the Section's Annual Meeting and will be convening again in Saratoga Springs at our Spring Meeting. Indeed, the Section is pleased that next year three of our five officers will be women: Vice-Chair Laurel R. Kretzing from Jaspán Schlesinger, LLP, in Garden City, Long Island; Treasurer Sandra Rampersaud, an in-house attorney at UBS Services US LLC; and Jamie Sinclair, a litigator from Ganfer & Shore, LLP.

As to geographic diversity, three of our executive committee meetings this year took place out of Manhattan, in Albany, Syracuse, and Westchester. Next year, the Section will continue its effort to reach members and communities across the State by holding executive committee meetings in Buffalo and Rochester. The Section is also co-sponsoring an event in March in Buffalo honoring outgoing Commercial Division Justice Timothy J. Walker. Our incoming Chair, Mitchell Katz, is from Syracuse and our incoming Vice-Chair is from Long Island. We have reinvigorated our Kings County members by appointing Gregory LaSpina as our new Brooklyn District leader and the Section will be holding a reception honoring Justices Lawrence Knipel and Sylvia G. Ash, the two Kings County Commercial Division Justices, in April at Brooklyn Law School. The Dean and law students from Brooklyn Law School will attend the reception. In addition, our record-breaking *Evening with the Commercial Division Judges of the Tenth Judicial District* will again take place this year where we expect as usual a terrific turnout of Long Island's Commercial Division Justices and commercial litigators.

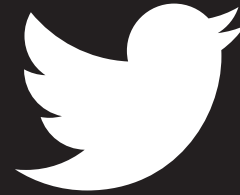
We need to be more diverse with our "younger" members. This year we will have visited Albany, Brooklyn, CUNY, Hofstra, Pace, Syracuse, and Touro law schools, which is half of the law schools in New York State. The Section will be building on these outreach programs with more of our New York State law schools by increasingly engaging students and faculty in Section programming. Law students also attended the Section's *Evening at Thurgood Marshall Courthouse*, which took place before our Annual Meeting, where they met some of New York's federal judges. Second Circuit Chief Judge Robert A. Katzmann, both during his remarks that evening and during his remarks at our Annual Meeting, stressed the

need for the judges and lawyers of this State to engage in civic programs to assist in educating New York's high school students in civic responsibility and the law. In fact, the principal of Stuyvesant High School and one of its social studies teachers attended the *Evening at Thursday* event. We all should lead in such civic education of the younger generation, as I have done, volunteering twice a year for the past seven years teaching law and taking the students on a class trip to watch a hearing or trial in court. Many members of NYSBA's *Young Lawyers* Section also attended this Section event, which sought to introduce younger lawyers to our Second Circuit Judges. Further, this year, the Section for the first time has included its 2016 *Diversity Fellow*, Simonne Isaac, from Hofstra Law School, in many of its executive meetings and has invited her to attend Section events. Of course, 2017 is the year of the Section's unprecedented Commercial Litigation Academy geared toward educating New York's younger attorneys, and it will be taught by the "best and brightest" of New York's judges and commercial litigators.

Diversity also means providing value to both small and larger law firms. Our nation-leading e-discovery committee will be designing a CLE program directed at

small firms, addressing how they can economically and efficiently litigate e-discovery disputes with larger firms. This webinar will seek to level the playing field so that smaller firms are not at a disadvantage in litigating e-discovery matters.

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New York State Chief Judge Stanley H. Fuld Award

NYSBA Commercial & Federal Litigation Section Presentation of Award to the United States Court of Appeals for the Second Circuit

January 25, 2017

Remarks by Chief Judge Janet DiFiore

Good afternoon. I want to start by commending the Commercial and Federal Litigation Section for selecting the United States Court of Appeals for the Second Circuit as this year's recipient of the **Stanley H. Fuld Award**, recognizing the Court's exceptional contributions to the law and our legal profession.

When I was asked to present the **Fuld Award** to the Second Circuit Court of Appeals, I was honored and thrilled. As we all know, the Second Circuit is one of the preeminent appellate courts in the nation, and its judges are among the most important members of our legal community, widely respected and admired for their great legal skills and historic contributions to American jurisprudence.

And today there is an added pleasure for me in presenting this award to the Second Circuit because of the personal affinity I—like so many of you—feel for **Chief Judge Stanley Fuld**, a former prosecutor who became one of the most respected and influential judges in our nation's history. **Judge Fuld** worked diligently and wisely to ensure that societal interests, and particularly public safety, were balanced fairly and appropriately with basic concepts of due process and respect for individual liberties.

From everything we know about **Chief Judge Fuld**, but especially his life-long commitment to judicial excellence and the fair administration of justice, we can be absolutely certain that he would be thrilled and delighted that the Second Circuit Court of Appeals—just completing its 125th anniversary year—is being honored in his memory today.

Established in 1891, the United States Court of Appeals for the Second Circuit has adjudicated tens of thousands of cases over the years, growing from its original three judges to its present thirteen members, while serving as the court of last resort for 99% of the appeals it hears.

Some of the nation's most distinguished jurists have made their reputations on the Second Circuit, including Learned Hand, Henry Friendly, and three Supreme Court Justices: John Marshall II, Thurgood Marshall, and Sonia Sotomayor.

With its courthouse located in downtown Manhattan, the Second Circuit has always handled some of the nation's most challenging, complex, and significant cases. The Court certainly deserves the recognition of this Section and of the New York State Bar Association for the very influential role it has played over the last century in the adjudication of commercial disputes and the development of an excellent, comprehensive, and reliable body of commercial jurisprudence that is respected and appreciated by the business community around the globe.

My colleagues and I on the New York Court of Appeals have the greatest admiration for the Second Circuit, and we very much appreciate the respect and deference shown by our federal counterparts in regularly certifying questions of state law to our Court. Those certified question cases, I will tell you, are among the highlights of our work at the Court of Appeals.

We also have the greatest respect for those who have served as leaders of the Court, including our present Chief Judge, Robert Katzmann, who has demonstrated his ability to manage—and balance—both his adjudicative and administrative responsibilities with great skill and competence, serving as a strong and visible leader for his Court.

Chief Judge Katzmann, active and senior Judges of the United States Court of Appeals for the Second Circuit, there is no question that your Court has played an important role in maintaining New York's longstanding prominence in law and commerce, and on behalf of the New York State Bar Association and the entire legal community of this State, we honor the Court today as a truly deserving recipient of this year's **Stanley H. Fuld Award**.

2017 Presentation of the Hon. Stanley Fuld Award to the United States Court of Appeals for the Second Circuit on the Occasion of the Court's 125th Anniversary

January 25, 2017

Remarks of Second Circuit Chief Judge Robert A. Katzmann

Thank you, Chief Judge DiFiore for your kind introduction and remarks about the Second Circuit. Knowing the many demands on your schedule, we are especially grateful to you. Our two courts have enjoyed a strong and warm relationship over the past many decades. I know that I speak for all my colleagues when I say that we look forward to strengthening our existing bonds with you and your colleagues in the years ahead. It is a privilege to be your judicial cousin, having long admired your distinguished life in public service, your extraordinary leadership in promoting the fair and effective administration of justice.

For my court, it is a great honor to receive the Stanley H. Fuld Award, named for a giant in the law, whose contributions to the administration of justice continue to serve as a model for all of us in the legal profession. We are deeply grateful to the Commercial and Federal Litigation Section and to its present and incoming Section Chairs—Mark Berman and Mitch Katz—and the entire Commercial & Federal Litigation Section for presenting this most prestigious award to our Court.

We also want to thank Robert Holtzman, this year's Fuld Luncheon Chair, for a terrific job in coordinating this luncheon. As Chief Judge, I know only too well all the hard work required to make an event such as this one appear so seamless and well-organized.

My colleagues and I have long respected the work of the New York State Bar Association and its Section on Commercial and Federal Litigation, and several of us have attended many of these lunches. For myself, over the years, I have had the pleasure of introducing two Fuld Award recipients, Joseph McLaughlin and Jed Rakoff. I will always treasure having been a recipient in 2011 of the Fuld Award. My colleagues and I have also participated in various meetings of the Section. We have been an appreciative consumer of the reports of the Section—for example, the report on certification of questions from the Second Circuit to the New York Court of Appeals, and the report on the surge in immigration cases in the Second Circuit; your Section's thoughtful reports on matters of procedure and practice in the New York State and New York-based federal courts. Over the years, the Section has become known for its many serious reports commenting on proposed amendments to the federal rules of practice

and procedure and for providing guidance to the Bar in navigating the individual practice rules of federal judges in the Southern and Eastern Districts—for example, its E-discovery reports; and its report on Rule 68 offers of judgment and mootness. We all learned much from your bibliography of books and articles by and about the judges and cases of the U.S. District Court for the Southern District, your 150th Anniversary Long Island Program.

The New York State Bar Association and its Section on Commercial and Federal Litigation's concern for the federal courts is at all times palpable, furthering through your activities the fair and effective administration of justice. Your efforts to support our federal courts on Capitol Hill are deeply appreciated and important to preserving a vigorous, independent judiciary. All of us on the bench are much in your debt.

And, we very much applaud the mentoring initiative of the Section, which preserves the highest traditions of the legal profession. The Section's work to attract younger lawyers, particularly women and minority attorneys, to commercial litigation is particularly deserving of commendation. Last night's *Evening at Thurgood* was an example of the Section's efforts, led by the innovative Mark Berman, to introduce younger members of the New York State Bar Association to the Section and to the federal courthouse. The Section sponsors scholarships and fellowships designed to attract women lawyers and minority law students to the commercial practice in both the state and federal courts. Through its Judith Kaye Scholarship for women litigators; its Summer Diversity Fellowship in the Commercial Division for law students and the recently created Shira Scheindlin Award for Excellence in the Courtroom by a woman litigator, the Section strives to diversify its membership the better to reflect the bar community it serves. We congratulate Carrie Cohen on her award for excellence in the courtroom.

In the remaining time, I want to share with you some thoughts on two initiatives I have had the privilege of proposing, and which are under way because of the dedicated efforts of many in this room: (1) our 125th Anniversary and also (2) our civic education initiative: Justice for All: Courts and the Community.

125th Anniversary Commemoration

Today is a wonderful event for our Court and its year-long commemoration of the Court's 125th Anni-

versary. On March 3, 1891, Congress passed the Second Judiciary Act, creating nine federal appeals courts, including the Second Circuit. Commonly known as the Evarts Act after its primary sponsor, William Maxwell Evarts of New York, the Evarts Act devolved jurisdiction in the majority of federal appellate matters to the newly created circuit appellate courts, thereby freeing the United States Supreme Court to take control of its docket. From the beginning, our Court—like the New York Court of Appeals—would be well-regarded for its jurisprudence in the areas of finance, antitrust and commercial law.

To commemorate this 125th Anniversary of our Court, I formed a committee over two years ago and wisely asked Judge Richard Wesley of our Court—and formerly a judge of the New York Court of Appeals—to serve as Chair. The purpose of the initiative was not self-congratulation; rather it was grounded in the view that for any institution to do its work better, it is valuable to reflect on the past with the involvement of the Bar and the interested public. Judge Wesley and his Committee have done a spectacular job in developing programs, events and two major publications to commemorate the history of our Court: a biographical volume published by the *Cornell Law Review*, “The Judges of the Second Circuit,” and a volume on the jurisprudence of the Second Circuit, published by the *Fordham Law Review*. Our year-long commemoration began on October 26, 2016—almost 125 years to the day that our Court first sat to hear oral arguments—with a Special Session of the Court attended by Justices Ginsburg and Sotomayor. In December, we had a program on Thurgood Marshall, moderated by Judge Paul Engelmayer, with discussion by Justice Marshall’s former clerks, including Justice Elena Kagan.

Our 125th Anniversary year continues with a program almost every month, beginning on February 9th when our Staff Attorney Players will present an evening of short re-enactments of three Second Circuit appeals—“Two Wars & a Book”—at the Thurgood Marshall Courthouse. On March 10th, we will host a program on the judicial giant, Henry J. Friendly, moderated by Judge Pierre Leval. We are very much looking forward to the program your Section is developing with the New York Courts Historical Society, looking at the historical link between the New York State Court of Appeals and the Second Circuit through the prism of commercial law, in the context of certified cases. We will conclude our year-long commemoration on September 27th with a program on the “remarkable” Hands—Learned and Augustus—who sat on our Court for many years.

You can find our 125th Anniversary calendar on our Court’s website and register for as many programs and events as your schedule permits. I hope you will join us for what promises to be a series of interesting and educational evenings.

Our Court’s 125th Anniversary has provided us with a golden opportunity to reach out to our constituencies but has allowed us to invite into our spectacularly renovated home at 40 Foley Square, the Thurgood Marshall Courthouse, not only the lawyers whose names appear on our rolls, but the lawyers who often do not have cases in federal appellate courts. This anniversary year has brought together our circuit judges with the members of the Bar, including the Commercial and Federal Litigation Section, in ways that I had hoped when we embarked on this journey back in 2014. That effort to reach out to the community is also manifested in the civic education initiative—Justice for All: Courts and the Community—which was begun around the same time.

Justice for All: Courts and the Community

I want to return briefly to that Circuit-wide initiative on civic education, with appreciation for the role of the New York State Bar Association effort, and with some thought on a few ways in which the members of this Section can continue and increase their involvement with our federal courts throughout New York State.

As we all know from daily media accounts, the knowledge of the average citizen regarding the functioning of our government is woefully inadequate. The mission of our civic education initiative is to create “educated consumers” of our American government by students, teachers and adult citizens. In order for our form of government to flourish, it requires that our citizens be knowledgeable about the functioning of our federal and state governments—how they work and how they do not—in order to improve government and the services it delivers to our citizenry now and in the future. “Democracy requires knowledge,” a great mentor of mine, Daniel Patrick Moynihan, would say. How can we expect our citizens to support and defend our governmental system, when they know so little about it? Students who learn about and appreciate the Constitution and courts grow up to be adults who respect and support it. Understanding our system of constitutional liberty keeps our democracy strong and safeguards the rights of all Americans.

Two-and-a-half years ago, I called for an initiative, then, to help increase points of contact between the courts and the communities we serve, to facilitate mutual understanding and help to ensure that the courts are accessible and effective communities in which courts function. The hope was to develop a program that could be implemented in every district and courthouse in our Circuit. Thus was born the idea for our Second Circuit-wide initiative on civic education and public engagement, Justice for All: Courts and the Community.

To that end, our mission encompasses two principal approaches: to bring the communities to the courts, and to bring the courts to the communities. I appointed my

esteemed colleague, Southern District Senior Judge Victor Marrero, as my co-chair, and together with the Circuit Executive, I formed a Circuit-wide Committee on Civic Education and Public Engagement consisting of judges and court executives throughout the three states of our Circuit. Working with us is an extraordinary group of lawyers and educators. The Committee developed a mission statement to assist its members in defining the Committee's goals for this Circuit-wide program on civic education. I want to pay special tribute to the judges, lawyers and educators participating with such dedication, and to our court staff, especially in the Circuit executive office and in the library.

In doing our work, we are buoyed by the work already ongoing by New York State Bar Association, whose Law, Youth & Citizenship Program, under the direction of Martha M. Noordsy, is involved in many outstanding civic education programs: mock trial programs, including a mock trial summer institute: We the People: The Citizen and the Constitution, a program that seeks to promote civic competence among secondary students; the James Madison Legacy Project; the Robert H. Jackson Essay Context; Project Citizen at Girls, Inc., a summer professional development program, an annual conference for educators, and continuing legal education program. In our own civic education website, which I will describe shortly, we link to the civic education work of the New York State Bar Association in hopes of spreading your word.

Our Circuit-wide civic education initiative, Justice for All, has been divided into nine subcommittees: Civic Education Programs; Advocacy Skills; Learning Centers; Reenactments; Student Contests; Civic Ceremonies; Speakers Bureau; Adult Education; and Civic Education Media & Public Outreach. Each of these subcommittees consists of several judges along with members of the Advisory Group. I know that in this room there are many who have participated in various ways in our activities, as members of the various subcommittees, as judges meeting with students or with teachers, as court staff meeting with students and teachers.

Let me share with you a few of the many activities, programs and events being planned and being held in the courthouses of our Circuit.

A. Civic Education Programs Subcommittee Activities

In New York City, the Civic Education Subcommittee, co-chaired by our excellent leaders, Judges Marrero and Laura Taylor Swain, has partnered with the Justice Resource Center ("JRC") of the New York City Department of Education to develop programs for courthouse visits for students and professional development seminars for teachers, and enhance the general social studies curriculum for New York City public school students. Federal

courthouses, where citizens go to enforce their rights, belong to the people, and are locations that should welcome visitors for tours, lectures and other events. At the Thurgood Marshall Courthouse in lower Manhattan, for instance, we have hosted monthly visits for high school students to watch oral arguments in the Court of Appeals, view district court proceedings in the Southern District and participate in legal research modules called Library Labs. Programs feature courthouse tours, presentations about the architecture and history of our courthouses, and presentations by judges and staff about the federal courts, including their probation and pre-trial services departments, and also partners, including the U.S. Marshal Service, U.S. Attorney's Office, and Federal Defenders.

Plans are under way to expand these programs to other parts of the courts of the Circuit. With advance notice, our project welcomes court visits from school groups, mentorship program participants and community groups throughout the Second Circuit (which covers Connecticut, New York and Vermont), as well as dialogue on how we can assist educators in enhancing civic education. Civic education opportunities are potentially available every week day (other than national holidays).

In another successful collaboration with the JRC, the Civics Education Subcommittee developed and presented, with the integral participation of federal judges, faculty from numerous law schools and practicing lawyers, an unprecedented week-long summer professional development program for New York City and Albany, NY, teachers in 2016. The program focused on the teaching of a comprehensive high school civics education curriculum ("We the People"). The teachers who participated in this special program were selected from among those working in schools in economically challenged areas. Our judicial colleagues presided over a mock hearing at which teachers offered four-minute presentation speeches on topics related to the week's lessons. We very much expect to replicate this program in the future, and to provide additional courthouse-based professional development programs during the school year. Our Civics Education Subcommittee also collaborated on and hosted a New York City Teachers Professional Day at the Thurgood Marshall Courthouse in the spring of 2016, which featured discussions with judges, a legal research seminar and a screening of the film *Justice Is a Black Woman*.

We have collaborated with New York City's Justice Resource Center (JRC) to develop civil and criminal law, constitutional law, mock trial and legal research courses for high school students enrolled in special law-focused public school programs throughout New York City, and we provide venues and logistical support for moot appellate court and mock trial competitions. To that end, the subcommittee worked with Eric Contreras, then-Executive Director of Social Studies for the New York City Department of Education, to review the proposed

new social studies curriculum for New York City public school students. Aided by Russell Wheeler of the Governance Institute at the Brookings Institution, subcommittee members reviewed the law focused curriculum with a view to enhancing its lessons about the courts, the role of the courts in our government, and civic education. Now being implemented in public schools is that Introduction to Law school curriculum, in grades 9-11 (grade 12 still in development). The curriculum being introduced—reaching 60,000 students and the product of a collaboration of the New York City Department of Education, the Judicial Resources Center, and judges and educators we recruited for this purpose—consists of the following:

- 9th grade: Intro to Law 1; Intro to Law 2
- 10th grade: Criminal Justice; Criminology
- 11th grade: Constitutional Law
- 11th grade: Moot Court and Mock Trials

As noted above, a 12th grade Legal Research and Writing course is still in development.

Further projects for the 2016-2017 academic year include collaboration with the New York City Department of Education on the enhancement and implementation of judiciary and law-related aspects of the general social studies curriculum, through commentary on draft materials and the development of components that will enhance students' understanding of the role of the courts, particular legal issues, and significant historical events.

As part of our activities, we also hosted participants in several internship programs for law students and high school students in our New York City courthouses during the summer of 2016. These included the Sonia & Celina Sotomayor Judicial Internship Program, whose high school interns were placed in judges' chambers and attended weekly seminars on practical topics such as college applications, career exploration and cyber-security, as well as legal research training in our law libraries, other law-related skills, and legal history.

B. Advocacy Skills Programs and Competitions

This spring, the New York State Bar Association will sponsor its annual state-wide mock trial competition. In New York City, we are partnering with the Justice Resource Center, led by Debra Lesser, to host the last several rounds of the competition, including the final round, at the Marshall and Moynihan courthouses. Federal judges will serve as judges for these rounds and volunteer the use of their courtrooms to the students. Outside of New York City, the Civic Education Committee will open federal courthouses around New York State to participating schools so these students can "try" their cases in federal courtrooms before federal judges. We are seeking lawyers to volunteer themselves and their law firms to mentor these participating high schools. Our goal is to enable

any high school to participate in a year-long advocacy program teaching students public speaking, research and writing skills through moot court competitions in the fall and mock trial competitions in the spring.

This past summer, Eastern District Judge Bianco, the dynamic chair of the Advocacy Skills Subcommittee, hosted a week-long advocacy program for ninth graders at the D'Amato Courthouse in Central Islip, with the support of the Federal Bar Association, culminating in a mock trial competition for the students. Over 80 high school students, from over 20 schools in Nassau and Suffolk County, participated in the program, whose speakers included seven federal judges, the U.S. Marshal for the Eastern District, two FBI agents, a U.S. Secret Service agent and several prosecutors and defense attorneys. The speakers described their roles and taught basic advocacy skills for the mock trial competition. The students observed a Naturalization Ceremony. They heard from two law professors about issues implicated in *Miranda v. Arizona*, this being the 50th anniversary of that landmark decision. At lunch one day, the keynote speaker was Mary Beth Tinker, the plaintiff in the Supreme Court decision, *Tinker v. Des Moines*. The Advocacy Skills Subcommittee is also hard at work developing a template to replicate the JRC's mentor-based moot court and mock trial program outside New York City with assistance from the Nassau Bar Association and Hofstra Law School for Long Island-based high schools.

At Thurgood Marshall, we hosted the final round of the New York City-wide moot court competition last December and the last four rounds of the multiple-round New York City-wide mock trial competition. This summer, we hosted our (now) annual moot court argument for the New York Intellectual Property Association's summer associate program and the Legal Outreach summer mock trial competition in August.

The Advocacy Skills Subcommittee continues to encourage individual courts to host student moot court and mock trial competitions with judges presiding over these student competitions. It makes all the difference to the students to be able to argue in a real courtroom where their arguments are heard by actual real-life judges.

A subcommittee, chaired by Geoffrey Crawford of Vermont, is reviewing how best to stimulate such competitions as student essay contests, to replicate efforts already under way in parts of the Circuit that would like to take on this activity.

In all this, I thank our judges and Bar members who have volunteered to preside at these student advocacy skills competitions.

C. Learning Centers

With the energetic initiative of Eastern District Judge Pamela Chen, who chairs the Learning Centers Subcommittee, we are working to create a model and exhibit

materials for physical and virtual learning centers that can be used, or adapted for use, in each of our Circuit's courthouses. It is envisioned that these learning centers will cater to visitors of all ages, backgrounds and levels of knowledge regarding the federal judicial system, its judges, its courthouses and its role in maintaining our republican form of government. We expect that the learning center at the Thurgood Marshall Courthouse will be open in the spring; my co-chair, Victor Marrero, and I are working with the Circuit Librarian and the Learning Centers Subcommittee to make that a reality.

D. Reenactments

My colleague Denny Chin and his wife, Kathy Chin, have pioneered civic education through the presentation of re-enactments of famous trial cases. Our Court's 125th Anniversary has provided us with an opportunity to develop and present re-enactments of famous Second Circuit appeals. Last November, the Conner Inn of Court presented a re-enactment of the Wright Brothers' appeals that were heard in our Court in November 1913. On February 9th, Judge Chin will present three vignettes of three Second Circuit appeals—*Antonelli Fireworks*, *Cortright v. Resor* and *Ulysses*. In May, the Federal Bar Council Inn of Court will present a full evening re-enactment of a First Amendment appeal—*Russo v. Public School District Number 1*. The scripts and accompanying slide shows will be posted to our civic education website where you can download them and use them for educational programs with students, young lawyers and senior citizens. It would be wonderful if Commercial and Federal Litigation Section members identified important commercial cases of the New York state and federal courts and developed re-enactments of these cases for our Civic Education Subcommittee.

E. Civic Ceremonies

Our project, under the vigorous leadership of co-chairs, Judges Margo Brodie and Michael Shea, worked on programs for Law Day and Constitution Day celebrations, including naturalization programs throughout the Circuit. The subcommittee has provided a template for such events. Through the subcommittee's efforts, Justice Sotomayor videotaped remarks which were shown at all naturalization programs in the Circuit. There was substantial media coverage of the Ellis Island ceremony I mentioned earlier and the ceremonies of the Eastern District, one of which featured a star of the show *Hamilton*. The late Gerald Walpin, a subcommittee member, prepared a quick questionnaire which contains sixty questions about the Constitution and the Supreme Court. The subcommittee is also considering developing a list of recommended "minimum standards" for courthouse visits in each district—for instance, necessary website information, the appointment of a visits coordinator, and a series of ready-made programs.

F. Speakers Bureaus

Our plan, devised by superb subcommittee co-chairs Victor Marrero and Bankruptcy Judge Elizabeth Stong, is to coordinate speaking events for judges, professors, lawyers, and scholars about the legal profession and the work of the courts, participating in school, and other communal events. In this regard, we are working with law school deans to involve their faculties and students; Dean Trevor Morrison of NYU Law School hosted a luncheon meeting of deans throughout the Circuit, who gave generously of their time and thinking.

Judges and lawyers will visit local schools and community organizations for presentations, panel discussions, or Q&A sessions. Examples of places visited by federal judges include:

- Middle schools and high schools;
- Community colleges;
- Senior centers;
- Child and family services non-profit organizations;
- Youth groups, including local Boy Scout and Girl Scout troops;
- Public radio stations

Examples of topics that judges and lawyers may address include:

- Our Federal courts and how they function;
- Your Constitutional rights and duties;
- Careers in the law and law enforcement;
- How does one become a lawyer, a judge, and law enforcement agent?
- Our jury system;
- Financial literacy and why it matters;
- Significant and historic trials.

G. Adult Education

For adult audiences, our project is developing financial educational programs on consumer bankruptcy and consumer credits, expanding the Credit Abuse Resistance Education (CARE) program, and forming panels of lawyer educators to partner with judges for presentations on financial literacy in a variety of locations, reaching a wide population, including seniors, veterans, immigrants, and victims of domestic violence. The energetic and thoughtful Bankruptcy Judge Shelly Chapman chairs this subcommittee.

H. New Civic Education Website

An initiative of this magnitude requires a permanent public presence where teachers, students and the public can access information about the many activities, pro-

grams and events happening at the courthouses of our Circuit. Under the skillful guiding hand of the Subcommittee on Civic Education Media & Public Outreach, chaired by Connecticut Magistrate Judge Holly Fitzsimmons, together with Circuit Librarian Lou Lopez and his staff, I am pleased to announce that our Circuit has developed a new and exciting public face to its Circuit-wide initiative on civic education, Justice for All: Courts and the Community. You can easily access that website by clicking on to the website of the Second Circuit, www.ca2.uscourts.gov, or going to justiceforall.ca2.uscourts.gov.

Our website provides a broad array of information and teaching materials developed by judges, attorneys, legal experts, and educators. From the website, you can:

- Learn about our programs, including Courthouse visits, civic ceremonies, and student contests.
- Find educational materials specifically for students and teachers, historic court case reenactments, and additional information about civic and adult education programs.
- View the calendar of upcoming events.
- And finally, you can read more about us, find the Courts of the Second Circuit, and contact us about various topics or questions.

We will continue to expand our online content to bring you updated and relevant information, so I encourage you to bookmark our website and check back often. We encourage you also to let us know of activities you'd like us to link to on our website. In addition, stay tuned for information about our upcoming physical and virtual learning centers.

We continue to seek the assistance of judges, lawyers, educators, academics, curators, architects, engineers, journalists and citizens with an interest in our Justice For All: Courts and the Community project. Please be in touch with us.

In conclusion, on behalf of my Court of Appeals of colleagues, we very grateful to the Commercial and Federal Litigation Section on the awarding of the prestigious Fuld Award to the U.S. Court of Appeals in commemoration of its 125th anniversary. We look forward to seeing you at our 125th Anniversary programs and events; to hearing your ideas about and having your participation in our civic education effort; and to working together to promote the fair and effective administration of justice. I look forward to working together on this effort to promote understanding of the judiciary, and to keep our judicial institutions vital for the communities we serve. Together, we have a collective responsibility that our Constitution and government remain vital for generations to come.

Thank you for your great courtesy.

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ComFed—The Intersection of the Federal and State Judiciary

By Section Chair Mark A. Berman

The intersection of the federal and state courts is celebrated by the Commercial and Federal Litigation Section. The Section this year has brought new meaning to its name of being the *go to* bar group representing “Commercial and Federal” litigators by melding both the federal and state judiciaries into its programming.

This year, the Section created a new annual award, the first in a decade, called the *Shira A. Scheindlin Award for Excellence in the Courtroom*. The award is named after retired United States District Judge and former Chair of the Section, Shira A. Scheindlin, to honor a woman who has distinguished herself in either state or federal court and who has been actively involved in mentoring attorneys. The award was conferred in the Ceremonial Courtroom at the Southern District of New York and the audience heard remarks from New York State Court of Appeals Chief Judge Janet DiFiore, Second Circuit Judge Denny Chin, Southern District Chief Judge Colleen McMahon, and Eastern District Chief Judge Dora Irizarry. During that same event, the Section presented to five young women attorneys scholarships named after New York’s former Chief Judge called the *Judith S. Kaye Commercial and Federal Litigation Scholarship*.

Further, to celebrate the 125th anniversary of the United States Court of Appeals for the Second Circuit, New York Chief Judge DiFiore will present the Section’s 2017 Stanley H. Fuld Award to the Second Circuit. Second Circuit Chief Judge Robert A. Katzmann will accept the award on behalf of the Second Circuit in recognition of the Circuit’s outstanding contributions to the development of commercial law and jurisprudence in New York State. The Second Circuit is the ideal choice for the Fuld Award as its thoughtful and insightful opinions have advanced commercial law in New York and have provided guidance to business and litigators regarding the legal standards under which businesses operate in our State. The Annual Meet-

ing’s CLEs will include judges from both state and federal courts, including Second Circuit Judge Rosemary S. Pooler and Commercial Division Justices O. Peter Sherwood and Timothy S. Driscoll. In furtherance of celebrating the Second Circuit’s anniversary, the Section will host a reception at the Thurgood Marshall United States Courthouse, the evening before its Annual Meeting, where young attorneys will have the opportunity to meet the judges.

The Section will work with the Second Circuit and the New York Courts Historical Society to develop a program that will look at the historical link between the New York State Court of Appeals and the Second Circuit through the prism of commercial law in which both courts have been leaders. Concepts for this program are under development and may include cases where the Second Circuit certified questions of New York law to the New York Court of Appeals on commercial issues.

The Section has travelled and will travel throughout the State for its monthly meetings, some of which have been held for the first time in various federal courthouses. In December, we travelled to Syracuse to hear United States District Judge Brenda R. Sannes speak; in January, Karen Greve Milton, the Second Circuit Executive, spoke to our Executive Committee; and then, in February, we will be going to the Charles L. Briant Jr. Federal Building and Courthouse in Westchester to hear United States District Judge Cathy Seibel.

The Section looks forward to continuing this wonderful conjoining of the state and federal judiciaries in our programming for the years to come.

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Friday, May 19, through Sunday, May 21, 2017

2017 Commercial and Federal Litigation Section Spring Meeting

The Gideon Putnam Hotel | 24 Gideon Putnam Road | Saratoga Springs

CLE panels will include the latest on trade secrets litigation and the implications of the Defense of Trade Secrets Act; the prosecution and defense of actions involving restrictive covenants and implied duties of confidentiality and loyalty; how to deal with the authentication of electronic evidence at trial and to address the proliferation of “fake evidence”; and an update on changes to the federal rules and rules of the Commercial Division—a discussion of the convergence of the rules of practice and a “heads up” on potential rule changes.

The Robert L. Haig award will be conferred on Seymour W. James, Jr. Esq., former President of NYSBA and the Attorney-in-Chief of The Legal Aid Society in New York City.



Seymour W. James, Jr. Esq.

2017 Annual Meeting CLEs

By Jamie Sinclair

Current Ethics Issues in Commercial Litigation

The first panel of the morning addressed current ethical issues in commercial litigation and featured panelists Hon. Timothy S. Driscoll, Justice of the Supreme Court of the State of New York, Nassau County Commercial Division; Danielle C. Lesser, Esq.; Michael S. Ross, Esq.; and Vincent J. Syracuse, Esq. The panel was moderated by Ellen Yaroshefsky, Esq., the Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University. The program specifically honed in on the recent First Department decision in *Stock v. Schnader Harrison Segal & Lewis LLP* and the recent New York Court of Appeals decision in *Ambac Assurance Corporation v. Countrywide Home Loans, Inc. et al.*

Two hypothetical scenarios were discussed among the panelists, seasoned with dynamic questions from Yaroshefsky. The first hypothetical posed the question of whether internal communications within a law firm regarding the possibility of having missed a statute of limitations would be protected from disclosure in light of the *Stock* decision. Throughout this discussion, the panelists stressed their recommendation that all firms designate an attorney as holding the title of “General Counsel” to the firm—even if that individual serves in that role only on a part-time basis while otherwise engaging in the practice of law on behalf of third party clients—and develop specific firm policies regarding client issues where the propriety of the firm’s conduct is implicated, and that lawyers should not bill time to the client for liability-related communications and research. The second hypothetical scenario concerned an outside lawyer providing advice to a client that marketed tax investments that created significant tax write-offs using aggressive tax strategies and whether communications with the company’s internal counsel would be protected by the attorney-client privilege or otherwise. The hypothetical was discussed both in light of the *Ambac* decision as well as the crime-fraud exception and other related issues.

Appellate Attacks on Arbitration Awards

The second panel of the morning was titled “Appellate Attacks on Arbitration Awards.” The panel was moderated by Hon. Rosemary S. Pooler, U.S. Circuit Judge for the United States Court of Appeals for the Second Circuit, and featured panelists Hon. O. Peter Sherwood, Justice of the Supreme Court of the State of New York, New York County Commercial Division; Louis P. DiLorenzo, Esq.; Lea Haber Kuck, Esq.; and Jeanne C. Miller, Esq. In general, there are limited grounds under CPLR 7511(b) (1) for the vacation of an arbitration award, including (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of the arbitrator; (3) the arbitrator exceeded his or her power or imperfectly executed it; and (4) failure to follow the procedures of Article 75 under the CPLR. The Federal Arbitration Act similarly provides limited avenues for attacking arbitration awards.

Louis DiLorenzo provided an overview of the landscape of New York case law applicable to actions seeking to vacate an arbitration award. “Deflategate,” the infamous controversy concerning game balls that the New England Patriots inflated below NFL standards during a playoff game, was presented as a case study of how attacks on arbitration awards may be litigated. Next, Judge Pooler provided a lively discussion of her own experience with class action waivers in arbitration agreements, specifically discussing her three decisions in the *In re Am. Express Merchants’ Litigation* cases and the subsequent review of those decisions by the United States Supreme Court. Lea Haber Kuck discussed her experience seeking vacation of an international arbitration award rendered in the United States and discussed how to determine what law applies. Finally, Jeanne Miller provided insight as a neutral from JAMS, which provides arbitration and mediation services worldwide, and discussed the arbitration appellate procedures offered by JAMS and other dispute resolution providers.



COMMERCIAL AND FEDERAL LITIGATION SECTION

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EVENING AT THURGOOD MARSHALL COURTHOUSE WITH THE SECOND CIRCUIT

By Natasha Shishov, Co-Liaison of the Young Lawyers Section

On January 24, 2017, approximately ninety people attended the Commercial and Federal Litigation Section's "Evening at Thurgood Marshall Courthouse with the Second Circuit" event to celebrate the 125th anniversary of the Second Circuit Court of Appeals and to provide an opportunity for the judges of the Second Circuit to meet younger lawyers over cocktails and *hors d'oeuvres*. The event was co-sponsored by the New York State Bar Association's Young Lawyers Section.

Second Circuit Chief Judge Robert A. Katzmann welcomed attendees to the Thurgood Marshall Courthouse and discussed, among other areas, the Second Circuit's civic initiatives and its outreach to high school students. Tours of this historic iconic courthouse were offered.

Many Second Circuit and District Court judges were in attendance, as well as many state court judges from throughout New York. The audience also heard remarks from New York State Bar Association President Claire P. Gutekunst and Southern District Judge P. Kevin Castel.

An impressive number of young lawyers attended the event. This unique opportunity allowed younger members of the Bar to network with practitioners and gain first-hand insight from the bench. This successful evening is yet another example of how the Section, the Bar and the Bench collectively enrich the legal profession and its up-and-coming younger lawyers in a meaningful and significant way.

Remarks by NYSBA President Claire P. Gutekunst

Good evening. On behalf of the New York State Bar Association, I want to thank Chief Judge Katzmann and the Commercial and Federal Litigation Section for inviting me and the members of our Young Lawyers Section to help celebrate the Court's 125th anniversary. Thanks to the members of the Court who have joined us tonight. Thanks also to Circuit Executive, and my friend, Karen Greve Milton for being so welcoming to this Section and our Association. This is the fourth time since mid-November 2016 that NYSBA groups have been in this courthouse or the Southern District of New York courthouse at 500 Pearl Street. You truly make us feel at home in your courts.

I also want to acknowledge the law students in attendance, and the principal of Stuyvesant High School and one of the school's social studies teachers, who are also here tonight. The Section's diversity fellow, Simonne Isaac, is here from Hofstra Law School. You are our next generation of lawyers and those who teach them. It's a pleasure to see you all.

I'm so proud of all the Section's activities, but especially all these opportunities for Bench-Bar interaction and the Section's phenomenal Women's Initiative, led by women former chairs of the Section, which aims to increase the number of women in the first chair at trial and at oral argument on appeals. It is much needed and appreciated.

I also want to offer congratulations in advance to the Second Circuit Court of Appeals, which will receive the Section's highest honor, the Stanley H. Fuld Award, at the Section's annual lunch tomorrow. The Fuld Award recognizes outstanding contributions to the development of commercial law and jurisprudence in New York State. Once before, a court—the Commercial Division in 2006—has received this award, so this is not a first. But what may be a first is that Chief Judge Katzmann can now call himself a two-time Fuld Award winner—he received the Award in 2011. And last night, your colleague Judge Denny Chin received the Diversity Trailblazer Award from our Association's Committee on Diversity and Inclusion. Your Court is on a roll!

Actually, it has always been on a roll. Many of your decisions have been affirmed by the U.S. Supreme Court.¹ That Court has called the Second Circuit the "Mother Court" of securities law.²

Chief Judge Katzmann developed the 125th anniversary celebration not as a way for the Court to take a victory lap, but to take the time to reflect on the Court's past, present, and future. To organize this reflection, he established a committee to develop a year-long set of activities to review what he called the "125-year experience" of the Court.

A very valuable product of the committee's work is the October 2016 issue of the *Fordham Law Review*, which consists of essays written by prominent practitioners in the Second Circuit, as well as four notes on Second Circuit issues by Fordham Law students. The essay authors discuss the Circuit's wide-ranging effect on the law, covering everything from the First Amendment to white collar crime and national security issues, to antitrust and financial and securities law. It is a wonderful, and lasting, gift to all lawyers, not the least because it reminds us that, as Judge Katzmann noted in his preface, "law is not an abstraction, but has great impact on individuals and institutions."

The Circuit Courts of Appeals are the last stop before the Supreme Court and the courts of last resort in 99% of cases, because the Supreme Court grants certiorari only rarely. So the onus is on these courts to get it right. And the Second Circuit has had a terrific record in its first 125 years. May the next 125 years be as fruitful for the Court and the nation.

Thank you

Endnotes

1. Roger J. Miner, One Hundred Years of Influence on National Jurisprudence, in U.S. Courts in the Second Circuit: A Collection of History Lectures Delivered by Judges of the Second Circuit, 138, 144 (Fed. Bar Council Found. ed, 1992).
2. *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 275-76 (2010) (Stevens, J., concurring) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975)).

The Section's First Annual Shira A. Scheindlin Award for Excellence in the Courtroom

By Jaclyn H. Grodin

The Section has long embraced women's leadership within its own ranks and throughout the legal community at large. On November 14, 2016, the Section confirmed that this tradition will continue into the future with the presentation of the first annual Shira A. Scheindlin Award for Excellence in the Courtroom by former Section Chair, the Honorable Shira A. Scheindlin, to former Section Chair Carrie H. Cohen, a partner at Morrison & Foerster LLP. Cohen, formerly an Assistant United States Attorney for the Southern District of New York, who received the inaugural award in recognition of her successes as a dedicated trial lawyer and continued commitment to advancing women in the legal profession.

Cohen first thanked the award's namesake, Judge Scheindlin and expressed gratitude for being selected as the first recipient of an award honoring a jurist from the court Cohen considered her home, the Southern District of New York. Recalling how she first got hooked on trial work as a young associate at the firm Vladeck Waldman, Cohen also recognized the many people who had helped shape and develop her career over the years, including judges, mentors, supervisors, partners, former colleagues, and friends, many of whom were in attendance at the awards ceremony. In particular, Cohen recognized the important role that Chief Judge Judith S. Kaye, who passed away in January 2016, had played in her life, and the guidance Judge Kaye provided over the many years of their friendship. She also thanked current Section Chair Mark Berman, and the award selection committee, comprised of former Section Chairs Bernice Leber, Steve Younger, and the Honorable P. Kevin Castel, in addition to Judge Scheindlin.

Cohen rounded out her acknowledgments by thanking her family, whom she recognized as patient, loyal, and her biggest fans in and out of the courtroom. The recipient concluded her remarks by giving words of advice to litigators at the start of their careers, and particularly younger women attorneys beginning to face some of the challenges

Cohen had previously encountered: help others, use your legal skills to their fullest potential, and, most importantly, say yes to *every* assignment, *every* new opportunity, and *every* invitation to join a bar association or committee.

The awards ceremony featured prominent jurists from the federal and state benches, each confirming Cohen's place as a leader among New York litigators. In addition to Judge Scheindlin's presentation of the award, Judge Denny Chin of the Second Circuit Court of Appeals, Chief Judge Colleen McMahon of the Southern District of New York, and Chief Judge Dora Irizarry of the Eastern District of New York offered words of praise and congratulations to Cohen. Although she could not attend the ceremony in person due to commitments in Albany, Chief Judge DiFiore sent a letter commending the Section for creating the award and for choosing Cohen as the award's first recipient. Chief Judge DiFiore praised Cohen's accomplishments as a public servant and ability to serve as a supportive mentor and role model for women seeking to make their own mark in the law.

In a similar vein, Judge Chin recalled getting to know Cohen when they both worked at Vladeck, supervising her first deposition, and officiating at her wedding. In recognizing the traits that made Cohen so successful—her professionalism, confidence, energy, positivity, and her balance—Judge Chin repeated the sentiment of the evening's other presenters and honored Cohen for embracing all of the best that lawyering and litigation have to offer. More importantly, Judge Chin confirmed that Cohen's continued pursuit of excellence in the courtroom and throughout her community, and her dedication to her family and friends, made Cohen a model recipient of the first Shira A. Scheindlin Award for Excellence in the Courtroom. The audience wholeheartedly agreed, giving Cohen a standing ovation while her youngest children enthusiastically high-fived their mother.



Pictured left to right:
Tracee E. Davis, NYSBA
President Claire P. Gutekunst,
Carla Miller, Lauren J.
Wachtler, Bernice K. Leber,
Carrie H. Cohen, USDJ Shira
A. Scheindlin (ret.), Miriam
J. Manber, Adrienne M. Hol-
lander, Anna S. Badalian,
Section Chair Mark A.
Berman, Alisha L. McCarthy,
Erica Barrow

The Honorable Judith S. Kaye Commercial and Federal Litigation Scholarship

By Lauren J. Wachtler

On November 14, 2016, in conjunction with the inauguration of the Hon. Shira A. Sheindlin Award for Excellence in the Courtroom to former Section Chair Carrie Cohen, the Commercial and Federal Litigation Section celebrated another “first.”

Through a gift from the Commercial and Federal Litigation Section of the New York State Bar Association, the Section created the Honorable Judith S. Kaye Commercial and Federal Litigation Scholarship to provide up to five junior female litigators to attend the Commercial and Federal Litigation Trial Academy, which is held every other year in the Spring. The Scholarship will cover each awardee’s registration fee for their participation in the Trial Academy.

The Kaye Scholarships recognize women litigators from a variety of backgrounds throughout the State, with the goal of increasing the number of women taking a leadership role in commercial cases litigated in both the state and federal courts in New York.

“Establishing this scholarship in Judge Kaye’s name is the Section’s way of honoring her and the remarkable impact she had on the legal profession and in blazing a pathway for female attorneys,” said Mark Berman, chair of the Section

After the Section’s selection committee conducted a rigorous review of numerous submissions from women litigators throughout the State, November 14, 2016,

marked the first award of the Kaye Scholarships to five female junior litigators from a variety of diverse backgrounds who displayed the outstanding qualifications and ambition to become first-rate commercial litigators.

“It was gratifying to see so many qualified professionals apply for this prestigious honor,” noted Lauren Wachtler, a former Chair of the Section and member of the selection committee who, with Judge Kaye’s daughter, Luisa, bestowed this honor on this year’s five recipients.

The recipients this year included Jessica Clemente, a fourth year associate with Ward Greenberg Heller & Reidy LLP, Tara N. Gaston, an attorney from Saratoga Springs, Alexis Marquez, Commercial Division Law Clerk to Hon. Saliann Scarpulla in Supreme Court, New York County, Stacey E. Trien, an associate with Leclair, Korona, Vahey, Cole, LLP, in Rochester, and Alissa M. Fortuna-Valentine, an associate at the Rochester office of Phillips Lytle LLP.

In her remarks at the ceremony, Luisa Kaye spoke on behalf of the Kaye family: “This is truly an honor and wonderful tribute to our mother, who was a leader in championing women in the profession and a mentor to so many in their careers.” The Section looks forward to continuing this tribute in its dedication to increasing the number of qualified women litigators among its ranks. The Scholarship will cover each awardee’s registration fee to the Section’s 2017 Commercial and Federal Litigation Trial Academy to be held in May 2017.

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The Section Presents Its First Annual Shira A. Scheindlin Award for Excellence in the Courtroom and Kicks Off Its Women's Initiative With a Trial Practice CLE Designed to Highlight Women's Courtroom Skills

By Carla M. Miller

On November 14, 2016, the Commercial and Federal Litigation Section highlighted its ongoing women's initiative with the presentation of its first annual Shira A. Scheindlin Award for Excellence in the Courtroom and Trial Practice CLE program. The Section's women's initiative is designed to increase the ranks of women in lead litigation roles within the New York state and federal courts, after numerous high-profile articles in legal publications emphasized the significant underrepresentation of women lawyers in the courtroom. The women's initiative was spearheaded by all seven female former Section Chairs—The Honorable Shira Scheindlin (Stroock, Stroock & Lavan LLP); Bernice Leber (Arent Fox LLP); Sharon Porcellio (Bond, Schoeneck & King PLLC); Lauren Wachtler (Mitchell, Silberberg & Knupp LLP); Lesley Friedman Rosenthal (General Counsel, Lincoln Center for the Performing Arts); Carrie H. Cohen (Morrison & Foerster LLP); and Tracee Davis (Zeichner Ellman & Krause LLP).

The Trial Practice CLE program was an entertaining and instructive re-enactment of an actual commercial trial conducted in the Southern District of New York before Hon. Shira Scheindlin, and showcased methods for creating compelling opening and closing statements and conducting tactical examinations of witnesses. The actual

trial transcript was edited and enhanced to highlight key aspects of the parties' openings and closings and witness examinations. In the re-enactment, Judge Scheindlin reprised her role as presiding judge, and several of the Section's former chairs, who are all experienced trial lawyers, paired off on behalf of the plaintiff against several competitively selected mid-level female litigation associates at New York law firms, who represented the defense side of the case. The associate participants were: Anna Badalian (Ballou, Stoll, Bader & Nadler P.C.); Erica Barrow (Baker & Hostetler LLP); Jaclyn Grodin (Olshan, Frome & Wolosky LLP); Adrienne Hollander (Arent Fox LLP); Miriam Manber (Hoguet, Newman, Regal & Kenney LLP); and Alisha McCarthy (Foley & Lardner LLP). The trial re-enactment was followed by a discussion among the CLE presenters and participants, who shared their trial strategy, advice, and insights with the audience.

Overall, the trial re-enactment CLE format received overwhelmingly positive feedback from attendees, and the Section intends to continue other programming in this vein in order to increase the representation and enhance the visibility of women in the courtroom, as well as to encourage young women lawyers to consider litigation as a viable and rewarding career option.

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Women on the Move

By Ignatius A. Grande

On October 26, 2016, the Commercial and Federal Litigation Section sponsored the annual Women on the Move program, which was held at NYSBA's offices in Albany. The 2016 program co-chairs, who organized the event, were Linda Relisky and Debra Vey Voda-Hamilton.

This year's program was entitled "Exposure, Evidence and Ethics—Social Media's 21st Century Role in Lawyering." The program was introduced by NYSBA President Claire Gutekunst. Judge Mae D'Agostino, a federal district court judge from the Northern District of New York, presented the keynote address on the impact of social media on the courts.

The CLE was set up in a unique format, which had each panelist present a short presentation followed by a discussion moderated by the program co-chairs. The panelists included the co-chair of our Section's Social Media Committee, Ignatius Grande from Hughes Hubbard & Reed LLP; Scott Malouf, a social media attorney and active Social Media Committee member who is the Section's social media Twitter manager; and Nicole Black,

a Rochester attorney and the Legal Technology Evangelist for MyCase, who has been involved with previous Section CLEs.

The first presentation, by Ignatius Grande, focused on the Ethics of Social Media: Marketing Your Message Ethically. The second presentation, by Nicole Black, related to Mining Social Media for Evidence: Ethics & Practicalities. The third presentation was given by Scott Malouf, which touched on How to Get Social Media into Evidence, Hot Topics in Internet Law and Right of Privacy, and the Internet of Things.

The topics led to a lively discussion amongst the panelists and Judge D'Agostino, which was well received by the participants and those who viewed the event as a webinar. Following the CLE, the Section's Executive Committee held its meeting in Albany with Hon. Linda Stein of the U.S. Court of Appeals of the Second Circuit as the guest speaker.



The Section's Women's Initiative

By Carrie H. Cohen

The Section's women's initiative, led by the former women Section Chairs (ret.) Judge Shira A. Scheindlin, Carrie H. Cohen (Morrison & Foerster LLP), Tracee Davis (Zeichner Ellman & Krause LLP), Bernice Leber (Arent Fox LLP), Sharon Porcellio (Bond Schoeneck & King), Lesley Rosenthal (Lincoln Center for the Performing Arts), and Lauren Wachtler (Mitchell Silberberg & Knupp LLP), as well as Carla Miller (Universal Music), continued its hard work at the Section's Annual Meeting. The former Section Chairs currently are compiling the results from the initiative's survey of the percentage of women appearing as lead counsel in the federal and state trial and appellate courts and expects to report on those results by the Section's Spring Meeting in May

2017. While those efforts are ongoing, the former Section Chairs held an invite-only roundtable discussion after the Section's luncheon on January 25, 2017, which was attended by approximately 20 people. The attendees at that meeting discussed many ideas on how best to address the perceived need to increase the number of women appearing as first chairs in the trial and appellate courts and agreed that many of those ideas would become recommended action items after the survey report is completed. The Section looks forward to the survey report and continuing its work on this important initiative.

Section Partners with JAMS to Present Program on Mediation of Employment Disputes

By Robert N. Holtzman

On October 13, 2016, the Section partnered with JAMS to present *Practical Tips to Achieve Success in Mediating Employment Disputes*. Presented as part of the annual Mediation Week activities, the program was attended by more than 100 practitioners.

A distinguished panel led the program, each of whom has literally decades of experience litigating and mediating employment disputes. **Gerald T. Hathaway**, co-chair of the Section's Committee on Employment and Labor Relations, moderated the panel. Other panel members included **Robert N. Holtzman**, Vice Chair of the Section and co-chair of the Committee on Employment and Labor Relations, who represents management in employment disputes; **Charles Fournier**, Senior Vice President Employment Law at NBC Universal; **Debra L. Raskin**, who represents plaintiffs in disputes; and Carol A. Wittenberg, a JAMS neutral with decades of experience mediating employment and labor disputes.

The program followed an interactive question and answer format, starting with when mediation should be considered and continuing through the entire mediation process, the conclusion of the mediation (whether successful or unsuccessful), and post-mediation efforts to resolve matters that do not reach a negotiated conclusion during an initial mediation session. For each question, Hathaway sought the views of different panelists, such that a variety of perspectives were offered—for example, a single question often elicited a response from the plaintiff's, the employer's, and the mediator's perspective.

All of the panelists agreed on the value of mediation to resolve employment disputes and regularly employ this process to serve their clients. Moreover, they concurred that early mediation—sometimes after a limited exchange of information—can be extremely effective to efficiently resolve matters to the satisfaction (or, at least, the mutual dissatisfaction) of all parties.

The discussion revealed extensive agreement on many topics relating to the approach to and process of

mediations. Other topics were debated, including the use of opening statements given by the parties during mediation sessions (which can run the risk of inflaming emotions and set a mediation off on the wrong foot), whether the parties exchange written mediation statements, and negotiating techniques, including the use of final offers and “brackets,” where one party offers to move to particular number if the other party moves to another—e.g., we will offer \$100,000 if you will reduce your demand to \$250,000.

The panelists universally agreed that a mediation is not necessarily unsuccessful if an agreement is not reached during the initial meeting session. Wittenberg described her process of following up with counsel in the days and weeks after a mediation session to see if negotiations can be rekindled, and other panelists agreed that there are continued opportunities to pursue mediation, whether formally through a subsequent mediation session or informally through discussions with the mediator or direct communications between counsel, which ultimately can lead to a resolution. And an “unsuccessful” mediation sometimes can sow the seeds of a resolution months or even years later.

The more than 100 attendees represented a broad swath of the Bar, including many individuals with extensive experience litigating and mediating employment disputes. Indeed, many interesting and challenging questions and viewpoints were offered by participants in the program.

The Section is grateful to JAMS for hosting this program at its New York City office, including a wine and hors d'oeuvres reception, where panelists and attendees took advantage of the opportunity to continue the discussion and network following the conclusion of the formal program.

Pre-Argument Conference Program—First Department

By Helen E. Freedman

Unlike most other jurisdictions, New York allows parties to appeal virtually every civil order to the Appellate Division (CPLR 5501 et seq.). Consequently, the First Department entertains about 3,000 civil appeals every year, many of which involve complex commercial issues but are not necessarily orders from final determinations. The Pre-Argument Conference Program, established pursuant to 22 NYCRR § 600.17 and inaugurated about 20 years ago, has been extremely successful in rendering the docket manageable by settling or convincing parties to withdraw at least ten percent of all civil appeals.

The Program functions by requiring counsel for appealing and responding parties in civil cases to appear before a Special Master for a pre-argument mediation/settlement conference either before or after the appeal is fully perfected. Currently, Melissa Ringel, Esq., runs the program, and Hon. E. Leo Milonas (Ret.) is Chair of the Special Masters. Ms. Ringel succeeded Caroline Antonacci, Esq., who initiated the program. Each has been devoted full time to make the program a resounding success. Ms. Ringel screens cases and herself mediates ten to twelve cases a week. In addition, there are now 30 active volunteer Special Masters, all of whom have been approved by a vote of all of the First Department Justices, who sit once or twice a month to mediate cases. The Special Masters are lawyers with extensive litigation and mediation experience or retired justices or judges. The result is that about a third of the cases mediated are resolved, removing 10% of all civil cases (close to two months' worth) from the appeals docket either by settlement or withdrawal.

When a case is assigned to a Special Master, he or she tries not only to resolve the immediate issue on appeal, but looks at the entire case with a view toward achieving a global settlement. Where it appears that the appeal has absolutely no merit or no chance of success, the Special Master may urge the appellant to withdraw the appeal. However, anything that happens during the conference is totally confidential and parties are free to

proceed as they would have if the mediation had not taken place. While one hour is usually allocated to a mediation, many cases are settled after the Special Master allows more time or when parties agree to or are directed to return for further conferences. Although parties are directed to appear with full settlement authority, counsel are not always able to obtain sufficient authority at the first conference. As in any mediation, parties or counsel may learn things at the first conference that make them more amenable to settlement at a subsequent conference and or prior to argument. Justice Milonas advises lawyers "to be prepared to negotiate because this really works."

Cases set down for mediation, about 1,000 in any given year, include most types of civil cases, except for cases originating in the Family Court. Tracy Crump, the clerk of the Special Master program, often attempts to match cases with mediators who may have special expertise or an interest in a certain type of case.

Many lawyers who appear regularly for settlement conferences in the Special Master Program are extremely enthusiastic. Brian J. Isaac, Esq., a distinguished appellate lawyer who appears frequently, states:

The mediation program at the Appellate Division[s] provide remarkable and free services which can be used to settle cases, if the attorneys prepare for a conference as though it were an argument, and are committed to the settlement process. I have settled well over 80% of pending appeals where parties were invested in settling....Court appointed mediators may call cases back several times before they settle.

Any lawyer who feels a settlement conference would be valuable may request one by writing to the Clerk of the Pre-argument Conference Program or the Special Master Program at the Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010.

Find details on programs, meetings and much more
on our Website at www.nysba.org/ComFed



New York State Chief Judge Janet DiFiore,
Second Circuit Chief Judge Robert A. Katzmann,
Section Chair Mark A. Berman



SDNY Chief Judge Colleen McMahon, NYSBA
President Claire P. Gutekunst, New York State Chief
Judge Janet DiFiore, Section Chair Mark A. Berman,
Second Circuit Chief Judge Robert A. Katzmann

NYSBA 2017 Annual Meeting



Second Circuit Chief Judge Robert A. Katzmann
addressing a packed house



Professor Ellen Yaroshefsky, Hofstra Law School



Second Circuit Judge Rosemary S. Pooler,
Justice O. Peter Sherwood, Lea Haber Kuck,
Louis P. DiLorenzo, Jeanne C. Miller



New York State Chief Judge Janet DiFiore

Shira A. Scheindlin Award for Excellence in the Courtroom



Claire P. Gutekunst, Justice Peter H. Moulton



Mark A. Berman, Carrie H. Cohen, USDJ Shira A. Scheindlin (ret.), Claire P. Gutekunst



Pictured left to right are: Lauren J. Wachtler, Foundation Board Member; Luisa Kaye, daughter of the Hon. Judge Kaye; Tara N. Gaston, Kaye Scholar; Alissa M. Fortuna-Valentine, Kaye Scholar; Alexis Marquez, Kaye Scholar; Stacey E. Trien, Kaye Scholar; Jessica Clement, Kaye Scholar; and NYSBA President Claire Gutekunst. Back Row: Section Chair Mark A. Berman



Left to right: Ferve E. Ozturk, Nicole Black, Ignatius A. Grande, Scott Malouf, United States District Judge Mae D'Agostino, NYSBA President Claire P. Gutekunst, Debra Vey Voda-Hamilton, Linda A. Redlisky



United States District Judge Mae D'Agostino



New York State Court of Appeals Judge Leslie E. Stein

Women on the Move

Section Partners with JAMS to Present Program on Mediation of Employment Disputes



Gerald T. Hathaway, Carol A. Wittenberg, Robert N. Holtzman, Charles Fournier, Debra L. Raskin



Charles Fournier, Debra L. Raskin

The Westchester Program



Left to right: Section Chair Mark A. Berman,
United States District Judge Cathy Seibel,
Courtney R. Rockett



Westchester Reception

ADR Program on the Differences Among ADR Providers



*In-House
Insights in
Bankruptcy
Litigation
breakfast*

Westchester Program

By Marc V. Ayala

On the evening of Wednesday, February 14, 2017, the Commercial and Federal Litigation Section hosted a well-attended bench and bar event at the Hon. Charles L. Briant, Jr. Federal Building and United States Courthouse in White Plains, New York.

There were close to 40 participants at the event, including judges, their law clerks, practicing attorneys, and local law students. The evening began with a cocktail hour and hors d'oeuvres, during which there was a spirited discussion among the participants about contemporary commercial litigation practice issues. Section Chair Mark A. Berman made remarks, highlighting the Section's broad reach and the many programs it is developing. The Section's Ninth Judicial District Leader, Courtney Rockett, also spoke and expressed her eagerness and availability to help any local practitioners engage with the Section and to have their ideas incorporated into the Section's work.

Participants then sat down to hear remarks from Hon. Cathy Seibel, whose presentation focused on mediation and the efforts the Westchester courthouse has been making to develop new and innovative court-ordered mediation programs. Judge Seibel also solicited participants' views regarding mediation, and what started as a presentation soon became a vigorous discussion. Judge Seibel and the participants explored how the Bench's and the Bar's thoughts on court-ordered mediation overlapped in many ways but differed in others, and the group collectively discussed ways to improve mediation programs. Once Judge Seibel departed, the Section hosted its monthly executive committee meeting.

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

Differences Among Leading ADR Providers

By Jeffrey T. Zaino

On February 7, 2017, the Arbitration and ADR Committee of the Commercial and Federal Litigation Section held a program with the top ADR providers titled, “Differences Between the Leading ADR Providers: Perspectives from AAA, CPR, FINRA and JAMS”. Over 50 ADR users and neutrals were in attendance. The panel members for the program included:

- Charles J. Moxley, Jr., independent arbitrator and mediator (moderator)
- Jeffrey T. Zaino, Esq., AAA Vice President, Commercial Division
- Olivier P. André, Esq., CPR Vice President, International
- Matthew P. York, JAMS General Manager
- Chrystal Loyer, Specialist, FINRA

During the program, the moderator, Charlie Moxley, asked a series of questions. Below are the questions and notes on each speaker’s response.

QUESTION	AAA	FINRA	CPR	JAMS
WHAT IS YOUR CURRENT CASELOAD?	<ul style="list-style-type: none"> • 250,000 total cases filed per year • Of which 8,000 are commercial (1,000 Commercial are NY cases and 1,589 Large, Complex Cases) • LCC are cases \$500,000 and up • Labor – 8,000 • ICDR – 1,000 • Employment – 3,500 • 80% arbitration cases • 20% mediation cases 	<ul style="list-style-type: none"> • 20,000 total cases filed per year, a 7% increase from previous year • 2/3 customer claims • 1/3 intra-industry claims • 16.7 months turn around, which is a 7% reduction from previous year • Case filings for the past 5 years on FINRA.org 	<ul style="list-style-type: none"> • No numbers because cases are non-administrated • Increase in mediation cases this year • Mediation is 1/3 of caseload • Arbitration is 2/3 of caseload • No consumer or employment except for high end • Arbitrate commercial, construction, etc. • Arbitrations from beginning to end are roughly 9 mos. • Standard business arbitration is 4-6 mos. • Won the GAR Award for Innovation due to an increase in users using their optional process 	<ul style="list-style-type: none"> • Average of 13,000 cases per year • 70% mediation • 30% arbitration • Cases include commercial, employment, insurance, multi-party complex matters, IP • Growth in all areas, including public interest work • Now have judge on panel that was instrumental in the stop and frisk laws

QUESTION	AAA	FINRA	CPR	JAMS
WHO ARE YOUR NEUTRALS?	<ul style="list-style-type: none"> • At one time there were over 56,000 neutrals, early 90s, now 6,700 neutrals in all areas with attorneys and non-attorneys • 1,500 of that number are mediators 	<ul style="list-style-type: none"> • 7,100, with half made up of attorneys • There are two categories of arbitrators: <ul style="list-style-type: none"> - Non-Public—have been formally employed by financial company 	<ul style="list-style-type: none"> • 600 arbitrators and mediators • Exclusively all lawyers and a panel of CPAs • 20 specialty panels (IP, Banking, etc.) 	<ul style="list-style-type: none"> • One panel of 350 neutrals that can handle a lot of different case types • Want people with diverse backgrounds who can do a variety of case types


QUESTION	AAA	FINRA	CPR	JAMS
WHO ARE YOUR NEUTRALS? (continued)	<ul style="list-style-type: none"> • 280 former judges • All neutrals carefully vetted by local VPs at regional offices • Need minimum 10 years of applicable experience (most have 20-30 years), pay an annual fee, and are independent of the AAA • Always receiving applications so don't necessarily recruit except for diverse candidates 	<ul style="list-style-type: none"> - Public—no financial experience • 170 mediators and parties already know who they want to select • Want to diversify more minorities and women arbitrators, recruiting now • Arbitrators require 5 years of professional experience, 2 years of higher education, and list past employment and affiliations 	<ul style="list-style-type: none"> • 2 international panels (global and cross-border) • 26% from diverse backgrounds • Requirements include a commercial background and ADR experience • Specialty panel requirement, extra vetting by a variety of people • Will seek out additional panelist where gaps exist 	<ul style="list-style-type: none"> • Panel members are full-time, exclusive to JAMS and include attorneys and judges • Recruit panelists on a "rolling admissions" basis • Some panelists are independent contractors • If panelists meet a revenue threshold they are asked to be owners

QUESTION	AAA	FINRA	CPR	JAMS
WHAT IS THE FEE SCHEDULE?	<ul style="list-style-type: none"> • Sliding scale, varies depending on size of the case and area of the law • Fee range from \$750 to \$65,000 • Arbitrators fees range from \$400-\$800/hr. in NY • In other parts of the country, fees range around \$350/hr. • Labor fees range from \$1,500-\$2,000 per day • Some arbitrators are scaling back on cancellation fees due to client complaints • Labor fees range from \$1,500-\$2,000 per day • Some arbitrators are scaling back on cancellation fees due to client complaints 	<ul style="list-style-type: none"> • Arbitrators are independent contractors • \$600 flat fee for full-day hearing • \$350 for honorary arbitrator for paper cases • Mediators set their own rates ranging from \$50 for new cases—\$600/hr. for more experienced mediators • Mediation fees range from \$100 - \$10,000 • Fee discounts in October • Fee waiver if need can be demonstrated • Mediation fees range from \$100 - \$10,000 • Fee discounts in October • Fee waiver if need can be demonstrated 	<ul style="list-style-type: none"> • If parties agree on mediator, no fee • If CPR has to select mediator, \$1,850 split by the parties • Flat fee of \$3,500 to split with parties • No fee for non-administrated cases • For administered cases, filing fee of \$1,000; selection fee between \$2,500-\$10,000 depending on cost of the case • For administered cases, filing fee of \$1,000; selection fee between \$2,500-\$10,000 depending on cost of the case 	<ul style="list-style-type: none"> • Only have three fees • \$600 filing fee for mediation • \$1,200 filing fee for arbitration • 12% administrative fee based on total fee for arbitrator compensation • Arbitrator fee is an hourly rate set by arbitrator

QUESTION	AAA	FINRA	CPR	JAMS
HOW DO YOU SELECT AN ARBITRATOR?	<ul style="list-style-type: none"> • Strike and rank option used the most by clients • Parties can select using Arbitrator Search Platform, an online platform with the all AAA arbitrators • Pursuant to rules, after exhausting the first list, an administrative appointment can occur • AAA reluctant to do an administrative appointment because it is the parties process and selecting the arbitrator(s) is an important part of the process for the parties 	<ul style="list-style-type: none"> • Get one list with the arbitrator information • 15 names of public arbitrator • 10 names of non-public arbitrators selection based on an algorithm • Mediators are known or a staff person will provide a list 	<ul style="list-style-type: none"> • Will hold a conference call between the parties to learn preferences, review candidates and eliminate conflicts of interest • Parties can select or get help to find an arbitrator • Minimum number on lists is defined by the Rules, but usually provide more 	<ul style="list-style-type: none"> • Process belongs to the parties • Can use strike and rank or case management staff can assist and find the arbitrators

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What Might the Social Media Committee “Post” in 2017?

By Ronald J. Hedges

Co-chaired by Ignatius Grande and Ron Hedges, the Social Media Committee has planned several undertakings for 2017.

First, on March 30th, the Commercial and Litigation Section will again co-sponsor “Legal Ethics in the Digital Age: Practical Strategies for Using Technology Ethically in Your Practice.” This CLE program will be offered both live in New York City and online and will build on the highly successful program of the same name presented last fall and will feature updated content as well as new faculty to bring fresh perspectives to attendees. Several members of the Social Media Committee will be faculty



members, and the Committee co-chair, Ron Hedges, will also co-chair the March 30th program.

Second, the Committee will soon begin work on the third edition of the NYSBA Social Media Ethics Guidelines. First issued in 2014 and updated in 2015, the Guidelines offer a comprehensive perspective on how attorneys should and should not use social media across all areas of practice. The third edition will expand on that perspective through consideration of new topics, as appropriate, and updates of case law and ethics opinions across the nation. Look for publication in May or June.

Creditors’ Rights and Bankruptcy Litigation Committee Presents “In-House Insights in Bankruptcy Litigation”

By Sheryl Giugliano

On January 19, 2017, the Creditors’ Rights and Bankruptcy Litigation Committee of the Commercial and Federal Litigation Section of the New York State Bar Association presented a unique, informal breakfast panel discussion, in a roundtable format, titled “In-House Insights in Bankruptcy Litigation,” featuring panelists Ben Katz, Senior Vice President and Director of Asset Resolution at Sterling National Bank, and Richard Papper, Managing Director and Managing Counsel at Bank of New York Mellon. The discussion was moderated by Sheryl Giugliano of Diamond McCarthy and Charles H. Jeanfreau of Weinstein & Riley, PS, and hosted at Hodgson Russ LLP.

The panelists were kind enough to participate in a lively discussion concerning their experiences, working with outside counsel in bankruptcy litigation and restructuring matters, and highlighted the importance of open communication with their retained professionals. Although their areas of practice may differ slightly—Mr. Katz at Sterling generally works with middle market restructuring and bankruptcy matters, and Mr. Papper at Bank of New York Mellon generally works with larger indenture trustee matters—Mr. Katz and Mr. Papper agreed that the key to a successful relationship with outside counsel is communication.

Those in attendance were able to ask direct questions and receive candid answers in connection with business development efforts, legal costs, and improving legal services for clients. Specifically, the attendees received confirmation that reaching the illustrious “bank roster” can be difficult, but learned that some in-house lawyers will look “off-list” when the matter is unique or extraordinary. In addition, attendees learned that in-house lawyers may be looking for alternative fee structures, or at least reduced hourly rates, in certain circumstances. Last, the panelists explained that “value added” from outside counsel may come from helpful advice rather than serving as a messenger between parties.

In sum, it was a productive and informative discussion. The panelists enjoyed responding to questions about the positive experiences they have with outside counsel, and how those relationships can be improved upon. The attendees took advantage of a unique opportunity to ask direct questions and receive candid answers concerning business development, adding value, and improving client relationships. After the panel discussion the panel participants as well as the attendees had an opportunity to network and confer with each other that all found most rewarding.

Electronic Discovery Committee Update

By Steven C. Bennett

The mission of the eDiscovery Committee of the Commercial and Federal Litigation Section is to contribute proactively to the rapidly advancing development of eDiscovery law and practice by raising awareness among members of the Bench and Bar, through publications and educational programs, by considering, analyzing and reporting on major rule-making initiatives in the field, and by providing a resource to help lawyers and judges obtain timely and comprehensive information about eDiscovery. In that regard, in the coming year, Committee plans include the following.

Update to eDiscovery Best Practices Guidelines: In 2011, the Committee issued a set of Guidelines on Best Practices in eDiscovery in New York State and Federal Courts. In 2017, the Committee will issue an updated and revised version of the guidelines, which will address (among other things) recent amendments to the Federal Rules of Civil Procedure that affect the eDiscovery process.

Education programs: The Committee will be co-sponsoring a full-day CLE program at Fordham Law

School that will focus on “Recommendations for Improving Dispute Resolution in the Courts and in Arbitration,” which will address matters including improving the efficiency of the eDiscovery process. The Committee is also co-sponsoring a half-day CLE program on “Ethics in the Digital Age,” addressing, among other things, ethical issues implicated in eDiscovery. The Committee also hopes to offer a CLE webcast for small firms on methods of efficient management of the eDiscovery process and a program introducing the Updated eDiscovery Best Practices Guidelines.

Guidance materials: In addition to updating the Best Practices Guidelines, the Committee will consider the development and distribution of other materials that may be of use to the Bar in the area of eDiscovery. The Committee’s website and blog are intended to address issues of general importance, and updates on developments, in this area.

Amendments to the Statewide Commercial Division Rules: A Renaissance in Commercial Litigation Practice

By Rebecca C. Smithwick

On January 11, 2017, under the auspices of the Commercial and Federal Litigation Section, former Section Chair and Member of the Commercial Division Advisory Council, Jonathan D. Lupkin, and his colleague, Rebecca C. Smithwick, the author of five articles on the Commercial Division’s recent overhaul, presented a one-hour webcast. The program, titled “Amendments to the Statewide Commercial Division Rules: A Renaissance in

Commercial Litigation Practice,” provided a high level, yet comprehensive, overview of the recent amendments to the Commercial Division Rules, covering topics such as enhanced expert disclosure, presumptive limitations on depositions and interrogatories, the Division’s embrace of categorical privilege logs and the introduction of guidelines for seeking ESI from non-parties.

The Section’s District Leaders

County (District)	District Leader	Firm
Albany (3rd)	James T. Potter	Hinman Straub P.C.
Erie (8th)	Heath J. Szymczak	Bond Schoeneck & King PLLC
Kings (2nd)	Gregory LaSpina	Borchert & LaSpina, P.C.
Nassau/Suffolk (10th)	Laurel R. Kretzing	Jaspan Schlesinger, LLP
Onondaga (5th)	Jonathan B. Fellows	Bond Schoeneck & King PLLC
Monroe (7th)	Jeffrey J. Harradine	Ward Greenberg Heller & Reidy LLP
New York (1st)	Joseph Drayton	Cooley LLP
Queens (11th)	John A. Mitchell	Mitchell & Incantalupo
Westchester (9th)	Courtney Rockett Patrick Rohan	Boies, Schiller & Flexner LLP

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

By Rebecca C. Smithwick

In the Summer/Fall 2014, Winter 2014, Spring 2015, and Spring 2016 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. Increasing the jurisdictional threshold in New York County from \$150,000 to \$500,000;
2. Amending §§ 202.70(b) and (c), which address eligibility criteria for Commercial Division treatment;
3. Amending §§ 202.70(d) and (e), which address the assignment and transfer of cases into and out of the Commercial Division;
4. Amending the Preamble to the Commercial Division Rules (the "Rules") to include reference to the imposition of sanctions for dilatory conduct;
5. Amending the Preamble to the Rules to confirm that principles of proportionality apply in conducting discovery in the Division;
6. Adopting a new (optional) Preliminary Conference Order Form;
7. Adopting a new (optional) Compliance Conference Order Form;
8. Adopting a new (optional) Status Conference Order Form;
9. Enacting Rule 34, which mandates staggered court appearances;
10. Amending Rule 6, which addresses the use of bookmarks in e-filed documents;
11. Enacting Rule 9, which permits litigants to consent to streamlined procedures for expedited adjudication;
12. Amending Rule 3, which provides for summary jury trials;
13. Enacting Rule 14, which requires the submission of three-page letters regarding discovery disputes (in the absence of Part Rules to the contrary);
14. Amending Rule 8(a), which addresses settlement-related disclosures;
15. Enacting Rule 11-e, which requires parties to provide increased specificity when responding and objecting to document requests;

16. Enacting Rule 11-b, which creates a preference for the use of categorical privilege logs;
17. Enacting Rule 11-a, which sets the presumptive limit on interrogatories at 25;
18. Enacting Rule 11-d, which sets presumptive limits on both the number (10) and duration (7 hours) of depositions;
19. Enacting Rule 11-f, which addresses entity depositions;
20. Amending Rule 13, which provides for robust expert disclosure; and
21. Enacting Rule 11-c, which provides guidance regarding discovery of ESI from nonparties.

Since my last article went to print, five additional Rules have been promulgated (the first three became effective on July 1, 2016, and the fourth became effective on October 17, 2016, and the fifth will become effective on April 1, 2017):

1. Rule 11-g and Appendix B, regarding the standard form confidentiality order;
2. Rule 14-a, relating to procedures governing disclosure conferences conducted by non-judicial personnel;
3. Rule 3-b, providing for a settlement conference before a justice other than the justice assigned to the case;
4. Rule 32-a, relating to direct testimony by affidavit of a party's own witness in a non-jury trial; and
5. § 202.70(d)(2) and Appendix C, addressing consent to the jurisdiction of the Commercial Division.

In addition, the court also adopted a further revised Preliminary Conference Order Form, which became effective August 1, 2016 (and which supersedes item 6 above).¹

Standard Form of Confidentiality Order

New Rule 11-g updates the standard form of confidentiality order to be used in the Division (at the election of the justice presiding over the case). The revised form is attached as Appendix B to the Rules. This is the first update to the standard form since the New York City Bar Association's Committee on State Courts of Superior Jurisdiction released the original version in February 2007. According to the Rule's drafters, the original standard form—which was made presumptively mandatory by

many of the Commercial Division Justices throughout the state and by all but one of the Commercial Division Justices in New York County—“need[ed] to be updated to reflect lessons learned over time and key changes in Commercial Division practice.”² Here is a summary of the key components of the overhaul: *first*, several changes were made to clarify that both parties and non-parties may avail themselves of the protections afforded by the stipulation; *second*, language was added to make it clear that, regardless of which party moves to challenge a confidentiality designation, the burden of establishing entitlement to confidential treatment rests squarely with the party seeking it; *third*, the universe of individuals entitled to see confidential information has been clarified; and *fourth*, the form has been amended to bring it in line with various updated rules (e.g., to conform it to new Commercial Division Rule 13 regarding expert disclosure, and to recognize the replacement of the New York Code of Professional Responsibility with the New York Rules of Professional Conduct).

“New Rule 14-a provides for the memorialization (and subsequent endorsement by the presiding justice) of rulings issued at discovery conferences conducted before non-judicial personnel.”

By far the most extensive changes, however, relate to the filing of confidential documents under seal. The critical changes here are two-fold.

First, the original standard form provided no mechanism for filing confidential documents in e-filed cases; the new standard form addresses the issue at length, providing explicitly a procedure to be followed in such cases. In broad strokes, the procedure for e-filed cases is as follows:

- A party who seeks to file with the court a document containing information which has previously been designated as confidential, must *e-file the document in redacted form*, while simultaneously providing the other parties (as well as a non-party whose confidential information is referenced in the filing) with an un-redacted set of papers for review;
- If the party who originally made the confidentiality designation seeks to have the information maintained under seal, it must make a *motion to seal within 7 days*;
- If *no motion to seal is made*, the party who filed the redacted document must take steps to *replace it with a corresponding un-redacted version*;
- If a *motion to seal is made*, the *redacted version* of the document stays on the ECF system *until the sealing motion is decided*;

- If the motion to seal is *denied*, the party who filed the redacted document must take steps to *replace it with a corresponding un-redacted version*; and
- If the motion to seal is *granted*, the party who filed the redacted document must ensure that it is filed in accordance with the *procedures that govern the filing of sealed documents on the NSYCEF system*.

According to the Rule’s drafters, “[t]h[is] proposed procedure is intended to honor both the letter and spirit of Rule 216.1 as well as reflect the realities and mechanics of the electronic filing system.”³

The *second* critical change with respect to sealing is that the revised standard form removes entirely the procedure contemplated in the original standard form whereby, in connection with hard copy filings, parties could sidestep a formal motion to seal by simply providing a set of motion papers to chambers without filing them at all in the public record (in which case, after the motion on the merits, chambers either returned or destroyed the papers provided to it). The elimination of this procedure not only ensures that the issuance of a sealing order follows more closely the strictures of Rule 216.1 (which requires a court finding of “good cause”), but it also ensures that the filing party does not find itself in the unenviable position of having no record from which to appeal.⁴

Rulings at Disclosure Conferences

New Rule 14-a provides for the memorialization (and subsequent endorsement by the presiding justice) of rulings issued at discovery conferences conducted before non-judicial personnel. The procedure contemplated by new Rule 14-a varies, depending on whether the conference is conducted in-person or by telephone. More particularly:

In the case of *in-court conferences*, prior to the conclusion of such conferences and upon request of any party, the parties may either (a) prepare a writing incorporating the resolutions reached at the conference and submit it to the court to be so-ordered, or (b) insist that all resolutions be dictated into the record, with either the transcript to be so-ordered or the resolutions otherwise incorporated into some other form of written order by the court.

In the case of *telephone conferences*, within one business day of the conference and with permission of the court, the parties may submit a stipulated proposed order memorializing the resolution of the discovery dispute. (In the event the parties are unable to agree upon an appropriate form of order, the Rule provides that the parties advise the court so that it can direct an alternative course of action.)

The Rule is designed to address the difficulties created by oral “rulings,” which cannot be confirmed by a review of the record. The thought is that reducing or eliminating the number of unwritten “rulings” will minimize unneces-

sary motion practice stemming from after-the-fact disputes regarding the nature and scope of the original oral ruling, the terms of which have disappeared into the ether.⁵

Settlement Conferences Before a Justice Other Than the Justice Assigned to the Case

New Rule 3-b provides a formal mechanism for parties to request that their case proceed with a settlement conference before a justice other than the justice assigned to the case. The key benefit of discussing settlement before the *non*-presiding justice is self-evident; the parties can avoid disclosing weaknesses in their case to the justice who will ultimately decide it.⁶ There are three key features of the Rule: the request (1) must be made jointly by counsel, (2) may be made at any time in the litigation, and (3) will be granted in the discretion of the justice assigned to the case upon finding that such a separate settlement conference would be “beneficial to the parties and the court and would further the interests of justice.” Like so many of the recent Rule changes, this Rule was also inspired by federal practices, where parties may obtain a settlement conference before a magistrate, rather than the presiding district court judge.⁷

Direct Testimony by Affidavit

New Rule 32-a provides that the court may require that direct testimony of a party’s own witness in a non-jury trial or evidentiary hearing be submitted in affidavit form. (There is, sensibly, an explicit exception for witnesses not under the control of the party offering the testimony, as in such cases the party would likely be unable to procure an affidavit from such a witness.) As noted by the Rule’s drafters, Justice Charles E. Ramos was an early adopter of the practice.⁸

“The new form is a wonderful resource for both the Bench and the Bar, as it incorporates all of the new discovery Rules impacting practice in the Division.”

The Rule is yet another nod to federal practice where, as of March 2016 (when the proposed new Rule was first put to the Advisory Council), 21 out of 46 sitting judges in the SDNY required direct testimony by affidavit in non-jury trials, and one allowed it with permission.⁹ The practice is also the norm in a number of common-law jurisdictions outside the United States, and in international arbitrations.¹⁰ The key to the Rule as propounded is that it does not *require* the adoption of the practice—the Rule continues to leave the justice presiding with discretion as to whether to require direct testimony by affidavit or live testimony. Although not mandatory, the Rule serves the purpose of “heighten[ing] awareness, among both justices and practitioners, that the choice exists, so that justices who might not otherwise have

considered such an option may be encouraged to experiment with it, and litigants who believe that direct testimony by affidavit would help to streamline a particular trial or evidentiary hearing may be encouraged to suggest it to the presiding justice.”¹¹ The second—and equally important—purpose of the Rule is to “promote awareness in the business community that the Commercial Division embraces procedural innovation designed to promote the efficient and cost-effective resolution of commercial disputes.”¹²

Consent to the Jurisdiction of the Commercial Division

Section 202.70(d) of the Rules, relating to “Assignment to the Commercial Division,” has been amended to reference a new Appendix C, which “provides contracting parties with a convenient and streamlined sample forum selection clause in selecting, in a pre-dispute context, the New York Commercial Division as the choice of forum.”¹³ According to the Rule’s drafters, the sample clause is styled as a mandatory (as opposed to a permissive) forum selection clause, so as to offer a greater degree of certainty.¹⁴

Under the new section, parties must still meet the jurisdictional requirements for assignment to the Commercial Division (and indeed may wish to consider including an alternative venue in the event the jurisdictional requirements have not been met).¹⁵

Further Revised Model Preliminary Conference Order Form

Finally, the Administrative Board has adopted a (further) revised Model Preliminary Conference Order Form. The first major overhaul of that form went into effect in June 2014 (which I reported on in the Summer/Fall 2014 edition of this newsletter). Given the onslaught of new Rules since that time, the 2014 version quickly became dated, necessitating its most recent incarnation. The new form is a wonderful resource for both the Bench and the Bar, as it incorporates all of the new discovery Rules impacting practice in the Division.¹⁶

On the Horizon

At the time this article was submitted for publication, five further proposed new rules had closed for public comment. The proposed new rules (1) require advocates seeking TROs to provide adversaries with advance copies of papers supporting the application, (2) address the court’s power to require counsel to consult in good faith on expert testimony in advance of trial, (3) address the power of the court to require estimates of, and to limit, the total number of hours of trial, (4) address the sealing of court records, and (5) permit the court to require hyper-linking in e-filed documents.

As always, we await with interest the outcome with respect to these proposed rules.

Endnotes

1. Copies of the new rules and revised 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>.
2. Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council dated September 10, 2015 ("Revision to Standard Form Confidentiality Order for Use in Commercial Division of the Supreme Court of the State of New York"), at p. 2, a copy of which is available at http://nycourts.gov/rules/comments/PDF/Public%20Comment%20Confidentiality%20Order%20_1%2019%2016%20final.pdf.
3. *Id.* at p. 4.
4. *See generally, id.* at pp. 4-5.
5. Memorandum from the Commercial Division Advisory Council to the New York State Office of Court Administration dated December 8, 2015 ("Proposed Rule Regarding Memorialization and Effectuation of Rulings Issued During Conferences"), at p. 2, a copy of which is available at <http://nycourts.gov/rules/comments/PDF/DisclosureConferences.pdf>.
6. *See generally* Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council dated December 1, 2015 ("Proposed Rule Regarding Settlement Conferences Before A Justice Other Than The Justice Assigned to Hear The Case"), at p. 2, a copy of which is available at <http://nycourts.gov/rules/comments/PDF/Public%20Comment%20Settlement%20Conferences.pdf>.
7. *Id.*
8. Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council dated March 18, 2016 ("Proposed Rule Regarding Direct Testimony in Non-Jury Trials by Affidavit"), at pp. 1 and 4, a copy of which is available at <http://nycourts.gov/rules/comments/PDF/ProposedCommercialDivisionRuleAffidavitSubmission.pdf>.
9. *Id.* at 3.
10. *Id.* at 2.
11. *Id.* at 6.
12. *Id.* at pp. 1-2.
13. Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council dated September 9, 2016 ("Proposed Amendment to Assignment to Commercial Division Rule (Section 202.70(d) to Include Standard Forum Selection Clause") at p. 1, a copy of which is available at <http://www.nycourts.gov/RULES/comments/PDF/CommercialDivision-ForumSelection.pdf>.
14. *Id.* at 2.
15. *Id.*
16. *See generally* Memorandum from the Hon. Eileen Bransten and Roberta Kaplan, Co-Chairs of the Subcommittee on Best Practices for Judicial Case Management to the Commercial Division Advisory Council dated September 4, 2015 ("New Revised Model Preliminary Conference Order Form"), a copy of which is available at <http://nycourts.gov/rules/comments/PDF/PC-Form-CoverMemo.pdf>.

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Securities Litigation and Arbitration Committee Update

By Jonathan Hochman

The most recent meeting of NYSBA's Securities Litigation and Arbitration Committee was hosted by Morrison & Foerster on February 21st. The speaker at our meeting was Judge Denny Chin of the U.S. Court of Appeals for the Second Circuit. In his wide-ranging and highly informative remarks, Judge Chin gave members a "behind the scenes" look at life as a judge on the Second Circuit, explaining how opinions are assigned to a member of a panel by the presiding judge and why the circuit's judges rarely issue dissenting opinions or vote to rehear cases en banc. Judge Chin also discussed the differences between his current role and his experiences as a district judge in the Southern District of New York, where he spent over fifteen years, and admitted to missing the

frequent interaction with attorneys, witnesses, and jurors that goes with being a district judge. When asked for advice on effective advocacy in the circuit courts, Judge Chin urged committee members to approach oral argument as a "learned conversation" with the panel and not to ignore weak points in their clients' positions.

The committee also discussed its upcoming CLE seminar, entitled, "Securities Arbitration and Mediation 2017: The Courage to Simplify," which will take place on April 6th in New York City. This event is traditionally well attended and well received, so interested section members are encouraged to sign up. The brochure for the seminar is available at: www.nysba.org/SAM2017.

Section Members Making a Difference, One Law Student at a Time

By Adeline M. Antoniou, 1L CUNY School of Law

On November 17, 2016, CUNY School of Law hosted a NYSBA event, "Pathway to the Profession," which affords law students an informal opportunity to meet practicing attorneys face-to-face. I am a first-year law student and the first member of my family to enter this field. Naturally, like many others in my class, I was quick to sign up.

At this event, over some appetizers and refreshments, we were able to freely engage with lawyers in a comfortable environment and gain insights into what practicing attorneys actually do on a day-to-day basis. I also wanted to explore and really obtain a feel for what area of the profession I was attracted to the most. Like most law students, I am intrigued by the law but cannot say I know much about being a lawyer or what the different careers paths entail.

Throughout the evening, I spoke with lawyers who practiced immigration law, intellectual property, environmental, real property, criminal, family law, and Commercial and Federal Litigation. I was able to question and listen to attorneys who handle real-life matters on an everyday basis. For the first time I felt my journey to becoming a lawyer was real, and I could not have been more inspired.

The volunteer attorneys from various NYSBA Sections were eager to share their experiences and insights. Mark Berman, Chairman of the Commercial and Federal Litigation Section, informed us about the importance of a clerkship and how publishing a piece in the *NYLitigator Newsletter* could benefit us tremendously in the future.



Adeline M. Antoniou

I also had a chance to speak with Barry A. Wadler, also from the Commercial and Federal Litigation Section, who is both a litigator and a transactional lawyer. It was clear that he had a passion for mentoring and was eager to share. He spent a considerable amount of time with me and several others, sharing stories from many of his cases and general career advice. He told us that, even in hard-fought litigations, adversaries act professionally and treat each other with respect and that yesterday's adversary can be today's colleague. Our ears perked and our questions kept being answered. It truly was encouraging!

Despite the experience our professors have, there is only so much that can be taught in a classroom. The benefit that we students received from these volunteer lawyers from NYSBA is inestimable. As a first-year law student, it is easy to question whether all this stress will be worth it someday. However, being exposed to this type of event only heightened my interest and increased my hunger for more work in this field.

As Mr. Wadler advised us that evening, "no two cases are alike" and the key to being an effective lawyer is "knowing what questions to ask." This type of thinking is not taught in a classroom. Only through lawyering can one learn such a concept. Thanks to the NYSBA event, "Pathway to the Profession," a door has opened to a new way of thinking and an opportunity to ask questions surrounding this career path. My colleagues and I are looking forward to upcoming events NYSBA has to offer.

Meet the Sections at Touro Law School

By Laurel R. Kretzing

The Commercial and Federal Litigation Section participated in the New York State Bar Association's Pathway to the Profession program at Touro Law School on November 1, 2016. The program, entitled Meet the Sections, offered Touro Law students an opportunity to learn about what each of the sections of the State Bar can offer them now and after they graduate.

The informal lunchtime program allowed students to go from table to table speaking to local representatives of the various Sections. Tenth District Leader Laurel Kretzing manned our Section's table and explained the benefits of the Section to some enthusiastic future litigators and handed out copies of the latest edition of the *NYLitigator*.

Effective Legal Writing: A Guide for Students and Practitioners

By Professor Douglas Abrams, West Academic Publishing
 Reviewed by James D. Yellen, Adjunct Professor of Law,
 Fordham Law School



Effective Legal Writing by Professor Douglas Abrams is the best book on legal writing I have read in many years—and I have read dozens. Abrams has succeeded in providing a roadmap of effective legal writing for associates and law students, as well as a refresher for the seasoned lawyer. The book, like Strunk and White’s *Elements of Style*, should be on every lawyer’s bookshelf.

Abrams presents chapters on the four fundamentals of good writing: Conciseness, Precision, Simplicity, and Clarity. These four prongs of good legal writing are reviewed in every textbook and article on writing in the recent past. Brilliantly, Abrams quotes George Orwell in Chapter 6, “Breaking the Rules,” who recognized that “the worst thing one can do with words is to surrender to them.” Abrams continues, “For years, I have taught students that legal writers should be the masters of language, and not its prisoners.” Well said. Strunk and White also opined, “the best writers sometimes disregard the rules of rhetoric.” The book is chock full of interesting and outstanding quotes on how to write well—from the lesser known to the famous. The quotes and references alone are worth the price of admission.

The book includes sections useful for law students first learning the craft, as well as codgers such as myself who have long been trying to improve. We are all “apprentices,” Abrams intones. The major book sections are: Foundations; Researching; Writing (the four principles); Editing; Dismantling Barriers; and Versatility. There is no such thing as good writing—only good rewriting. And there is no such thing as good legal writing—only good legal rewriting. If you can wrap your head around these two little truisms, you will become an accomplished legal writer. I learned these gems from Professor Abrams 30 years ago, so I know he will agree.

The first fifty pages of the book deserve a detailed review. Abrams begins with legal writing in “plain English” and discusses the importance of writing for a non-lawyer. Both complexities and simplicities are rewarded; however, there is an obvious tension between the complexities of the law and the simplicity of reaching out for statutory understanding. “Out of intense complexities,” Sir Winston Churchill observed, “intense simplicities emerge.” Abrams summarizes the tension by eloquently noting, “Law may not always prove as complex as it first appears, and disciplined drafters adept at plain English can often dismantle barriers that legalese would impose.”

Abrams describes how the virtues of plain English remain as central today as they were in the 16th century, when British King Edward VI urged lawmakers to make statutes “more plain and short,” so that the populace might better understand them. Extracurricular writing about law or public policy offers us one way to fulfill a responsibility cited by the ABA Rules of Professional Conduct to perform as “public citizens” who “further the public’s understanding of and confidence in the rule of law and the justice system.” As former California Chief Justice Roger J. Traynor said, writing is “thinking at its hardest.”

The last two chapters of the book are on the responsibility and the rewards of extracurricular writing, including legal blogs, social media, and both national and regional papers. For years, I have promised my law students extra credit for publishing a letter to the editor in *The New York Times*—it has not happened yet. Lawyers writing on editorial pages, blogs, or other forums publically available give life to the title of David Brinkley’s memoir, *Everyone Is Entitled to My Opinion*. In the end, a lawyer’s extracurricular writing demands “graceful expression” because no one else has to read it. Thus, lawyers should be careful to avoid typos, colloquialisms, and bad grammar that detract from the true meaning and flow of the words.

Professor Abrams has spent the bulk of his career writing and teaching writing. This book is a composite of more than forty years of experience, wisdom, and research. It gives the reader great pleasure. It gives me even more.

James D. Yellen is the Principal of Yellen Arbitration and Mediation Services in New York, which he founded in 2006 to provide mediation expertise for the securities industry. Mr. Yellen is Co-chair of the New York State Bar Association’s Securities Law and Arbitration Committee. He is an Adjunct Professor at Fordham University School of Law, where he has taught Legal Writing and Research to first-year law students for the past 27 years. He is an active lecturer and panel participant in the field of securities arbitration and mediation. Mr. Yellen thanks Lauren Paylor, a 3L at Fordham Law School, for her assistance in writing and editing this review.

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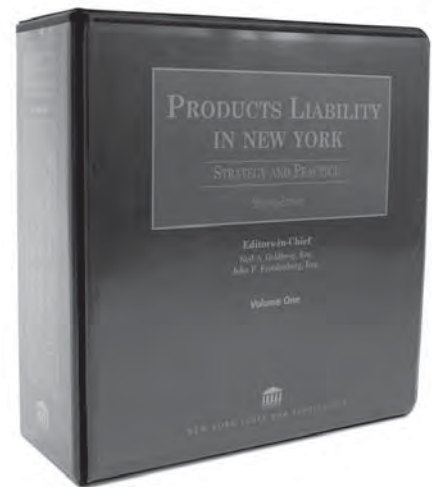
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CPLR Amendments: 2016 Legislative Session

(2016 N.Y. Laws ch. 1-519 [end])

CPLR §	Chapter (Part) (Subpart, §)	Change	Eff. Date
214-f	128	Adds a statute of limitations for actions for personal injury caused by substances in a superfund site	7/21/16
3408	73(Q, 2-3)	Expands requirements for mandatory settlement conferences in residential foreclosure actions	12/20/16 ¹
4503(b)	262	Adds revocable trusts	8/19/16
5521(b)	487	Adds FOIL appeals to list of preferences	5/27/17

Notes: The expiration of the revival of Agent Orange actions was extended from June 16, 2016, to June 16, 2018. 2016 N.Y. Laws ch. 75. See CPLR 214-b.

¹ The amendments to CPLR 3408 set forth in section 2 of Part Q of 2016 N.Y. Laws ch. 73 expire on the date set forth in 2009 N.Y. Laws ch. 507, as amended, at which time the amendments to CPLR 3408(a) set forth in section 3 of Part Q of chapter 73 shall take effect. 2016 N.Y. Laws ch. 73, Part Q, § 11(a).

NEW YORK STATE BAR ASSOCIATION

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If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor-in-Chief:

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*Articles should be submitted in electronic document format
(pdfs are NOT acceptable), along with biographical information.*

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, 10-39 [end])

A copy of these rules changes is available on the Section's website at http://www.nysba.org/Sections/Commercial_Federal_Litigation/Commercial_and_Federal_Litigation_Section.html under the New Rules tab.

22 NYCRR §	Court	Subject (Change)	Eff. Date
202.5(e)(1)(v)	Sup.	Adds certain documents, testimony, and evidence in matrimonial actions to categories of confidential personal information	3/1/16
202.12-a	Sup.	Corrects reference to NYS OAG Homeowner Protection Program; changes and adds requirements for Settlement Conferences	12/20/16
202.16(m)	Sup.	Adds and then amends a provision on omission or redaction of confidential personal information from matrimonial decisions	3/1/16 & 6/22/16
202.70(g), Rule 3	Sup.	Adds a provision on settlement conferences before a justice other than a justice assigned to the case	7/1/16
202.70(g), Rule 11-g	Sup.	Adds a proposed form of confidentiality order	7/1/16
202.70(g), Rule 14-a	Sup.	Adds a new rule on procedures at disclosure conferences conducted by non-judicial personnel	7/1/16
202.70(g), Rule 32-a	Sup.	Adds a new rule on direct testimony by affidavit	10/17/16
500.1(j), (l)	Ct. App.	Changes "computer-generated" papers to "papers prepared by a word-processing system" and changes "Times Roman" to "Times New Roman"	6/22/16
500.11(m)	Ct. App.	Adds word and page limits for submissions in alternative procedure for selected appeals	6/22/16
500.13(c)	Ct. App.	Adds word and page limits for briefs in normal course appeals	6/22/16
500.23	Ct. App.	Requires that amicus submissions meet word and page limits of 500.11(m) and 500.13(c)	6/22/16
800.23(c)	3rd Dep't	Increases fees for admission certificates	2/1/16
800.24-a(a)	3rd Dep't	Adds as an exception appeals entered in proceedings pursuant to Mental Hygiene Law art. 9, 10, and 15	8/8/16

Notes: (1) On May 23, 2016, effective July 1, 2016, the Chief Administrative Judge of the Courts rescinded the Appendix of Official Forms for the CPLR. See CPLR 107. AO/119/16.

(2) On June 24, 2016, effective August 1, 2016, the Chief Administrative Judge of the Courts promulgated a revised New Model Preliminary Conference Order form for optional use in the Commercial Division. AO/132/16.

Notes of the Section's Executive Committee Meeting

September 28, 2016

Guest speaker Hon. Janet DiFiore, Chief Judge of the New York State Court of Appeals, discussed the need for the judiciary to partner with other organizations to keep New York as the premiere forum to resolve business disputes and described her Excellence Initiative, which requires input and participation from external partners, such as the Section.

The Executive Committee discussed the Shira A. Scheindlin Award for Excellence in the Courtroom, the Evening at Thurgood Marshall Courthouse with the Second Circuit, the Annual Meeting, the Bench Bar Forums, the Membership Initiative, and the JAMS Partnership and "Practical Tips to Achieve Success in Mediating Employment Disputes."

October 26, 2016

Guest speaker Hon. Leslie Stein, Associate Judge of the New York State Court of Appeals, discussed the Court of Appeals' work and the procedural rules applicable to appeals and provided an overview of the Court's review power, as well as common errors in applications for leave to appeal. She also discussed a "normal day" at the Court, how decision writing responsibilities are assigned, the role of tradition on the Court, the new word limits applicable to briefs, and what oral argument at the Court is like.

Among other topics, the Executive Committee discussed the "Legal Ethics in the Digital Age" CLE event, the "Women on the Move" event, the Fordham International Arbitration and Mediation Conference, and the Section's Law School Initiative.

November 16, 2016

Guest speaker Hon. Sylvia G. Ash, Supreme Court of the State of New York, Kings County, Commercial Division, discussed her background and career path to the Commercial Division. She also discussed the monetary threshold for bringing claims to the Kings County Commercial Division and reviewed her individual filing rules and rules for motion practice, discovery, and conferences.

The Executive Committee discussed, among other topics, the 2017 Spring Meeting, the November House of Delegates Meeting and Section Delegates Caucus meeting, and the Report on Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys.

The Executive Committee discussed and voted to modify three Commercial Division Committee Reports for the next Executive Committee meeting: a Report on Trial Duration Estimates; a Report on Good Cause for Sealing; and a Report on Expert Evidence in Advance of Trial. The Executive Committee also discussed and voted to approve two Commercial Division Committee reports, the second



with revisions: a Report on Hyperlinking and a Report on Ex Parte TROs. Finally, the Executive Committee discussed and voted to approve a Civil Practice Law and Rules Committee Report on Pilot ADR Project.

December 6, 2016

The Executive Committee discussed and approved the Report of the Section's Diversity Committee Working Group in support of the Report of the NYSBA Committee on Continuing Legal Education's proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys. The Executive Committee also discussed and voted to table three reports of the Commercial Division Committee: a Revised Report on the Proposed Commercial Division Rule Defining the Protection of Commercially Sensitive Information to Be Good Cause for Sealing of Court Records; a Revised Report on Proposed Amendment to Rule 26 of the Rules of the Commercial Division Addressing the Limitation on Total Hours of Trial; and a Revised Report on Proposed Commercial Division Rule Addressing Consultation on Expert Witness Testimony in Advance of Trial.

December 15, 2016

Guest speaker, Hon. Brenda K. Sannes, United States District Court Judge for the Northern District of New York, discussed the caseload of the Northern District and her perspective and suggestions to attorneys for drafting dispositive motions and encouraged Section members to consider serving as pro bono counsel, for which a need exists in many of the prisoner cases in the District.

The Executive Committee discussed and approved the Second Revised Report on Proposed Amendment to Rule 26 of the Commercial Division Addressing the Limitation of Total Hours of Trial. The Executive Committee also discussed but did not approve any of the versions of three reports: the Report on Proposed Commercial Division Rule Addressing Consultation on Expert Testimony in Advance of Trial; the Report on Proposed Commercial Division Rule Addressing Consultation on Forum Selection Clauses; and the Report on Proposed Commercial Division Rule Defining Protection of Commercially Sensitive Information to Be Good Cause for Sealing of Court Records.

January 10, 2017

Guest speaker Karen Greve Milton, Circuit Executive, Second Circuit Court of Appeals, discussed the events celebrating the Second Circuit's 125th anniversary and the Circuit's Civic Education Initiative.

The Executive discussed and adopted the Section's Report on the Report and Recommendations of the NYSBA Committee on the New York State Constitution. The Executive Committee also discussed upcoming Section events and CLEs.

The Commercial and Federal Litigation Section Welcomes New Members

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Elyse Christine Pillitteri
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David A. Shargel
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Anthony J. Siano
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Joshua S. Stricoff
Laura Sulem
Steven I. Super
Jomo Gamal Thomas
Lewis P. Trippett
Elizabeth Usinger
Benjamin Daniel Van Horn
Konstantinos Volakos
Richard Keith Weingarten
Erik Weinick
Paul T. Weinstein
Charles Austin Whittier, III
Kimberly Wolf Price
Melissa Yang
James D. Yellen
Nicola Young
David Howard Yunghans
Evan Patrick Zatorre

Section Committees and Chairs

Arbitration and 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

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

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

Appellate Practice

Suzanne O. Galbato
Bond Schoeneck & King PLLC
One Lincoln Center
Syracuse, NY 13202
sgalbato@bsk.com

James M. McGuire
Holwell Shuster & Goldberg, LLP
750 Seventh Avenue, 26th Fl.
New York, NY 10019
jm McGuire@hsgllp.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

James M. Wicks, Esq.
Farrell Fritz, P.C.
1320 RXR Plaza
Uniondale, NY 11556-1320
jwicks@farrellfritz.com

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

Creditors' Rights and Bankruptcy Litigation

Michael Luskin
Luskin, Stern & Eisler LLP
Eleven Times Square
New York, NY 10036
luskin@lsellp.com

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

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

Diversity

Tracee E. Davis
Zeichner Ellman & Krause, LLP
1211 Avenue of the Americas, 40th Fl.
New York, NY 10036-8705
tdavis@zeklaw.com

Sylvia Omata Hinds-Radix
NYS Appellate Division, Second
Department
320 Jay Street
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

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

Maura R. Grossman, Esq.
Maura Grossman Law
503 East 78th Street, #1A
New York, NY 10075
maura@mauragrossman.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

**Employment and Labor Relations
(continued)**

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
Wollmuth Maher & Deutsch LLP
22 Marbourne Drive
Mamaroneck, NY 10543
JSafer@WMD-LAW.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

Stephen T. Roberts
Mendes & Mount, LLP
750 Seventh Avenue
New York, NY 10019-6829
stephen.roberts@mendes.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

Sophia M. Goring-Piard
Fragomen, Del Rey, Bernsen
& Lowey, LLP
7 Hanover Square
New York, NY 10004
sgoring-piard@fragomen.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
Walsh Pizzi O'Reilly Falanga LLP
One Newark Center
1085 Raymond Boulevard
Newark, NJ 07102
ppizzi@thewalshfirm.com

Legislative and Judicial Initiatives

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

Mentoring

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

Nominating

Melanie L. Cyganowski
Otterbourg, Steindler, Houston & Rosen
230 Park Avenue
New York, NY 10169-0075
Mcyanowski@otterbourg.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

James D. Yellen
Yellen Arbitration and Mediation Services
156 East 79th Street, Suite 1C
New York, NY 10021-0435
jamesyellen@yahoo.com

Social Media

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

Ronald J. Hedges
Dentons
1221 Avenue of the Americas
New York, NY 10020
ronald.hedges@dentons.com

State Court Counsel

Melissa A. Crane
Manhattan Criminal Court
100 Centre Street
New York, NY 10013
macrane@nycourts.gov

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

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

Former Chairs

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Upcoming Executive Committee Meetings

Tuesday, April 4, 2017, 6:00 p.m.

Location: Kramer Levin Naftalis & Frankel LLP
Guest Speaker: Robert L. Haig, Chair of the Commercial Division Advisory Council

Wednesday, May 10, 2017, 6:00 p.m.

Location: Kramer Levin Naftalis & Frankel LLP
Guest Speaker: Michael A. Cardozo, Partner, Proskauer, and former Corporation Counsel for the City of New York City

COMMERCIAL AND FEDERAL LITIGATION SECTION NEWSLETTER

Editor

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

Section Officers

Chair

Mark A. Berman
Ganfer & Shore LLP
360 Lexington Avenue, 14th Floor
New York, NY 10017-6502
mberman@ganfershore.com

Chair-Elect

Mitchell J. Katz
Menter, Rudin & Trivelpiece, P.C.
308 Maltbie Street
Suite 200
Syracuse, NY 13204-1498
mkatz@menterlaw.com

Vice-Chair

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

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Jamie Sinclair, Esq.
Ganfer & Shore, LLP
360 Lexington Avenue
14th Floor
New York, NY 10017-6502
jsinclair@ganfershore.com

Treasurer

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

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