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Commercial and Federal Litigation Section Newsletter

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Message from the Outgoing Chair

Jonathan D. Lupkin

My mind is just spinning. I cannot believe that my year at the helm of the Commercial and Federal Litigation Section has drawn to a close. And what a year it has been!

After giving much thought to this, my last "Chair's Message," I have decided against recapping all that we have accomplished over the last year. To be sure, from our Mentoring Initiative to our soon-to-be released compendium of "Best Practices for Electronic Discovery in the Federal and State Courts," we have been extremely busy. But to use this final column like an Egyptian obelisk, recording our successes for posterity, would be antithetical to what our Section stands for.

If I had to define the Commercial and Federal Litigation Section in a single word, that word would be "service." As expressed by that great poet, Bob Dylan:

> "You may be an ambassador to England
> or France
> You may like to gamble, you might like

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Message from the Incoming Chair

David H. Tennant

Taking over the helm of the Section may be a particularly appropriate image given our Spring Meeting in Newport and the hard fought (but not close) race between "The Federals" and "The Commercials" in 12-meter America's Cup yacht racing. If so, I have inherited a beautiful, sleek, ocean-going vessel, handed down from exceptionally gifted (back-to-back) "skippers," Captains Vince Syracuse and Jonathan Lupkin. OK; enough of that. The ship has sailed on all nautical analogies. Working closely with Jonathan this year has been exceptionally rewarding both personally and professionally. I am inspired by his vision for the profession, legal ability, humanity, and devotion to a remarkable family. Mazel Tov! Thank you, Jonathan, for an outstanding year of leadership.

Standing at the helm, for what will be the blink of another year, is both daunting and invigorating: there is so much to do! If you did not attend the Spring Meeting, you may not have heard the ideas of the real David Ten-

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Inside

Message from the Outgoing Chair

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to dance
You may be the heavyweight champion
of the world
You may be a socialite with a long string
of pearls

But you're gonna have to serve somebody, yes indeed
You're gonna have to serve somebody."[1]

What makes our Section so special is the willingness of its members, be they partners at premier law firms, in-house counsel at world renowned institutions, solo practitioners, or members of the state and federal judiciary, to give freely of their time and formidable talent to better the legal profession. It would be easy enough for our Section members to rest on their proverbial laurels. Instead, though, our members recognize the importance of and satisfaction derived from having "to serve."

Leading the Commercial and Federal Litigation Section has been the most rewarding undertaking of my professional career to date. I have enjoyed the rich camaraderie of like-minded colleagues and have derived untold satisfaction from witnessing a large number of important projects come to fruition.

I owe an enormous debt of gratitude to several individuals, without whom this year would not have been the success that it was. Thank you to our Section's Executive Committee, and in particular to my Officers, David Tennant, Tracee Davis, Paul Sarkozi, and Erica Fabrikant. You all worked tirelessly for this Section and provided me with immeasurable support and good counsel. Thank you to Lesley Friedman Rosenthal and Matt Maron, two visionary leaders who were instrumental in the launch of our Section's Mentoring Initiative. Thank you to all of our Section's former chairs for blazing the trail and leading the way for our Section to evolve into what it is today. Thank you to my partners at Flemming Zulack Williamson Zauderer LLP for supporting my efforts this past year and for permitting me to hold this second "full time" job. Finally, a special thank you to Michelle Lupkin, my beloved wife of twenty-one years, and to Shira, Arielle, Leora, and Ilana Lupkin, my four remarkable daughters; without your unwavering love, support, understanding, and patience, I could not have served effectively.

The time has now come to pass the baton to Incoming Chair David Tennant, and his slate of officers: Chair-Elect Tracee Davis, Vice-Chair Gregory Arenson, Treasurer Paul Sarkozi, and Secretary Nicole Mastropieri. David and his all-star team know what it means "to serve." I am confident that they will lead our Section with distinction, integrity, and class in the year to come. Team David—the Section is now in your capable hands.

Jonathan D. Lupkin

Endnote

1. Excerpt from lyrics to "Gotta Serve Somebody," by Bob Dylan.

Message from the Incoming Chair

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nant (not the actor who played Doctor Who) for 2011-2012. While we all know that various issues and challenges will be thrust upon our Section over the next 12 months—and we will react to them as best we can—I would like to outline my priorities for the next year, organized under the headings, "People," "Places," and Things."

People

Our Section leads the bar in creative and pragmatic diversity programs, having established the Smooth Moves program in 2007, established the Hon. George Bundy Smith Pioneer Award, and started funding minority fellowships for the Commercial Division in the same year—which happens to be the same year Lesley Friedman Rosenthal chaired the Section. (Just a coincidence?) I think our Section can and must do more. In doing so, we answer State Bar President Vincent Doyle's Section Diversity Challenge. I hope to see the Section develop mentoring opportunities for attorneys of color, building upon our Association-leading mentoring program established last year. Lesley Friedman Rosenthal is not only a former Section chair and initiator of the Smooth Moves program (which has been ably co-chaired by Hon. Barry Cozier, recent chair of the Section's Diversity Committee, Carla M. Miller, and Tracee Davis), she also just co-chaired the Section's inaugural mentoring program. Together with our Diversity Committee, chaired by the Hon. Sylvia O. Hinds-Radix and Carla M. Miller, the mentoring program leadership will work in the program's second year to further ensure that the Section attracts and serves the professional interests of all commercial litigation attorneys.

I also wish to see our Section address the "pipeline" issue—the fact that too few minority college students are attending law school. To address that issue, which I think is essential to increase the numbers of attorneys of color, I hope to expand a moot court program at Cornell Law School that targets minority college students. The William E. McKnight Moot Court competition is an oral exercise only, and uses the moot court problem studied by first year law students in the prior year. The Black Law Students

Message from the Incoming Chair

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Association chapter at Cornell organizes and runs the competition. BLSA reaches out to the minority pre-law society (and other undergraduate groups) at Cornell University to recruit undergraduate students of color to participate in the moot court program. The goal of the McKnight Moot Court competition is to encourage minority students to attend law school. The program is low cost and runs on volunteer effort by law school students, faculty, alums, and practicing lawyers at Nixon Peabody.[1] We think the McKnight Moot Court program can be replicated easily at each of the fifteen accredited law schools in New York State, pairing each law school with one or more undergraduate colleges.

Places

Upstate New York is a lovely place to raise a family; it also contains vibrant legal communities in which savvy commercial litigators ply their trade. As the first "upstate" chair in a decade (and only the third ever), I think our Section can do better in expanding its footprint "upstate," by making itself more relevant and visible. I have commissioned an "upstate" task force, chaired by former Section chair Sharon Porcellio, and rounded out by Linda J. Clark in Albany, Mitchell J. Katz in Syracuse, Heath Szymczak in Buffalo, and me in Rochester. The task force will try to answer why this Section does not have the same kind of following upstate as, say, the Torts, Insurance & Compensation Law (TICL) Section. The task force will propose concrete, specific steps to increase enrollment in the State Bar and CFLS. We intend to bring certain events upstate, including at least one Executive Committee meeting that will be video-conferenced from an upstate location to our New York City office. We also expect to bring a CLE program to one or more upstate locations in the next six to nine months. If you live and practice upstate, CFLS activities will be coming to a neighborhood near you.

Things

The Commercial Division is the crown jewel of this Section's work, and we must find ways to support the court amidst the current crisis in funding. As courts are being asked to do more with less, as are the corporate clients we represent, the need for more efficient dispute resolution grows. The mantra "faster, cheaper, smarter" can and should be translated into efficient problem solving, where commercial and business disputes are rapidly evaluated and resolved through a creative truncation in traditional procedures. What that might look like is the job of a working group that is forming even as I write. These future-minded lawyers and judges will survey corporate clients to see what alternatives are possible and tolerable, examine existing court-annexed ADR and summary procedures, and conceive of super-efficient methods of dispute resolution for commercial and business cases. A report will be issued by the annual meeting in January.

Conclusion

Assuming leadership of the Section is a great opportunity and tremendous responsibility. I am blessed to embark on this adventure with dedicated and talented fellow officers: Chair-Elect Tracee Davis, Vice-Chair Greg Arenson, Treasurer Paul Sarkozi, and my colleague at Nixon Peabody, Nicole Mastropieri, who is serving as Section Secretary. We have a long tradition of exceptional teamwork in the Section, which I hope to continue.

Truly I stand on the shoulders of giants. The pantheon of former Section chairs is beyond remarkable, including such luminaries as Section founder Robert L. Haig, United States District Court Judges Shira A. Scheindlin and P. Kevin Castel, and three state bar presidents: Mark H. Alcott, Bernice K. Leber, and Stephen P. Younger. I would be remiss not to mention my partner Harry P. Trueheart, III, who went on to serve as managing partner or co-managing partner for Nixon Peabody and continues to serve as its Chairman. Of course, I also should mention the great leadership demonstrated by each former Section chair not already mentioned (Jack C. Auspitz, Cathi Baglin, Peter Brown, Carrie H. Cohen, Michael A. Cooper, John M. Nonna, Gerald G. Paul, Jay G. Safer, Lewis M. Smoley, Lauren J. Wachtler, and Mark C. Zauderer). We are blessed to have so many of these exceptional bar leaders involved in the Section's activities today, continuing to contribute to the lifeblood of the Section.

While atop the shoulders of such giants, my shoe size looks okay, but the minute I drop from that lofty perch, I have enormous shoes to fill. I am tempted to say, "Wish the Section luck!" But the Section needs more than your good wishes. We need all members to take ownership in the future of our Section, to roll up our sleeves and contribute to the Section's mission to better the profession. There are many ways to contribute. We look forward to your participation in our committees, CLE programs, Annual and Spring meetings and other Section events and activities over the next year, and beyond. Opportunities abound everywhere.

Jump 'board!

David H. Tennant

Endnote

1. The program at Cornell was established in honor of Bill McKnight, who received his law degree from Cornell University in 1972 and became the first African American partner at Nixon Hargrave Devans & Doyle (now Nixon Peabody) and was perhaps the first African American partner at any large firm in New York State outside New York City. Bill McKnight was an accomplished labor lawyer who was very active in the community. His path as a trailblazer was tragically cut short at age 36 in 1985. In his honor, the firm established (among other things) the McKnight Moot Court program at Cornell Law School, which has operated for more than 20 years.

Spring Meeting New England Style

For the 2011 Spring Meeting, the Section went down to the sea—specifically, to Newport, Rhode Island (Hyatt Regency Goat Island). The event, held May 20-22, kicked off with a Friday evening clambake with remarks by Stephen P. Younger (former Section Chair) on his last official weekend on duty as State Bar President. Following dinner, we heard from Chris Museler, who makes a living writing and talking about yachting. He described the future of America's Cup competitions (not your father's sailboat!). These 72-foot carbon-fiber, multihull, hard-sail vehicles will shoot across oceans at 40 miles per hour.

Stephen P. Younger

Chris Museler

Look at model of future hard-sailed boats

The good news is that the "friendly" sailing competition between The Commercials and The Federals, captained respectively by Steve Younger and Vince Syracuse (both former Section Chairs)—a Saturday afternoon "recreation" option—employed traditional 12-meter yachts with a top speed of eight knots. We are happy to report that in the zigging and zagging (technical sailing terms) the boats did not collide.

Younger Boat

Syracuse Boat

Lori Nicoll and her team at the State Bar meetings department went above and beyond in all respects, including arranging, just in time for the Saturday afternoon outdoor recreation activities, a miraculous break in the fog and rain that had gripped the Northeast for weeks (and driven the clambake indoors on Friday). The sailors appreciated sun and a steady ocean breeze; the golfers happily chased a small white ball around a beautiful course; and others enjoyed hiking the Cliff Walk (oceanside) or more leisurely tours of historic waterside mansions.

Friday Reception and Clambake



















On the business side, we enjoyed a robust roundtable discussion among two sitting federal district court judges, who formerly served as in-house counsel, and current in-house counsel, sharing common concerns about the costs, efficiency, and efficacy of litigation in resolving business disputes. Moderator Stephen C. Robinson (former federal prosecutor, former in-house counsel, former SDNY district judge, and now partner at Skadden Arps) deftly tossed questions and quips to the panelists: Hon. Paul G. Gardephe (USDJ, SDNY), Hon. Richard J. Sullivan (USDJ, SDNY), Karen Douglas (Corning Incorporated), Lawrence LaSala (Textron), Carla M. Miller (Universal Music Group), Jamie Stern (formerly ING), and Lesley F. Rosenthal (Lincoln Center). The panelists covered a lot of ground with a shared focus on reducing litigation costs. If you missed the panel presentation, the conversation is worth viewing on video. Thanks to Hudson Court Reporting and Digital Media, we recorded for posterity this program (and other weekend programs), which we will post on the NYSBA web site. What happened in Newport is *not staying* in Newport.

Stephen C. Robinson

Panelists, Questions from Audience and Conversations











Jeremy Feinberg

Jeremy Feinberg (Statewide Special Counsel for Ethics, OCA) hosted the Ethics Game Show (Part Deux) with panelists Hon. Thomas Dickerson (Appellate Division, Second Department), Carrie Cohen (U.S. Attorney's Office), Sheldon Smith (Nixon Peabody), Sara Walshe (New York City), and Carol Wojtowicz (Principal Law Clerk, Supreme Court Richmond County). Three contestants vied for first prize: free Section dues for two years. The parting gifts for the other contestants—NYSBA umbrellas—perhaps had more immediate appeal, so everyone left a winner. Jeremy and company were exceptional—the most fun anyone can legally have getting 1.5 hours in ethics credits.

We held the Gala Dinner Saturday night at the Marble House mansion, which provided an elegant setting for the festivities. Section Chair Jonathan D. Lupkin surprised Paul Sarkozi with the 2011 Section Chair award for his many important contributions to the Section, including his dedicated service as Treasurer, co-chairing the Commercial Division Committee, and serving as liaison to the Young Lawyers Section. The lightening struck twice as Jonathan awarded a second Section Chair award to Lesley Freidman Rosenthal for her many (and continuing) contributions to the Section—including co-chairing the mentoring initiative in 2010-2011 and being a prime-mover for the 2011 Spring Meeting (including conceiving of and organizing the judges / in-house counsel roundtable discussion). Both Lesley and Paul looked as pleased as they were surprised.


Jonathan D. Lupkin


Paul Sarkozi


Paul Sarkozi & Lesley Rosenthal

Ethics

Gala Dinner













Jonathan D. Lupkin

Following moving remarks of outgoing Chair Jonathan D. Lupkin, incoming Chair David H. Tennant presented Jonathan with a NYSBA plaque for his year of exceptional service and offered words of thanks on many levels. (See "Incoming" and "Outgoing" Chair's messages.) The program then moved to the presentation of the Robert L. Haig Award for Public Service to Victoria A. Graffeo, Associate Judge of the New York Court of Appeals. Justice Karen Peters, Appellate Division, Third Department "channeled" Chief Judge Emeritus Judith Kaye, who could not attend


Jonathan Lupkin and David Tennant


Hon. Karen Peters


Hon. Victoria Graffeo and Hon. Karen Peters

the dinner but sent a letter praising Judge Graffeo. Justice Peters added her own personal tribute, noting that she had hired Judge Graffeo, then in private practice, for her first position in government—what Justice Peters called her "best decision ever." The presentation was capped by Judge Graffeo's eloquent and humorous acceptance remarks.


Hon. Victoria Graffeo

Sunday

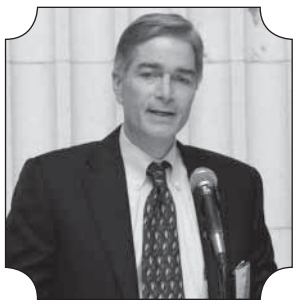
The Sunday morning program started with a plenary session on mentoring—taking stock of the State Bar's mentoring initiative under President Younger and the Association-leading mentoring program established in the Section during the Lupkin tenure (under the able co-chairing of Lesley Rosenthal and Matthew R. Maron of Ganfore & Shore LLP). Seymour W. James (Legal Aid Society of New York City and President-Elect of the State Bar as of June 1, 2011) served as moderator. Panel members were Stephen Younger, former State Bar President Kenneth G. Standard (Epstein Becker & Green), Elise R. Holtzman (The Lawyers' Success Coach Advocate Group LLC), Deborah E. Lans (Cohen Lans LLP), Jonathan Lupkin, Lesley Rosenthal,


Seymour W. James

Presentation of the Robert L. Haig Award









and Matthew R. Maron. The discussion was far-ranging and produced much energy, discussion, and many ideas for extending the mentoring initiatives within the Association as a whole and the Section in particular.

The weekend was capped by simultaneous substantive CLE programs: (1) New Federal Rules You Need To Know and (2) Everything You Always Wanted to Know About the Standard of Review but Were Afraid to Ask.

New Federal Rules

Anne B. Nicholson

The Young Lawyers Section presented a panel discussion on the amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure. Anne B. Nicholson (Flemming Zulack) moderated the discussion. Panelists consisted of Hon. Sidney H. Stein (USDJ, SDNY), Gregory K. Arenson (Kaplan, Fox & Kilsheimer, and Section Vice-Chair as of June 1), Thomas J. Gaffney (Lippes Matthias Wexler Freidman LLP), and Emily Stern (Proskauer Rose LLP).

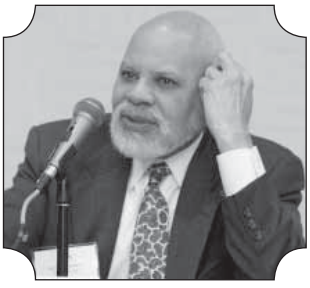
Mentoring Initiatives









New Federal Rules




Standards of Review

The Honorable Stephen G. Crane, retired justice of the Appellate Division, Second Department, and now with JAMS, moderated the program. The perspectives of three different appellate courts were represented: Judge Victoria A. Graffeo (New York Court of Appeals); Judge Peter Hall (U.S. Circuit Court of Appeals for the Second Circuit); and Justice Ariel E. Belen (Appellate Division, Second Department). Program Chair / Incoming Section Chair David Tennant presented the commercial litigator's view.


Hon. Stephen G. Crane

Steve Younger, perhaps because he won the America's Cup sailing challenge (with the help of his three strapping young sons hoisting sails and trimming the sheets), called the Newport Spring Meeting "one of the best ever ComFed spring meetings." What is clear is that the degree of success achieved (however measured or described) was the product of great teamwork both within the leadership of the Section and within the NYSBA meetings planning department. Well done one and all!

We hope to see you at next year's Spring Meeting.

Standards of Review





Opinion Piece
Sanctions and Costs: The Enemy of Advocacy

By Thomas F. Liotti and Drummond C. Smith

Our litigious society, together with fiscal, budgetary constraints, has glutted our dockets. Judges and staff are underpaid, and there are not enough of them. Our courthouses are inadequate to meet these burgeoning demands. Outside arbitrators and mediators have a new cottage industry taking the overflow of cases and alleviating some of the stressors in the system. Tort reform periodically surfaces as the panacea for high insurance costs but, at the same time, curtails access to the courts and jury or judicial determinations on the merits. In criminal law the federalization of crime by the enactment of more than approximately 4,450 federal crimes, the 1,483% increase in Federal Laws since the country's founding, and the creation of a vast prison bureaucracy that now costs nearly seven billion dollars per year just to maintain[1] has engulfed our system with a deluge of cases that command pleas. Each year fewer and fewer civil and criminal cases go to trial.

In order to accommodate these statistics, Judges spend more time conferencing cases and encouraging settlements where the parties cannot do it themselves. This then raises the question of how judicial resources and time are properly spent. What is the best use of those resources? For example, how much of a Judge's valuable time should be spent settling cases or resolving disputes over discovery. As frustrating as these management issues have become, the answer deployed by our courts and judges to resolve some of them has been the use of Federal Rule of Civil Procedure 11 and Part 130 of New York's Code, Rules and Regulations. These tangential tools may have the effect of reducing the numbers of cases and lawyers in the system. But at the same time, the benefits derived from the proper use of those rules must be measured against the negative impact that occurs when they are abused, either unwittingly or intentionally, by members of the Bar, *pro se* litigants, or the Judiciary.[2] Costs are limited by the CPLR for both the Trial and Appellate Courts (see CPLR 8201).

This article addresses the dangers that may occur from the improper use of those rules, but more importantly, why the law requires that they be used sparingly or not at all. The purpose of the rules was to deter the conduct of attorneys or *pro se* litigants who have shown an unbridled pattern of frivolous litigation. While tort reformers may market the notion that frivolous litigation or uncapped awards are driving up the costs of insurance or bankrupting companies, they are not. On the contrary, truly frivolous litigation within the context of the aforementioned rules involves a minuscule number of cases. The point of this article, then, is to suggest that the reaction of the Judiciary to those problems is an overreaction much like trying to kill a fly with a shotgun.

It should also be noted that the "American rule" does not allow for the imposition of costs in favor of the prevailing party except when authorized by statute. For private actions brought under 42 U.S.C. 1983, Congress established an exception to the "American rule" that the prevailing litigant is ordinarily not entitled to collect "attorney's" fees from the loser.[3] Under the Civil Rights Attorney's Fees Act of 1976, "attorneys" fees are available to the prevailing party.[4]

Rule 11

When Rule 11 was first adopted in 1983, there was no state rule equivalent. Rule 11 has no application in criminal cases. Likewise, costs and sanctions may not be imposed in New York State criminal cases. Nonetheless, the Rule was adopted with grave trepidations, particularly among members of the plaintiffs' Bar.[5]

The Advisory Committee Notes from 1983 provided:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel, or another member of the bar.

The Rule provides for the signing of pleadings by the attorneys of record; and in doing so, they make certain representations as a matter of law. The attorney or unrepresented party, by signing the pleading or other papers submitted to the Court, certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (b)(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

There is a "safe harbor" provision in the federal law not included in Part 130. It provides that a motion for sanctions must be separately made but only after the attorney making the averment or the affiant is given notice of the challenge and potential sanctions and then is given 21 days from the notice, or such other time as the Court may set, to withdraw and correct the pleading.

The Advisory Committee Notes concerning the 1993 Amendments to the Rule give more insight into its application.

> Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, *e.g.* New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).
>
> The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.
>
> Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.
>
> Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine.

Part 130

The enactment of Rule 11 then caused 22 NYCRR 130 to evolve and be adopted, albeit not by the Legislature. Part 130 does not provide for the "Safe Harbor" provisions that Rule 11 does. It also does not share the same Advisory Committee Notes or other analysis through legal articles and case law that Rule 11 has undergone since Rule 11 is statutory and Part 130 is not. The deployment of Part 130 then frequently takes the Court and attorneys into unchartered territory.

Part 130 allows for the imposition of costs in the form of the reimbursement of actual expenses reasonably incurred and reasonable attorney's fees resulting from "frivolous conduct." Section 130-1.1(c) defines "frivolous conduct" as:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

The purported frivolity or bad faith of a pleading for the most part depends upon the subjective evaluation of the jurist reviewing it. The operation of the author's state of mind in drafting the document is not a factor that is considered. It should be a requirement that a movant or a Court considering the imposition of sanctions prove that the author intended the harm contemplated by part 130. A pattern of such conduct may help to prove it, but the nature of a pattern has yet to be defined. It also remains subjective.

Courts can await the outcome of discovery and other litigation, including motions for summary judgment, or the actual verdict itself before reaching a determination on costs or sanctions. The imposition of sanctions, particularly during the course of litigation, may also cause disciplinary action to occur. The imposition of costs and/or sanctions against an attorney or litigant can drive a wedge between attorneys and their clients or create a conflict. Clients lose confidence or trust in their attorneys when costs or sanctions are imposed. They can also result in the clients being left without any counsel. Costs and sanctions then should be the weapons of last resort when all else has failed and it becomes necessary to pull the trigger on the nuclear option.

Conclusion

Courts should be mindful that the imposition of costs and sanctions or even the requests for them pose a serious and deleterious effect on the role of advocates and access to the courts. It can be a totally unfair, premature, and preemptive strike against an attorney or litigant. It is therefore an initiative that must be very carefully weighed and considered. Many other options are available, including deferment of the issues pending the outcome of the litigation. While Courts may question the conduct of attorneys against whom costs and sanction applications are made, they should be even more circumspect of attorneys who cavalierly or irresponsibly make such applications. Their efforts are not only destructive of the litigation and attorney/client relationships but even more damaging to our system of justice as a whole. Courts that do not adequately consider these issues then become partners, enablers, and aiders and abetters in the unfortunate consequences that then occur. Judges too far removed from the actual practice of law and the representation of clients run the risks of overlooking these issues when they are considering the imposition of costs or sanctions.

Endnotes

1. *See* Adam Liftak, *Right and Left Join to Take on U.S. in Criminal Justice Cases*, The New York Times, November 24, 2009, at 1 and A22. *See also* World Net Daily, August 21, 2008, at 72912; Kevin Johnson, *2011 Budget gives Federal Prisons $528 million*, USA Today, February 4, 2010.
2. *See* Thomas F. Liotti and Drummond Smith, *Judicial Civility*, The Attorney of Nassau County, July 2009, at 6, 10, 11.
3. *Sole v. Wyner*, 551 U.S. 74, 127 S. Ct. 2188 (2007).
4. 42 U.S.C. 1988; *Perdue v. Kenny A. ex. rel. Winn*, __ U.S.__ 130 S. Ct. 1662 (2010). *See* Pattern Jury Instructions, New York, Second Edition, vol. 2, PJI 3:60 at 632 (2011).
5. "Experience shows that in practice Rule 11 has not been effective in deterring abuses." Charles A. Wright & Arthur Miller, 6 Federal Practice and Procedure: Civil § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action; (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. *See* Rodes, Ripple & Mooney, *Sanctions Imposable For Violations of the Federal Rules of Civil Procedure* 64-65 (Federal Judicial Center 1981).

Thomas F. Liotti is an attorney and Village Justice on Long Island. He is a Past Chair of the NYSBA Criminal Justice Section and a member of this Section. He is the author of *Judge Mojo: The True Story of One Attorney's Fight Against Judicial Terrorism* (iUniverse 2007). Drummond Smith is an Associate in Mr. Liotti's firm.

WikiLeaks and WikiWars

On May 2, 2011, the NYSBA hosted "*WikiLeaks and WikiWars—Litigation Responses and Beyond*," a panel discussion held at the historic Union League Club of New York. The event, which was attended by over 70 people, was sponsored by the Internet and IP Litigation Committee of the Commercial and Federal Litigation Section and was moderated by Committee Co-Chair Joseph V. DeMarco of DeVore & DeMarco LLP. David E. McCraw, Vice President of and Assistant General Counsel for The New York Times Company, discussed that newspaper's decision to print material posted by WikiLeaks and what factors an attorney advising a news organization must weigh in determining whether to publish "leaked" materials. After focusing on the particular circumstances of the WikiLeaks story—including fascinating insights and anecdotes regarding the interaction between Julian Assange and newspaper officials—DeMarco and McCraw discussed how the news industry would, and should, handle analogous situations where corporate, rather than governmental, secret information is disclosed. Following Mr. McGraw's remarks, questions from the audience provoked discussion of the role of the press as a "gatekeeper" of information, an attorney's ethical responsibilities with regard to leaked information, and the implications of the ability to reach a broad audience on the Internet without need for traditional media organizations.

CPLR Amendments: 2011 Legislative Session

(2011 N.Y. Laws ch. 1-54, 57-399)

CPLR §	Chapter, Part (Subpart, §)	Change	Eff. Date
306-c	59, H(52-h)	Adds a new CPLR 306-c requiring that notice be given to Dept. of Health or county social services of commencement of personal injury action by person who has received medical assistance under Soc. Serv. Law Art. 5, Titles 11 and 11-D	6/29/11
1008	264	Provides that third-party defendant may not assert in answer defenses of improper service of summons and complaint, summons with notice, or notice of petition and petition or lack of personal jurisdiction over third-party plaintiff	8/3/11
1101(d), (f)	57, A(17)	Extends sunset of CPLR 1101(f) and proviso in CPLR 1101(d) until 9/1/2013	3/31/11
1101(f)(1)(i), (3)	62, C(B, 51)	Changes "correctional services" to "corrections and community supervision"	3/31/11
2302(b)	307(1)	Requires that, in absence of patient authorization, only court may issue trial subpoena duces tecum for patient's medical records	8/3/11
3122	307(2)	Adds court-issued subpoenas or orders as an alternative to meeting the requirement for patient authorization for production of medical records	8/3/11
3409	59, H(52-d)	Adds a new CPLR 3409 requiring settlement conferences in dental, podiatric, and medical malpractice actions	6/29/11
5011	62, C(B, 52)	Changes "correctional services" to "corrections and community supervision"	3/31/11
5205(a)(8)	1	Excludes exemption where state or municipality is judgment creditor	1/21/11
5224(a)(3)(k)	342(1)	Adds to the certification compliance with Gen. Bus. Law § 601	9/2/11

Note: 2011 NY Laws ch. 284 replaces Uniform City Court Act § 206 with a new provision on arbitration.

NYLitigator Invites Submissions

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

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

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

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

(West's N.Y. Orders 1-20 of 2011)

22 NYCRR §	Court	Subject (Change)
151.1	All	Add rules governing assignment of cases involving contributors to judicial campaigns
202.5-b	Sup.	Amends requirements for consensual e-filing and e-service
202.5-bb	Sup.	Amends requirements for mandatory e-filing
202.6(b)	Sup.	Adds to exemptions from RJI filing fee petitions for finance of religious / not-for-profit property and Mental Hygiene Law Art. 10 proceedings
202.12-a(f)	Sup.	Corrects cross-reference
202.16(f)(2)(v), (vi)	Sup.	Adds to the matters to be considered at preliminary conference in matrimonial actions the completion of a preliminary conference order substantially in the form in Appendix G
202.56(c)	Sup.	Adds provision on settlement conferences
202.58(h)(2)	Sup.	Authorizes Chief Administrator to authorize compensation for JHO's other than as provided in 22 NYCRR § 122.8
202.70(d)	Sup.	Amends the contents of requests for Commercial Division assignment, including a signed Commercial Division RJI Addendum certifying that the case meets the Commercial Division jurisdictional requirements

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

Notes of the Section's Executive Committee Meetings

February 8, 2011

Guest speaker, the Hon. Alan D. Scheinkman, Supreme Court, Westchester County, Commercial Division, discussed the current administrative problems of the courts.

The Executive Committee voted to approve the report on the new rule for expert disclosure in the Commercial Division.

March 15, 2011

The Executive Committee discussed a proposal to form panels of pro bono attorneys to serve as CPLR 3104 referees. The Executive Committee also voted to forgo the submission of an amicus brief in a case involving whether some insulation for potential wrongdoing should exist where a government agency has given its blessing to some part of the transaction.

April 12, 2011

Guest speaker, the Hon. O. Peter Sherwood, Supreme Court, New York County, Commercial Division, discussed recent changes in the court system, including the impact of layoffs, and his part rules.

The Executive Committee discussed the Smooth Moves program and the Spring Meeting programs.

May 10, 2011

Guest speaker, the Hon. Ann Pfau, Chief Administrative Judge for the State of New York, discussed the impact of the budget cuts on the courts.

The Executive Committee discussed a preliminary report on "E-Discovery 'Best Practices.'" The Executive Committee also approved a memorandum disapproving the current proposal for a new CPLR 2103-b and recommending that it be modified to address the issues raised by the memorandum.

May 31, 2011

The Executive Committee voted to support a report opposing Senate Bill 3767, which would amend the General Obligations Law in regard to contracts governing debt obligations of foreign states.

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