

# 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, September 29, 2016

**Legal Ethics in the Digital Age: Practical Strategies for Using Technology Ethically in Your Practice**  
CLE Program | 9:00 a.m. to 1:00 p.m. | 4.0 MCLE Credits in Ethics | NYC

*Co-Sponsored by the Law Practice Management Committee and the Committee on Continuing Legal Education.*

Find more information at [www.nysba.org/DigitalEthicsCLE](http://www.nysba.org/DigitalEthicsCLE).

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### Wednesday, October 26, 2016

#### **Women on the Move 2016**

CLE Program, Lunch and Networking Reception | 12:00 p.m. to 6:00 p.m. | 4.0 MCLE Credits | Albany

Keynote by the Honorable Mae A. D'Agostino, United States District Judge, Northern District of New York

*Followed by the Commercial & Federal Litigation Section Executive Committee with guest NYS Court of Appeals Judge Leslie E. Stein.*

*Co-Sponsored by the Committee on Women in the Law, the Committee on Lawyers in Transition, the Law Practice Management Committee, and the Continuing Legal Education Committee.*

Find more information at [www.nysba.org/WomenontheMove2016](http://www.nysba.org/WomenontheMove2016).

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### Monday, November 14, 2016

**CLE Program and Awards Ceremony** | 5:00 p.m. to 8:00 p.m. | Reception | NYC

The Section presents its **First Annual Shira A. Scheindlin Award for Excellence in the Courtroom** to **Carrie H. Cohen** and announces the First Recipients of the **Hon. Judith S. Kaye Commercial and Federal Litigation Scholarship**.



The **Shira A. Scheindlin Award** will be bestowed annually upon a female litigator who has distinguished herself in the courtroom in federal or state court in New York and who has shown a commitment to mentoring young attorneys in the legal community. More information at [www.nysba.org/ScheindlinAward](http://www.nysba.org/ScheindlinAward).

**Women's Initiative Trial Practice CLE - A Re-Enactment of a Commercial Trial** | 1.0 MCLE in Skills  
Creating compelling opening and closing statements and conducting tactical examinations of witnesses.

The **Kaye Scholarship** will be awarded to up to five female junior litigators who will be called Kaye Scholars. The goal of the Scholarship is to help increase the number of women taking a leadership role in commercial cases litigated in both the state and federal courts. To apply please visit [www.tnybf.org/kayescholarship](http://www.tnybf.org/kayescholarship).

*Co-Sponsored by the Committee on Women in the Law and the Young Lawyers Section.*

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### Wednesday, January 25, 2017

**Annual Meeting and Gala Luncheon** | 9:00 a.m. to 2:00 p.m. | New York Hilton Midtown NYC

The Section will be bestowing its **Stanley H. Fuld Award** to the **United States Court of Appeals for the Second Circuit**. *The award recognizes outstanding contributions to the development of commercial law and jurisprudence in New York.*

## Upcoming Commercial and Federal Litigation Section Executive Committee Meetings



**September 28, 2016**  
Kramer Levin Naftalis & Frankel LLP, NYC

New York State Court of Appeals  
Chief Judge Janet DiFiore



**October 26, 2016**  
New York State Bar Association, Albany  
& Kramer Levin Naftalis & Frankel LLP, NYC (by video)

New York State Court of Appeals  
Judge Leslie E. Stein



**November 16, 2016**  
Kramer Levin Naftalis & Frankel LLP, NYC

Commercial Division  
Kings County Supreme Court  
Justice Sylvia G. Ash



**December 15, 2016**  
Jury Assembly Room, James M. Hanley  
Federal Building, Syracuse  
& Kramer Levin Naftalis & Frankel LLP, NYC (by video)

U.S. District Judge Brenda K. Sannes

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## Message from the Outgoing Chair

I'm honored that you allowed me the great privilege of chairing our Section this past year. We accomplished a lot together, with many oars in the water, leading to reports that have gained national recognition, as well as the creation of new scholarship awards, the initiation of a robust women's initiative, and increasing membership.



James M. Wicks

Our hardworking District Leaders (a program implemented by my predecessor Paul Sarkozi) and our many Committee Chairs continued our great tradition of generating thorough and resourceful reports and CLEs and, of special note, webcasts. Indeed, our Section is now viewed as a good example of the use of webcasts to provide member benefits.

I want to thank our judicial guest speakers at our Executive Committee meetings this year. We appreciate you taking the time out of your busy schedules to be with us and share your thoughts, insights, and ideas. It is you who give us fodder for our reports and help us try to help improve the administration of justice. Your participation and contributions are critically important to our Section.

Special mention of course goes to my fellow officers, Mark Berman, Mitch Katz, Deborah Edelman, and Jeremy Corapi. I couldn't have handpicked a better working group of individuals. We communicated and met regularly, which led to creative ideas and innovative projects. Each put his or her heart into our Section—advancing ideas for the betterment of the Section, and no other reason. I am proud to have been part of that group. Thank you.

We've had many noble accomplishments this year, but I have no doubt that, under the new leadership of Mark Berman, Mitch Katz, Robert Holtzman, Deborah Edelman, and Jamie Sinclair, we're in store for great things this year as well. Some noteworthy projects that I'm particularly proud of this year include:

- Establishing scholarship awards in honor of former Chief Judge Kaye. These scholarships will be awarded to female litigators to attend the Commercial Division Academy to better their skills as commercial litigators.

*Continued on page 5*

## Message from the Incoming Chair

It is a privilege and honor to have been elected Chair of the Commercial and Federal Litigation Section, following in the steps of great icons of the New York State Commercial Bar. The Section's membership has increased over the past year and the Section is a vibrant and robust organization of terrific commercial litigators. We are the bar organization of choice for attorneys who practice business litigation in our State and Federal Courts, and we will continue to add value to our members and offer the best programming available in the State.



Mark A. Berman

### The Fuld Award Goes to the Second Circuit

The Section has great plans for the next year. We are excited and proud to announce that the entire Second Circuit Court of Appeals will be presented with the Section's 2017 Stanley H. Fuld Award at our Annual Meeting in January 2017. The award recognizes outstanding contributions to the development of commercial law and jurisprudence in New York. The Second Circuit's accomplishments in advancing commercial law in New York State, throughout this country and the world are well-recognized. With this award, it is only appropriate that the Annual Meeting's CLE programming will include a panel addressing federal appellate issues. In addition to honoring the Second Circuit in this manner, the Section also will be sponsoring an additional event with the Second Circuit associated with the Fuld Award. The Section is honored to be participating in celebrating the Second Circuit's 125th anniversary with the presentation of the Fuld award, and looks forward to the opportunity to strengthen its ties with the Second Circuit and the Federal Judges in each of the Districts in New York State.

### The Section's Women's Initiative

The Section just established a new award, the first time in over ten years that one has been created. It is called *The Shira A. Scheindlin Award for Excellence in the Courtroom* in honor of the Section's former Chair, who served with distinction as a United States District Judge for the Southern District of New York from September 1994 through April 2016. The Section will present this award annually in November, around the date when women received the right to vote in New York State in

*Continued on page 5*



- Creation of our Social Media Guidelines, through the hard work of our Social Media Committee. These Guidelines have gained national attention; mentioned by legal commentators throughout the country, they are making our state bar a recognized leader in this area.
- Our Social Media jury charges, also spearheaded by our Social Media Committee, are the latest word on jury charges to assist the judiciary. We also created a Social Media poster for posting in the jury rooms across the state, warning of use of social media during trial.
- Our women's initiative, formed by our group of female former Section Chairs, have now had two successful panel discussions on issues facing women in the commercial litigation sphere. These programs have been hugely successful, and there are more projects in the works that you'll hear about this upcoming year.
- Celebrating the Tenth Anniversary of Smooth Move with a terrific program featuring Zachary Carter, New York City's Corporation Counsel, and Justice Barry A. Cozier.
- We've had several successful lunchtime webcasts, all of which have been wildly successful. These are sometimes with CLE credit, other times not, but all focus on discrete areas that might be of particular interest to members. NYSBA has commented on how well we've initiated this.
- In the last year, both the *NY Litigator* and *Commercial and Federal Litigation Section Newsletter*, have seen some of the biggest and robust issues to date, thanks to Dan Wiig and Mark Davies, respectively.

These are just a few of our major accomplishments, all done through the indefatigable efforts of individuals who care deeply not only about our Section, but more importantly about the administration of justice and maintenance of the rule of law. The hard work of our District Leaders, Committee Chairs, and Officers engenders a work ethic for all involved, leading to great ideas and the implementation of productive projects. I'm privileged to have been part of that process.

Thank you all for allowing me to serve.

**James M. Wicks**

1917, to a woman who has distinguished herself in the courtroom in both the Federal or State Courts in New York and who has shown a commitment to mentoring young attorneys in the legal community.

The awardee will be Carrie Cohen, now of Morrison & Foerster, who this year successfully prosecuted Sheldon Silver as an Assistant United States Attorney and who served as Section Chair in 2007-2008. The award will be presented on November 14th in the ceremonial courtroom in the Southern District of New York's Federal Courthouse.

The November program will also initiate a new Section scholarship funded through the New York Bar Foundation to be awarded to junior female attorneys, which covers the cost of their registration to the Section's 2017 Commercial Litigation Academy. The goal of this new scholarship is to prepare women to serve as first chair in business litigation trials. The awardees will be called Kaye Scholars in honor of the Honorable Judith S. Kaye, the State's former Chief Judge. The program will have, among other components, a CLE trial practice program, and its participants will include female former chairs of the Section as well as young rising women attorneys. Additional programming seeking to increase the number of women in the courtroom is also intended this year.

### **CLEs and Our Cutting Edge Reports**

Already scheduled for September 29 is a groundbreaking Section four credit CLE program entitled *Legal Ethics in the Digital Age* that draws upon members of our Ethics and Professionalism, Electronic Discovery, and Social Media committees as well a member of the Executive Committee of the New York State Bar. The Section is also working on putting together a joint CLE with the Dispute Resolution Section on eDiscovery and arbitration.

The Section intends to continue to lead the nation in issuing reports concerning our new digital world. This fall the Electronic Discovery Committee will debut the Third Edition of its *Best Practices in eDiscovery in New York State and Federal Courts*. The Social Media Committee also intends to issue the Third Version of its *Social Media Ethics Guidelines* next spring. The Second Version of the Social Media Ethics Guidelines already leads the nation on the issue and is highlighted on the State Bar's homepage.

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## Meeting Chief Judge DiFiore and the Section's Executive Meetings Continue to Travel the State

We have always invited State and Federal Judges to speak at our monthly Executive Committee meetings concerning current issues, but this coming year we are extremely proud to kick off the year in September with Chief Judge Janet DiFiore speaking to our Section's Executive Committee.

As for our monthly Executive Committee meetings, continuing the initiative of holding meetings throughout the State, we anticipate traveling out of New York City three times during the next year and will seek to have these meetings held at upstate Federal Courthouses. By having our Executive Committee meetings at Federal Courthouses, we hope to forge closer ties to the Federal District Judges throughout our State, as well as to their law clerks and local practitioners, who will be able to see first-hand the benefits of joining our Section.

## Membership Diversity—Seeking to Add Diversity, Youth, and Law Students to the Section

As part of our membership initiative, the officers of the Section intend to speak with law students at law schools around the State to encourage them to join our Section. To that end, the Section has created a video promoting the benefits of joining the Section which will be shown to students during our visits. The Section also intends to work with local upstate bar associations to create a diversity program with the goal of increasing the diversity

of the Section statewide. The Section is going to work with local bar associations, having already reached out to the Asian American Bar Association, to explore symbiotic relationships with the Section. In addition, the Section this year created a formal Kids Club at our Spring Meeting in Cooperstown in order to encourage Section members who have young child to attend our meeting. I will seek to make this a permanent addition to our programming with the goal of extending our reach to our membership who have not typically attended our Spring Meetings.

## Conclusion

The Section will continue to focus its efforts on educating the business community on the benefits of litigating in New York State by continuing our support of finding new ways to make litigating in our New York State and Federal Courts more efficient and cost effective. We have the best and brightest attorneys as members of our Section, and it is their creative ideas that have assisted the Bench and Bar in seeking to achieve this objective.

This will be an exciting year, and the Section is committed to providing value to its members through CLEs, programming, reports, and the mentoring of young attorneys. We are always open to ideas, so please feel free to contact me at [mberman@ganfershore.com](mailto:mberman@ganfershore.com) if you would like to share with me your thoughts regarding how we can continue to grow and improve.

**Mark A. Berman**

## Have an IMPACT!

As the charitable arm of the New York State Bar Association, The Foundation seeks donations for its grant program which assists non-profit organizations across New York in providing legal services to those in need.

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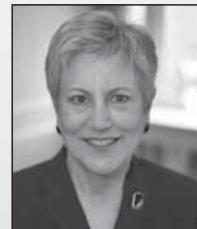


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"I became a member of The Foundation's Legacy Society because I have seen first-hand the impact that our giving can make. Delivering checks for disaster relief efforts for Super Storm Sandy and meeting directly with several organizations that are grant recipients was an enlightening experience; reaffirming the need for The Foundation, what we do today, and can do in the future. Adding The Foundation to my long-term philanthropic plans gives me the peace of mind that I am supporting my passion while still providing for members of my family."



**Immediate Past President, Cristine Cioffi**  
Cioffi Slezak Wildgrube P.C., Niskayuna, NY

# Our Spring Meeting in Cooperstown

By Jamie L. Sinclair, Section Secretary

The 2016 Spring Meeting of the Commercial and Federal Litigation Section was held at the historic Otesaga Resort, a luxury hotel in Cooperstown, New York, from May 13-15. The Meeting was well attended by approximately two hundred people and featured an impressive array of both state and federal judges, speakers, and panelists. As Cooperstown is the home of the Baseball Hall of Fame, the Spring Meeting's theme was the intersection of baseball and law. Incoming Section Chair Mark A. Berman organized the Meeting and served as its Program Chair and emcee for the three-day event. For the first time, the Spring Meeting featured a formal children's program for the families of attendees.

### The Opening Dinner at the Baseball Hall of Fame

The Meeting began on Friday night, when guests were ushered via trolley car to the Baseball Hall of Fame. A lively cocktail reception kicked the weekend off, welcoming Section members and the Meeting's other guests. Over lawyerly libations, the Meeting's attendees waited in anticipation of the night's main event, an interactive presentation by Professor of Law Ross E. Davies of the George Mason School of Law. Following the cocktail reception, guests took their seats for the commencement of the evening's primary festivities. Each guest's seat held their souvenirs for the evening: a "Supreme Court Sluggers" Baseball card, an honorary "Hall of Fame Series" baseball card featuring our own Presiding Justice Karen K. Peters, and a ballot for use in the presentation.

Outgoing Section Chair James M. Wicks gave opening remarks and expressed gratitude to the Meeting's sponsors, which included Complete Discovery Source, LexisNexis, JAMS, Deloitte, and Counsel Press. Chair-Elect Mark A. Berman, wearing his Tom Seaver Hall of Fame jersey, set the stage for the evening, with additional opening remarks offered by David P. Miranda, then President of the New York State Bar Association. As guests enjoyed a delicious meal, Professor Davies began his Interactive Presentation, titled "The Ten Greatest Lawyers in Baseball: A Contentious Ballot." Professor Davies is a two-time winner of the Doug Pappas Award from the Society for American Baseball Research. His work on baseball and the law has appeared in numerous publications, including the *Journal of Supreme Court History*, the *Baseball Research Journal*, the *NYU Journal of Legislation and Public Policy*, the *Seton Hall Journal of Sports and Entertainment Law*, the *Texas Review of Entertainment and Sports Law*, and the *Green Bag*.

Professor Davies' presentation featured a discussion of the most interesting and important crossover stars of law and major league baseball. He explained that each candidate on the ballot of potential winners existed on an axis, with one end reserved for outstanding lawyering skills and the other indicating an exceptional baseball career. He, of course, mentioned Appellate Division Justice Rolando T. Acosta, who was sitting the audience, one of the most decorated baseball stars ever to sit as a judge. Following Professor Davies' PowerPoint presentation, attendees were asked to vote for the following potential winners: Don Fehr (1948-), David Fultz (1875-1959), Hughie Jennings (1869-1928), Kenesaw Mountain Landis (1866-1944), Robert D. Manfred, Jr. (1958-), Dick Moss (1931-), Branch Rickey (1881-1965), Monte Ward (1860-1925), and Michael Wiener (1961-2013). Upon submission of a completed ballot, attendees received one of the most unique mementos of baseball and law available in the United States: a bobblehead of Supreme Court Justice John G. Roberts, Jr.

### CLEs and Social Activities

The weekend's activities featured four outstanding CLE programs, titled: (i) "On Higher Ground?: Baseball's Antitrust Exemption"; (ii) "Social Media and Its Effect on the Jury System"; (iii) "So You Think You Are Effective in Mediation—Not So Fast! Sticky Mediation Issues and How to Address Them"; and (iv) "Proportionate and Cost-Efficient eDiscovery: An Oxymoron?" A more detailed description of each panel is provided in separate articles describing each panel. Given the natural beauty that Cooperstown, New York, has to offer, the weekend also featured a wide range of options for leisure and outdoor activities, including a Saturday morning 5k fun run, hiking, swimming, and more. A golf tournament, headed by former Section Chair Carrie Cohen, was organized Saturday afternoon on the five-star rated Leatherstocking Golf Course.

### Advancing Women in the Legal Profession Luncheon

A breakout session, co-chaired by Mark A. Berman and Carrie Cohen, was held over lunch on Saturday afternoon to address the topic of "Advancing Women in the Legal Profession." The luncheon featured an open discussion format where attendees, including state and federal members of the bench and litigators, brainstormed over ways to further empower women in the



profession, including increasing the number of women taking a primary role in the courtroom. During the lunch, Mark A. Berman, incoming Section Chair, announced the creation of the Section's Shira A. Scheindlin award, which will be awarded annually in November, around the date when women received the right to vote in New York State in 1917, to a woman who has distinguished herself in the courtroom in either the Federal or State Courts in New York.

### **Children's Program**

For the first time in Section history, the weekend included a formal children's program. The program included pizza parties and movies during the weekend's dinners, as well as an interactive teaching program at the Farmer's Museum on Saturday and a fishing tournament on Sunday.

### **The Saturday Night Gala Dinner and Presentation of the Robert L. Haig Award for Distinguished Public Service**

The weekend's highlight was the Saturday Night Gala Dinner, which was well attended by state and federal judges and lawyers who practice throughout New York. The evening included a three-course meal at the Otesaga Resort and remarks from Section leaders, including James M. Wicks, Mark A. Berman, and Claire P. Gutekunst, then incoming NYSBA President. Mr. Wicks highlighted some of the accomplishments of his term (see "Message from the Outgoing Chair"), and Mr. Berman discussed his goals for the 2016-2017 term.

The Section's prestigious Robert L. Haig Award for Distinguished Public Service was presented by Mark C. Zauderer, a partner at the law firm of Flemming Zulack Williamson Zauderer LLP. Mr. Zauderer expressed his honor and gratitude to present the Haig award to his mentor and friend, Justice Karen K. Peters, Presiding Justice of the Appellate Division, Third Department, a woman who has dedicated her professional life to the service of the people of New York State. Mr. Zauderer highlighted many of the accomplishments of Justice Peters' distinguished career, from her beginning as the single female defense attorney in Woodstock County (where she requested assignment to criminal cases) to her nine years as a family court judge, to her involvement in the New York State Council on Alcoholism. Justice Peters was appointed to the Appellate Division, Third Department, in 1994, where she became the first female justice in the Third Department. In 2012, she was appointed as Presiding Justice. In this capacity, Justice Peters oversees twenty-eight counties. Some of Justice Peters' most notable decisions include her dissent in *Pataki v. New York State*, as well as her trailblazing decision in *Dickerson v. Thompson*, which held that New York residents who entered into a same sex civil union in Vermont may

dissolve their civil union in New York. In concluding his remarks, Mr. Zauderer observed that Justice Peters embodies a true scholar, who is independently minded and not motivated by political considerations.

Justice Peters took the podium to accept not only her award, but an honorary baseball card in her likeness blown up to placard size. Justice Peters began her remarks by thanking the Section Chairs who had organized the weekend, and for their inclusion of children and families into the program, which brought life and vivacity to the weekend's events. Justice Peters expressed her awe and gratitude to the profession and to the people of the State of New York for allowing her to participate in the process of assisting them to resolve disputes through peaceful means. Justice Peters complimented her peers, as well as the attorneys in the room, whose tireless efforts allow judges to render "thoughtful and accurate decisions" on matters of paramount importance to individuals throughout the State. The Justice also heralded the important work of the Commercial Division in New York, a globally recognized leader of trial and commercial lawyers.

Justice Peters also remarked on her career highlights at the Appellate Division, including the introduction of a 2013 electronic device policy, which allows lawyers to use cell phones and other electronic devices while waiting for a case to be called, thereby enabling lawyers and their clients to make valuable use of time in court. Justice Peters was also instrumental in bringing webcasting to the Third Department, which allow clients and the public to observe oral argument in the Third Department from around the world. She expressed her desire to see cameras in courtrooms around the State, so that our citizens can "see their democracy in action." In concluding her inspiring remarks, Justice Peters declared that we can work in bringing the "world to our courts, and the courts to our world."

### **Conclusion of the 2016 Commercial and Federal Litigation Section Spring Meeting**

Before the Sunday morning CLE's begin, then-State Bar President-Elect Claire P. Gutekunst spoke to the attendees, and Program Chair Mark A. Berman read remarks from Chief Judge Janet DiFiore further honoring Justice Peters for receiving the Haig Award. Following the conclusion of two outstanding CLE programs, the weekend came to a close on Sunday morning, with a beautiful afternoon left to explore Cooperstown, New York, and its picturesque surroundings. The Section's officers and members thank all of those who attended this year's Spring Meeting and are already gearing up for next year's Spring Meeting, which will take place May 19-21 in Saratoga Springs, New York, at the Gideon Putnam Hotel.



## The Antitrust Exemption for Baseball

Remarks by Jay L. Himes

The Section's lead-off program concerned the anti-trust exemption for baseball. The exemption traces its origin to a 1922 decision by Oliver Wendell Holmes, called *Federal Baseball Club v. National League*. As Justice Holmes explained: "The business is giving exhibitions of baseball, which are purely state affairs." As such, the sport of organized baseball was outside the reach of federal law.

Circuit Judge Kozinski recently called the baseball exemption "one of federal law's most enduring anomalies." That assessment is, if anything, understated. In 1949, Judge Jerome Frank wrote that Supreme Court rulings in the years after *Federal Baseball* had rendered Justice Holmes' decision "an impotent zombie." Yet, within a couple years after Judge Frank's comment, three Court of Appeals rulings upheld the exemption. In a *per curiam* decision, the Supreme Court confirmed the zombie's virility: "Without re-examination of the underlying issues, the judgments below are affirmed on the authority of Federal Baseball Club of Baltimore."

Barely four years later, Justice Thomas Clark, writing for a Supreme Court majority, called *Federal Baseball* "a ruling which at best was of dubious validity. The ruling, Justice Clark recognized, was "unrealistic, inconsistent, [and] illogical." Or, in the words of one six-time presidential candidate, "picky, picky, picky." I bet that will send some of you to Wikipedia.

In 1970, Judge Friendly wrote: "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days. . . . [W]e should not fall out of our chairs with surprise at the news that *Federal Baseball* [and *Toolson*] had been overruled." Around the same time, however, Judge Irving Ben Cooper in the Southern District upheld the exemption in a case called *Flood v. Kuhn*. The Court, Judge Cooper wrote, "can take judicial notice that baseball is everybody's business." The Judge further wrote:

To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession . . . were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves everyone to keep it there.

The Second Circuit unanimously affirmed dismissal. Writing for the Court, Circuit Judge Waterman nevertheless quoted Judge Friendly's earlier remarks, adding that "We adhere to" those "sentiments . . ." The Supreme Court affirmed the Second Circuit, with Justice Blackmun acknowledging in the majority opinion that the antitrust exemption had become an "aberration confined to baseball."

So here we are nearly a half a century later, discussing a not-so- "impotent zombie" of "at best dubious validity," which was "not one of Mr. Justice Holmes' happiest days." It is not just an "aberration," but "precedent on steroids." Make no mistake, however. The exemption is law, and for that reason, it is serious stuff that is a regular subject of litigation.

\* \* \*

### Article by Jamie L. Sinclair

The antitrust program panel included Hon. Rosemary S. Pooler, Seth Bloom, Edward Diver, Ed Edmonds, and Professor Michael Salinger, and was moderated by NYSBA Antitrust Law Committee Chair Jay L. Himes. The panel considered such topics as the doctrinal expansion of Congressional authority under the Constitutional Commerce Clause and the increasingly business-like nature of baseball, recent decisions relating to the baseball exemption, the Supreme Court's deference to Congress on whether the antitrust exemption should still be applied, efforts in Congress to consider possible legislation, and whether it makes sense to treat Major League Baseball differently from the NFL, NBA, and other professional leagues.

The panel also addressed whether the Supreme Court's commitment to *stare decisis* is appropriate in light of the Court's description of the antitrust exemption as "inconsistent" and "illogical." The name for the panel was derived from the Supreme Court's decision in *Flood v. Kuhn*, which declared "baseball is on higher ground, it behooves everyone to keep it there." A highlight of this panel was Edward Diver's discussion of *Garber v. Office of Commissioner of Baseball*, a case in which he was lead counsel, which asked the question of whether the baseball exemption covers broadcasting behavior and the geographical division of territories.

\* \* \*

## Spring Meeting: Social Media and Its Effect on the Jury System

By Rebecca C. Smithwick

The Spring Meeting panel devoted to “Social Media and Its Effect on the Jury System” was a multi-dimensional panel tasked with examining the myriad issues surrounding the use of social media by jurors and attorneys during *voir dire*, and the resulting actual and potential impact on jury trials.

During this interactive and dynamic 75-minute presentation, the audience was treated to the insights of a distinguished panel regarding cutting-edge legal and ethical issues in the “social media” world. The audience was also dished a healthy dose of comic-relief, which was a welcome addition to the weekend program.

Carrie H. Cohen—distinguished former SDNY AUSA, now-partner at Morrison Foerster and former Commercial and Federal Litigation Section Chair—was a superb moderator of the program, which consisted of three discrete parts and included no fewer than nine participants.

### Part 1: The Role Play

The panel commenced with an attorney/client role play “starring” Lauren J. Wachtler (a partner at Mitchell Silberberg & Knupp LLP and a former Section Chair) as the attorney, and her real-life husband Paul D. Montclare (also a partner at Mitchell Silberberg & Knupp LLP), as the client. The hypothetical case in which they were embroiled was a civil action arising from environmental contamination caused by an oil and gas company and as a result of which that company was being sued for substantial damages. The two discussed their ideal juror and, conversely, jurors they would prefer to avoid. In an entertaining to-and-fro, the two debated the pros and cons of hiring external vendors to assist in electronic data-driven jury selection and, having made the decision to procure further information, attended an information session with two representatives from Deloitte.

The Deloitte representatives (Wendy Conway Schmidt, Principal and Global Service Line Leader for Deloitte Advisory, and Scarlett Kim, a Manager with Deloitte Business Intelligence Services) described the sophisticated methodologies available to aid in the selection of an objective jury. Deloitte was then “hired” and the scene cut to the day of trial where the audience was shown how—within minutes—Deloitte’s tools have the power to transform a one-page jury questionnaire into a comprehensive amalgam of information, including criminal records, tax liens, litigation history, bankruptcy filings, business affiliations, licensing and voter registrations, employment history, education level, home location, neighborhood demograph-

ic information and, critically, social media relationships. I think it is safe to say that the audience found quite remarkable the depth of information that Deloitte’s tools could assemble, and the speed with which they could do it.

For the purposes of the role play, the one-page jury questionnaire provided to Deloitte was for “Juror No. 7”—a tough-as-nails Harley Davidson biker. To round out the first part of the program, the “attorney” (Lauren Wachtler) then extemporaneously *voir dired* “Juror No. 7” using the array of information collected by Deloitte. The “juror” was played by Jonathan D. Lupkin—founder of Lupkin & Associates PLLC and former Section Chair—who, with good humor, dressed up for his moment of fame in his best biker gear. The *voir dire* garnered more than a few laughs, to be sure.

### Part 2: The Study

The second part of the program showcased a presentation by Mark A. Berman—a partner at Ganfer & Shore, LLP and then-Section Chair-Elect and Program Chair—who demonstrated the prevalence of juror (mis) use of social media through a discussion of a recent study performed using software that enables users to view public Tweets by geographical location. Mr. Berman explained that during just one month in 2014, the software registered many public tweets in the area immediately surrounding the Manhattan courthouses (Pearl Street/Foley Square) containing the words “jury,” “duty,” “trial,” “court,” “judge,” or “panel.”

### Part 3: The Panel

The third part of the program was the formal panel, comprised of the Honorable John M. Curran (New York State Supreme Court, Appellate Division, Fourth Department), Scott L. Malouf (a solo-practitioner based in Pittsford, New York, who concentrates in helping other attorneys locate and use social media and electronic information to present the best case for their clients), and Vishal Gupta (a partner at Steptoe & Johnson LLP in New York). The panel discussed various issues raised during the role play and study, including a discussion of ethical issues concerning what may constitute an attorney’s improper “communication” with a juror resulting from monitoring a juror’s social media posts. A number of the key takeaways from the panel are discussed below.

Justice Curran facilitated a free exchange of ideas and a healthy back-and-forth between the panel and the many members of the judiciary who were in attendance. He also

expressed his view (shared by all of his fellow panel members) as to just how important it is for practitioners faced with social media issues to know their judge: What is your judge's overall familiarity with social media and its use by jurors? How does he or she feel about juror privacy issues? And, critically, what is your judge's default position? It is, after all, the judge who controls the courtroom, and practitioners must follow their lead. Only with the background knowledge about the presiding judge can practitioners make informed decisions about how best to proceed in terms of collecting digital information about jurors and/or monitoring their social media behavior during trial.

Scott Malouf stressed an equally important concept: practitioners must take the time to lay the groundwork with their clients and prepare them for the risks. "Lawyers need to tell their clients that there are certain ethical obligations that are not waivable. Clients need to be told that if you decide to monitor jurors during the trial and you find out that they have been breaking the rules, you have an obligation to tell the court—even if you are winning the case. Clients need to know that, regardless of the amount of money they may have spent up to that point, the outlay of money can never justify withholding information from the court when the ethical rules require its disclosure." With respect to ethical obligations, Mr. Malouf directed the audience's attention to ABA Formal Opinion 466—titled "Lawyer Reviewing Jurors' Internet Presence"—as a useful resource to tee-up some of those issues.

At the time of the program, the third panel member, Vishal Gupta, had recently completed a multi-million-dollar jury trial in which he used the services of external vendors to collect information about jurors for use during *voir dire*. He stated that there was an expectation among his caliber of clients that juror research would be undertaken; it was simply part-and-parcel of effective advocacy when millions of dollars were at stake. In his experience, the key when dealing with vendors is to spend the time briefing them sufficiently so that they do not return reams of irrelevant and unnecessary data that the trial team may simply not have time to sift through. Regarding the issue of whether jurors should be advised that their backgrounds may have been investigated and/or their social media accounts monitored, Mr. Gupta's preference was that any such disclosure come from the presiding judge, in order to avoid any ill-will that jurors may feel toward an attorney having to disclose that information.

In the words of Carrie Cohen: "Given the recent publication of our Social Media Committee's Social Media Jury Instructions Report, we thought the issues related to the use of social media and jurors was ripe for discussion and that the Spring Meeting was an ideal platform for such a discussion. We were fortunate to have exceptional panelists with first-hand experience policing these issues and I am so pleased the program was well-received. I am confident the Section will continue to be a leader on the important and controversial issues surrounding social media as it relates to jurors."

## ***NYLitigator* Invites Submissions**

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## Mediation: Tough Strategic Call

By Helen E. Freedman

Our Sunday morning panel, “Sticky Mediation Issues and How to Address Them,” moderated by Stephen P. Younger (Patterson Belknap), and including Simeon Baum (Resolve Mediation Services), Helen E. Freedman (JAMS), Dina R. Jansenson (JAMS), Matthew Maron (Assistant General Counsel, Trump Organization), Shelley Rossoff Olsen (JAMS), and Mark Zauderer (Flemming Zullack Williamson Zauderer LLP) featured a lively exchange that demonstrated that one size does not fit all. Moderator Steve Younger began by asking panelists about the pre-mediation contacts with counsel. Dina R. Jansenson and Simeon Baum discussed the joint and separate telephone calls they had with each party, matters covered in written submissions, and methods of obtaining crucial information to move the process forward efficiently.

Whether or not to hold a joint session at the beginning, a hot topic now in the mediation world, brought a variety of approaches. While the panelists here, unlike some mediators elsewhere, favored the joint session for each side to hear its adversary’s claims, cautions were noted. Shelley Olsen described putting two extremely hostile former partners together, without lawyers, who, after cursing at each other, settled the case. Helen Freedman talked about separating parties from lawyers on occasion and letting lawyers meet jointly without parties.

All agreed that it was important to obtain the confidence of all parties through sensitive use of separate caucuses. Mark Zauderer emphasized that the mediator should focus on the strengths and not the weaknesses of that party’s arguments to gain the party’s confidence; it

should not be the job of the mediator to “talk sense into the client.” At the same time, the mediator can point out uncertainty of outcome. Mr. Zauderer described two instances of taking principals down to 60 Centre Street to watch a *voir dire* being conducted of about 80 people. After 45 minutes the parties settled the case!

Whether a facilitative or evaluative approach was preferable elicited a variety of responses. Simeon Baum expounded on the importance of facilitation in reaching a meaningful and satisfying result. Mark Zauderer concurred, particularly from his experience as a lawyer representing a client, and knowing more about the case than a mediator could. Matthew Maron, as client, agreed. Shelley Olsen and Helen Freedman talked about the mediator’s proposal when the parties needed a final push, and Dina Jansenson described techniques, like “brackets” for getting to “yes,” where the parties did not reach closure on their own.

Finally, Steve Younger asked about ethical issues arising in mediation. Can you as counsel lie to the mediator, ask the mediator to lie to the other side, withhold critical information, allow your client to misrepresent facts to the mediator? Where do you draw the line between puffery and lying? As mediator, what is your obligation in conveying a demand or an offer, when you know that there is less needed or more available? Is lying to a mediator different from lying to a Judge? These are some of the sticky wickets that are so often answered with “it depends,” but the consensus was that ethical obligations were similar to those lawyers face in other contexts.

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## Recap of Panel: Proportionate and Cost-Efficient eDiscovery: An Oxymoron?

By Maura R. Grossman

A Sunday morning panel exploring the applicable federal and state rules, and practical tips for achieving proportionality, in electronic discovery capped off the 2016 Spring Meeting of the New York State Bar Association's Commercial and Federal Litigation Section. The esteemed panel, moderated by Maura R. Grossman, Of Counsel at Wachtell, Lipton, Rosen & Katz, consisted of the Honorable Andrew J. Peck, United States Magistrate Judge from the Southern District of New York; the Honorable Barbara R. Kapnick, Associate Justice of the New York Supreme Court Appellate Division, First Department; Anne S. Rutland, recently retired Court Attorney of the New York Commercial Division, Eighth Judicial District; Sandra J. Rampersaud, Executive Director in the Global eDiscovery Group at UBS AG; and Ignatius A. Grande, Senior eDiscovery Attorney and Director of Practice Support at Hughes, Hubbard & Reed, LLP.

The panel began with an audience poll inquiring whether attendees believed that eDiscovery could be conducted in a proportionate and cost-efficient manner, and whether they had actually seen it done. Some participants believed it was possible, and a few had observed it, but the numbers were relatively low. Ms. Grossman asked the audience to consider whether the factors distinguishing successful from unsuccessful experiences had anything to do with the technical competence of counsel, efforts by parties to cooperate, an actively engaged judge, or all of the above.

Judge Peck then described the December 1, 2015, amendments to the Federal Rules of Civil Procedure bearing on proportionality, including changes to:

- Rule 26(b)(1) regarding the scope of permissible discovery, which is now limited to information “relevant to any party’s claim or defense and proportionate to the needs of the case”;
- Rule 1, encouraging cooperation by the parties and their counsel (in addition to efforts by the court) to achieve the just, speedy, and inexpensive resolution of disputes;
- Rule 26(d)(2), permitting parties to serve early Rule 34 requests for production prior to the Rule 26(f) conference, so they can be discussed at the meet and confer;
- Rule 34(b)(2), requiring greater specificity in responses and objections; and

- Rule 16(b), encouraging in-person scheduling conferences and letters to the court in place of formal motions practice on discovery-related matters.

Justice Kapnick and Ms. Rutland discussed recent changes to the New York Commercial Division Rules [Section 202.70] also aimed at fostering greater efficiency in managing eDiscovery. Justice Kapnick reviewed Rule 1(b), which requires the appearance by counsel (or association with a client or other representative) “sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery,” and Rule 8(b), outlining the various topics that should be discussed at the meet-and-confer of the parties prior to the preliminary conference—and addressed with the court at the conference—regarding eDiscovery issues. Justice Kapnick noted that Rule 9(d), providing for Accelerated Adjudication Actions—and limited eDiscovery—does not seem to be widely used by litigants in the New York Commercial Division.

Ms. Rutland reviewed Rule 11-b and the Commercial Division’s preference for categorical privilege logs over document-by-document logs, as well as the availability of cost shifting when a party insists on a document-by-document log without cause. The practitioners on the panel discussed their experiences with categorical logs, which offer the potential for cost savings, but require thoughtful negotiation and flexibility in implementation since not all categories are known before a privilege review begins. Ms. Rutland also described Rule 11-c and Appendix A of the Commercial Division Rules, which address eDiscovery from non-parties. The Guidelines in Appendix A reflect New York CPLR 3111 and 3122(d), which require requesting parties to defray the reasonable production expenses of non-parties, and provide other suggestions for limiting cost and burden to non-parties.

The consensus of the panel was that both the amended Federal Rules and the New York Commercial Division Rules provide counsel and the court with the necessary tools to achieve greater proportionality in eDiscovery, when properly used. The panel emphasized the need for counsel to quickly become educated about their clients’ information systems and relevant custodians and data sources, so they can have meaningful discussions about ways to reduce cost, such as phased discovery, which begins with the most readily available and probative custodians or types of electronically stored information, and sampling, when the relevance or usefulness of information is unknown.

The panel then shifted its focus from rules to practical suggestions. Ms. Rampersaud described the challenges of applying proportionality principles to preservation, in light of the fact that the law of sanctions for spoliation differs so significantly in New York federal and state courts. Amended Federal Rule of Civil Procedure 37(e) permits the imposition of the most severe sanctions—including an adverse inference instruction—only when a party has acted with the intent to deprive another party of the lost information’s use in the litigation, whereas New York State law, as recently set forth in the New York Court of Appeals’ decision in *Pegasus Aviation I v. Varig Logistics*, permits the imposition of an adverse inference for mere negligent loss. Mr. Grande went on to describe cost-savings measures that can be used for collection, under appropriate circumstances, including targeted collection, active (versus full forensic) collection, and remote collection.

Ms. Grossman polled the audience regarding use of clawback agreements and Federal Rule of Evidence 502(d) Orders to protect against inadvertent waiver of privilege in document productions. Attendees did not seem to be using FRE 502 Orders. Judge Peck explained how such orders can protect the parties in the immediate litigation, as well as in other litigations. Mr. Grande also touched on “quick peek” arrangements that can be used in circumstances

where the responding party is not unduly concerned about privileged or confidential information that may be contained in documents.

Ms. Grossman then provided a brief description of some of the benefits of technology-assisted review (“TAR”) and gave a demonstration of a free online TAR tool, available at <http://cormack.uwaterloo.ca/cormack/caldemo/>. The tool contains approximately 300,000 emails from Jeb Bush’s eight-year term as the Governor of Florida. Ms. Grossman showed attendees how the tool could be used to quickly learn the nickname of Governor Bush’s general counsel, as well as to easily identify and distinguish between documents concerning the Miami Dolphins, and those concerning efforts to save endangered dolphins.

The panel ended with a discussion of available methods to efficiently resolve eDiscovery disputes, including the use of letters to or telephone conferences with the court, instead of formal motions practice (as is required in the Southern District of New York and encouraged by the 2015 Federal Rules amendments), and, where appropriate, the involvement of Court Attorneys, eMediators, or Special Masters to assist counsel in navigating technical matters.

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## Introduction by Mark C. Zauderer of Justice Karen K. Peters on Her Receiving the Robert L. Haig Award for Distinguished Public Service

Good evening. It is good to see everyone here. I am honored to present tonight the Robert L. Haig Award, which we created over two decades ago to recognize the tireless work and dedication of Bob Haig, who has devoted much of his professional life to the betterment of the profession and the courts. Before I present the award, however, I wanted to share with you a few thoughts.

This morning's program on social media and jurors was fascinating. I recall a trial experience I had in the early days of social media, when judges were just beginning to feel their way through the problems created by the internet. At the end of each trial day, our trial judge instructed the jurors not to do any research on Google. One morning, a juror reported to us and the judge that another juror had violated the judge's instructions. The judge called in that second juror and said, "Didn't I order the jurors not to do any research on Google?" The juror replied, "Judge, I didn't violate your order at all. I went on Yahoo."

It was twenty-one years ago this month that the Commercial and Federal Litigation Section held its first ever Spring meeting right here in Cooperstown. At the time, the event was somewhat of an experiment, and we certainly did not know that we were beginning a tradition of collegiality and friendship among the Bench and Bar that has now continued for over two decades.

Those of you who recall the first meeting here may remember how surprised we were to be invited to play a softball match on the original Doubleday Field, where baseball originated. We were even more surprised when the Trustees of Doubleday Field informed us they were assigning to us a professional umpire for our softball game. It was only later we learned that what prompted the offer was their concern that a group of hypercompetitive, New York lawyers would ruin their beloved playing field if they were not supervised.

And then there was one of our colleagues who told us he had been a star baseball player in college and had turned down a chance at professional baseball for law school. He invited several of us to come with him to one of the batting cages in Cooperstown. He headed right for the fastball cage, picked up a bat and waited for the pitch as we watched. Well, the pitch came in and it passed him by the time he started his swing. He then tried a second time, and again the ball zoomed past him before he could swing. Finally, trying a third time, and now anticipating the speed of the ball, he watched the machine and com-

pleted his swing **before** the ball reached the plate; only this time, the bat flew out of his hands and struck the batter near him. Well, at that point, he quit and one of the onlookers said, in a stage whisper, "This guy ought to go back to being a lawyer."

And while we are taking a trip back in time, perhaps you will recall a particularly momentous year—the year 1972. It was during that year that Watergate hit the national headlines; it was the year when the first scientific hand-held calculator was introduced; when President Nixon visited China; when astronaut Eugene Cernan became the last man to walk on the moon; when the Israeli athletes were taken hostage at the Olympics; when the top 10 movies of the year were *The Godfather*, *Fiddler on the Roof*, and *Dirty Harry*; and when the book *The Joy of Cooking* which had been on the best-seller list for 50 years, was supplanted by a new book, *The Joy of Sex*. I guess American's priorities had shifted a bit.

1972 was also the year a brilliant law student, Karen Peters, motivated by the idealism that motivated so many of the 60s generation, was graduated with honors from New York University Law School.

Karen's long journey from law school to the position of Presiding Justice of the Appellate Division, Third Department reads like a work of improbable fiction. Law is a career path she never dreamed of as a child. Karen's parents never finished high school and her father, who died when Karen was just a young teen, was a recovering alcoholic, but nonetheless a true role model for her. He taught her never to judge people by the clothes that they wore or the color of their skin or the religion they chose to practice, but by their character alone. According to all that have known or worked with Karen, those values have characterized her relations with everybody she has come into contact with, both professionally and personally.

Following law school, with little money and no professional connections, Karen left the New York City area to move to a town she fell in love with, Woodstock, New York. There, she became a defense attorney and made a name for herself defending difficult cases as the only woman defense attorney in her county. As there was no county public defender, she asked the town judges for the opportunity to be assigned to criminal cases. Some of the judges decided that the best way to accommodate her was to assign her only to clients who were not in jail, because

they thought that visiting a jail would not be a safe thing for a woman to do.

Karen then served a short stint as an assistant district attorney before she was afforded the opportunity to serve as the first counsel to the New York State Division of Alcoholism and Alcohol Abuse in Albany.

In 1983, there had never been a Democrat elected to county-wide judicial office in the history of Ulster County, and no woman had ever run for that office. People there wanted Karen to run for office to raise issues concerning child abuse, adequate assigned counsel programs, domestic violence issues, and other matters of vital importance to women and families. To the surprise of many, Karen won the election and served nine years as a family court judge.

During that time, Karen's adopted son, Avanti, arrived from Calcutta, India. As an adoptive single mother of a four-month-old and a full-time Family Court judge, her daily life changed considerably, as she exercised admirable discipline to fulfill her roles as judge and single mother.

After serving on the Family Court, Peters ran and won election as the first woman candidate for Justice of the Supreme Court in the history of the Third Department, which encompasses 28 counties. In 1994, she was appointed to the Appellate Division, Third Department—the first woman justice on that Court—and then in 2012, she was appointed by the Governor as Presiding Justice of that Court—again, the first woman appointed as Presiding Justice of that Court.

As a judge and administrator of her Court, Peters oversees matters in twenty-eight of the state's sixty-two counties. As an administrator, she is highly regarded by everybody. But Peters' renown as a skilled administrator is matched, if not exceeded, by her reputation as a scholar and independent jurist, motivated by beliefs and not political considerations.

A prime example of her independence was her dissent in 2004 in *Pataki v. New York State Assembly, et al.*, in which the Governor had brought suit against the Legislature for allegedly amending his budget bills, in violation of the state Constitution. While the majority ruled for the Governor, Peters wrote a dissent, finding against the very Governor of the opposite political party who was then considering her for reappointment to the Court. And in 2011, in a decision written before the New York Legislature legalized same-gender marriage, the Third Department considered an appeal in which the plaintiff had brought an action for equitable

and declaratory relief seeking dissolution of her same-sex civil union that had been validly entered into in Vermont. Unable to meet the residency requirement to bring an action in Vermont, the plaintiff faced a different obstacle in New York because this state had no legislatively created mechanism by which a court could grant the dissolution of a civil union entered into in another state—which led the trial court to dismiss the action. In an elegant opinion exploring the landscape of the life of a person interminably bound to an abusive relationship, the Court, in the decision written by Peters, held that absent Supreme Court's invocation of its equitable power to dissolve the civil union, there would be no court competent to provide relief, and thus equity could be invoked to provide the remedy of dissolution.

And in an entirely different but equally significant decision, early on in her judicial career, while sitting on the Family Court, Peters heard a proceeding brought against a father who was alleged to have sexually abused his daughter. The child was non-verbal and communicated through a technique known as "facilitated communication." Beginning her opinion with a poignant Ogden Nash poem, Peters said, "The question before the court is simple—have we heard the frantic cry of a child?" Peters became one of the first judges in the state to conduct a *Frye* hearing to deal with the question of admissibility of testimony through facilitated communication.

But her formal accomplishments, impressive as they are, hardly give us a full picture of the person. Everyone who has known her professionally or personally has admiration for Karen's fairness and compassion. I asked retired Judge Victoria Graffeo, who is here with us tonight, how Karen Peters was as a boss, for it was Karen who hired Vicky Graffeo some thirty years ago at the New York State Division of Alcoholism and Alcohol Abuse. Graffeo thought for a moment and said, "Does the fact that Karen and I have been best friends since then for over thirty years answer that question?"

Well, today, Karen Peters has many friends who have known and respected her for over thirty years. And it is an honor that I and so many others could be here tonight to express our appreciation for her accomplishments and her friendship.

So Justice Karen Peters: now, therefore on this 14th day of May, 2016, by the authority conferred upon me by the officers of the Commercial and Federal Litigation Section, I hereby confer upon you, Karen Peters, the 2016 Robert L. Haig Award for Distinguished Public Service. Congratulations!



**Mark C. Zauderer presenting the Robert L. Haig Award for Distinguished Public Service to Justice Karen K. Peters**

## Remarks of Justice Karen K. Peters on Acceptance of the Robert L. Haig Award

Good evening.

Thank you, Mark, for that wonderful introduction.

I am humbled to receive the Roberg Haig Award for Distinguished Public Service tonight. I'd like to take a moment to thank Bob for his many contributions to the legal profession and the community.

Each day I marvel at the opportunity I have had to spend my career serving the people of this great state. To play some small role in making people's lives better and settling disputes by peaceful means is such a gratifying experience.

My years on the bench have taught me that humanity and dignity do not have to be a stranger to reason. The process of decision-making is a dialogue between the head and the heart.

Now that I've been a judge for decades, I'm looking through the lens of someone who is a year and a half away from retiring. Much has changed throughout my career.

But one constant theme has been my governing philosophy that, as judges, we are here to serve the people who come before us. Of course that means we must render thoughtful and accurate decisions, but it also means that we must improve access to justice broadly and access to the courts in a very literal sense. We must have meaningful relationships with the organized bar to maintain an understanding of the realities of practice and to take advantage of your expertise as we craft new rules. And it means that we must uphold the public's trust in our justice system by reflecting the diversity of our communities.

It is truly an honor to be recognized by this extraordinary section of the State Bar. The work you do is a perfect example of the service the organized bar can provide and the influential role attorneys can play in shaping the law.

For decades, this Section has been leading the way in commercial and federal litigation.

You've created an active community of practitioners and you provide excellent opportunities to connect and learn from one another. Through your legislative and regulatory advocacy, you've earned the trust of policy-makers who benefit from your knowledge and expertise.

More than 20 years ago, your advocacy for the Commercial Division helped give rise to a forum for commercial litigation that is known around the globe for its fairness and efficiency.

Today, entities choose New York to transact business because they know we have a clear and well-developed body of commercial law. Litigants choose our Commercial Division courts to resolve their disputes because they know the judges are sophisticated and the rules make sense. They can be confident that their cases will move expeditiously and the dispositions will be fair.



**Justice Karen K. Peters**

This Section has contributed to that outstanding reputation by providing valuable guidance to the Court System throughout the Commercial Division's evolution.

As the Third Department's Chief Administrator, and through my work on the Administrative Board of the Courts, I have had an opportunity to review many of the Commercial Division's innovative rules and procedures. We've seen groundbreaking rules providing for effective case management, placing reasonable limits on discovery, and encouraging mediation and settlement.

I have been particularly impressed by this Section's efforts to make sure the Commercial Division operates efficiently and responsibly. As the Division continues innovating, your input helps to sharpen and clarify proposed amendments to its rules. It is so important that the practitioner's perspective is represented when we consider those changes, and this Section consistently provides well-reasoned and reliable feedback from expert litigators.

At the Third Department, we have been innovating as well, in an effort to better serve litigants, attorneys, and the general public.

Since 2013, we have permitted the use of electronic devices in the courtroom as long as they are silent. In keeping with New York's status as a preeminent venue for transacting business, we believe this policy helps to bring our courts into the 21st Century by allowing attorneys to work while they wait for their cases to be called.

We are also pleased to provide our new oral argument webcast. Earlier this year, we began streaming live video of all of our oral arguments on our website.

As I'm sure many of you know, the Third Department is exceptionally large—it covers more than half the state's land mass. Webcasting our arguments allows clients, lawyers, judges, and members of the media and the public to observe our court in action, from anywhere in the world with an internet connection.

We are the only Appellate Division Department to provide the service at this time, and it has been a very useful resource.



I look forward to a time when more of our courts are webcasting their proceedings—including, I hope, the Commercial Division.

Former Chief Judge Lippman once said of New York State and the Commercial Division: “We are the commercial center of the world and our courts should be not only world class, but a place where everyone understands that they can come and see what happened, see the right way to resolve a commercial dispute.”

My hope is that before long, with the help of technology and forward-thinking legislation, we will be able to “see what happens”—literally—in more of our courtrooms.

It’s important to facilitate access for all of the people we serve, regardless of their geographic location or their ability to travel to the court in person.

As we work to bring the world to our courts, we also work to bring our courts to the world.

Another critically important way that our courts must serve the public is by making sure the bench reflects the diversity of our communities.

In the Third Department that includes traits such as gender, race, and ethnicity as well as geographic diversity.

I’m pleased to report that just this past March, we made new strides toward a more inclusive bench with the swearing-in of two new judges.

Justice Robert C. Mulvey is the first judge to join the Third Department from Tompkins County. Justice Sharon A. M. Aarons is not only our first judge to hail from Bronx County, but she is also the first person of color to serve on the Third Department in its 120-year history.

These are important milestones, and Justice Mulvey and Justice Aarons have each been a wonderful addition to our court.

I’m so proud of the strides we’ve made and the many ways we continue to innovate and evolve.

I’d like to thank you again for recognizing contributions to public service with the Robert Haig Award.

It has been a tremendous privilege to have spent my career serving the people of this state. What better life could anyone ask for than to pursue intellectually challenging work with people you care deeply about and serve the public at the same time?

It’s incredibly meaningful to be recognized for that work, and I am so grateful to have been selected to receive this honor. Thank you.

### **Letter of Chief Judge Janet DiFiore on the Award to Justice Karen K. Peters**

New York State Bar Association  
Commercial and Federal Litigation Section  
c/o Mark Berman, Chair  
Ganfer & Shore LLP  
360 Lexington Avenue, 14th Floor  
New York, NY 10017

May 14, 2016

Dear Friends,

Warmest greetings to you all at the annual meeting of the Commercial and Federal Litigation Section of the New York State Bar. I regret that I am unable to be with you this weekend, though I would like to take this opportunity to congratulate Justice Karen Peters upon receiving the Robert L. Haig Award.

Judge Peters is a leader and model in the legal community. I have the pleasure of serving with her on the Administrative Board of the Courts, and I am so proud that she is our representative from the Third Department. She is a singular role model for trial and appellate judges in our state and young attorneys alike. Her career has been marked by trailblazing achievements, such as becoming the first woman elected as a Supreme Court Justice in the Third Department and becoming the first woman to serve as a Presiding Justice in the history of the department.

Judge Peters conducts herself with integrity and fairness and is a dedicated and loyal public servant, serving previously as assistant district attorney, counsel in the executive branch, director of a standing committee in the Assembly, and as a family court judge for many years. She has a razor sharp intellect, is a talented court administrator, and has the trust and esteem of her colleagues and the profession. I appreciate her firm leadership and her steadfast support for the courts. Her expertise in judicial education and administration, criminal law, family law, appellate practice, and in so many other areas are highly valuable to our court family and to the many New Yorkers we serve.

I extend my heartfelt congratulations to Judge Peters for this well-deserved award and wish you all a wonderful evening of celebration.

Sincerely,

Janet DiFiore  
Chief Judge  
New York Court of Appeals  
Albany

Scenes from the  
Commercial and Federal Litigation Section

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May 13-15, 2016

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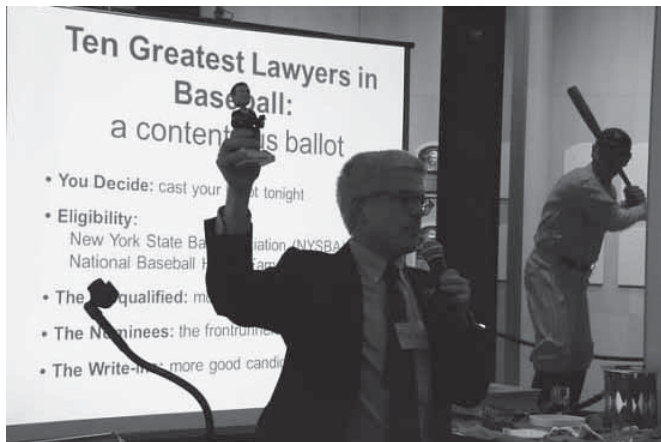
Appellate Division Justice Jeffrey A. Cohen and wife, Appellate Division, Justice Thomas A. Dickerson and wife, Appellate Division Justice Sandra L. Sgroi and husband at Hall of Fame reception



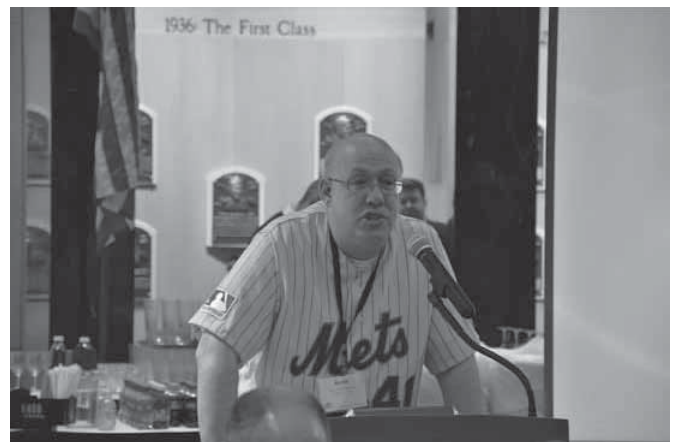
Appellate Division Justice Thomas A. Dickerson, then-current Bar President David P. Miranda, then-Chair-Elect Mark A. Berman at Hall of Fame reception



Then-State Bar President David P. Miranda



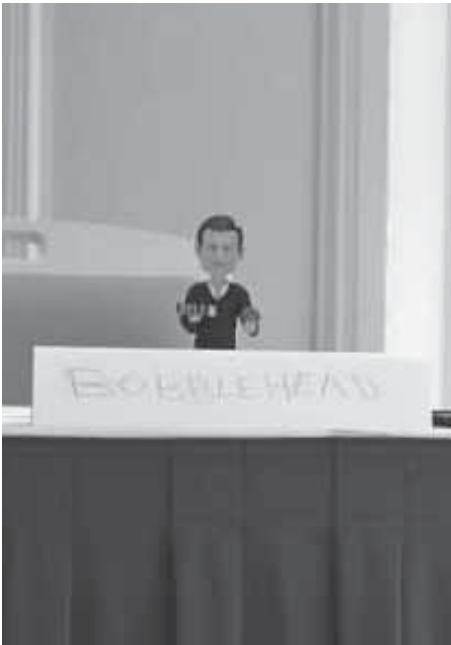
Prof. Ross E. Davies



Mark A. Berman



# Saturday



Chief Justice John G. Roberts bobble-head during the mediation program



Presentation of Chair's Award by James M. Wicks to Magistrate Judge Frank Maas



Kids fishing Saturday morning



Jamie L. Sinclair, Section Secretary; James M. Wicks, then-Section Chair; Claire P. Gutekunst, then-State Bar President-Elect; Mark A. Berman, then-Chair-Elect; Mitchell J. Katz, then Vice-Chair

## Don't forget!

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# The Section Presents “Smooth Moves: A Decade of Celebrating Diversity,” and Confers the Honorable George Bundy Smith “Pioneer Award” on NYC Corporation Counsel Zachary W. Carter

By Carla M. Miller

On April 19, 2016, the Commercial and Federal Litigation Section presented its 10th Anniversary “Smooth Moves” program at Lincoln Center for the Performing Artist’s Stanley Kaplan Penthouse. Since its inception in 2007, Smooth Moves has emerged as the Section’s premiere diversity initiative. Designed to attract attorneys of color to more active participation within the Section, the Smooth Moves annual event includes a complimentary CLE program and a professional networking reception, culminating in the presentation of the Section’s Honorable George Bundy Smith Pioneer Award. The Section also selects a first year minority law student from a local law school via a writing competition to participate in a summer fellowship in the chambers of a Commercial Division Justice within New York County. The New York Bar Foundation generously provides a \$5,000 stipend for the 1L Commercial Division Fellow.



**New York Appellate Division Justice Barry A. Cozier (ret.), New York City Corporation Counsel Zachary W. Carter, New York Court of Appeals Judge George Bundy Smith (ret.)**

This year’s CLE program—aptly entitled *A Decade of Celebrating Diversity*—featured a thought-provoking and inspiring conversation with The Honorable Zachary W. Carter, the 78th Corporation Counsel of the City of New York. The discussion was facilitated by Mr. Carter’s long time friend and NYU School of Law classmate, former Appellate Division, Second

Department Justice Barry Cozier. Mr. Carter reflected on his life in the law; the continuing challenge of ensuring diversity within the legal profession; the importance of mentoring and how it shaped his career; and the unique political and ethical considerations associated with career transitions among the public and private sectors, and the judiciary.



**Simonne Isaacs, Award Recipient, New York Court of Appeals Judge George Bundy Smith (ret.), New York City Corporation Counsel Zachary W. Carter, New York State Supreme Court Justice Anil C. Singh**

Mr. Carter is one of the true icons of the New York Bar, with a career spanning 40 years of legal excellence in both the public and private sectors. Following stints as a judge on the New York City Criminal Court, as well as magistrate judge for the United States District Court for the Eastern District of New York, in 1993, President Bill Clinton appointed him United States Attorney for the Eastern District of New York. Mr. Carter was the first African-American to hold that office. During his tenure at the Eastern District, in addition to prosecuting a full range of federal criminal matters, Mr. Carter’s office oversaw multiple, high-profile civil rights prosecutions, including the Abner Louima police torture case, as well as cases stemming from the 1991 Crown Heights riots during which a



young Rabbinical student was killed. Prior to his 2014 appointment as the City's Corporation Counsel by Mayor Bill de Blasio, Mr. Carter was a partner in the international law firm of Dorsey & Whitney LLP, where he oversaw the New York office's Trial Group, and co-chaired the firm's White Collar Crime and Civil Fraud Practice.

Immediately following the CLE program, the Section also presented The Honorable George Bundy Smith Pioneer Award to Mr. Carter in honor of his lifetime achievements. The George Bundy Smith Pioneer Award was established in 2007 by the Section in recognition of Judge Smith's work in the civil rights movement, and his 30 years of public service in the judiciary, including 14 years as an associate judge of the New York Court of Appeals

Past recipients of the Section's Pioneer Award include Hon. George Bundy Smith himself (JAMS – New York), Cesar A. Perales (New York Secretary of State, and Co-Founder, and past President and General Counsel, LatinoJustice), Elaine R. Jones (Director-Counsel Emeritus, NAACP Legal Defense

and Educational Fund), the Honorable Carmen Beauchamp Ciparick (former Senior Associate Judge, New York Court of Appeals), the pioneering, father-son law practice of Kee & Lau-Kee, the Honorable Samuel Green (retired Court of Appeals Associate Judge), Kenneth Standard (General Counsel Emeritus, Epstein Becker & Green, P.C.), Kay Crawford Murray (retired General Counsel, New York City Department of Juvenile Justice), and The Honorable Denny Chin of the U.S. Court of Appeals for the Second Circuit.

Finally, the Section awarded the 1L Commercial Division Fellowship at the event to Simonne Isaac, a first-year law student from the Maurice A. Deane School of Law at Hofstra University, who will spend the summer working in the Chambers of the Honorable Anil Singh, Justice of the New York State Supreme Court, Commercial Division.



**Smooth Moves Planning Committee: David P. Miranda, then-New York State Bar President; Sara Chang, Lincoln Center; Lesley Friedman-Rosenthal, Lincoln Center; James M. Wicks, then-Section Chair; New York City Corporation Counsel Zachary W. Carter; New York Appellate Division Justice Barry A. Cozier (ret.); New York Appellate Division Justice Sylvia Hinds-Radix; Carla M. Miller; Tracee E. Davis; Mark A. Berman, then-Section Chair-Elect**

# The Section Hosts a Webinar on the Impact of Recent Amendments to the Federal Rules

By Michael C. Rakower

Recent amendments to the Federal Rules of Civil Procedure, effective December 1, 2015, place an emphasis on efficient case management, cooperation among parties, and proportionality in discovery. They also set the framework for remedial and punitive measures courts may take when a party fails to preserve electronically stored information (“ESI”). On February 10, 2016, the Section hosted a webinar to examine issues raised by the amendments. The webinar was titled “Is it Really Time to Change: Analyzing the Scope and Impact of the Recent Amendments to the Federal Rules.”

Providing insights from the bench, academia, and the bar, the webinar was led by the Honorable Frank Maas, former Chief Magistrate Judge, U.S. District Court for the Southern District of New York, Professor Alexander A. Reinert, Professor at Benjamin N. Cardozo School of Law, and this author, a partner at Rakower Law PLLC.

The webinar began with an explanation of the primary purpose of the amendments: to encourage early case management; to reduce the opportunity for existential discovery disputes; to create an opportunity to rein in unwieldy discovery demands; and to set a standard for punitive measures associated with lost e-discovery. Overall, the goal of these amendments is to streamline litigation in federal courts so that it will be faster and more cost-effective.

The panelists focused on amendments to Rules 16, 26, 34, and 37 because they viewed those changes as having the most significant impact on daily practice, although changes were also made to Rules 1, 4, 30, 31, 33, 55, and 84.

Concerning Rule 16, the panelists noted with approval the 30-day reduction under Rule 16 for courts to issue a scheduling order and for the plaintiff to serve any defendants with a summons and complaint. They also applauded changes that now encourage a court to include in a scheduling order provisions regarding ESI-related

preservation and disclosure obligations as well as agreements related to Federal Rule of Evidence 502. They explained that increased use of 502(d) stipulations, which provide protection against inadvertent disclosures, will aid litigants.

The panelists next discussed changes to Rule 26, which primarily concern a newfound focus on proportionality in discovery. Although in substance the rules have not changed the proportionality standard, the panelists explained that in practice one should expect increased efforts by practitioners to limit the breadth of discovery and an increased willingness by courts to impose stricter boundaries. This will affect not just document discovery, including ESI, but also could affect the number and length of depositions in a case.

The panelists explained that changes to Rule 34 evidence a further effort to streamline the discovery process. Under Rule 34, document requests may now be issued before a Rule 26 conference, but any responses will not be due until 30 days after the conference. This right to issue document requests early in the action will enable parties to address actual, rather than theoretical, discovery concerns at the initial conference. Under the new Rule 34, parties objecting to discovery requests will no longer be permitted to assert boilerplate objections, but will now be obligated to identify with particularity the basis for withholding each withheld document.

Finally, the amendments to Rule 37 establish measures courts may take when ESI that should have been preserved is irretrievably lost. Notably, these corrective measures can be imposed even if a party lacks the intention to deprive the adversary of information. Rule 37 gives courts wide latitude to devise curative and, if warranted, punitive measures when preservable ESI is lost. However, Rule 37(e) has no impact on an independent tort claim for spoliation, if a state law authorizing such claim is applicable.



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# Section Presents “How-To” Session on Categorical Privilege Logs

By Royce F. Cohen

On March 15, 2016, the New York State Bar Association’s Commercial and Federal Litigation Section sponsored a “how-to” webinar on categorical privilege logs. The panel consisted of experienced practitioners Royce F. Cohen of Tressler LLP and Jennifer R. Levy of Cleary Gottlieb and was moderated by Jessica Perazzelli Ross of Deutsche Bank AG NY. The panelists offered real-life perspectives and explained the pros, cons, and “how-to” of using categorical privilege logs in practice.

The panel opened by discussing the struggle that courts and practitioners have encountered in searching for ways to contain the increasing costs of discovery and the production of electronically stored information (“ESI”). The webinar opened with a discussion of traditional privilege logs and the issues and pitfalls encountered in using a traditional approach to logging privileged documents.

The panel then turned to a discussion of the categorical privilege log approach reflected in the most recent amendments to the Uniform Rules for the New York State Commercial Division. On September 2, 2014, revised Rule

11-b of the Uniform Rules for the Supreme and County Courts went into effect and established a preference for the use of “categorical designations” in preparing privilege logs in New York’s Commercial Division. See 22 N.Y.C.R.R. § 202.70(g). The panel discussed a step-by-step guide as well as the benefits and pitfalls to using the categorical approach to privilege logs as set forth in Rule 11-b.

The panel also provided a model categorical privilege log created by the New York City Bar Association E-Discovery Subcommittee, which is based on the Committee comments and court decisions addressing categorical privilege logs. The model includes the information generally required in any categorical privilege log, including dates of withheld documents, authors/recipients, number of documents withheld, and the privilege asserted.

In sum, the Section’s March 15 webinar was informative and practical. Practitioners in attendance left the program better prepared to use a categorical privilege log during discovery.

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# The SDNY 225th Anniversary Book

By Clara Flebus

The Commercial and Federal Litigation Section prepared a Book to honor the 225th Anniversary of the United States District Court for the Southern District of New York. The book is a listing of all the books and articles written by and about SDNY Judges and their cases since the first sitting of the Court in 1789. Jay G. Safer, a partner at Wollmuth Maher & Deutsch LLP and Chair of the Section's Federal Judiciary Committee, coordinated this project, which was carried out with the assistance of Past Section Chair Paul D. Sarkozi and the law firms of Sheppard, Mullin, Richter & Hampton LLP and Paul, Weiss, Rifkind, Wharton & Garrison LLP. Notably, Southern District Judge P. Kevin Castel, who is Former Chair of the Section, and Southern District Judge Deborah A. Batts provided guidance in preparing this very comprehensive and well-organized bibliography.

The book lists each SDNY Judge, followed by every publication authored by the Judge, including books and articles on a surprisingly vast array of subjects addressing not only law, but also history, famous Judges, and the courts. A reader perusing this section of the bibliography will discover that the Judges' writings have contemplated many fascinating issues. For example, Judge Harold R. Medina wrote a commentary on the law practice of Alexander Hamilton; Judge Robert P. Patterson Sr. wrote extensively about World War I and II; Judge Abraham D. Sofaer published dozens of law review articles also discussing the presidency, war, and foreign affairs; Judge



Jay G. Safer, Judge P. Kevin Castel, Judge Deborah A. Batts, and Clara Flebus

John M. Walker Jr. wrote about the Iran hostage crisis and the Hague Claims Tribunal; and Judge Lawrence Walsh published a book on the Iran-Contra conspiracy theory.

In addition, the book lists publications about every Judge, including biographies, tributes and more. The book also contains a case section noting publications about specific famous cases handled in the Court.

Publications about SDNY legendary cases explore, for example, the espionage trials of Julius and Ethel Rosenberg and Alger Hiss, Ariel Sharon's suit against TIME magazine, the government's challenge to the publication of the *New York Times'* Pentagon Papers, and the "Pizza Connection" mafia trials. Lastly, the book features a miscellaneous section, which contains a wide range of publications about the court, its past and present, legal practice and issues, and relevant books authored by well-known attorneys.

Reading through the list of Judges, the publications, the famous cases, and about the court is an eye opener and study of celebrated legal history. The Section is grateful to all who participated in developing this critical and unique work on the SDNY, that helps us understand the culture, the rationale behind judicial decisions, the personalities that shaped the court's jurisprudence, and the roles and role-players in the administration of justice. An electronic version of the book is available online at: <http://history.nysd.uscourts.gov/biblios/SDNYBibliography.pdf>.

## Don't miss out on the joint March 13th, 2017, Commercial and Federal Litigation and Dispute Resolution Sections program held at Fordham Law School!

The focus will be on the respective efforts of the litigation and arbitration worlds to provide quicker and less expensive trials and hearings and to handle the difficult issues presented by ESI.

*Organized by the Commercial and Federal Litigation Section's Committee on Arbitration and ADR, its International Committee, the Arbitration Committee of the Dispute Resolution Section, and co-sponsored by the American Arbitration Association.*

**More details will be available soon, please check [www.nysba.org/ComFed](http://www.nysba.org/ComFed)**

# Hedge Fund and Capital Markets Litigation CLEs

By Benjamin R. Nagin

This spring the Committee on Hedge Fund and Capital Markets Litigation hosted two events addressing complex commercial disputes.

On March 22, 2016, the Honorable Bernard Fried (ret.) spoke to the Committee regarding his service on the Commercial Division and his work at JAMS as a mediator and arbitrator. Justice Fried began work as an arbitrator and mediator after serving for over eight years as a justice of the Commercial Division of the New York State Supreme Court in New York County. His judicial career spanned 32 years on the New York State bench, first in the New York City Criminal Court, later in the Bronx County Supreme Court, and most recently in the New York County Supreme Court.

Among other topics, Justice Fried discussed the mediation of significant commercial disputes, having first served as a judge for many years. Numerous members inquired whether, in mediation, Justice Fried effectively provided advisory opinions and “played the role” of a judge for the litigants in an effort to reach a consensual resolution. Justice Fried explained that the manner in which he approached a mediation really depends on the parties. Thus, where parties want the benefit of Justice Fried’s views as to how he might have approached and even decided the issue as a judge, he certainly could provide that point of view. However, Justice Fried more often plays the role of a traditional mediator, making effort to find common ground between the parties and assess, in a realistic way, whether a resolution might occur. But, unlike on his days on the bench, Justice Fried notes that he cannot decree or otherwise force a resolution.

On May 11, Sidley Austin LLP and the Section hosted a two-panel conference on international aspects of hedge fund and capital markets litigation. The first panel was called “Key Choice of Law Considerations: Do You Really Have a Choice?” The panelists were: The Honorable Martin Glenn (Bankr. S.D.N.Y.); Jack Jacobs, Senior Counsel, Sidley Austin LLP (Delaware Chancery and Supreme Courts) (ret.); Barry A. Cozier, Senior Counsel, LeClair Ryan (Commercial Division Justice) (ret.); and Judith Archer, Commercial Litigation Partner, Norton Rose Fulbright. Ben Nagin moderated the panel, which engaged in a far-ranging discussion of the limits of choice of law provisions—even in complex and sophisticated agreements. The panel also reviewed when a choice of law provision may not apply, including for example when the internal affairs doctrine applies, as well as the question of how foreign law must be pleaded and proven in New York state and federal courts.

A second panel addressed cross-border litigation issues, including questions regarding the selection of jurisdiction and the factors that may go into such a selection (e.g., location of defendants, location of assets, impact of local law, etc.). The panelists were Adam Frankel, General Counsel, Evercore Group LLC; Ben Mays, Partner, Carey Olsen (British Virgin Islands); Ank Santens, Partner, White & Case LLP; and Gonzalo Zeballos, Partner, Baker Hostetler. The panel was moderated by Robin Rathmell, Kobre & Kim. Approximately 70 practitioners and clients attended.

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**For more information contact Megan O’Toole at [motoole@nysba.org](mailto:motoole@nysba.org)**

# Data Security for the New York Litigator: 2016 Law and Practice or How to Maintain Competence in the Face of Constant Threat

By Matthew F. Knouff

The NYSBA's Commercial and Federal Litigation Section convened a cutting-edge CLE on data security. The aim of the program was to enhance the competency of New York litigators with regards to current issues in cybersecurity. Stories of data breaches in corporations, law firms, and even government institutions are common fodder for the 24-hour news cycle. Litigators focused on their core practice areas can feel overwhelmed in the current cybersecurity landscape filled with constantly evolving threats.

At the start of the program, the difference between data security and data privacy was outlined. Though these two elements of data handling are often conflated, it is important to understand that data privacy encompasses the appropriate usage and disclosure of data by trusted parties, while data security refers to the measures taken to prevent unauthorized access to data. It is a fundamental difference. The June 2nd program focused specifically on how litigators can handle data security issues both for their firm's data and for their clients. Law firms are entrusted with a treasure trove of client information; and in the wake of headline-grabbing breaches at major firms, litigators must educate themselves on how to successfully address cybersecurity threats.

The first panel of the day focused on key Federal and New York State data security laws and trends. Participants Shoshanah Bewlay (General Counsel and Director of Enterprise eDiscovery Services, NYS Office of Information Technology Services), Krista Ellis (Head of Litigation, Credit Agricole Corporate and Investment Bank), and Samantha Ettari (eDiscovery Counsel, Kramer Levin Naftalis & Frankel, LLP) unpacked key pieces of legislation in the context of shared real-world stories. Ms. Ellis underscored that not only is there a focus on securing data on site at her bank, but there is increased attention being paid to employee activities. Severe consequences can emanate from seemingly everyday events such as sending an email to a personal account or printing out a document. Controlling data once it leaves the four corners of a law firm can be nearly impossible. For example, companies are increasingly monitoring employee use of flash drives because not only is this technology a conduit for information leaving the premises, it is also a means for malicious software to enter corporate servers.

The panel also discussed the increased scrutiny on vendors who handle sensitive data. As Ms. Bewlay stated, any vendor who has access to specific categories of protected information, such as HIPAA-protected data, can expect to see an RFP with very serious security questions. Ms. Ettari discussed third party data management at length, noting that there is now an expectation that vendors will offer multi-factor authentication and encryption

for their services. Law firms should ask for the ability to perform security audits on their vendors to ensure technology and processes are robust. There is also increased awareness that breaches are not 100% preventable and that law firm and vendor incident response plans must be thorough. As the saying goes, "there are two types of firms: those that have been breached and those that don't know they have been breached." Contractual language should be in place that addresses cybersecurity issues such as vendor notification of cyber incidents and vendor indemnification for financial losses from a breach.

Panelists discussed the fact that different government agencies issue their own guidance with regards to data security, making it a challenge for organizations to keep up with the shifting landscape. Though the language used in these guidelines can vary, there is consistency among suggested practices. When asked how firms can best comply with the panoply of regulations, Ms. Ettari recommended that the safest course is to set the bar to the highest, most stringent requirements. By erring on the side of caution, firms can both comply with regulations and manage risk in the most effective manner possible.

Members of the second panel, Gregory Bautista (Partner, Wilson Elser Moskowitz Edelman & Dicker LLP), Joseph DeMarco (Partner, DeVore & DeMarco LLP), and Rebecca Waldman (Partner, Dechert LLP) discussed enforcement actions and Federal and New York State data security cases. Mr. Bautista noted the wide range of lawsuits that emerge from cybersecurity breaches, including consumer class actions, smaller privacy related actions, contract claims, unjust enrichment claims, and consumer fraud litigations. Liability in these cases extends beyond the law firm or corporate entity—attorneys can face personal liability for cybersecurity failings. *FTC v. Ross* has set a trend that can be seen across the white collar world: individuals are held liable in order to create a deterrent effect. Mr. DeMarco added that this trend should not necessarily be shocking to litigators, as such liability is also present in the environmental context and in other areas.

The concept of what constitutes a reasonable security measure was discussed at length by the panel. Mr. DeMarco noted that in light of the speed with which technology evolves, defining what is adequate or good security is going to be a near impossible task. Ms. Waldman highlighted that it is important to understand the constantly evolving nature of threats as well.

The panel addressed how enforcement actions begin. In many cases, it can be as simple as having a regulator encounter a news article about the breach. At other times, a complaint from a victim sparks enforcement. Criminal law enforcement may even contact a civil regulator directly to start proceedings. The panel went on to dissect a wide



range of cybersecurity case law from *Wyndham*, *Anthem*, *Target*, and other opinions, addressing such issues as the enforcement authority of the FTC, standing, and private rights of action.

The final panel of the day discussed the practical aspects of data security as they specifically apply to law firms. Panelists Jim Garrett, GCFA, CISSP, MBA (Chief Information Security Officer, NYS Office of Information Technology Services, Enterprise Information Security Office), Abel Sussman (Director for Public Sector Practice, Coalfire-Cyber Risk Management & Compliance), Kathryn Cole (Counsel, Farrell Fritz, P.C.), and Tom Ricketts (SVP and Executive Director, Aon Risk Solutions) began by addressing the current threat landscape. Mr. Garrett outlined the three factors that make up the world of security threats: actors, attack vectors (where the actors will attack), and vulnerabilities within systems. Law firms that handle M&A data are especially attractive targets for attack because of the large amount of IP they handle. Not only can competitors target these file stores, but there are cases in which nation-states have stolen IP from target companies. Mr. Sussman identified four systemic issues that plague many law firms: a lack of a systems security plan, a lack of an incident response plan, no definitive information inventory, and a need to review access controls. Ms. Cole then discussed cyberattacks and the consequences and the impact such events can have on attorney-client privilege.

Mr. Ricketts led a conversation on insurance as it relates to data breaches. While general liability insurance is predicated on bodily injury or property damage and requires the plaintiff to have standing, cyberinsurance does not require this of a claimant. Cyberinsurance responds to the needs of clients as the first party under the policy. With regards to reputational damage to firms in the wake of a cybersecurity incident, the topic of reputation insurance was broached. Insurance companies are in the process of figuring out how to insure the reputations of firms and corporations, but it is difficult to quantify losses associated with reputational damages. Some insurers offer reputation insurance that helps pay for public relations and response efforts after a security incident. Mr. Ricketts also stated that, unfortunately, law firms should not expect to have their premiums reduced based on improvements in their security postures. When asked about security measures that lawyers can start implementing immediately, Mr. Garrett recommended conducting a risk assessment and Mr. Ricketts emphasized the importance of implementing two-factor authentication.

While it is true that cyberattacks are becoming both more prevalent and more sophisticated, the presentations at the data security MCLE stressed that there are practical steps that law firms can take to comply with regulations and protect their data. Simply put, the information they warehouse is too important not to protect to the fullest extent possible.

The Section would like to thank Wilson Elser and its partner Daniel M. Braude for hosting the event, Complete Discovery Source for helping to organize the CLE and sponsoring the program lunch, as well as Coalfire for hosting the post-CLE lunch.

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# New York County Bench Bar Commercial Division Program

By Isaac B. Zaur

Nearly a hundred attendees gathered for a panel discussion featuring many of the justices of the New York County Commercial Division on Tuesday, June 21, at the midtown offices of Cravath, Swaine & Moore LLP.

After a convivial cocktail hour, Section Chair Mark A. Berman convened the panel discussion. The panel was moderated by James McGuire (formerly of the Appellate Division, First Department), and comprised Justices Charles Ramos, Shirley Kornreich, Peter Sherwood, Marcy Friedman, Saliann Scarpulla, Anil Singh, and Barry Ostrager.

Several members of the panel emphasized that the new rules recommended by the Advisory Council represent, in large measure, a codification of practices already well-established in New York County. There was some discussion of the contrast between the current practice of statewide rulemaking and a more informal process in the earlier years of the New York County Commercial Division, when case management techniques were largely informed by regular meetings between the justices themselves.

Efficiency of dispute resolution was the touchstone of the discussion throughout the evening. One disagreement that emerged among members of the panel (and audience) concerned the utility of aggressive discovery deadlines. Certain voices felt that such deadlines are useful in incentivizing parties to make discovery truly self-executing and proportional, while others expressed concerns about the fairness of rigid deadlines.

Perhaps the liveliest exchange of views concerned the propriety of sanctions for discovery misconduct. Certain practitioners in the audience expressed frustration that robust sanctions are rare, and slow to come, even for serious abuses, such as spoliation of evidence. On the other hand, members of the panel expressed doubt that serious malfeasance occurs with any great frequency, and under-

lined their basic confidence in the professionalism of the attorneys practicing before them.

Many of the other recently adopted rules were also discussed. The judges in attendance described general compliance with the new presumption in favor of categorical privilege logs, but a failure on the part of many counsel to abide by the new rule requiring greater specificity in objecting and responding to document demands. Several of the justices noted that they were continuing to explore means making the court-annexed mediation program more successful.

The Section would like to thank Cravath for hosting the event, Beth Gould of NYSBA for her logistical assistance, Michelle Bholan (Rivkin Radler) for coordinating the CLE materials, and Joe Drayton (Cooley), Tom Bivona (Millbank), and John Lundin (Schlam Stone) for their assistance with publicity and outreach.



Isaac B. Zaur, Co-Chair Commercial Division Committee; Justice O. Peter Sherwood; Justice Anil C. Singh; Justice Saliann Scarpulla; Justice Charles E. Ramos; Justice Barry R. Ostrager; Justice Shirley W. Kornreich; and Justice Marcy S. Friedman (not pictured)

## Women on the Move 2016

CLE Program, Lunch and Networking Reception  
Wednesday, October 26, 2016 | 12:00 p.m. to 6:00 p.m. | 4.0 MCLE Credits | Albany  
Followed by the October Commercial and Federal Litigation Section Executive Committee Meeting  
with guest New York State Court of Appeals Judge Leslie E. Stein.

**Keynote by the Honorable Mae A. D'Agostino**  
United States District Judge, Northern District of New York

Co-Sponsored by the Committee on Women in the Law, the Committee on Lawyers in Transition,  
the Law Practice Management Committee, and the Continuing Legal Education Committee.

Find more information at [www.nysba.org/WomenontheMove2016](http://www.nysba.org/WomenontheMove2016).

# Long Island Bench Bar Commercial Division Program

By Laurel R. Kretzing

The Nassau/Suffolk District Bench and Bar turned out in full force on June 21, 2016, to participate in the Section's second Bench/Bar Forum that was co-sponsored by the Nassau County Bar Association Commercial Litigation Committee and the Suffolk County Bar Association Commercial Division Committee. The program was held at the Melville Marriott and had approximately 130 in attendance for cocktails followed by a lively panel discussion. Beth Gould made the journey from Albany and ensured that the evening proceeded smoothly. Program Chair Laurel R. Kretzing extended welcome remarks on behalf of new Section Chair, Mark A. Berman, who was in attendance at the New York County Bench/Bar Forum, held on the same night.

Special Guest Suffolk County Administrative Judge C. Randall Hinrichs graciously attended and gave opening remarks expressing support for the mission of the Commercial Division and mindfulness of the need to provide resources for that mission.

All six of the Commercial Division Justices, Hon. Stephen A. Bucaria, Hon. Vito M. DeStefano, Hon. Timothy S. Driscoll, Hon. Elizabeth H. Emerson, Hon. Jerry Garguilo, and Hon. James Hudson, appeared for the panel discussion moderated by Section members Harvey Besunder (Co-Chair of the Suffolk County Bar Commercial Division Committee) and Kevin Schlosser (of the Nassau County Bar Commercial Litigation Committee).

The panel discussion kicked off with the Judges' views on vitriolic rhetoric in motion papers (unfavorable), their views on settlement (favorable), and the various techniques they use for bringing settlement about. The Judges also gave their perspectives on new Commercial Division Rule 3-b (settlement conference before a Justice other than assigned Justice).

The panel then turned to the topic of trial management techniques with a focus on the proposed new rule that will give the court discretion to require parties to present their own witnesses' direct testimony by affidavit. The predominant view expressed was that some form of direct testimony by affidavit was needed in commercial bench trials in order to expedite the trial process, given the complexity of cases and the limited amount of time that the Court can devote to a trial—a maximum of only five hours per day. However, it was also noted that use of the affidavit should be flexible in terms of the ability to supplement the affidavit, address only background issues or limit it to expert witnesses in order to balance time constraints with the Court's need for an adequate opportunity to be exposed to the witness to judge the credibility of the witness.

The new amendment to Rule 3 permitting parties to stipulate to resolution by summary jury trial received enthusiastic, thoughtful support from the Justices. Practitioners were urged to educate themselves and their clients on the proven efficacy of this dispute resolution technique.

The panel discussion concluded with thoughts on the new limitations on depositions, "paper discovery," categorical privilege logs, and the concept of proportionality raised by the amendment to the preamble of the Commercial Division Rules. While the need for proportionality and efficiency of the use of resources was noted, the panel also expressed its understanding of the practitioner's need to zealously represent the client and the view that the rules could and would be modified based on the needs of the case.

Following the panel discussion, Harvey Besunder gave everyone a quick update on the proposed amendments to the Rules of Professional Conduct. The evening concluded with members of both Bench and Bar expressing appreciation for the opportunity to participate in the forum.



Suffolk County Administrative Judge C. Randall Hinrichs, Laurel R. Kretzing, Kevin Schlosser, Justice Elizabeth Hazlitt Emerson, Harvey B. Besunder, Justice Stephen A. Bucaria, Justice James C. Hudson, Justice Jerry Garguilo, Justice Timothy S. Driscoll, and Justice Vito M. DeStefano.



# Effective Arbitration from the Perspective of Institutional Providers, Counsel, Arbitrators, and the Courts

By Clara Flebus

The NYSBA Commercial and Federal Litigation Section's Committee on International Litigation and Committee on ADR co-sponsored an informative CLE program titled "Effective Arbitration—The 10 Most Important Things for Counsel and Arbitrators." The program, held at the American Arbitration Association's state-of-the-art facilities in New York City on February 24, 2016, featured the following panelists: Jeffrey T. Zaino, Vice President of the American Arbitration Association ("AAA") and newly appointed Co-Chair of the Committee on ADR; Peter A. Stroili, a partner at D'Amato & Lynch, LLP; Charles J. Moxley, Jr., a mediator at Moxley ADR LLC and Co-Chair of the Committee on ADR; and Clara Flebus, appellate court attorney at New York Supreme Court and Chair of the International Litigation Committee. The panel discussed best practices in conducting commercial arbitrations from the perspective of all the players involved—administrator, counsel, arbitrator, and the courts—and highlighted key differences between arbitration and litigation, particularly as to discovery, motion practice, and the conduct of the arbitration hearing.

Presenting the perspective of the arbitral institution, Jeffrey Zaino examined ways to make arbitration faster and more cost effective. First, he cautioned parties against using a boilerplate arbitration clause without giving up-front consideration to the details of the procedures most suitable to any dispute likely to arise under a specific contract. Key issues counsel should consider to avoid problems down the line include realistic case deadlines, discovery limits, arbitrator selection and qualifications, and confidentiality. In this regard, Mr. Zaino spoke about a free drafting tool offered by the AAA—an online program available at [www.clausebuilder.org](http://www.clausebuilder.org) that guides parties in drafting a customized arbitration clause in commercial and other types of cases.

Next, Mr. Zaino focused on the selection of the arbitral tribunal. He stated that the traditional method for choosing an arbitrator is based on a list provided by the arbitral institution. Alternatively, the AAA offers an arbitrator search platform tool that permits parties to search the entire AAA database by inputting specific parameters for the arbitrator. Notably, this alternative method requires a certain degree of cooperation from the parties. Mr. Zaino recommended selecting one arbitrator rather than three whenever possible. He discussed a case study showing that arbitration with three arbitrators costs five times more, and takes nearly six months longer, than when a single arbitrator is appointed. He explained that parties can agree upon a single arbitrator and deviate from the default AAA rule calling for appointment of

three arbitrators in cases seeking damages above \$1 million.

In an administered arbitration, Mr. Zaino recommended letting the arbitral institution handle administrative tasks so as to unburden the arbitrator, who should be able to focus on substantive tasks rather than scheduling issues. Another way suggested to contain cost and avoid delays is to limit discovery by establishing a strict discovery schedule focused on the exchange of necessary information. Finally, Mr. Zaino recommended that parties closely monitor their budgets. He stated that counsel may ask to see the arbitrator's invoices in addition to the AAA bills.

Peter Stroili offered the perspective of counsel in arbitration. As perhaps the most important step for attorneys representing clients in arbitration, Mr. Stroili recommended researching and vetting prospective arbitrators extensively to make sure that they are knowledgeable in the areas of the law on which the arbitration will focus and have the character, integrity, and communication skills necessary to persuade the other arbitrators. Mr. Stroili also explained that while the arbitration hearings are private, there is no guarantee of confidentiality with respect to documents and information exchanged by the parties in the arbitration. Thus, he advised that counsel negotiate and enter into a confidentiality agreement. The agreement should contain an exception to file documents in court—for example in support of a motion to confirm or vacate the award—without having to apply for a sealing order.

Mr. Stroili explained that counsel can ensure that the arbitration process is conducted in a fundamentally fair manner by means of: (a) a well drafted arbitration clause that provides the "blueprint" for both the parties and counsel; (b) a detailed statement of claim or an answering statement setting forth every cognizable affirmative defense and counterclaim; (c) a detailed preliminary conference order addressing critical issues, including whether depositions or dispositive motions are allowed; and (d) a written record of any major decisions in the case by way of an order issued by the arbitrator. He stated that applications to vacate an award on fundamental fairness grounds have a much greater chance of success than a motion based on manifest disregard of the law.

In addition, Mr. Stroili stressed the importance of preparing for the preliminary conference hearing, which constitutes the first opportunity to educate the panel about the case. Pre-hearing briefs that are well-written and researched are also important means to try and persuade the arbitrators. In general, Mr. Stroili recommended that counsel be well prepared, collegial, and courteous

throughout the entire arbitral process, and avoid being over argumentative and vexatious, as arbitration is more up close and personal than a trial in court.

Presenting the perspective of the arbitrator, Charles Moxley spoke about the arbitrator's duty to provide a diligent and full disclosure through a well-thought out and reliable conflicts system, including every case arbitrated in the prior 10-15 years, names of lawyers involved in the case, and expert witnesses heard. He then commented on the managerial role of the arbitrator, who is in charge of ensuring the flexibility that is the hallmark of arbitration by proactively helping the parties design the process most appropriate for their case.

Mr. Moxley also discussed the concept of "muscular" arbitrator. The muscular arbitrator (a) controls discovery so that each side obtains the evidence reasonably necessary to prosecute or defend its case without incurring costs and delays of unnecessary discovery; (b) does not allow parties to make substantive motions, unless they appear likely to foster the economical, expeditious, and fair administration of the case; and (c) conducts an expeditious hearing by trying to avoid duplicative, cumulative, and irrelevant testimony, while giving each side a reasonable opportunity to present its case. He stated that perhaps the biggest challenge in commercial arbitration is limiting discovery of electronically stored information ("ESI") only to information that is material to the outcome of the case. The current trend is also to impose limits on the number of depositions. He explained that these issues are discussed and determined at the preliminary conference hearing, which may take up to two or three hours in a complex case and is generally conducted by phone.

Mr. Moxley recommended that at the conclusion of the hearing on the merits of the dispute the arbitrator elicit the parties' agreement that they have been afforded a full and fair opportunity to present their case. This falls under the arbitrator's primary responsibility of protecting the award from challenges on due process grounds. He concluded by stating that arbitrators should develop awareness of potential unconscious influences on their perception and evaluation of the case in all of its phases and proactively manage any personal heuristic biases—these are mental shortcuts used by individuals to form judgments that focus on one aspect of a complex problem while ignoring other relevant factors.

Lastly, offering the perspective of the courts, Clara Flebus provided an overview of the specialized International Arbitration (IA) Part of the Commercial Division of New York Supreme Court. The IA Part was created in

2013 by order of the Chief Administrative Judge designating Justice Charles E. Ramos to hear all applications related to international arbitration that are brought under CPLR Article 75 or the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., in New York County. The objective of the IA Part is to provide a dedicated forum in which proceedings ancillary to international arbitration are handled with consistency, expertise, and in an expeditious and efficient manner. Many leading venues for international arbitration worldwide feature courts or chambers specialized in handling these types of applications. It can be said that the establishment of the IA Part has effectively contributed to enhancing the profile of New York, which is currently the fifth most popular city for ICC international arbitrations following Paris, London, Geneva, and Singapore.

Ms. Flebus explained that attorneys must properly designate the case as an international arbitration-related matter on the Request for Judicial Intervention (RJI). Counsel should also familiarize themselves with the "International Arbitration Part Rules" of Part 53 (Justice Ramos) published on the Commercial Division's website. Ms. Flebus noted that the Commercial Division rules were recently amended to provide that the court's monetary threshold applies to arbitration-related matters, but an exception was made for those matters designated as international arbitration, which continue to be exempt. She further commented that, so far, the IA Part has entertained approximately an equal number of applications to enforce the arbitration agreement and applications to confirm or enforce international awards.

In conclusion, Ms. Flebus observed that a reasoned award—one that explains findings of fact and conclusions of law—provides a better starting point for seeking vacatur than a "bare bones" award—one that simply announces the decision. However, statistics show that the courts afford arbitration awards great deference. The grounds upon which an award can be vacated under the CPLR or the FAA are very limited and do not provide for an "appellate" review of the decision made by the arbitrator.

The program was instructive in presenting a comparative perspective on best practices to handle a successful arbitration. Panelists highlighted critical aspects of representing clients in arbitration rather than litigation and provided useful tips to reap the full benefits of the arbitral process. The event was attended by approximately forty lawyers, including many seasoned practitioners and arbitrators, and concluded with a buffet and networking reception sponsored by the AAA.



**Charles J. Moxley, Jr., Peter A. Stroili,  
Clara Flebus, and Jeffrey T. Zaino**

# Update: International Litigation Committee

By Clara Flebus

The Committee on International Litigation works to educate foreign judges, lawyers, and law students on various aspects of U.S. litigation by developing educational materials and programs and by conducting outreach activities involving foreign delegations visiting New York Supreme Court. The Committee is also actively engaged in preparing programs and materials to inform the bar on recent developments in the field of international litigation and arbitration involving New York courts. The Committee is chaired by Clara Flebus, who is a Court Attorney in New York Supreme Court focusing on commercial litigation and the resolution of international arbitration-related matters before the specialized International Arbitration Part of the Commercial Division.

As part of its outreach activities, earlier this year the Committee organized a program for a delegation of Chinese lawyers at the New York International Arbitration Center (“NYIAC”) in New York City. The delegation included five senior partners practicing in the areas of finance, securities, and arbitration in prominent law firms in China. Alexandra Dosman, the Executive Director of NYIAC, discussed the role of the Center in studying and promoting the development of international arbitration in New York through the creation of a case law library that collects all international arbitration decisions issued by New York courts and the organization of seminars and lectures on cutting-edge issues in this field. Ms. Flebus also addressed the delegation. She examined the impact of U.S. federalism on international arbitration from the perspective of the courts.

Prior to this event, the Committee hosted delegations from China, the Mediterranean region, and Australia at New York Supreme Court. The Chinese delegation comprised eight partners from leading law firms with an international practice in the areas of corporate, finance, intellectual property, securities, and maritime law. The delegates met with Supreme Court Administrative Judge Peter H. Moulton and Justice Doris Ling-Cohan (of Supreme Court and Appellate Term), who spoke generally about the structure and administrative organization of the court system, as well as the types of cases they deal with in their respective courtrooms. The delegates also enjoyed a presentation from Justice Salim Scarpulla (of the Commercial Division) on the U.S. concept of pre-trial discovery and conducting bench trials in complex commercial cases.

In addition, the Chinese delegation met with Dean M. D. Leslie, senior settlement coordinator, and Ms. Flebus, who discussed court-annexed mediation programs and the role performed by the judiciary in the international arbitration system established by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. The program for this delegation included a visit to the law firm of Schlam Stone & Dolan LLP, where committee member Jeffrey M. Eilender, a partner at the firm, commented on the dynamics of the U.S. adversary system from the perspective of the advocate.



Clara Flebus

The delegation from the Mediterranean region included judges, lawyers, and administrators from various Mediterranean countries. These delegates were primarily interested in understanding the underpinnings of U.S. commercial litigation and the inner workings of a specialized forum such as the Commercial Division. The Committee also assisted in hosting a large group of law students from Deakin Law School, Melbourne, Australia. The Australian students met with several Commercial Division justices who examined recent developments in the field of international commercial litigation and the use of mediation in the courts as an efficient dispute resolution option.

For members of the bar, the Committee co-sponsored a CLE program with the Committee on Arbitration and ADR at the American Arbitration Association (“AAA”) in February 2016. The program focused on effective measures to represent clients in arbitration and offered tips to implement efficiency in the arbitral process from the comparative perspective of the arbitral institution, counsel, arbitrator, and the courts. Over 40 lawyers attended this successful event, which concluded with a reception offered by the AAA.

The Committee also organized a presentation on international litigation and arbitration for Fordham law students at New York Supreme Court. Justice Charles E. Ramos (of the Commercial Division) addressed issues typically arising in litigation involving foreign parties, such as long-arm jurisdiction, forum non conveniens, and application of foreign law. Jay G. Safer, a partner at Locke Lord LLP, and Ms. Flebus discussed enforcement of foreign judgments and awards and the functioning of the specialized International Arbitration Part in the Commercial Division of New York County.



Additionally, the Committee partnered with the Foreign and International Law Committee of the New York County Lawyers' Association in offering a presentation on the Qatar International Court. Justice Gerald Lebovits (of New York Supreme Court) discussed the establishment and procedures of this specialized commercial court that handles international business disputes and follows adversary common-law principles, as opposed to the inquisitorial system applied in Qatar's local courts, where Shari'ah law is the main source of law.

In the coming year, the Committee intends to expand its relationship with New York Supreme Court in hosting delegations of foreign judges, lawyers, and law students and to continue to organize informative and useful programs for members of the New York bar on timely topics in the field of international litigation and arbitration.

\* \* \*

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# 2016 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

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](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
202.16(m)	Sup.	Adds a provision on omission or redaction of confidential personal information from matrimonial decisions	3/1/16
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
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

Note: (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.

## Save the Date!

**Wednesday, January 25, 2017**

**ANNUAL MEETING AND GALA LUNCHEON**

9:00 a.m. to 2:00 p.m. | New York Hilton Midtown | NYC

The Section will be bestowing its **Stanley H. Fuld Award** to the  
**United States Court of Appeals for the Second Circuit.**

*The award recognizes outstanding contributions  
to the development of commercial law  
and jurisprudence in New York.*

# CPLR Amendments: 2016 Legislative Session

(2016 N.Y. Laws ch. 1-286)

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 <sup>1</sup>
4503(b)	262	Adds revocable trusts	8/19/16

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.

<sup>1</sup> 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).

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# Notes of the Section's Executive Committee Meetings

*These reflect the remaining minutes from the 2015-2016 year*

## February 9, 2016

Guest speaker Hon. Alan D. Scheinkman, J.S.C., Presiding Judge, Commercial Division of Westchester County and Administrative Judge, Ninth Judicial District, discussed what lawyers who appear before him should and should not do and his practice and procedures.

The Executive Committee approved, with changes, three reports of the Commercial Division Committee: (1) a comment on the proposed amendment to the Commercial Division rule regarding memorialization of rulings in disclosure conferences; (2) a comment on the proposed amendment to the Commercial Division rule regarding settlement conferences before a justice other than the justice assigned to hear the case; and (3) a comment on the proposed Model Preliminary Conference Form for use in the Commercial Division.

The Executive Committee also approved, with changes, a report of the CPLR Committee on the use of expert affidavits in summary judgment motions.

The Executive Committee discussed the upcoming Spring Meeting, the House of Delegates Report, and the Annual Meeting Presidential Summit Report.

## March 9, 2016

Guest speaker Hon. Brian M. Cogan, United States District Court Judge for the Eastern District of New York, discussed the particular practices he uses in managing his cases and chambers.



The Executive Committee discussed the Pattern Jury Instruction Committee's Revised Agency Jury Instructions. The Executive Committee also discussed the upcoming Spring Meeting, the upcoming 10th Anniversary Smooth Moves Program, and upcoming Section CLE programs

## April 5, 2016

Guest speaker Hon. Barry R. Ostrager, Justice, New York State Supreme Court, Commercial Division, New York County, discussed his transition from law firm partner to justice and his individual practices and daily schedule.

The Executive Committee discussed a report of the Hedge Fund and Capital Markets Committee and its recent and upcoming events. The Executive Committee also discussed the upcoming Spring Meeting, the upcoming Smooth Moves Program, a membership report, and the House of Delegates Report.

## May 18, 2016

Guest speaker Hon. Lawrence K. Marks, Chief Administrative Judge of the Courts of New York State, discussed his responsibilities as Chief Administrative Judge and his focus on improving the efficiency of the New York State Court System.

The Executive Committee approved an update of the report of the Federal Procedure Committee on Rule 68 that had been approved in May 2015 and September 2015. The Executive Committee also approved a report of the Antitrust Committee on REMS.

## The Section's District Leaders

County (District)	District Leader	Firm
Albany (3rd)	James T. Potter	Hinman Straub P.C.
Erie (8th)	Heath Szymczak	Bond Schoeneck & King PLLC
Kings (2nd)	Richard Klass	Richard Klass, Esq.
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 Mitchell	Mitchell & Incantalupo
Westchester (9th)	Courtney Rockett Patrick Rohan	Boies, Schiller & Flexner LLP

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### Upcoming Executive Committee Meetings

September 28	October 26*
November 16	December 15*

#### Please note:

Unless otherwise noted, all meetings will be held at the offices of Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York City.

*\*The October Executive Committee Meeting will be held in conjunction with the Women on the Move CLE Program at the New York State Bar Association in Albany, and the December Executive Committee Meeting will be held at the James M. Hanley Federal Building in Syracuse. Both will be video-conferenced to Kramer Levin Naftalis & Frankel LLP in New York City.*

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