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Commercial and Federal Litigation Section Newsletter

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

Message from the Outgoing Chair

I am proud to have been the Section's 25th Chair, but I am especially proud of the efforts of so many Section members who have made the past year a success. We have met my goals to continue to produce excellent reports and CLE programs, to communicate through 21st-century media as well as print, and to celebrate the Section's 25 years.

Gregory K. Arenson

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Message from the Incoming Chair

I am truly honored to begin my service as the Chair of the Commercial and Federal Litigation Section, and I invite each of you to work with us to fulfill our mission of being *the premier bar organization dedicated to business litigation in New York*. We have a very ambitious agenda for the next year—one that will raise our profile and involvement in the state and federal courts, one

Paul Sarkozi

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Inside

Message from the Outgoing Chair

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Celebration

On October 23, 2013, the Section celebrated its 25th anniversary at the Kaplan penthouse in the Rose building at Lincoln Center thanks to former Chair Lesley Rosenthal with aid from New York State Bar Association Section Liaison Beth Gould. Nearly 200 persons attended, about a quarter of whom were judges. A highlight of the evening was the videotaped words of wisdom from past Chairs, which may still be viewed on the Section's website. The evening was capped by remarks from two friends of the Section—former New York Court of Appeals Chief Judge Judith S. Kaye and Second Circuit Court of Appeals Chief Judge Robert A. Katzmann.

Reports

The bread and butter of the Section's activities are the reports we produce on topics of interest and the educational programs we present in a variety of venues. It has been a productive year.

In March, we adopted Social Media Ethics Guidelines to help answer ethical challenges presented by social media. They were prepared by the Section's Social Media Committee under the guidance of Co-Chairs Mark Berman and Ignatius Grande. The Guidelines, which have received a favorable press, cover attorney advertising, furnishing advice through social media, review and use of evidence from social media, communicating with clients through social media, and researching jurors and reporting misconduct.

In June 2013, thanks to the Social Media Committee with input from the Employment and Labor Committee co-chaired by Robert Holtzman and Gerry Hathaway, the Section issued a memorandum opposing legislation in the New York State legislature prohibiting employers or educational institutions from requesting from an employee, applicant, or student any user name, password, or other means for accessing a personal account or service through electronic communications devices. Although the legislation did not pass in 2013, it was revived in the 2014 legislative session.

In September 2013, the Section approved a report on proposed amendments to the Federal Rules of Civil Procedure concerning case management, discovery, and spoliation, which report was submitted to the Advisory Committee on Civil Rules of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. This report was a product of the Section's Federal Procedure Committee under the direction of Jim Parver and Michael Rakower and the Electronic Discovery Committee under the direction of Connie Boland and Adam Cohen. Michael also testified before the Advisory Committee on November 7. Southern District of New York District Judge John G. Koeltl, who is a member of the Advisory Committee and one of the prime movers behind the proposed amendments, praised the Section's contribution: "The comments reflected the extensive work of your committee and the even-handed consideration of the proposals. The comments were in the highest tradition of the Association."

In addition to commenting on proposed changes in the Federal Rules of Civil Procedure, the Section has commented on changes proposed this year by the Commercial Division Advisory Council in practices of the Commercial Division of the state courts. At the behest of the Commercial Division Committee under the leadership of Mitch Katz and Julie North, the Section has: (1) approved provisions for accelerated adjudication actions to be adopted in pre-dispute contracts; (2) endorsed a limit of 25 interrogatories restricted at the outset to witness identities, logistical information about documents, and damages, while relegating any contention interrogatories to the end of discovery; (3) supported a pilot program in the New York County Commercial Division to send one in five cases to mediation within six months of assignment; (4) favored a pilot program to be tried in New York County to refer complex discovery issues to a pool of very experienced and highly qualified attorneys with knowledge of e-discovery issues acting as special masters; and (5) supported a proposal to encourage categorical privilege logs. Also, the Section adopted a report prepared by the Electronic Discovery Committee endorsing a proposal for guidelines for electronic discovery from non-parties with substantial modifications to be consistent with governing case law and any other applicable rules, including the CPLR. All these comments were transmitted to the New York State Office of Court Administration for consideration in the rule-making process. Already, the limitation on the number of interrogatories has been adopted.

The Section has also commented on proposed amendments to the CPLR to conform to certain federal practices. The Section's CPLR Committee, headed by Jim Bergin and Tom Bivona, took the lead in addressing these issues. The Association's CPLR Committee proposed a modification of CPLR 4547 regarding the admissibility in subsequent proceedings of statements or conduct in settlement negotiations so that it conformed to Federal Rule of Evidence 408. However, the federal rule includes a provision for the benefit of the United States Department of Justice, with which the Section disagreed. We therefore submitted to the Association's Executive Committee a partial opposition to permitting the admission into evidence in a subsequent criminal proceeding of a party's conduct or statements made in negotiation of a prior civil dispute between the defendant and a government agency.

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Message from the Incoming Chair

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that will create new leadership and participation opportunities for our members, and one that will seek to involve us in shaping business litigation as it continues to evolve in the face of new technologies. Let me identify just a few of our initiatives:

Commercial Division Initiatives

The Section has always taken a great interest in the development of state court commercial litigation. We were involved in the formation of the Commercial Division and have always worked closely with Commercial Division justices and the court system to make the Commercial Division an exceptional forum for resolving complex business disputes.

Over the past year, the Commercial Division Advisory Council and court system have proposed and begun to implement a series of rule changes to transform Commercial Division practice. Many of the Section's members and former chairs have played an instrumental role in developing these rules and the Section is committed to their successful implementation. To that end, the Section will be sponsoring Bench-Bar programs throughout the state in the next 18 months to make sure that business litigators in every Commercial Division court are aware of the changes and have an opportunity to discuss with the justices how the changes can be integrated into everyday practice—for the benefit of the court, litigator, and client.

In organizing these programs, we will seek to partner with county and other local bar associations. The Section views its role as an umbrella organization for business litigation in New York. By working closely with local bar organizations, by supporting local initiatives, and by bringing statewide resources to support those initiatives, we can work together to advance our clients' interest in achieving cost-effective solutions to business disputes.

Federal Court Initiatives

The Section has also played a significant role in federal business litigation practice. Indeed, two of our former chairs—Judge P. Kevin Castel and Judge Shira A. Scheindlin—are United States District Court Judges. Over the past year, our Section weighed in on the proposed changes to the Federal Rules of Civil Procedure, presenting a detailed and thoughtful analysis of how the changes might affect practice and offering suggestions about how some of the proposals might be modified.

This upcoming year marks important anniversaries for our federal courts—the 225th anniversary of the Southern District, the 200th anniversary of the Northern District, the 150th anniversary of the Eastern District, and the 115th anniversary of the Western District. To recognize our commitment to each of the Districts, the Section will be holding Executive Committee meetings in each of the districts over the course of the year—with judges from each of the Districts joining us to share their perspectives. We also will look to partner with local and other federal bar organizations to celebrate these anniversaries and find other ways to support our federal courts.

Section Initiatives

Finally, the Section continues to take steps to welcome new members and get them involved in leadership roles. Whether it is our mentoring program, our Smooth Moves program, or our Commercial Litigation Academy, the Section is committed to promote diversity and welcome all lawyers to active participation.

This year we are taking two important steps to enhance our geographic diversity and promote new leadership. To enhance geographic diversity, we will create the position of District Leaders—individuals from around the state whose responsibility will be to promote the Section's involvement in each of New York's 13 judicial districts by partnering with local bar organizations, interacting with the courts and making sure local needs have Section support. As for leadership in general, we will be phasing in term limits for our Committee Co-Chair positions. Our Committee Chairs have devoted years of time and energy and have made enormous contributions to the development of business litigation in New York. It is now time for a new generation of leaders to rise and to have a mechanism to promote them and recognize their contributions.

Conclusion

Today's world of business litigation poses new challenges and opportunities. New technologies enhance knowledge, but also create obstacles and perhaps new pathways to the cost-effective resolution of business disputes. With your involvement and dedication, I know the Section will continue to help make New York the pre-eminent forum for business litigation and that both judges and business clients will continue to turn to us for ideas and action in advocacy and reform.

Paul D. Sarkozi

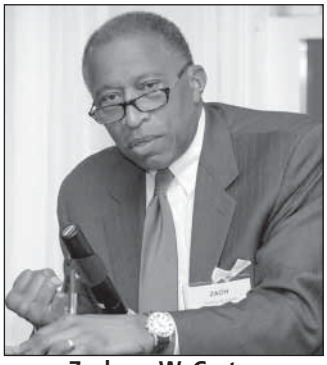
The Spring Meeting

The 2014 Spring Meeting of the Commercial and Federal Litigation Section was held at the Cranwell Resort & Spa in Lenox, Massachusetts from May 2-4. The Meeting featured an array of speakers, panelists, and awards over the course of the weekend, and celebrated the past, present, and future of the Section. New Section Chair Paul Sarkozi organized the Meeting and served as emcee for the three-day event.

Section Chair Paul Sarkozi

Keynote Speaker: Zachary A. Carter

The Meeting began on Friday night, with a cocktail reception and dinner to welcome Section members. After thanking incoming NYSBA President Glenn Lau-Kee for joining the Section for the weekend's meeting, Mr. Sarkozi introduced the meeting's Keynote Speaker, Zachary Carter.



Zachary W. Carter

Mr. Carter was recently appointed Corporation Counsel of New York City. He previously served in private practice at Dorsey & Whitney LLP, United States Magistrate Judge in the Eastern District of New York, and U.S. Attorney for the Eastern District of New York. With the perspective gained from the breadth of his prior experiences, Mr. Carter spoke of the differences between private practice and public service, and the delicate balance lawyers in both sectors must reach when advocating for their clients while striving to keep fundamental precepts of the law, like fairness and advantage, on their radars.

Mr. Carter observed that many of the struggles inherent in the litigation process stem from the fact that the law has developed in such a way so as to require parties to use specific, somewhat inflammatory language, in drafting their claims, particularly in employment discrimination and civil rights cases. This language oftentimes does not reflect the intent behind the claim, drives parties further apart than is necessary, and works against efficient resolution. "We all fall in love with our theories of defense or prosecution of our claims, and it's hard to let that go and to have the kind of discussion that advances public policy in a sensible way," he explained. "And so what I've tried to get the lawyers in my department and in the Law Department comfortable with is the notion that there is a purpose beyond winning the contest, that winning gets redefined as accomplishing a broader policy purpose for the City." In fact, Mr. Carter suggested that litigators, regardless of whether they are in public service or private practice, should keep their client's broader goals in mind, and that if they do, they will find themselves to be more effective and more fulfilled than if they just focus on pursuing any particular argument they have crafted.

CLEs and Social Activities

The weekend's activities feature five CLE programs (discussed in other articles in this *Newsletter*), an afternoon of hiking, golfing, tennis, and relaxing on the beautiful grounds of the Cranwell, and a Bench-Bar fun run. On Saturday evening, attendees gathered to watch the Kentucky Derby at the bar, drinking traditional Mint Juleps and sporting Derby bonnets.

Hon. Barbara Kapnick and Hon. Linda Jamieson watching the Kentucky Derby

Zach Carter, Tracee Davis, Jonathan Lupkin

Watching the Kentucky Derby

The Saturday Night Gala Dinner

Gregory K. Arenson and Scott L. Malouf

The weekend's highlight was the Saturday night Gala Dinner. Well attended by state and federal judges and lawyers who practice throughout New York, the dinner featured several award presentations. Section Chair Gregory Arenson presented Scott Malouf with the Section's Distinguished Service Award for his efforts at establishing and building the Section's social media footprint, including its Twitter account, @nysbacomfed. Mr. Arenson also highlighted some of the accomplishments of his term (*see* "Message from the Outgoing Chair") and Mr. Sarkozi discussed his goals for the 2014-15 term (*see* "Message from the Incoming Chair").

Presentation of the Haig Award by Judge Kaplan to Judge Smith

Finally, after a humorous introduction by Antitrust Committee Co-Chair Jay Himes, United States District Judge Lewis A. Kaplan (Southern District of New York) presented the Section's Robert L. Haig Award for Distinguished Public Service to Associate Judge Robert S. Smith (New York Court of Appeals). Judge Kaplan began his remarks by thanking the Section and its members for its work improving the quality of justice in commercial and federal cases throughout New York. Judge Kaplan, a longtime friend and former colleague of Judge Smith, described the time the two spent together at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP. He explained to the audience that Judge Smith was a "trial scrounge" who "just wanted every bit of courtroom experience he could get." People at Paul Weiss knew that if a TRO came in on a Friday afternoon, Bob Smith was the lawyer who would raise his hand to work the weekend and get in court. Just that happened when a female motor cross driver who was denied a professional license sought an injunction to require the motor cross professional association to grant the license. After Judge Smith cross examined the president of the professional association, the defendants gave up and issued the license, "and that's how Bob Smith got his first trial experience."

Hon. Robert Smith, Hon. Richard Platkin, Stewart Aaron, Christine Aaron, Hon. Howard Levine

Hon. Robert Smith and Hon. Lewis Kaplan

Judge Kaplan described Judge Smith's work on the bench as "principled," and "based upon a judicial philosophy that focuses on what he views as a faithful, narrow interpretation of the law…even where he may not applaud the outcome of such an application." Judge Smith's philosophy was clear only six months into his tenure on the Court of Appeals, when he dissented in the controversial case of *People v. LaValle*, which held that New York's death penalty statute was unconstitutional. The dissent highlighted Judge Smith's belief in the importance of separating personal concerns and discomforts from the Court's obligation to defer to the state legislature. Judge Kaplan concluded by applauding the contributions Judge Smith made to the bar, the bench, and the people of New York.

Judge Smith's Remarks

Judge Smith then accepted the Section's Haig Award. He thanked Jay Himes and Judge Kaplan for agreeing to present him with the award and for sharing their experiences of the time the three spent together while at Paul Weiss. Judge Smith also thanked the Section for the honor of receiving the Award, and then in an address that was filled with humor, he shared several lessons that he had learned as a judge that practitioners would want to know, but which likely would not change the way they practice.

First, he explained that "[a]ll briefs are too long," that every brief he ever wrote was too long, but that practitioners (himself included) are going to continue on that way out of habit and caution. Second, Judge Smith praised the work that court personnel—at every level of the court system—provide, noting that their outstanding work allows judges to be more efficient and focused, and to provide the justice that lawyers and their clients deserve. Third, Judge Smith underscored the importance


Hon. Robert Smith

of oral argument. Although most of the time judges have their minds made up before argument, there are indeed situations where a practitioner is so persuasive, or points out an issue the bench did not previously consider, that a judge will change his or her mind. Finally, Judge Smith revealed that despite the consensus among lawyers to the contrary, whether or not a judge particularly likes or respects a practitioner has little to do with how that judge will decide an issue: "I can tell you, I have decided some tough cases in favor of some really loathsome, obnoxious lawyers and some tough cases against some really lovely people I like…. And one fault I've never for an instant observed in any of my colleagues is any tendency to lean this way or that because the judge hates or loves the lawyer. It doesn't happen." The seasoned member of the bench and bar closed his speech by expressing his love of the profession, and telling the room he was excited to return to practicing in the near future after his retirement at the end of 2014.

* * *

Spring Meeting: Is a Complex Commercial Appeal Different from All Others? The View from the Appellate Bench

By Jaclyn H. Grodin


Mark Zauderer

Mark C. Zauderer, partner at Flemming Zulack Williamson Zauderer LLP and former Commercial and Federal Litigation Section Chair, moderated the program *Is a Complex Commercial Appeal Different from All Others? The View from the Appellate Bench*, which featured judges from the First, Second, and Third Departments of the Appellate Division, as well as from the Court of Appeals. The distinguished panel consisted of the following speakers: Judge Victoria Graffeo (New York Court of Appeals); Justice Karen Peters (Presiding Justice, Third Department); Justice Helen Freedman (First Department); Justice Barbara Kapnick (First Department); Justice Karla Moskowitz (First Department); Justice Barry Cozier (Second Department, retired); and Justice Thomas Dickerson (Second Department).

The judges discussed appeals of cases originating in New York's Commercial Division, including common mistakes practitioners make in drafting appellate briefs and at oral argument, the points judges pay special attention to in analyzing the merits of a particular case, and the practical chances of success in an appeal of a commercial case.

Mr. Zauderer posed a number of questions to the panelists touching on issues in every layer of a commercial appeal.

When asked about the considerations Justice Cozier takes into account when deciding whether to handle an appeal of a commercial case, the retired justice did not hesitate when explaining that before anything else, he looks at the record to determine whether or not there are actually appealable issues: in other words, was there error at the trial court and, if so, was it dispositive? He noted, "[M]y focus is always on the question: Are there dispositive issues for purposes of appeal—and to try and prioritize those issues."

Of utmost importance to any appeal is, of course, the appellate brief. Justice Cozier, like the rest of the panel, explained that he subscribes to the philosophy that "less is more" when it comes to presenting the relevant issues on appeal, and to focus on the core, or "beef," of the error at the trial court which provides the grounds for appeal. Justices Moskowitz and Freedman echoed the panel's universal plea to practitioners: clear and simple is the way to an appellate justice's heart, particularly with respect to the preliminary statement. "You've got to be clear what your case is about, and why the Court (below) was wrong, and not every little error, because most of them are clearly harmless errors," Justice Freedman explained.


Hon. Barry Cozier and Hon. Karla Moskowitz

Justice Peters applied the "less is more" theme in explaining that parties should include only the most relevant facts in their briefs to allow the court to drill down on the core issues, particularly in light of the general practice among appellate judges of reading the lower court's decision before anything else. "I really don't need you (the practitioner) to lecture me on summary judgment (standards)…All I want to know is what I need to know to decide your appeal, and the more concise and clear you can be in the statement of facts, the more I will find you credible, and the less credible you are in the beginning of that brief, the less likely you are to win." Justice Freedman concurred on the importance of the lower court's decision: "Unfortunately, because of the way things go, the clearest description of what the case is about is in the lower court's opinion."

According to Justice Dickerson, "less is more" fits in with a doctrine familiar to judges and practitioners alike: stare decisis. "Don't waste our time. Keep it simple. We (the judges) know what the law is," he said. "The lawyers that we really like and respect are the ones that come in and say, 'Your Honors, here's the precedent that we wish to challenge, here are the cases supporting (that precedent), here are some other cases that have questioned that particular precedent and here are the facts of the case.'" Attorneys should be up front with the bench if they are challenging precedent. As Judge Dickerson explained, "[I]f you're going to challenge precedent, just come right out and say it."

Justices Barbara R. Kapnick, Helen E. Freedman and Thomas A. Dickerson

The scope of appeal for the Appellate Division is very broad, and practitioners should remember that fact when crafting their appeals. In other words, while appellate justices prefer to affirm, "there is wiggle room" to refine facts where necessary and make sure the trial court "got it right," according to Justice Cozier.

Parties looking to the Court of Appeals for relief should focus on the motion for leave to appeal before anything else, which should not merely "spiff up" the party's brief from the Appellate Division, according to Judge Graffeo, particularly in light of the number of conditions precedent for filing in the state's highest court.

Justice Karen Peters and Court of Appeals Judge Victoria Graffeo

Practitioners should also paint their cases in the most *appealing* light. "We are looking for significant cases, novel interests, something that affects an industry practice. I'm not going to mislead you. Of course, the amount of damages, the size of the case sometimes makes a critical difference. We are very, very interested in keeping New York on the forefront of international commercial and financial matters," she said. A split in the Appellate Departments also strengthens the possibility of the Court granting a motion for leave to appeal.

Practitioners should also keep in mind that before the motion for leave gets to the judges at the Court of Appeals, staff attorneys read the motions and write a report which recommends whether to deny or grant the appeal. While these attorneys are focusing first on the prerequisites for appealing to the Court, the other factors Judge Graffeo noted influence the attorney's ultimate recommendation. Although the recommendation is not binding, it is the first opportunity a judge has to assess the motion for leave.

So how can a practitioner turn the panel's suggestions into a successful appeal?

- If the case involves a contract, include the *full text* of the relevant provisions, not just those that are helpful to your case (in other words, don't "use little dots" when quoting the contract, explained Justice Moskowitz).
- When you file a reply brief, make sure it actually responds to the arguments raised in a respondent's arguments. Justice Peters noted how often she reads reply briefs which do no more than rehash arguments raised in the opening brief, which adds nothing to an appellant's case.
- Consider using charts or timelines to relay the facts in particularly complex cases, for example, where there are a significant number of related but separate corporate parties, or a chronology of an investment decision gone wrong, as it can allow judges to understand the context of the case while reading the brief.
- Be prepared for hot benches at oral argument. Across the panel, judges commented on their preparation before sitting for oral argument, and the fact that the time allotted may end means little if the

judges still have questions. Answer questions posed by the bench directly, even if you intended to cover that issue later in the argument. As Judge Peters explained, "[T]he worst thing to ever do to us is to tell us you'll get to that later. It should never be part of your lexicon because it is just rude."

L to R: Mark Zauderer, Hon. Karla Moskowitz, Hon. Barry Cozier, Judge Victoria Graffeo, Justice Karen Peters, Thomas A. Dickerson, Justice Barbara R. Kapnick, Justice Helen E. Freedman

- If you are filing in the Court of Appeals, make sure that you meet each of the jurisdictional requirements before you begin working on the appeal. Further, ensure that you make it abundantly clear if the case has the possibility to affect an industry standard, and if it does, determine if it is possible to submit amicus briefs in connection with your motion for leave from groups familiar with the underlying issues.
- Oral argument at the Court of Appeals will likely involve a number of hypotheticals, "and no matter how ridiculous you may think some of those hypotheticals are, we're trying to expand the rule and to test and to see if it breaks somewhere, how it's going to affect other types of cases," according to Judge Graffeo. As a practitioner, be ready to answer those hypothetical questions.

Ultimately, presenting your case as clear and focused, with a truly appealable issue, is the key to getting the bench's attention. As Justice Peters explained, "[W]hat you want to be able to do is to write a brief that persuades us that your case is the most important case that day, so that when we walk into the robing room to put our robes on to get up on the bench, the topic of the conversation among the five judges is, "'Wow, can you believe this? This is going to be a fascinating argument.' You want your case to be that topic."

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Spring Meeting: PRISM, Snowden and the NSA—National Security Litigation in the Digital Age

By Peter J. Pizzi and Joseph DeMarco

The Spring Meeting panel devoted to a discussion of "PRISM, Snowden and the NSA—National Security Litigation in the Digital Age" undertook an ambitious agenda: explain the post-9/11 surveillance programs disclosed by fugitive government contractor Edward Snowden; summarize the legal rationale while also explaining opposing views; describe proposals for reform; and, finally, address how the current dialogue might be carried out in the future. If that sounds like a lot to accomplish in 75 minutes, it was! Audience questions had to be handled at lunch and throughout the remainder of the weekend.

Hon. Frederick J. Scullin, Jr.

The Section was honored that U.S.D.J. Frederick J. Scullin, Jr. agreed to participate in the presentation. A former Northern District of New York U.S. Attorney and current federal Judge sitting in Syracuse, Judge Scullin served on the Foreign Intelligence Surveillance Court (FISC) from 2004 through 2011. After briefly outlining Supreme Court precedent in the area of foreign intelligence surveillance, Judge Scullin explained that, following Watergate, the [Sen.] Church Commission led to the 1978 enactment of the Foreign Intelligence Surveillance Act. Under FISA, the FISC was charged by Congress to rule upon National Security Agency (NSA) requests for data and information concerning foreign intelligence activities. The court consists of seven district court judges appointed by the Chief Justice, with seven-year terms. Panels of three FISC Judges convene in Washington on a periodic basis for one-week intervals, during which the tribunal might entertain 30-60 applications for authority to conduct specified surveillance. FISC judges local to the Washington, D.C. handle emergent matters. Most

applications are fact intensive, Judge Scullin remarked, and some are routine, such as re-approvals of surveillance operations previously ruled upon by the Court. The applications that, after Mr. Snowden's disclosures, have received media attention actually occupy very little FISC time, in Judge Scullin's experience.

L to R: David McCraw, Prof. Jonathan Hafetz, Joseph DeMarco, Peter Pizzi and Hon. Frederick J. Scullin, Jr.

Per panel moderator Peter Pizzi, two disclosures in Snowden's epic security breach received the most media attention: (i) the NSA's bulk collection of telephone call "metadata," namely, details of all telephone calls made across the networks operated by major United States telcos; and (2) the operation called "Prism," code name for the NSA's collection of all internet traffic handled by Google, Microsoft, Yahoo! and other major providers. Judge Scullin drew the audience's attention to FISC Judge Collyer's March 20, 2014, declassified opinion explaining that the constitutionality of NSA's collection of telephony metadata rested in part upon *Smith v. Maryland*, the U.S. Supreme Court's decision holding that a telephone pen register is not a search because, *inter alia*, the target already had released the data to a third party, i.e., the phone company, and, further, the content of communications was not revealed.

Seton Hall Law Professor Jonathan Hafetz, an expert on national security litigation, noted that the telephone metadata program rested upon a provision of the 2011 Patriot Act, whereas the collection of Internet data was based upon Section 702 of the FISA. Two court challenges to the surveillance programs following Snowden's disclosures have reached opposite results, with Judge Leon of the D.C. District Court finding unconstitutional the telephony metadata program and S.D.N.Y Judge Pauley upholding the government's surveillance endeavors, largely relying upon *Smith*. Professor Hafetz felt that the U.S. Supreme Court eventually would decide one or both of the challenges and would not rely upon standing issues to avoid the merits because of the scale and scope of the program. In the Professor's view, the scale of the collection in question—every communication from everyone in the United States using telephone networks—coupled with the kinds of detailed information present on the average smart phone, suggest that past decisions by the Court may not foretell its reaction to the present surveillance challenges.

Turning to reform proposals, Professor Hafetz cited the Obama Administration's limits on the querying of the data to two "hops" from the "seed" telephone number in the "reasonably articulable suspicion" searches of the metadata trove. Further, the Administration will leave the metadata in the hands of the phone companies, and not transfer it *en masse* to the NSA. Finally, Professor Hafetz mentioned the introduction of a "special advocate" to appear before FISC Judges in appropriate cases.

David McCraw, Assistant General Counsel to *The New York Times*, discussed the decision-making process a newspaper like the *Times* goes through before deciding whether to publish material such as that leaked by Snowden. In certain cases in history—the Bay of Pigs, for example—the paper initiated a dialogue with the government before publication and then withheld publication until after that debacle became public, leading President Kennedy to quip that he'd wished the editors had gone ahead and published despite his administration's objections. In the case of the Pentagon Papers, however, the *Times* published without advance vetting, and the Supreme Court eventually rejected the Nixon administration's efforts to obtain a prior restraint. In all circumstances, the paper seeks to avoid publishing details that cause harm without advancing the public interest, such as names of cooperating foreign agents.


Joseph DeMarco

Joe DeMarco urged that lawyers who undertake to advise clients about governmental surveillance requests should think through carefully about the first response to the directive because the law is presently unsettled, with few precedents supporting a categorical objection.

* * *

Spring Meeting: Ethical Issues in the Investigation of Commercial Lawsuits

By Tony Harwood

Tony Harwood

During a beautiful weekend in May in the Berkshire Mountains, I had the pleasure of moderating a discussion for the Section's Spring Meeting on ethical issues in the investigation of commercial lawsuits. Our panelists were Jonathan Lupkin, a past chair of the Section and a partner at Rakower Lupkin PLLC; Joanna Hendon, a partner at Spears & Imes LLP; and Evan Barr, a partner at Steptoe & Johnson LLP. The speakers highlighted three areas where there is disagreement about the ethical duties of a lawyer: (1) using social media in investigations; (2) recording conversations without the consent of some of the parties; and (3) representation of former employees in corporate investigations.

I. Social Media

Evan Barr

Evan Barr discussed several ethics opinions on the use of social media sites such as Facebook in investigations. He focused on a split of authority on when an attorney may contact a witness by making a friend request on Facebook. In an opinion issued in 2010, the New York City Bar Association concluded that a lawyer may use his or her real name and truthful profile to send a friend request on Facebook to an unrepresented witness to obtain evidence without disclosing the lawyer's purpose.[1] However, the opinion continued that an attorney may not use deception, such as creating a false profile, to gain access to a web page, citing Rule 8.4 of the Rules of Professional Conduct. Rule 8.4 bars lawyers from conduct involving dishonesty, fraud, deceit, or misrepresentation. In a similar scenario, the Philadelphia Bar Association took a more restrictive view, saying that an investigator working for an attorney may not make a friend request of a witness using the investigator's true name and profile without revealing that the purpose of the request is to obtain evidence for a lawyer.[2] The San Diego Bar Association has addressed this fact pattern too, agreeing with the Philadelphia Bar Association that it would be improperly deceptive to make a friend request to obtain information for litigation without revealing that purpose.[3]

II. Recording Conversations

Jonathan Lupkin addressed whether a lawyer, or an investigator working for a lawyer, may record conversations with another person without that person's consent. In many states, including New York, it is legal to record a conversation as long as one party to the conversation consents to that recording. That means that other participants in the conversation may not know they are being recorded. However, even if this type of surreptitious recording is legal, lawyers still have to consider whether it is ethical to make such a recording under the rules of professional conduct. The interpretation of the rules of ethics in this situation is another area of disagreement among the bar associations.

In 1974, the American Bar Association issued an opinion stating that it is improper for a lawyer to record a conversation with another person without that person's consent, leaving open the possibility of an exception for law enforcement.[4] At that time, the ABA concluded that making recordings without the consent of all parties was conduct involving dishonesty, fraud, deceit, or misrepresentation. The New York State and New York City Bar Associations adopted the same rule, but the City Bar recognized an exception for prosecutors and defense counsel in criminal cases.[5]

Subsequently, there has been a trend toward the contrary view. In 1993, the New York County Lawyers Association stated that the recording of a conversation without the consent of the other party is not by itself unethical.[6] However, the County Lawyers warned that it would be improper to deny falsely that the conversation was being recorded and that it would be improper to record or cause to be recorded a conversation with an adverse party whom the lawyer knows to be represented in the matter. Other states similarly have concluded that such recordings are ethically permissible.[7] In 2001, in response to these opinions and other criticism, the ABA reversed itself, stating that non-consensual recording of a conversation does not violate the rules of professional conduct, provided that the recording is not illegal under the law of the state or states where the recording is made and that the lawyer does not falsely deny that the conversation is being recorded.[8] However, the ABA was divided about whether it is ethical for a lawyer to record surreptitiously a conversation with a client. This leaves things

L to R: Evan Barr, Joanna Hendon, Jonathan Lupkin and Tony Harwood

rather uncertain for a New York lawyer. In addition to the uncertainty about the interpretation of the ethical rules, with today's mobile communications technology, the person recording the conversation may not know where the other participant is, and so an attorney in that situation would not know whether the other person is located in a state where it is illegal to record with only one party's consent.

III. Representing Former Employees In Corporate Litigation

Joanna Hendon

Joanna Hendon discussed the application to corporate investigations of ethical rules limiting solicitation of clients. She explained that it has been common practice for defense attorneys representing corporations in civil lawsuits and investigations to offer representation to the corporations' former employees. However, in 2010, in a case titled *Rivera v. Lutheran Medical Center,* the Appellate Division for the Second Department affirmed a decision holding that this practice was a violation of the rules restricting solicitation of clients.[9] The lower court ruled that defense counsel solicited former employees in violation of the disciplinary rules "to gain a tactical advantage" by "insulating" the former employees from informal contact with plaintiff's counsel. The court held that in addition to violating the disciplinary rules, this conduct was contrary to the policy favoring informal discovery practices, particularly, private interviews of fact witnesses, which the New York Court of Appeals endorsed in *Neisig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S2d 493 (1990).

Ms. Hendon questioned whether the rule on solicitation should apply in this situation, since it applies only when an attorney solicits clients for monetary gain, and says nothing about soliciting former employees of the client for "tactical advantage." She also commented on a subsequent decision from the same trial court, *Dixon-Gales v. Brooklyn Hospital Center,* which found no improper solicitation on similar facts when the defendant had an obligation, under its insurance policies, to provide representation to its former employees.[10] Many corporations have this same obligation under their insurance policies or by-laws.

Moreover, Rule 7.3(c), which governs solicitations, permits written solicitations in many situations, provided that the solicitations are filed with the Departmental Disciplinary Committee. Neither *Rivera* nor *Dixon-Gales* involved a written solicitation filed with the Disciplinary Committee. An attorney who wants to minimize risks might consider utilizing a written solicitation under this rule.

Endnotes

1. New York City Bar Association Formal Opinion 2010-02.
2. Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (March 2009). Under Rule 5.3 of the Rules of Professional Responsibility, a lawyer who hires any non-lawyer, including an investigator, has to make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer.
3. San Diego County Bar Association Legal Ethics Opinion 2011-2 (May 24, 2011).
4. American Bar Association, Committee on Ethics and Professional Responsibility, Formal Opinion 337 (August 10, 1974).
5. New York City Bar Association Formal Opinion 1995-10 (July 6, 1995); New York State Bar Association, Committee on Professional Ethics 328 (March 18, 1974).
6. New York County Lawyers' Association, Committee on Professional Ethics No. 969 (June 23, 1993).
7. American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 01-422 (June 24, 2001).
8. *Id.*
9. 22 Misc. 3d 178, 866 N.Y.S.2d 520 (Supreme Ct. Kings County 2008), *aff'd,* 73 A.D.3d 891, 899 N.Y.S.2d 859 (2d Dep't 2010). The court applied disciplinary rule 2-103(a), now Rule 7.3 of the Rules of Professional Conduct.
10. 35 Misc. 3d 676, 941 N.Y.S.2d 468 (2012).

* * *

Spring Meeting: Alternative DISCOVERY Resolution

By Steven Bennett

A panel on "Alternative Dispute Resolution" (ADR) as a means to resolve discovery disputes addressed the use of referees, masters, and mediators to help find solutions to the growing problem of "electronic discovery" (e-discovery) in litigation. The volume of electronically stored information (ESI) and the ever-changing communications, storage, and other applications technologies present a great challenge for courts, which may not have the resources and expertise to tackle the project management issues that often arise in e-discovery.

Steven Bennett, a partner at Park Jensen Bennett, moderated the panel, noting the need for cooperation and transparency in e-discovery. Because the parties best know their own needs and capabilities, negotiation, rather than motion practice and judicial supervision, has become a key to efficient litigation. Yet, counsel sometimes shirk their responsibility to gain an understanding of their clients' capabilities, and may assert overbroad demands and objections to discovery. Where parties do not confront their issues in good faith, and early in the discovery process, a case can become tied up in motion practice, sideshow requests for sanctions, and "do over" inefficiencies.

Hon. Carol Heckman

Carol Heckman, a former magistrate judge, and currently partner at Harter Secrest & Emery, outlined the options in the federal courts. Under federal rules, a "special master" may be appointed to supervise all or a portion of the e-discovery process. Typically, the master's appointment terms are negotiated between the parties, and "so ordered" by the court. The master's fees are generally paid by the parties. Due to expense, masters are not routinely used. Most courts rely on magistrate judges to supervise more complicated discovery projects in federal litigation. Judge Heckman noted that several districts have adopted mediation programs, which could be adapted to the e-discovery context. She noted that, in many cases, a judge may perform "triage" to determine what particular issues, or what forms of discovery, may best contribute to efficient resolution of the case.

Justice Elizabeth Emerson, a Commercial Division Justice in Suffolk County, reviewed options in the state courts. The state courts are authorized to appoint special "discovery referees" to oversee complicated or contentious cases. The courts also may draw upon retired judges as "judicial hearing officers." Several of the Commercial Division courts have developed programs for more organized referral of cases, where judges spot problems brewing in the discovery process. She suggested that a neutral may help set a "tone" of civility in the discovery process, which can facilitate resolution of problems, without the need for motions practice. Justice Emerson suggested that courts might benefit from access to a set of technology professionals, assigned to the court, to help judges address e-discovery issues.

Hon. Elizabeth H. Emerson and Steven Bennett

Jeremy Feinberg, a Special Referee in the Supreme Court, New York County, recounted his experiences, noting that, in many cases, organized discussion of e-discovery problems can produce negotiated solutions. He reinforced the view that a neutral should help "turn down the temperature" of discussions in adversarial proceedings. A neutral may also "do some teaching," educating the parties about their options for managing the process. He noted that a neutral need not resolve all e-discovery disputes in a single session, suggesting that the process may proceed in "steps" toward resolution of significant issues. Where problems remain, moreover, the process of review by a referee provides increased clarity of understanding, such that resolution by the court may be made more efficient.


Hon. Jeremy Feinberg

Ira B. Warshawsky, a former Commercial Division Justice, and currently of counsel at Meyer, Suozzi, English & Klein, summarized developments and expected improvements in the use of ADR to manage discovery. The 2012 Task Force Report on Commercial Litigation, prepared at the direction of Chief Judge Lippman, recommended, among other things, development of a cadre of

qualified referees and other resources to assist in management of the discovery process. Not all of these efforts necessarily require additional resources from the courts. One particular suggestion is that judges focus early on discovery efforts that may help to settle a case. Another suggestion is the use of "categorical" privilege logs (versus the "Manhattan phone book" approach, which can be expensive and burdensome). Justice Warshawsky also suggested that many of the best practices of the Commercial Division judges could be extended to litigation in other areas.

L to R: Hon. Jeremy Feinberg, Hon. Carol Heckman, Ira B. Warshawsky, Hon. Elizabeth H. Emerson, Steven Bennett

The panelists concluded with a lively discussion of the status of developments in this area, recommending further education programs, sharing of "lessons learned" from pilot programs, and other means to streamline the discovery process.

* * *

Spring Meeting: Expert Witnesses

At the Spring Meeting Program, on Sunday, May 4, a Panel entitled, "Best Practices for Expert Witnesses in Federal and State Court Business Litigation" was held. The Panel consisted of:

- Alan Friedman, Vice President, Charles River Associates—Moderator
- Hon. O. Peter Sherwood, Commercial Division Justice, Supreme Court, New York County
- Hon. Andrew J. Peck, Magistrate Judge, United Stated District Court for the Southern District of New York
- Stewart D. Aaron, Esq., Partner, Arnold & Porter LLP, New York City
- Daniel B. Rapport, Esq., Partner, Friedman Kaplan Seiler & Adelman LLP, New York City

L to R: Daniel B. Rapport, Stewart D. Aaron, Hon. O. Peter Sherwood, Hon. Andrew J. Peck, Alan Friedman

Mr. Friedman introduced the panel and set the context. The Panel would discuss the key elements of the existing CPLR Rule 3101(d) on expert witnesses and compare and contrast it with newly adopted Commercial Division Rule 13(c) and Federal Rule 26. The five areas for discussion were: 1) expert reports; 2) expert dispositions; 3) draft reports and attorney-expert communications; 4) timing of expert disclosure; and 5) admissibility of expert testimony under *Frye* or *Daubert* analysis.

Messrs. Aaron and Rapport provided the analysis of the CPLR rule, new Commercial Division Rule 13(c), and Federal Rule 26, including the rationale and historical background for adopting the new rule. Very little is required in experts' reports under CPLR 3101(d), but now Rule 13(c) calls for reports with: 1) a complete statement of all opinions; 2) data and other information considered; 3) exhibits used; 4) witness qualifications; 5) list of cases for previous four years in which the expert has testified; and 6) compensation paid.

Under the CPLR, depositions of experts are the exception, whereas under the new rule, there is no need to demonstrate special circumstances. The issues of availability of the draft reports and whether attorney-expert communications are privileged was addressed in both the presentation phase and in questions to the Judges. The Federal Rules, as amended in 2010, basically preclude draft reports from being examined by the other side and extend privilege to the communications with attorneys. Rule 13(c) does not specifically address the issue, so the Panel advised caution when dealing with this subject. However, both Judge Peck and Justice Sherwood felt that attempting to get draft reports or inquiring into attorney-expert communications was essentially meaningless and unnecessary. For that reason, the Federal Rules eliminate the gamesmanship surrounding examining drafts and inquiring into attorney-expert communications. Alan Friedman stated that, in CRA's experience, the examination of drafts and inquiry into attorney-expert communications made the process more costly and accomplished little substantively. Thus, experts generally welcomed the Federal Rule amendments which did away with the prior practices.

Under the CPLR, there is no deadline set for the expert disclosure, and preclusion orders are rare unless the court finds prejudice because someone was acting intentionally badly. New Rule 13 (c) requires the parties to confer on an expert disclosure schedule, which is to be completed no later than four months after the completion of fact discovery. Under the Federal Rules, as a practical matter, the parties will agree on a schedule or arrangement on discovery.

The next issue was the admissibility of expert reports under the *Frye* rule in State Courts and *Daubert* rule in Federal Courts. *Frye*, a long-standing rule in the New York State courts, basically asks whether the expert's technique "generates results accepted as reliable within the specific community, generally" (the counting hands analysis). *Daubert* asks whether the expert's information is relevant and whether the expert is competent in the particular field—has the expert relied on the right facts and done the right calculations? The consensus of the Panel was that the admissibility issue will be decided as a commonsense approach. Justice Sherwood thought that it was a rare event to rule on the admissibility of experts in the Commercial Division, although the practicing attorneys (Stewart Aaron and Daniel Rapport) felt that more motion practice was likely in this area in the future. Commercial Division cases deal more with financial matters and less with scientific issues, and thus there is less of a tendency to engage in *Frye* or *Daubert* motions. In any event, whether under *Frye* or *Daubert*, the Judge is the gatekeeper and will likely apply a rational approach of whether the information is reliable and helpful.

Judge Peck was asked whether he thought the expert reports under the Federal Rules have been overly burdensome to the litigants. He thought not—the purpose of the rule is to avoid trial by ambush. By having a lengthy report, you know what the expert will say in advance.

Justice Sherwood was asked if he thought there would be an advantage to plaintiffs or defendants as a result of the expanded reports under Rule 13(c). He felt both sides needed to know the information, and thus there should be no advantage to one side or the other. Both Judges felt that knowing the other sides' theory of the case (as expressed in an expert report) would be helpful in settlements, a desired result.

In terms of depositions, Justice Sherwood felt that Rule 13(c) reflected a recognition of the need all parties have for robust pretrial disclosure in commercial cases.

A question was raised as to whether, with the advent of Rule 13(c), there would be more competition for cases by the Commercial Division. The Panelist felt that expert rules were relatively low as a determinant of whether one would use the Federal or state courts. Other factors, such as ease of appeals and quickness of decision making, were more relevant factors. Stewart Aaron and Dan Rapport expressed the view that the most important factor for them would be the quality of the Judges. Each court has more than enough cases to handle so the Judges stated that there is no true competition for cases.

Mark A. Berman and Ignatius A. Grande

Ted and Lesley Rosenthal

Hon. Deborah Karalunas and Mark Zauderer

Paul D. Sarkozi and Gregory K. Arenson

Steve Younger, NYSBA President Glenn Lau-Kee and Dave Tennant

Update: Committee on Social Media


Mark A. Berman

Social media is having a great impact on our legal community. The Commercial and Federal Litigation Section and its Social Media Committee are seeking to meet that challenge by educating Section members about the risks and benefits of utilizing social media as part of their law practice and their professional obligations that come into play when using social media. In addition to working to keep members current on ethical, disciplinary, and malpractice issues, the Section and its Social Media Committee are looking at data privacy concerns of social media, "best practices" concerning the preservation and collection of social media, social media legislative developments, and appropriate social media corporate policies.

In addition, the Committee's mission is to bring the Section to the "next level" by actively using social media and more specifically Twitter, to promote the work of the New York State Bar Association and the Section. As a result of the Committee's work, the Section has sent out over 2,300 tweets. The Committee works with the State Bar Association to utilize social media to keep Section members current on information about the Section and important legal developments.

The Social Media Committee is co-chaired by Mark A. Berman and Ignatius A. Grande. Mr. Berman is Vice-Chair of the Section. He is an experienced commercial litigator and a partner at Ganfer & Shore, LLP. He has had a column in *The New York Law Journal* since 1995 addressing New York State electronic discovery issues. Mr. Berman is a member of the New York State E-Discovery Working Group. He has taught eDiscovery and social media law to a variety of judicial and bar groups as well as at various law schools. He is also a member of the Second Circuit Committee of the Federal Bar Council.

Mr. Grande is Senior Discovery Attorney/Director of Practice Support at Hughes Hubbard & Reed LLP. In his role at Hughes Hubbard, he provides legal counsel to case teams and clients on the best ways to manage e-discovery and social media during the course of litigation. He is a member of the Section's Electronic Discovery Committee and The Sedona Conference Working Group on Electronic Document Retention and Production. Mr. Grande is an author and frequent speaker on the topics of eDiscovery and social media law. He teaches eDiscovery at St. John's Law School.

The Committee recently authored the Section-approved ground breaking *Social Media Ethics Guidelines*. These Guidelines may well be the first social media ethics guidelines published by a bar association in the United States. *The Guidelines* have received national coverage, including being reported on by Bloomberg BNA and *InsideCounsel* magazine, and they have been referred to by other bar associations and referenced in a variety of articles, including one published by *The National Law Review*.


Ignatius A. Grande

Citing ethics opinions from around the country, but focusing on opinions issued by New York sources, the Guidelines seek to provide guidance for how attorneys might use social media platforms. They are divided into five sections entitled: Attorney Advertising; Furnishing Advice Through Social Media; Review and Use of Evidence from Social Media; Ethically Communicating with Clients; and Researching Jurors/Reporting Misconduct. Each section suggests practices needed to comply with current ethical guidance, cites to underlying ethical opinions or case law, and provides commentary with additional analysis and practical tips.

At the Section's Spring 2014 Meeting, now-President Glenn Lau-Kee of the State Bar Association praised the *Social Media Ethics Guidelines*. In addition, the Committee was "called out" by Section leadership for its innovative work, including presenting Scott Malouf, one of its members, with the Section's Outstanding Service Award for his work in using the Section's Twitter account to communicate to the Section breaking developments in New York law.

At the Section's 2014 Annual Meeting, the Committee organized a program entitled *Social Media In Your Practice: The Ethics Of Investigation, Marketing*. This program, where the audience electronically answered hypothetical ethics quandaries that were then tabulated "live" with the results integrated into the program, addressed social media ethical questions such as:

- Can you advise a client to "take down" incriminating social media postings?
- What do you need to inform an unrepresented witness when "friending" to gain access to her private postings?
- What if any ethical considerations are there in researching a juror's social media presence?
- Can you identify areas of practice under "Skills & Expertise" on LinkedIn?

Earlier last year, the Committee also put together a timely CLE entitled *How Social Media Is Changing the Practice of Law*. The panels addressed the "Growing Litiga-

tion Challenges of Social Media" and "Social Media and Criminal and Civil Investigations."

In addition, the Committee monitors legislative developments as they relate to social media. In this role, the Committee spearheaded a report adopted by the Section which opposed the form of legislation proposed by New York State legislature that sought to restrict the use of individuals' social media passwords by employers. The Section, as reflected in the report, did not perceive that, in its current form, the proposed legislation properly addressed the concerns of both employees and employers relating to, among other things, privacy and the appropriate use of the underlying social media communications.

The Committee's next project will be to examine jury instructions used by New York State and Federal judges when cautioning jurors regarding their use of social media during trial and deliberations. Use of social media during trial is increasingly becoming a serious issue where it has been well-documented as potentially tainting a juror's thought processes by providing him or her access to information about a case, party, witness, or lawyer that he or she should not have had.

If you have an interest in participating in this Committee's forward-thinking activities, please e-mail Mr. Berman at mberman@ganfershore.com or Mr. Grande at grande@hugheshubbard.com.

Mark A. Berman
Ignatius A. Grande

Update: Committee on the Commercial Division


Mitchell J. Katz

The Committee on the Commercial Division uses videoconference technology to allow members to participate from all over New York State. So, too, we have been pleased to have justices of the Commercial Division from around the State participate in our meetings. This past year Justice Bransten (New York), Justice Marks (New York), and Justice Walker (8th Judicial District), and some of their law clerks, shared their perspectives on practice before the Commercial Division. These meetings provide an extraordinary insight into that practice and offer a unique opportunity to spend some time with members of the judiciary.

We use these discussions to foster an open dialogue about Commercial Division practice, sharing our general experiences and identifying how we can help the Commercial Division continue to provide outstanding dispute resolution services with ever-increasing caseloads and diminishing resources.

Special projects have included the analysis of and reporting on proposed rule changes concerning privilege logs, special masters, accelerated adjudication, interrogatories, and mandatory mediation. The Committee has worked with Section leadership to provide to the Office of Court Administration input and comments on proposed rule changes. We know that this work will continue as more proposed changes to Commercial Division rules are expected.


Julie Ann North

We intend to expand our meetings to include discussions about commercial practice issues, discussions that will be led by members of the Committee. We hope to use these discussions not only to enhance how our members address thorny practice issues but also to identify possible rules or guidelines for consideration by the Chief Judge's Advisory Council.

Plans are under way for a fall 2014 bench-bar program in New York County, which will offer Section members the opportunity to interact with judges, their legal teams, and court administrators. We hope to present a similar event in upstate New York.

We have redoubled our effort to identify strategies to meet one of the challenges that our Committee has faced: securing participation by more members from all across New York State, and in particular, attracting less experienced practitioners. Toward that end, we will be reporting on the effort to use "brainstorming" sessions with current members to implement plans to educate Section members about how easy it is to participate in our Committee with any level of practice experience and the value of doing so.

Minutes and announcement of our meetings are periodically posted on the Committee's webpage at http://www.nysba.org/ComFedCommercialDivision.aspx.

Mitchell J. Katz
Julie Ann North

Update: Committee on Arbitration and ADR


Charles J. Moxley, Jr.

ComFed's Committee on Arbitration and ADR has been active in the past year and plans a full range of activities for the coming year. Our activities in the past year have included numerous meetings with significant speakers in the ADR field; conducting a well-received public program at the New York International Arbitration Center ("NYIAC"), co-sponsored with ComFed's International Litigation Committee; and working on a report on Best Practices in Representing Clients in Arbitration.

Our speakers over the past year have included the Hon. Melanie Cyganowski, former Bankruptcy Judge of the Eastern District of New York, addressing the subject of mediation in the Bankruptcy Court and also her experience as a mediator following her retirement from the bench; the Hon. Carolyn D. Demarest, a Supreme Court Justice in the Commercial Division in Kings County, addressing her experience in cases appearing before her concerning arbitration issues; and Rebecca Price, Mediation Supervisor for the United States District Court for the Southern District of New York.

Our Committee's recent program at NYIAC focused on the new International Arbitration Part in the Commercial Division of Supreme Court, New York County, and upon the activities and role of NYIAC, as New York's new international arbitration center, in a context where both of these initiatives emerged from the NYSBA Task Force on International Arbitration and Litigation initiated by Steve Younger during his presidency of NYSBA.

Participating in the program at NYIAC were Hon. Charles Ramos, the Justice of the Commercial Division overseeing the Commercial Division's new International Arbitration Part; Alexandra Dosman, Executive Director of NYIAC; Steve Younger, who, as indicated, initiated the Task Force that led to these developments; Greg Arenson, the then-Chair of the Section; and Ted Semaya, Chair of Section's International Litigation Committee; with the panel being moderated by Charlie Moxley, Chair of the Section's Committee on Arbitration and ADR.

The program at NYIAC explored the functioning and prospects of the International Arbitration Part in the Commercial Division and the role of NYIAC as a leading international arbitration center.

The meetings of the Committee on Arbitration and ADR, which occurred approximately every two months, have also included brainstorming sessions at which Committee members discuss issues of concern that have arisen in their ADR practices, to gain the benefit of collegial discussion of such issues.

The Committee is also working on developing a report on how litigators can best represent clients in arbitration, taking advantage of the special opportunities that arbitration offers for advocacy. The focus of the report will be on the differences between the techniques that are effective in arbitration versus litigation. The panel is preparing the report from the perspective both of experienced counsel and arbitrators.

In additional to the foregoing, the Committee also had a meeting at which it reviewed in detail the recently revised Commercial Arbitration Rules of the American Arbitration Association ("AAA"). This discussion was particularly interesting in that the AAA's recent revisions of its rules highlight areas in which arbitration practice has changed and is in the process of changing.

The Committee welcomes additional members and looks forward to an active and interesting year during the incumbency of the Section's new Chair, Paul Sarkozi.

Charles J. Moxley, Jr.

Changing Landscape of International Arbitration in New York

By Clara Flebus

The Section's Committee on Arbitration and ADR and Committee on International Litigation co-sponsored an informative program on new developments in international arbitration in New York. More than 50 lawyers attended the program, which was held at the New York International Arbitration Center ("NYIAC") on May 29, 2014. The panel consisted of moderator Charles J. Moxley, Jr., an arbitrator and mediator at MoxleyADR and Chair of the Arbitration and ADR Committee; Commercial Division Justice Charles Ramos (New York Supreme Court); former NYSBA President and Section Chair Stephen P. Younger, a partner at Patterson Belknap Webb & Tyler; Gregory Arenson, a partner at Kaplan Fox & Kilsheimer and outgoing Chair of the Section; Alexandra Dosman, the Executive Director of NYIAC; and Ted Semaya, a partner at Eaton & Van Winkle and Co-Chair of the International Litigation Committee. (The author is the other Co-Chair of the International Litigation Committee.)

Members of the panel explained that three years ago the NYSBA established the Task Force on New York Law in International Matters to undertake a review of New York law as an international standard and the use of New York as a forum for resolving cross-border disputes. In a comprehensive report, the Task Force recommended that certain initiatives be taken to meet the challenges of participating in an increasingly integrated international environment, including, among other things, the creation of specialized chambers to handle international arbitration related matters regularly and the establishment of a dedicated center for international arbitration. The Chief Judge's Task Force on Commercial Litigation in the 21st Century also endorsed such a proposal in its June 2012 Report, as did the Chief Judge's Commercial Division Advisory Council.

As a result, last September the Chief Administrative Judge of the Courts of New York State designated Justice Ramos to hear all international arbitration cases before the Commercial Division in New York County, including all proceedings brought under CPLR Article 75 or the Federal Arbitration Act.

The highlight of the program was Justice Ramos' discussion of the court's practices and procedures for hearing applications involving international arbitration. Justice Ramos emphasized that he gives a fast track to these applications, which may be made on an expedited basis by order to show cause, and suggested that attorneys familiarize themselves with the "International Arbitration Part Rules" of Part 53, published on the Commercial Division's website at http://www.nycourts.gov/courts/comdiv.

An indispensable tip concerned the designation of the matter as one concerning international arbitration, so that the matter will promptly be assigned to Justice Ramos. A party commencing a special proceeding involving international arbitration must check the box "Other Special Proceeding" on the Request for Judicial Intervention ("RJI") and write out "international arbitration" in the blank space provided. If an international arbitration issue is raised in an action that is pending but not yet assigned (e.g., as a motion to stay action and compel arbitration), a party must check the box "Other Commercial" and write "international arbitration" in the space provided. In the latter instance, a party must also file a Commercial Division RJI Addendum, in which it should note that the matter concerns international arbitration. These instructions can be found in the "Administrative Order Relating to International Arbitration," also available on the Commercial Division's website. A copy of the Administrative Order must accompany any request to assign or transfer an action or proceeding to Part 53.

Justice Ramos, who is dedicated to resolving these applications expeditiously, explained that the Commercial Division rules do not require that arbitration matters meet the court's monetary thresholds. However, he stressed that to avoid removal to federal court, transactional lawyers should draft arbitration agreements providing for the exclusive jurisdiction of the Supreme Court of the State of New York in matters related to enforcement.

In addition to prompting a specialized judiciary, the Task Force report also prompted the creation of NYIAC, a state-of-the art center that opened its doors in June 2013 and that features hearing rooms, breakout rooms, and facilities for interpretation. NYIAC was founded by a consortium of 37 New York law firms, which provide financial support and leadership for the center along with the NYSBA. NYIAC Executive Director Alexandra Dosman stated that during its first year of operations the center has hosted 19 arbitrations and two mediations.

Former New York Court of Appeals Chief Judge Judith S. Kaye, now Of Counsel at Skadden, Arps, Slate, Meagher & Flom and Chair of NYIAC's executive committee, was intimately involved in planning and designing the center. Judge Kaye attended the program and expressed her enthusiasm for the commitment and efforts made by Justice Ramos and NYIAC thus far.

Both initiatives are geared to promote New York as a seat for international dispute resolution, which, according to the Task Force report, generates an estimated $2 billion in revenues for New York law firms each year. The program concluded with a reception at NYIAC.

Anyone interested in joining the International Litigation Committee may contact Co-Chair Clara Flebus at clara.flebus@gmail.com. To become a member of the Arbitration and ADR Committee, please contact its Chair, Charles J. Moxley, Jr., at cmoxley@moxleyadr.com.

Section Presents the Eighth Annual "Smooth Moves" CLE Program for Attorneys of Color and Bestows the Honorable George Bundy Smith Pioneer Award on Esteemed Attorney Kay Crawford Murray

On April 1, 2014, the Commercial and Federal Litigation Section presented its Eighth Annual "Smooth Moves" program—the Section's premier diversity event organized to attract attorneys of color to more active participation within the Section. Since its inception in 2007, Smooth Moves has included both a CLE program and a networking reception, culminating in the presentation of the Section's Honorable George Bundy Smith Pioneer Award. The Pioneer Award is given each year to an attorney of color whose career accomplishments exemplify those of the retired Court of Appeals jurist for whom the award is named: legal excellence, community involvement, and mentoring.

Judge George Bundy Smith with Pioneer Award Recipient Kay Crawford Murray

The CLE program this year was entitled "Social Media Strategies for Attorneys: Marketing Techniques, Practice Tips and Ethical Quandaries." The program, which was moderated by Darrell Gay of Arent Fox, featured an outstanding panel of leading law firm and in-house practitioners in the field (Jasmin Chavez, social media strategist for LatinoJustice; David Lin of the law firm Lewis & Lin; and Rhonda Joy McLean, Deputy General Counsel of Time, Inc.) as well as United States District Court Judge for the Eastern District of New York Margo Brodie, who offered perspective on how social media considerations have impacted the trial process, including in the areas of jury selection and charges. The panelists also highlighted the advantages of marshalling social media as part of an integrated law firm marketing strategy and addressed the legal issues and ethical challenges associated with the widespread use of such technologies, including within the discovery process.

The George Bundy Smith Pioneer Award was established by the Section in recognition of Judge Smith's work in the civil rights movement, and his 30 years of public service in the New York judiciary, including 14 years as an associate judge of the Court of Appeals. Judge Smith presented this year's Pioneer Award himself to his longtime friend Kay Crawford Murray, formerly the General Counsel to the New York City Department of Juvenile Justice. Ms. Murray held the position from the agency's inception in 1979 until her retirement in 2002. Since the mid-1980s, Ms. Murray has served on the Committee on Character and Fitness in the Appellate Division, First Department, and has also served as a Trustee for the New York State Bar Foundation. Ms. Murray has been one of the most respected trailblazers and leaders of the New York bar for decades.

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 of LatinoJustice); Elaine R. Jones (Director-Counsel Emeritus, NAACP Legal Defense and Educational Fund); the Honorable Carmen Beauchamp Ciparick; the pioneering, father-son law practice of Kee & Lau-Kee; and retired Court of Appeals Associate Justice Samuel Green.

Finally, the Section awarded the Commercial Division's Minority Law Student Fellowship at the event to Ana Federico, a first year law student from Albany Law School, who will spend the summer working in the chambers of New York Supreme Court–Commercial Division Justice Marcy Friedman. The New York Bar Foundation provides a $5,000 stipend for the fellowship recipient.

From left: Judge Margo Brodie, David Lin, Darrell Gay (moderator), Rhonda Joy McLean, and Jasmin Chavez

Carla M. Miller

Acceptance Remarks by Kay Crawford Murray Upon Receipt of the Hon. George Bundy Smith Pioneer Award, Smooth Moves 2014

I thank the Commercial and Federal Litigation Section for this tremendous honor.

Because my route to becoming a lawyer was somewhat atypical, I thought you might be interested in information about my background and how I happened to practice law in the public sector.

Having attended public schools in Cleveland, where I was born, and Pittsburgh, I received my bachelor's degree from Bennington College in Vermont and one year later began graduate studies in psychology at Columbia Teachers College. After studying, doing research and college teaching, I decided that I no longer wanted to pursue a doctorate. Feeling that my education was incomplete, I reviewed catalogs for different graduate programs, and, although I never consciously wanted to practice law, thought that law school, especially at Columbia, would be challenging. I certainly was not wrong about that.

So, at age 41, I found myself a recent law graduate (though not a "young" lawyer) and became an associate in the litigation department of a Wall Street firm. I remained there for almost three years before deciding for several reasons that I wanted a change. In spite of my age, I was willing to start at the bottom and work my way up, but found the process in a big firm too slow. I was not unwilling to work long hours and weeks, but wanted to devote some time to bar association, alumni and community activities to which I could not make a commitment while at the firm. In addition, I preferred to work in a setting in which I made a difference and was not just another fungible associate. Except for the meager salary, becoming a government attorney seemed the ideal solution. Fortunately, acquiring a law school education was not as financially burdensome 35-plus years ago as it is today.

At that time (1979), the City of New York was creating a new agency, an event that occurs rarely. The Department of Juvenile Justice was responsible for providing custodial care for children charged with crimes. I was hired as the General Counsel, knowing little about what a General Counsel does or how a government agency functions. The only contract I had written was one for a law school class in negotiations. I had never drafted legislation or analyzed its impact. Juvenile justice was certainly not an area of the law with which I had much familiarity.

There were numerous issues that I had not had to deal with as a law firm associate. Unlike the professional staff of a large law firm where nearly everyone is a lawyer or a paralegal, including the client's representatives with whom you interact, DJJ, because it was a small agency, had no other lawyers on staff. I soon learned that it was not possible to make a casual comment without having someone say, "our lawyer said." It was necessary to understand that my client was the agency, not any of its employees, including the agency head (whose title was "Commissioner") to whom I reported directly. Over the years three of the commissioners were themselves lawyers, which had its pluses and minuses.

In addition, I was now the manager of a unit, albeit a very small one with only one secretary, occasionally a legal assistant and often a student intern. From other employment experiences, I knew there were specific management skills which I learned neither in graduate school nor in law school. A complicated employee performance evaluation system and the complex public sector budgeting system were only two of the areas in which I had to develop expertise very quickly.

The first issue with which I was confronted was one that I refer to as spousal conflict of interest. Assistant Corporation Counsel from the City Law Department prosecuted the children who were in our care pretrial, on court order. My husband headed The Legal Aid Society that provided representation for many of those children. Based on the memorandum I prepared as my initial assignment in my new position, I was able to convince the City Department of Investigation and the Corporation Counsel that there was no conflict, real or apparent. If you are a prosecutor or defense counsel and your spouse is on the other side, or if either of you becomes a judge, you could face a similar situation.

As with every position, being a government lawyer has its advantages and disadvantages. In my experience, it was both challenging and demanding. What I enjoyed most was what I referred to as preventive lawyering and creative lawyering: being able to develop the trust of the line staff, so they would seek my advice before taking any action that resulted in the violation of the laws and regulations that governed our agency. This gave me the opportunity to help them figure out how to solve their problems legally.

So, were the expectations I had on leaving private practice met when I became a public sector lawyer? Absolutely. I had time to become involved in activities, some of which benefited my agency, I functioned with sufficient authority, and most importantly, I knew that my being there made a difference not only to fellow employees but to the children in the agency's care. Initially, I signed on for one year but remained until I retired 23 years later.

Again, my heartfelt thanks for this award.

Update: Committee on Bankruptcy Litigation


Douglas T. Tabachnik

The Bankruptcy Litigation Committee works to educate the members of the bar and bench on the ever expanding role of litigation in the bankruptcy courts, the role of non-bankruptcy litigation in the disposition of the various rights and interests present in the bankruptcy reorganization process, and the impact of insolvency issues in non-bankruptcy litigation, including areas of concurrent jurisdiction that state courts have in determining bankruptcy-related issues. The Committee also has an active role in proposed legislation that affects the administration of the bankruptcy process, both at the state and federal level. The Committee also works to provide an understanding of the opportunities and potential pitfalls that bankruptcy issues may present when they arise in non-bankruptcy courts and proceedings. In the latter case, we continually seek to educate the members of the state bench about the concurrent jurisdiction that the state courts have with respect to the disposition of bankruptcy-related matters.

One area of recent involvement by our Committee involved the assistance we provided to the Business Section of the American Bar Association in securing for that organization the support of the New York State Bar Association for a resolution providing the ABA with a platform from which it could advocate a position in connection with the recent Supreme Court deliberation in the case of *Executive Benefits Insurance Agency v. Arkison (In re Bellingham Insurance Agency, Inc.)*, Docket no. No. 12–1200 (June 9, 2014). It was hoped that the Supreme Court would answer with this decision some primary questions left open by its earlier decision in the case of *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 2011 U.S. LEXIS 4791 (2011). In *Stern* the Court held that Congress did not have the authority to delegate to an Article I court a power constitutionally required to be tried before an Article III judge. In this case, the court was specifically addressing counterclaims for tortious interference asserted by a debtor against a creditor who filed a proof of claim. In *Stern* the Court held that Congress had impermissibly granted to the bankruptcy courts so-called "core" jurisdiction to determine counterclaims raised by a debtor or trustee to a creditor filing a proof of claim.

Among the issues left open by the *Stern* case was whether parties could consent to the jurisdiction of a bankruptcy court of Article III issues, now dubbed so-called *Stern* claims. In October and December 2012, the Ninth Circuit and Sixth Circuit held, in seemingly conflicting decisions, that parties could (Ninth Circuit) and could not (Sixth Circuit) consent to such jurisdiction. *Executive Benefits Insurance Agency v. Arkison (In re Bellingham Insurance Agency, Inc.)*, 2012 U.S. App. Lexis 24873 (9th Cir, 2012) and *Waldman v. Stone*, 2012 U.S. App. Lexis 22230 (6th Cir. 2012). It was hoped that the Supreme Court in the appeal of the *Executive Benefits* case would resolve the issue. Instead, the Supreme Court concluded that it didn't need to answer the primary questions addressed to it, leaving open the issue of whether parties can consent to final adjudication by a bankruptcy court in situations where the court could not otherwise issue a final decision. Other open issues include the status of a judgment rendered by a bankruptcy court on a so-called *Stern* claim as to which the parties neither object nor seek *de novo* review in the District Court. The court also assumed, but did not decide, the question of whether a fraudulent conveyance action would violate *Stern*. In fact, the only issue the Court did decide was that bankruptcy courts may issue reports and recommendations in core proceedings where they lack authority to make a final ruling.

The main question addressed by *Executive Benefits* is whether there is a gap in the statutory scheme of core vs. non-core jurisdiction as provided in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act"). The 1984 Act was enacted to address the finding by the Supreme Court that the original statutory scheme providing for adjudication by bankruptcy courts of state law-based claims under the Bankruptcy Act of 1978 was unconstitutional, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). The 1984 Act offered a solution whereby matters would be divided into core and non-core matters, respectively. The 1984 Act allowed entry of final orders on core matters and proposed findings in non-core, which would need affirmance by the district court in a *de novo* review. The question then left open is what to do with the disposition of core matters delegated to the bankruptcy court by Congress, but which the Supreme Court has determined can only be adjudicated by an Article III court. The 1984 Act, like most statutes, contains a severability clause. The Court concluded that any matter upon which the bankruptcy courts cannot properly enter a final judgment should simply be treated as non-core.

The matters left unaddressed by the Supreme Court's decision assure us that we will see these issues again.

Douglas T. Tabachnik

Chief Judge Lippman's Vision Coming to Life

By Rebecca C. Smithwick

"It is time to set a new vision for how we in the New York State court system might better serve the needs of the business community and our state's economy."

Chief Judge Jonathan Lippman, State of the Judiciary Address in February 2012.[1]

Oh, how that vision has begun to take shape!

In his February 2012 address, Chief Judge Lippman announced the creation of the Chief Judge's Task Force on Commercial Litigation in the 21st Century, to "take a fresh look at ways to enhance our stellar Commercial Division."[2] Four months later, the Task Force issued its Report and Recommendation to the Chief Judge, which focused on, amongst other things, procedural reform.[3] In February 2013, following a Task Force recommendation, Chief Judge Lippman established a permanent Commercial Division Advisory Council to advise him on all matters related to the Commercial Division.

Since the establishment of the Advisory Council, the rules governing practice in the Commercial Division have changed in significant ways. For example:

- In February 2014, the jurisdictional threshold for cases in the Commercial Division in New York County was increased from $150,000.00 to $500,000.00
- In September 2013, Rule 13 of the Statewide Rules of the Commercial Division was amended to provide, as a presumptive matter, for robust expert disclosure, including fulsome expert reports and expert depositions.

On June 2, 2014, two notable additions were made to the Statewide Rules of the Commercial Division:

- Rule 11-a—relating to the use of interrogatories; and
- Rule 9—relating to the use of accelerated adjudication procedures.

The court also adopted a model form for preliminary conference orders,[4] and, on June 23, 2014, the New York County Commercial Division adopted a pilot mandatory mediation program, effective July 28, 2014.

Interrogatories

New Rule 11-a addresses the number and scope of interrogatories that may be served on the other side in Commercial Division cases: The presumptive limit is set at 25 (in line with Federal Rule 33(a)(1) and many state court rules); and, apart from "contention interrogatories," which are discussed below, the scope of inquiry is limited to (i) the names of witnesses with knowledge of information relevant to the case, (ii) the computation of damages, and (iii) the existence, location, and general description of relevant documents (in line with Southern District of New York's Local Civil Rule 33.3(a)). The scope can be expanded by agreement or court order. The rule was promulgated in recognition of the fact that interrogatories are a tool that lend themselves to abuse, yet can be an efficient means of obtaining information when used in a targeted manner.

The new rule also explicitly authorizes the use of "contention interrogatories"—a longstanding feature of Federal practice that seeks to drill down on information relating to the other sides' claims or allegations in their pleadings. Consistent with the Southern District of New York's Local Civil Rule 33.3(c), contention interrogatories may not be served until the conclusion of all other discovery.

Accelerated Adjudication—New York's "Rocket Docket"

The new Rule 9 allows parties in Commercial Division cases (except for class actions) to consent to streamlined procedures designed to make a case trial-ready within nine months, measured from the date of filing of the RJI—a time period significantly shorter than those applicable in a large number of complex commercial litigations. It is hoped that the new procedures will provide an attractive alternative to other forms of alternate dispute resolutions, offering the speed and efficiency of arbitration with the comfort of knowing that a party may avail itself of meaningful appellate review. It is a rare instance that pre-trial proceedings in New York courts (i.e., discovery, dispositive motions) are measured in anything other than years, so the nine-month target is significant.

The rule authorizes the court to apply the accelerated procedures with the parties' express consent in writing, and expressly contemplates that prospective consent may be included in a written contract (i.e., in the same way as an arbitration or other dispute resolution clause). There is no magic formula for the contractual language required in order to trigger the Rule 9 procedures, and parties are free to impose their own limitations and restrictions on the accelerated process on a case-by-case basis. Alternatively, the rule provides a sample provision that parties can

simply drop into a contract if they want the accelerated procedures to apply.

The accelerated adjudication procedure contemplates a number of significant departures from standard litigation in the Commercial Division. The scope of discovery is chief among them. Under the new rule, absent agreement to the contrary, discovery is limited to narrowly focused document discovery, seven interrogatories, five requests to admit and, absent good cause, seven depositions per side, each capped at seven hours. The rule also allows for potential cost-shifting in relation to e-discovery.

In addition, parties that consent to the Rule 9 procedures irrevocably waive the right to: (i) make any objections based on lack of personal jurisdiction or forum non conveniens; (ii) a jury trial; (iii) recover punitive or exemplary damages; and (iv) interlocutory appeals (i.e., the appeal of any non-final order, such as a denial of a motion to dismiss, summary judgment motion, temporary restraining order, or preliminary injunction).

The hope is that these streamlined procedures will be particularly attractive to non-U.S. parties, who are often fearful of litigation in the United States and the concomitant availability of far-reaching and costly "American style" discovery.

Only time will tell whether the accelerated procedures will have the intended effect of attracting those parties otherwise predisposed to arbitration into the Commercial Division.

Litigators in the Commercial Division will no doubt be watching this space with interest.

Preliminary Conference Order

Effective June 2, 2014, the Commercial Division has also introduced a new—optional—model Preliminary Conference Order designed for use in e-filed cases. It is the first complete revision of the Preliminary Conference form in recent history. Of particular note are the re-vamped sections relating to confidentiality orders, e-discovery, expert disclosure, and alternative dispute resolution.

With respect to confidentiality orders, the court directs the parties to use the order promulgated in the Trial Part in which they are appearing or, if the Part has not adopted a form, the City Bar's model confidentiality agreement (which can be found at http://www.nycbar.org/pdf/report/Model Confidentiality/pdf). If the parties modify either of these agreements, they must submit a red-lined version to the court for its review.

In relation to electronic discovery, the parties are required, amongst other things, to: (i) certify that they have met and conferred on e-discovery-related issues prior to the preliminary conference; (ii) indicate that they have an ESI preservation plan in place, have identified the custodians of the ESI, and have designated the individual/s responsible for ESI preservation; (iii) indicate that they have agreed (or are at least in the process of reaching agreement) on the scope and method for searching and reviewing ESI, the form of production, and an anticipated production schedule; and (iv) identify how they will identify, redact, and log privileged and/or confidential ESI.

In keeping in step with the September 2013 amendments to Rules 8(a) and 13(c) regarding enhanced expert disclosure, the model form also requires parties to *confer* on a schedule for expert disclosure no later than 30 days before the completion of fact discovery, and *complete* expert disclosure no later than four months after the completion of fact discovery.

Most notably, the model form as adopted contains an entirely new section on alternative dispute resolution, in which the parties are asked to consider and discuss various forms of ADR on an ongoing basis, as "[t]he judges of the Commercial Division believe that the parties are better served the earlier a proper and just resolution can be reached."

Pilot Mandatory Mediation in New York County

Administrative Judge Sherry Klein-Heitler issued an Administrative Order on June 23 that beginning July 28, 2014, New York County would implement an 18-month pilot mandatory mediation program to be administered by the Court's ADR Coordinator. Under the pilot program, which is outlined in new Rule 15 of the New York County Commercial Division's Rules of the Alternative Dispute Resolution Program, one out of five cases newly assigned to the Commercial Division would be designated as a mandatory mediation case. Parties who believe that mediation would not be helpful could still opt out of the program by stipulation, and the court could also exclude a particular case from mediation upon a showing of good cause that mediation would be ineffective, unduly burdensome, or unjust. In most instances, however, it is expected that parties will select a mediator and conclude the mediation by no later than 210 days following the Request for Judicial Intervention in the action.

The Pilot Mediation Program has been designed to promote party choice in the selection of and timing of the mediator. Parties are encouraged to agree upon their mediator—whether from the ADR Program's Roster of Neutrals or otherwise—within 120 days of the filing of the RJI. If the parties cannot agree on a mediator, the parties will be given an opportunity to rank candidates that the ADR Coordinator proposes. While in most instances the parties will be required to begin mediation within 30 days of the confirmation of the mediator and conclude the mediation within 75 days from confirmation, parties who select their mediator within 120 days of the filing of the RJI may have up to seven months after the RJI to conclude the mediation. If selected to participate in the Pilot

Mandatory Mediation Program, counsel should be sure to consult new Rule 15 so as to comply with all applicable procedures and deadlines.

On the Horizon

At the end of May/beginning of June, five further proposed amendments to the Commercial Division Rules closed for public comment (regarding privilege logs, staggered court appearances, non-party ESI discovery, settlement-related discovery, and assignment of cases). We await with interest whether or not these proposed rules will be adopted.

Stay tuned...

Endnotes

1. The State of the Judiciary 2012, Jonathan Lippman, Chief Judge of the State of New York, p. 15. The full text of Chief Judge Lippman's address is available at https://www.nycourts.gov/admin/stateofjudiciary/SOJ-2012.pdf.
2. *Id.*
3. Chief Judge's Task Force on Commercial Litigation in the 21st Century, pp. 14-25. A copy is available at https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.
4. Copies of the rules and model order, and the Advisory Council's recommendations in support of the changes, are available from the New York State Unified Court System website at http://www.nycourts.gov/RULES/comments/index.shtml.

Commercial Litigation Academy

By Kevin J. Smith

On June 5 and 6, 2014, the Commercial and Federal Litigation Section and NAM sponsored the Third Annual Commercial Litigation Academy 2014. This two-day Academy program, chaired by Kevin J. Smith (Sheppard, Mullin, Richter & Hampton LLP), attracted an outstanding panel of distinguished commercial litigators, current and former in-house counsel, and judges. This year's program sold out, with the highest attendance to date. The program attracted approximately 160 attorneys, ranging from junior attorneys to more experienced practitioners and in-house counsel. Each of the audience members received valuable insights on federal and state commercial litigation—from choosing the proper venue through trial and the appellate process. One of the panels focused on litigating commercial cases efficiently, an especially important topic in today's world of ever increasing costs associated with all aspects of litigation. Discussions on the panels included heightened focus by counsel on early case assessment and mediation, streamlined state court appeals in commercial cases, and several proposals in the federal courts to reduce the number of depositions and interrogatories.

This year, the Academy panelists included United States District Judge Shira Scheindlin; New York Supreme Court, First Department, Appellate Division Justice Barbara Kapnick; former First Department, Appellate Division Justice James McGuire; New York State Supreme Court Commercial Division Justices Carolyn Demarest, Shirley Werner Kornreich, Jeffrey Oing, and Saliann Scarpulla; the Honorable John DiBlasi and Mark Bunim, NAM arbitrators and mediators; and well-known commercial litigators, trial attorneys, and in-house counsel, Robert M. Abrahams (Schulte Roth & Zabel LLP), Lauren E. Aguiar (Skadden, Arps, Slate, Meager & Flom), Lawrence Chanen (Associate General Counsel, JPMorgan Chase & Co.), Roger Cooper (Cleary Gottlieb Steen & Hamilton LLP), Jeffrey M. Eilender (Schlam, Stone & Dolan), Marshall H. Fishman (Freshfields, Bruckhaus, Deringer LLP), Robert S. Friedman (Sheppard, Mullin, Richter & Hampton LLP), Robert J. Giuffra, Jr. (Sullivan & Cromwell LLP), Robert J. Jossen (Dechert, LLP), Craig S. Kesch (Flemming Zulack Williamson Zauderer LLP), Lewis Liman (Cleary Gottlieb Steen & Hamilton LLP), Mitchell A. Lowenthal (Cleary Gottlieb Steen & Hamilton LLP), Jonathan D. Lupkin (Rakower Lupkin PLLC), Gregory A. Markel (Cadwalader, Wickersham & Taft LLP), David R. Marriott (Cravath, Swaine & Moore LLP), Robert D. Owen (Sutherland Asbill & Brennan LLP), Marcia B. Paul (Davis Wright Tremaine LLP), Richard C. Pepperman, II (Sullivan & Cromwell LLP), Bradley I. Ruskin (Proskauer Rose LLP), Paul Saunders (Cravath, Swaine & Moore LLP), Mark E. Segall, Esq. (JAMS and former Head of Litigation Worldwide at JPMorgan Chase & Co.), David J. Sheehan (Baker Hostetler LLP), Peter N. Wang (Foley & Lardner LLP), Mark C. Zauderer (Flemming Zulack Williamson Zauderer LLP).

CPLR Amendments: 2014 Legislative Session

(2014 N.Y. Laws ch. 1-206)

CPLR §	Chapter, Part (Subpart, §)	Change	Eff. Date
105(s-1)	29(2)	Extends expiration until June 30, 2019	6/19/14
2214(c)	109	Provides that in e-filed action previously e-filed papers need only be referenced by docket number on e-filing system and not filed again for motion, absent a court rule	7/22/14
3408(a)	29(1)	Extends expiration until Feb. 13, 2020	6/19/14

Note: The expiration of the revival of Agent Orange actions were extended from June 16, 2014, to June 16, 2016. 2014 N.Y. Laws ch. 46. See CPLR 214-b.

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

(West's N.Y. Orders 1-22 of 2014)

22 NYCRR §	Court	Subject (Change)
137, App. A, 8(B)	All	Increases to $10,000 threshold for submission of attorney-client fee disputes to panel of three arbitrators
202.6	Sup.	Amends Foreclosure RJI
202.9-a	Sup.	Adopts new rule governing special proceedings authorized by UCC § 9-518(d)
202.70(a)	Sup.	Increases monetary threshold for Albany County to $50,000, 8th Jud. Dist. to $100,000, Kings County to $150,000, Nassau County to $200,000, NY County to $500,000, Onondaga County to $50,000, Queens County to $100,000, 7th Jud. Dist. to $50,000, and Suffolk County to $100,000
202.70(d)-(e)	Sup.	Modifies procedures for assignment to and transfer into Commercial Division
202.70(g), Rule 8(a)	Sup.	Requires parties to consult about exchange of information that would aid early settlement of case
202.70(g), Rule 9	Sup.	Adopts new rule governing accelerated adjudication actions
202.70(g), Rule 11-a	Sup.	Adopts new rule governing interrogatories
202.70(g), Rule 11-b	Sup.	Adopts new rule governing privilege logs

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

Notes of the Section's Executive Committee Meetings

February 12, 2104

Guest speaker Justice Elizabeth Emerson of the Commercial Division, Suffolk County, discussed her service on the Chief Judge's Task Force on Commercial Litigation in the 21st Century, the differences in commercial cases in counties around the state, and the efforts of the Commercial Division justices in Nassau and Suffolk counties to develop consistency. She also discussed her own individual practices.

The Executive Committee discussed two proposals of the Section's PJI Committee on good faith purchaser for value and breach of fiduciary duty in LLCs. The Executive Committee also discussed the upcoming Smooth Moves program, the Spring Meeting, and Spring CLE programs.

March 11, 2014

Guest speaker Magistrate Judge Andrew Peck of the United States District Court for the Southern District of New York addressed Federal Rule of Evidence 502(d) and his position on predictive coding.

The Executive Committee discussed and adopted, with modifications, a report of the Section's Committee on the Commercial Division on Special Masters in the Commercial Division. The Executive Committee also discussed and adopted a report of the Section's Committee on Social Media on Social Media Ethics Guidelines.

April 8, 2014

Guest speaker Judge Andrew L. Carter of the United States District Court for the Southern District of New York discussed his philosophy as a judge, how he handles discovery and initial conferences, the importance of diversity on the bench, and a few of his individual practices.

The Executive Committee discussed and adopted the two proposals of the Section's PJI Committee on good faith purchaser for value and breach of fiduciary duty in LLCs. The Executive Committee also adopted the report of the Section's CPLR Committee regarding the New York State Federal Judicial Council's "Report on the Discrepancies between Federal and New York State Waiver of Attorney-Client Privilege Rules."

May 14, 2014

Guest speaker Justice Saliann Scarpulla of the Commercial Division, New York County, discussed her practice in regard to motions, settlement discussions, and discovery.

The Executive Committee discussed and adopted a report of the Section's Commercial Division Committee on the OCA proposal regarding privilege logs. The Executive Committee also discussed and adopted, with modification, a report of the Section's Electronic Discovery Committee on the OCA proposal regarding ESI from non-parties.

June 11, 2014

Guest speaker Michelle Browdy, Vice President, Assistant General Counsel, and Secretary at IBM, discussed her insights into the importance of early and focused case assessment and coordination between in-house and outside counsel in developing an effective strategy for a particular case. She highlighted these points by sharing examples from her experiences at IBM as a means of demonstrating how she applied the concepts she discussed.

The Executive Committee discussed the coming year's Committee schedules and new C&FLS Chair Paul Sarkozi's goals for his term. Jay Himes presented a report regarding developments in the field of Deferred and Non-Prosecution Agreements in Antitrust cases, which will be published in the *Commercial Litigation Insider* later this year. Charles Moxley updated the Executive Committee about the successful program he organized at the International Arbitration Center, and Mr. Sarkozi reported on the success of one of the Section's flagship events, the Commercial Litigation Academy, held on June 5 and 6.

(Continued from page 3)

The New York State–Federal Judicial Council proposed a new CPLR 4549 to correspond to Federal Rule of Evidence 502 on disclosure of communications protected by the attorney-client privilege or as attorney work product, and to Federal Rule of Civil Procedure 26(b)(5)(B) regarding an interim procedure for preventing the circulation or use of inadvertently produced information. The Section approved the concept but disapproved the specific wording of the proposals.

The Section's Commercial Jury Charges Committee, co-chaired by Judges Andrea Masley and Melissa Crane, was active. It made two proposals to the New York State PJI Committee. One was to amend the presentation on good-faith and *bona-fide* purchasers by adding a discussion of void and voidable title. The second was to include an expanded discussion of breach of fiduciary duties addressing direct versus derivative claims and breach of fiduciary duty in the context of limited liability companies. The proposals were principally the work of committee members Melissa Yang and Rebecca Smithwick, respectively. A modified version of the analysis of void and voidable title was also published in the Spring 2014 issue of the *NYLitigator*.

Programs

One of the Section's more unusual education programs was presented in January to a group of Kosovar jurists and academics. In conjunction with the United States Department of Commerce Commercial Law Development Program and the New York County Commercial Division, Ted Semaya and Clara Flebus, Co-Chairs of the International Litigation Committee, and I discussed the operation of the Commercial Division and alternative dispute resolution. Every word was translated to and from Albanian.

There also were more standard CLE programs. At the outset of my tenure, Mark Berman and Ignatius Grande led panels on Social Media in the Context of Litigation and Criminal and Civil Litigation Investigations. At the end, the Alternative Dispute Resolution Committee under Charlie Moxley with the Co-Chairs of the International Litigation Committee offered a panel at the New York International Arbitration Center on the importance of international arbitration in New York practice. Last fall, Richard Friedman put together four programs around the state on basic federal civil practice. This spring, former Chair Vince Syracuse ran five programs around the state teaching basic lessons on ethics and civility. The White Collar Criminal Litigation Committee co-chaired by Evan Barr and Joanna Hendon produced a panel on international criminal enforcement and investigations and Richard Dirks of the Committee on Civil Prosecution and former Judge Peggy Finerty conducted a program on blowing the whistle on fraud. The latter two also published a related article in the Spring 2014 issue of the *NYLitigator* on the federal False Claims Act and the SEC whistleblower program.

Vice-Chair Jim Wicks organized a lively and well-attended Annual Meeting in January. The CLE topics were How Social Media Has Altered the World of Legal Ethics and The Interplay of Delaware and New York Law in Resolving Corporate and Commercial Disputes. Included on the latter panel was Delaware Vice Chancellor J. Travis Laster. Over lunch, the Section proudly presented to its former Chair and United States District Judge for the Southern District of New York Shira A. Scheindlin for, among other things, her seminal work in e-discovery, the Stanley H. Fuld Award given to a member of the legal profession who has significantly contributed to the practice of commercial law and litigation.

In April, under the direction of Co-Chairs Barry Cozier and Carla Miller, the Section's Diversity Committee presented to more than 200 people the Association's premier annual diversity program Smooth Moves. The CLE component concerned Social Media Strategies for Attorneys: Marketing Techniques, Practice Tips, and Ethical Quandaries. The George Bundy Smith Pioneer Award was presented to Kay Crawford Murray for her long-term, outstanding service as the founding General Counsel of the Department of Juvenile Justice of the City of New York.

Chair-Elect Paul Sarkozi conducted an informative Spring Meeting at the Cranwell Resort in early May for approximately 180 participants, including more than 30 judges. The CLE programs addressed views from the appellate bench as to whether a complex commercial appeal is different from other appeals; PRISM, Snowden and the NSA—National Security Litigation in the Digital Age; Alternative Discovery Resolution—Using Referees, Masters and Mediators to Find Solutions to Discovery Disputes; Best Practices for Expert Witnesses in Federal and State Court Business Litigation; and Ethical Issues in the Investigation of Commercial and Federal Lawsuits. The keynote speaker was New York City Corporation Counsel Zachary W. Carter. During the gala dinner, the Section's Robert L. Haig Award honoring a member of the legal profession who has rendered distinguished public service was presented to iconoclastic and soon-to-retire New York Court of Appeals Judge Robert S. Smith.

Communications

Thanks to Scott Malouf the Section has an extremely active Twitter presence. In a little over a year, he has sent more than 2,000 tweets. For his efforts, Scott received

Message from the Outgoing Chair

(Continued from page 31)

the Section's Distinguished Service Award at the Spring Meeting.

During the year, the Section's website was relaunched. It is now easier to read and to access. Section members may review previous issues of the *NYLitigator* and the Section's newsletters, as well as the activities and reports of the Section's more than 25 committees, which can also link their members through online communities.

We did not neglect old-fashioned print media. Mark Davies produced three issues of the Section's newsletter to provide information and summaries of the day-to-day activities of the Section for Section members. Under new editor Teresa Bennett, the *NYLitigator* published three, not the usual two, issues. Among the articles was one by Peter Pizzi, Co-Chair of the Internet and Intellectual Property Litigation Committee, outlining in January the issues for streaming broadcast content under the copyright laws, which anticipated the granting of *certiorari*, and the opinion by the Supreme Court in *American Broadcasting Companies, Inc. v. Aereo, Inc.* The Spring issue included an article by Judge Melissa Crane and Bob Becker on guidelines for privilege logs, which, among other things, prefigured the proposal by the Commercial Division Advisory Council to encourage categorical privilege logs. That issue also included a copy of Judge Scheindlin's acceptance speech for the Fuld Award in which she outlined issues concerning the digital information revolution and privacy.

* * *

This year could not have been a success without the dedicated efforts of the Section's officers. As I have said, Chair-Elect Paul Sarkozi and Vice Chair Jim Wicks put together excellent Spring and Annual Meetings, respectively. Treasurer Deborah Edelman improved the financial condition of the Section by adding to our surplus. Secretary Jackie Grodin accurately recorded the Executive Committee discussions. I have relied on them all for advice and thank them for it. I am confident the Section remains in good hands as Paul and Jim move up and Mark Berman is added to the team as Vice-Chair. I look forward to at least another 25 years of the Section's leadership of the bar.

Greg Arenson

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