

Commercial and Federal Litigation Section Newsletter

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

A Message from the Chair

The Summer is usually a time when people relax and put off in July and August what they know will undoubtedly catch up with them in September, or, with any luck, October. Our Section, however, was busy at work throughout the Summer on a number of CLE programs, putting together the Presidential Summit for our Annual Meeting in January, planning our Spring Meeting, preparing reports, and meeting in our various committees to discuss the reports and programs already in progress.



Lauren J. Wachtler

We have had a number of new members join our Section since my last Message. We are now more than 2,000 strong and expect that number to increase even more this year. With all of the opportunities for speaking engagements, participation in programs and panel discussions, and the preparation of the many reports which are in progress, we are confident that we will meet those expectations long before next Spring. Because our numbers have passed the 2,000 mark, our Section is entitled to have three representatives in the House of Delegates of the New York State Bar Association, where our voice will be an influential one in the issues discussed and positions taken by the Association.

Since our newsletter last Summer, our Executive Committee has been privileged to have as our guest speakers the Honorable Bernard Fried, the newest justice to join the distinguished members of our Commercial Division in New York County; the Honorable Loretta A. Preska of the United States District Court for the Southern District of New York; the Honorable Herman Cahn, one of the first justices to be appointed as a Commercial Division judge; and the Hon. Nina Gershon,

United States District Judge for the Eastern District of New York. These judges have addressed our Executive Committee to share with us some of their views relating to the practice of law in both the state and federal courts, as well as some of the problems encountered by jurists in the courts. Already our speakers have provided us with useful information and spurred us on to take immediate action on important issues.

Inside

Commercial and Federal Litigation Section Participates in 2004 New York Mediation Settlement Day Events5 (Ruth D. Raisfeld)	
Conference in Cairo6 (Stanley N. Futterman)	
Hot Topics in Evidence and Discovery: A Must-Attend Annual Meeting Program7	
2004 Annual Seminar for the Commercial Division Justices ...8 (Tracee E. Davis)	
Section to Present Fuld Award to Spitzer8	
E-Filing When There Are Many Exhibits and Cumbersome Motion Papers9 (Edward White and Anthony Palumbo)	
Another View on E-Filing10 (Stanley N. Futterman)	
CPLR Amendments 2004 Legislative Session (Chapter 1-713).....11	
2004 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals in the Court of Appeals and the Appellate Division, and Certain Other Rules of Interest to Civil Litigators12	
Notes of the Section’s Executive Committee Meetings13	
Section Spring Meeting Will Examine the Jury in Commercial Cases13	
Section Committees and Chairs14	

Judge Preska and Judge Gershon shared with us some of the grim prospects we can look forward to because of the drastic administrative cuts that will have to be made as a result of the lack of additional federal funding for the judiciary. Their remarks provided valuable information for our Task Force on Federal Funding of the Judiciary. The Honorable Michael Mukasey, Chief Judge of the District Court for the Southern District of New York, addressed our Executive Committee on November 17. Judge Mukasey presided over the *Padilla* case, one of the Guantanamo Bay Cases, which will be one of the topics of our annual meeting. He was joined by Andrew Patel, who represented Mr. Padilla at the trial and appellate level in the Second Circuit. We were treated to a fascinating discussion about the many constitutional issues raised by the case. On the state side, we were all taken aback when we learned from our Commercial Division judges that the average time within which a motion will even be sent to the Law Department for a draft of a decision after briefs have been submitted and the case argued may be in excess of 120 days. This delay results largely from the magnitude of cases submitted to the Law Department for drafting of opinions from all of the Supreme Court justices, both Commercial Division and general Civil Term. We as commercial litigators often bring our cases in the Commercial Division for the express purpose of obtaining not only scholarly decisions but also expeditious determinations of our motions. We have often maintained to our clients that a good reason to choose the Commercial Division rather than federal court is the quality of the judges and the efficient case management, including the swift determination of motions. With a 120-day waiting period, this is hardly the "expeditious" adjudication we've been touting to our clients.

Our Section has, with assistance of Executive Committee member David Rosenberg, communicated our concerns to Judge Lippman and recommended the possibility of assigning certain court attorneys in the Law Department to work exclusively for the Commercial Division judges in drafting decisions. This approach would free up a majority of the court attorneys in the Law Department to work on matters assigned to other justices in the Supreme Court and allow those court attorneys assigned to the Commercial Division judges to concentrate exclusively on, and develop expertise in those areas litigated in, the Commercial Division. We have offered to assist Judge Lippman in exploring this possible means of remedying the current "log jam," a remedy that we believe will benefit not only commercial litigators but all attorneys who practice in Supreme Court, New York County.

In December our Executive Committee will hear from the Honorable Jonathan Lippman, Chief Administrative Judge of the State of New York; and in March, the Honorable Robert Smith, the most recent appointee to

the New York State Court of Appeals, will be our speaker. If any of our Section members would like the opportunity to hear one of our speakers at our monthly Executive Committee meetings, please contact me, and we will be happy to have you there. The schedule of Executive Committee meetings can be found on our Web site at <http://www.nysba.org/comfed>.

Our work with and support of the Commercial Division is continuing with a program our Section sponsored for the Commercial Division justices throughout New York State. For the past several years we have provided the Commercial Division justices with a day-long seminar in which we have addressed issues that have reached the Commercial Division for adjudication, or where recent developments in a particular area of the law have been of interest to the judges. This year, we were asked to present a program addressing recent developments in electronic discovery as well as the rather thorny problem, surprisingly encountered by many of the Commercial Division judges, of attorneys who fail to comply with discovery orders and how to deal with them. We also discussed abusive discovery practices, including the use of excessive and burdensome interrogatories and discovery demands. Adam Cohen, the Chair of our newly formed Electronic Discovery Committee, chaired the morning program relating to e-discovery, and our Section's Secretary, Tracee Davis, worked with other Section members and law secretaries in the Commercial Division as Chair of the afternoon portion of the program, dealing with discovery orders in the Commercial Division. The seminar was attended by almost all of the Commercial Division justices in the State and also included the justices' law clerks, law assistants and referees from all of the Courts. It was a resounding success, including more than 40 attendees. I was thrilled to see so many of you responding to my e-mail, offering your assistance in preparing and presenting this program. It is my intention to get as many of our Section members as possible to participate in our programs and seminars, which will be offered throughout the year, and I thank you for your support.

As many of you know, Chief Judge Kaye appointed Mark Zauderer, a former Section Chair, to head up a commission to report on the jury system. The Commission's report was available on the Internet, and I hope many of you had an opportunity to read it. Our Section was asked by the State Bar to review the Commission's Report and send our comments along to the State Bar Association. Our comments were forwarded to, and have been circulated among, the various committees of the State Bar and were provided to our liaison to the House of Delegates. Our Section's comments will provide the Commission with areas which we believe merit further investigation: conducting *voir dire* in our state courts; making the jury system and process more

efficient; and eliminating much of the delay, wasted time, and discomfort that jurors and attorneys alike continue to suffer.

Our Task Force on the Funding of the Federal Judiciary has made great strides in the preparation of a report to address the crisis in funding of the federal courts, a report that we expect to be in its final stage by mid-December. With the assistance of Task Force Chair Jay Safer and Task Force members Carrie Cohen, Harold Levy, Jack Auspitz, Carol Heckman, Lew Smoley, and Bernice Leber, we have met with, interviewed, and obtained comments from administrators in all of the federal district courts in New York State, including the bankruptcy courts, have analyzed the memoranda and press releases from various sectors of court administration in all of the federal court districts in the state, and have compiled data from administrators, jurists, and attorneys, all aimed at the creation of a report that will demonstrate the need for increased funding for the federal courts. Our report, which is entitled "Report of the Task Force of the Commercial and Federal Litigation Section of the NYSBA on Funding of the Federal Judiciary," will highlight the devastating impact the current freeze on federal funding is having and will continue to have on the federal courts, including the firing of hundreds of court employees, cutbacks in drug aftercare, scaling back of courtroom technology, and even the suspension of civil jury trials. We will encourage other bar associations to lend their support to our report, to send the strongest message possible to the Judiciary Committee and the Senate Appropriations Committee, which might assist in trying to prevent the detrimental effect the failure to fund the courts will have on court administration, the judiciary, and the rights of litigants in federal courts. Our Section is the first of any bar association group to take such steps, and I am grateful for all of the hard work our Task Force has put into this effort.

Our Annual Meeting promises to be a spectacular event this year. As the date draws closer, you will be receiving more information about our Section's meeting, which takes place on January 26, 2004, at the Marriott Marquis Hotel. (The week of January 24th is the Annual Meeting for the entire New York State Bar Association, and our Section always holds its meeting on the Wednesday of that week.) Our Section Vice-Chair, Lesley Rosenthal, has put together a morning program devoted to the topics of electronic discovery and evidence in both the state and federal courts, and the panels are comprised of outstanding commercial litigators and jurists.

We are particularly honored that Attorney General Eliot Spitzer has agreed to accept our Stanley Fuld Award, which is given by our Section each year at our Annual Meeting luncheon to an individual who has made significant contributions in the area of commercial

litigation. Our Section has bestowed this honor on a variety of highly regarded and respected jurists and individuals, and we are privileged to add Attorney General Spitzer to our distinguished list of recipients.

As in the year before last, our afternoon program will be part of the Presidential Summit. We have joined forces with our State Bar President, Ken Standard, who has asked our Section to prepare and present the Presidential Summit of the State Bar. The Summit is customarily attended by over 300 attorneys from all parts of the state and all Sections of the Bar. This year Lesley Rosenthal and I have selected as the title for the Presidential Summit: "High Impact Appeals: Persuasively Arguing the Great Issues of Our Time." We have secured the participation of attorneys from both the private and public sectors, who will be performing mock appellate arguments before members of the judiciary of both a state and a federal case, one of which will be the Guantanamo Bay case *Rumsfeld v. Padilla* and the companion cases of *Rasul v. Bush*, *Al Odah v. United States*, and *Hamdi v. Rumsfeld*.

If any of you have visited our Web site recently, you will note that our Committee Chairs have provided their mission statements along with a photograph of themselves. If you are interested in joining a Committee and wish to find out what that Committee's mission is, and the projects on which the Committee is working, that information is readily accessible on our Web site at <http://www.nysba.org/comfed>. Contact information of the Committee Chairs is also provided if you would like further information about any Committee. We hope this information will make your decision to join a particular Committee an informed one.

Our Committees have been hard at work on many interesting projects and reports, which will be shared with our other Section members throughout the year. Already our International Litigation Committee has produced a magnificent report addressing CPLR article 53 relating to the enforcement of foreign country money judgments, and we commend the work of that Committee's Co-Chairs, Ted Semaya and Steve Orel, and the report's principal authors, Charles Rosenzweig and Donald Howe. The International Litigation Section's report will appear in the next issue of the *NYLitigator*.

Dan Levitt, the Chair of our Technology Committee, has undertaken a report that was suggested to our Executive Committee by Judge Shira Sheindlin of the United States District Court of the Southern District. Judge Sheindlin had mentioned to our Section the difficulty the federal court judges have been having with electronic devices that attorneys are presently prohibited from bringing into the courtroom, absent court order. We have all experienced the frustration of not being able to get in touch with our offices while in

court; but more importantly, now that many attorneys carry with them a Blackberry device that includes not only a telephone but a calendar, scheduling additional conferences or motion dates, which are often set at conferences in federal court, has become almost impossible. Judge Sheindlin mentioned that she often finds it difficult to arrange scheduling when attorneys shrug their shoulders and tell her that their Blackberries are in the clutches of the federal marshal downstairs. Dan's committee is in the process of preparing a report that will discuss the use of electronic devices in court and that will analyze how courts in districts outside of New York have been dealing with the problems that both judges and attorneys have encountered in the New York federal courts. We are looking forward to some suggestions from Dan's committee, which Judge Sheindlin and others might be able to use to persuade court administration in the federal courts to adopt some approaches to the use of electronic devices in the courtroom that will address both the needs for and concerns these devices raise.

We continue to play a significant role in presenting successful CLE programs, and congratulate our Section's founder and former Chair, Bob Haig, on his Program, "Advice From More Experts: More Successful Strategies For Winning Commercial Cases In Federal Courts," sponsored by our Section. The day-long program, which gave the audience an opportunity to learn about everything from motion to trial practice from leading commercial litigators and jurists, was a tremendous success. This was the second year this program was offered, and the second year that it was sold out, with more than 300 attorneys participating.

Congratulations are also in order for Section member Ruth Raisfeld and Executive Committee member Ed Beane, who have been working with Dan Weitz of the Office of Court Administration in promoting a pilot program for ADR in the Commercial Division in Westchester County. We hope that this program, which is just about to take off, will be used as a model for the other Commercial Division Courts that do not have such a program. We commend Ruth and Ed for their efforts in seeing this project through to what I know will be a successful conclusion.

Our State Bar President, Ken Standard, has defined as one of the goals for his administration cooperation among the many Sections and Committees of the State Bar. He hopes to achieve this goal through the presentation of joint programs, the issuance of joint reports, and the co-sponsorship of many of the events sponsored by the Association throughout the year. I am proud to say that our Section again has been at the forefront of achieving those goals. Our commitment to the goal of intra-Section cooperation will be demonstrated in the joint report that our Electronic Discovery Committee, chaired by Adam Cohen, and our Federal Procedure Committee, Chaired by Greg Arenson, are in the process of preparing relating to the new amendments to the federal rules on electronic discovery.

On the inter-Section side, our Chair-Elect, Steve Younger, who is in charge of our Spring Meeting this year, has been working with the Chair of the Corporate Counsel Section. Their members will be joining our Section the weekend of May 14, 2005, at the Gideon Putnam Hotel in Saratoga Springs. Our Sections together will present a program on how corporate America perceives juries, how to present a complex commercial case to a jury, and how to select an appropriate jury for your case.

Although our Section is actually putting together the Presidential Summit for the State Bar, I have asked several other Section and Committee chairs to co-sponsor the event with us, including the Judicial Section, the Criminal Justice Section, the Trial Lawyers Section, and some of the State Bar Association committees that would have a particular interest in the subject matter of the Summit this year. Not only do these efforts promote inter-Section cooperation, but they also offer an excellent way in which we can work together for the State Bar Association and foster a spirit of collegiality and cooperation among attorneys and jurists who want to share their knowledge and experience with one another. As the year progresses I hope all of you will continue to take advantage of the many opportunities our Section offers to all of our members, and I look forward to working with you.

Lauren Wachtler

Commercial and Federal Litigation Section Participates in 2004 New York Mediation Settlement Day Events

By Ruth D. Raisfeld

Alternative dispute resolution proponents in New York State, together with courts, government agencies, and bar associations, launched the 4th Annual New York State Mediation Settlement Day, an effort "designed to further the understanding of the mediation process and advance the use of mediation by New York's citizens, communities, businesses and courts." To support this event, the Commercial and Federal Litigation Section teamed up with the Westchester County Bar Association ("WCBA") to promote use of the mediation program of the Supreme Court, Commercial Division of Westchester County. Judge Kenneth W. Rudolph, Supreme Court, Commercial Division, Westchester County, a member of the Section, is seeking to promote use of the Division's ADR Program to resolve cases and thereby provide a mechanism by which parties can avoid unnecessary motion practice, expensive litigation, and lengthy trials. At a dinner CLE program on October 20, 2004, Judge Rudolph spoke of the merits of ADR, and other speakers, Edward Beane, Frederick Salek, and Ruth Raisfeld, all members of the Section and the WCBA, explained how mediation works from the perspective of the commercial litigator, in-house and outside counsel, and the mediator.

Speakers described how mediation is an effective tool that provides an opportunity for legal disputes to be settled without "winners" and "losers." Impartial mediators assist parties in reaching a resolution that is acceptable to all involved and that may provide a remedy not available through court order or jury verdict. The speakers noted several characteristics of commercial disputes which make alternative dispute resolution a process all commercial lawyers should consider. For example, partnership disputes, distribution and requirements contract disputes, and franchise disputes are particularly appropriate for resolution by mediation as the parties may be interested in preserving the underlying relationship, continuing to do business, or averting publicity attendant to traditional litigation.

Further, as more courts in New York adopt court-annexed mediation programs, counsel must be aware of and experienced with the different brand of advocacy that is necessary to use these processes effectively and successfully. The "Gladiator"-litigation style may not

serve your client well in mediation, where the goal is not "win-win" but "live with-live with." Nevertheless, lawyers must prepare their cases for a mediation or arbitration with the same degree of care that they would use in preparing for arguing a motion to dismiss or a motion for summary judgment.

"ADR provides a forum that can more adequately address the psychological elements at play in litigation and resolution of legal disputes."

In addition, ADR is a viable solution to avoiding costly and lengthy litigation, as courts and agencies are unfortunately affected by burgeoning caseloads and distribution of scarce resources. With mediation and arbitration, the parties can select a neutral who is familiar with the industry and special problems that are involved, so that the dispute can be resolved more efficiently.

Finally, ADR provides a forum that can more adequately address the psychological elements at play in litigation and resolution of legal disputes. Particularly in mediation, parties are afforded an opportunity to explore alternative settlement options without the cumbersome procedural and evidentiary rules that may inhibit communication about the underlying issues in a dispute. Similarly, in mediation counsel can explore settlement options through an intermediary and avoid the brinkmanship often used in direct settlement discussions over the telephone or on the courtroom steps.

The use of mediation to resolve pending litigation should be considered in the spirit of Chief Judge Judith Kaye's recent address to the Nassau County chapter of the American Inns of Court, in which she admonished litigators to avoid "scorched earth adversarialism." Rather, commercial litigators should look to mediation as a means of pursuing "problem-solving justice," which in the end will yield better results, with less economic expense and emotional wear-and-tear.

Conference in Cairo

By Stanley N. Futterman

Members of the Commercial & Federal Litigation Section joined with lawyers from Europe, the United States, India, and, in the greatest number, Arab countries, at a conference in Cairo, Egypt, September 18-20, 2004, on Legal Protection of Foreign Investments. The conference was organized by Sunsglow, Inc., an organization directed at legal training in the developing world, hosted by Cairo University Law School and sponsored by the United States' Overseas Private Investment Corporation ("OPIC").

Aimed particularly at newly appointed or re-appointed Iraqi judges, officials, and government attorneys, the conference drew participants from Egypt, Saudi Arabia, Kuwait, Lebanon, Oman, the United Arab Emirates, and Switzerland, as well as former Justice Mohan of the Supreme Court of India. The conference was chaired by Dr. Yassin El-Ayouty, the founder of Sunsglow, who, after a 30-year career in the Political Division of the United Nations Secretariat, attended Cardozo Law School and became a member of the New Jersey Bar.

Other New York area participants included Judge Delissa A. Ridgway of the U.S. Court of International Trade, who, along with Ken Reisenfeld, Chair of the ABA's International Law Section, spoke on International Commercial Arbitration. Karen Kupersmith, Director of Arbitration for the New York Stock Exchange, explained her organization's dispute resolution process. John R. Horan, of Fox, Horan and Camerini, explored the area of complex commercial litigation. Stan Futterman dealt with means of protecting foreign investors from frivolous litigation, and also served as Rapporteur.

Ross Connolly, Senior Vice President of OPIC, presented the United States government's view of the importance of foreign direct investment in economic development. Mark Garfinkel, OPIC General Counsel, and Cindy Shepard and Dev Jagadesan, from the same office, explained their agency's role in encouraging and providing guarantees for U.S. private direct investment abroad, very little of which now goes to Arab countries. Several of the Arab speakers, especially Ambassador Abdulla Bashara, Kuwait's former Ambassador to the United Nations, emphasized the need to create a legal culture that is hospitable to foreign investment, as well as a supportive fiscal and economic environment. Others, in particular members of the Iraqi delegation,

argued that there would be little need for foreign investment once their country regained control over its natural resources.

Not the least part of the experience for the participating Americans was the opportunity to explore the fabled city of Cairo. A week could easily have been spent just in the Egyptian Museum. When the University learned that a group of non-Arabic speaking Americans was interested in a tour, it dispatched a freshly minted Egyptologist, with a "Masters in New Kingdom," to lead them through the treasures.

By this time even a little background reading, not to mention the ubiquitous presence of the six-pointed star in Egyptian iconography, had revealed that the roots of Western monotheism extend deep into Egyptian soil. Was not the Pharaoh Akhenaton the first person in contemporaneously recorded history, some 3,400 years ago, to espouse the doctrine of one God? When he died, by the age of 30—perhaps the first martyr to the cause of monotheism—and the temple priests attempted to erase the record of his existence, would not some of his followers have survived and continued to practice the new religion? Might it be that Moses, raised as an Egyptian prince (whatever the circumstances of his birth might have been), had identified with those followers, perhaps a generation or two later, and sought to protect them from persecution?

These were some of the questions pressed on Muhammad, the young Egyptologist from Cairo University. In an eloquent response he strode to an obscure corner of the museum and pointed to a stele taken from the tomb of the son of Ramses II, reputedly the Pharaoh of the Exodus. As do most such items, the stele recounts the military victories of the honored sovereign. In the dim light Muhammad traced with his finger the hieroglyphics that spell out the names of the conquered peoples, and among them the Egyptian script for I-S-R-A-E-L. Not on paper, not on papyrus, but, thankfully, etched in stone, where it had survived for 3,200 years, the only known record of the People of Israel in all of Egyptology. Was this a reference to the Exodus, and was that event in fact not so much of an escape as an expulsion?

Like all good conferences this one concluded with more questions left to explore, not all of them legal.

Hot Topics in Evidence and Discovery: A Must-Attend Annual Meeting Program

What are the hot topics in federal and state evidence and discovery for New York's commercial litigators? Hear it from those in the know: United States District Judge (and former State Supreme Court Justice) Harold Baer, Jr.; New York State Commercial Division Justice Helen E. Freedman, a member of the New York State and Federal Judicial Council and author of *New York Objections*; and State Supreme Court Justice Barbara R. Kapnick.

Other panelists who "wrote the book" in their respective fields are Professor Richard T. Farrell of Brooklyn Law School (*Prince, Richardson on Evidence*); Adam I. Cohen, Esq., of Weil, Gotshal & Manges LLC (co-author, *Electronic Discovery: Law and Practice*); and former Section Chair Gerald G. Paul, Esq., of Flemming,

Zulack & Williamson, LLP (co-author, "Discovery of Electronic Records," from *Commercial Litigation in New York State Courts*).

Capping off the morning will be a lively discussion of civility and ethics in commercial litigation, introduced by former Section Chair and now United States District Judge P. Kevin Castel and moderated by former Section Chair Mark C. Zauderer, Esq., of Piper Rudnick LLP.

The program takes place on Wednesday, January 26, 2005, from 9:00 a.m.–12:00 noon, as part of the NYSBA's Annual Meeting at the New York Marriott Marquis. Registration materials are available at <http://www.nysba.org>.

Also in the works for Wednesday, January 26, 2005:

ARGUING THE GREAT ISSUES OF THE DAY

- *The Guantánamo Bay Cases: The Clash of Civil Rights and National Security*
Featuring lawyers who argued the cases in the United States Supreme Court and Courts of Appeals
- *Hip-Hop Mogul Lobs Constitutional Challenges at New York's Lobbying Law*
Featuring prominent government and First Amendment oral advocates

2004 Annual Seminar for the Commercial Division Justices

By Tracee E. Davis

The Commercial and Federal Litigation Section presented its annual seminar for the Commercial Division Justices on November 16, 2004, at Cardozo School of Law. These seminars are designed to give the judges perspectives and advice on the current state of the law from practicing attorneys in the areas in which the judges have expressed an interest or concerns. This year we were asked to present a program on electronic discovery and also on how judges should handle attorneys who engage in abusive discovery practices.

During the first half of a full-day seminar, we explored the current issues courts face in the area of electronic discovery, how to address the spoliation of electronic information, and what type of sanctions are appropriate and the extent to which they should be imposed.

The justices have also expressed their concerns regarding the increasing number of attorneys who

ignore the rules of discovery and abuse the discovery process. The second half of the seminar focused on abusive practices, the options available to addressing non-compliance with discovery orders, and whether more stringent rules should be adopted. Currently, the Commercial Division Justices are considering the adoption of new rules restricting the use and abuse of interrogatories. The seminar included a discussion of imposing restrictions on interrogatories, and, in general, the efficacy of non-compliance discovery orders, the imposition of sanctions, and the deference given by the appellate courts to trial court decisions involving the imposition of sanctions.

Adam I. Cohen of Weil, Gotshal & Manges LLP, Chair of the Section's Committee on Electronic Discovery, and Tracee E. Davis of Zeichner Ellman & Krause LLP, Secretary of the Section, were the program co-chairs of this event.

Section to Present Fuld Award to Spitzer

The Section will present the 2005 Stanley H. Fuld Award to Eliot Spitzer, the Attorney General of the State of New York. The award, named after the late Chief Judge of the New York Court of Appeals, recognizes outstanding contributions to commercial law and litigation.

Spitzer's investigations of Wall Street analysts, mutual funds, insurance brokers, record companies, and others have catalyzed dramatic



reforms in many industries. His prosecutions of sophisticated white collar crimes have resulted in some of the nation's largest fraud recoveries.

Prior winners of the Section's Fuld Award include Chief Judge Judith S. Kaye of the New York Court of Appeals; Justice Antonin Scalia of the United States Supreme Court; and Judge Jack B. Weinstein, United States District Judge for the Eastern District of New York.

Spitzer will receive the award at the Section's Annual Meeting luncheon on Wednesday, January 26, 2005, at the New York Marriott Marquis. Registration materials are available at <http://www.nysba.org>.

E-Filing When There Are Many Exhibits and Cumbersome Motion Papers

By Edward White and Anthony Palumbo

Our first encounter with electronic filing (in an emergency, of course) involved a bankruptcy case in the Eastern District right after the rules became mandatory. It was a worrisome struggle. But learning the rules in advance and upgrading your office machinery and software can go a long way towards making electronic filing a cinch.

Our first experience with electronic filing involved filing an Adversary Complaint and a motion with a multitude of exhibits with the bankruptcy court. At the time our office did not have the scanning ability to efficiently convert our Word documents and exhibits to the requisite .pdf format. The document scanning was a job in and of itself.

You first must improve your office's scanning ability. Our office originally had a "manual" scanner. Not only did the scanner not automatically convert Word documents to .pdf format, but each page needed to be inserted one at a time. After having extensive trouble scanning and converting our Word documents, we upgraded our copy machine to perform both scanning and converting functions. Now we can simply scan documents as fast as making copies; and we also have the ability to e-mail the scanned documents directly from the copy machine to our desks, where we can label and organize them for e-filing. By chance, we had a copy machine that already had the capability built in, so we just upgraded, but you can also purchase a sheetfeed scanner or multifunction machine for under \$400. Just make sure it will automatically produce .pdf files on your computer. The court rules actually specify Adobe Acrobat .pdf files, but files created with Scansoft Paperport also seem to be acceptable, and Paperport is a less daunting program to learn than Acrobat.

We also attended an ECF training class that was helpful in understanding e-filing procedures. However, prior to attending a training class, try to become familiar with the ECF Web site, as well as the ECF guidelines and instructions for the federal courts in which you will be practicing. There is much detail to absorb.

It gets easier the second time: experience has been our greatest ally. Although we have found the ECF help desks to be very knowledgeable on technical issues (password trouble, reviewing documents previously e-filed, etc.), most of your understanding of the e-filing system will develop as you continue litigation in the federal courts.

One last word of advice—make sure to read the requirements and instructions for each federal court in which you are e-filing documents. You must keep the latest e-filing rules from the particular court in front of you. There are differences in the e-filing procedures between courts. Hence, do not assume that e-filing a motion in the Eastern District of New York will follow the same rules as the filing of a motion in the Bankruptcy Court of the Southern District of New York, or that the District Court rules will be identical among districts. Although most of the rules and policies are uniform among the federal courts, there are technical discrepancies that need to be followed meticulously to successfully e-file your documents.

In summary, bite the bullet now, buy what you need, and spend a few hours learning the rules and practicing before you get into a time-bind. This will be the way the world works from now on.



Catch Us on the Web at
WWW.NYSBA.ORG/COMFED

Another View on E-Filing

By Stanley N. Futterman

Jurisdiction to entertain “[c]ontroversies . . . between Citizens of different States,” established by the Constitution, and extended to the lower federal courts by the Judiciary Act of 1789, has been under attack for as long as any lawyer practicing today can remember. Many federal judges, including at least one Chief Justice, have considered the diversity jurisdiction a drain on judicial resources and a wasteful anachronism in a time of continually increasing national integration.

Yet Congress, the branch closest to the People, has maintained the opportunity for citizens from different states to resolve their differences in a federal forum, restricting access only through inflation adjusted increases to the required amount in controversy. With the advent of required e-filing in the federal courts, however, for all civil litigants except those appearing pro se, one wonders if technology may achieve much of what critics of the diversity jurisdiction have failed to accomplish.

Technology is supposed to make mechanical tasks easier, of course, even to level the playing field between those with access to large pools of man/woman power (read large law firms) and those without. Internet-based legal research has tended to do just that, making unnecessary the maintenance of private law libraries and the employment of researchers to pull multiple case books

off the shelves in a hunt for the apt case. E-filing, however, has so far added just another hurdle.

Nothing has been dispensed with. At last look, each judge in the Southern and Eastern Districts of New York requires, through Part rules, the delivery of “courtesy copies” in the usual form. E-filing just of notices, affidavits, and memoranda of law would not pose much of a burden—these documents are almost universally created on the computer and readily transmitted by e-mail—but most exhibits to affidavits exist only in hard copy. Before solo practitioners and small firms commit to scanning, and receiving, voluminous documents onto the office computer with sophisticated equipment and operators they do not yet retain, they are going to consider the alternative.

For diversity cases, as well as for many other cases arising under federal laws—including employment discrimination cases, which in the minds of many federal judges have replaced diversity cases as their least favorite diversion—the alternative is a convenient state court that has not yet insisted on comprehensive-filing. It will be interesting to review the case filing statistics for 2004, once they are available, to see if e-filing has a discernible influence on attorneys’ choice of courts. A judgment on the innovation must be reserved at least until then.

Available on the Web *Commercial and Federal Litigation Section Newsletter*

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Back issues are available at no charge to Section members. You must be logged in as a member to access back issues. For questions, log-in help or to obtain your user name and password, e-mail webmaster@nysba.org or call (518) 463-3200.

Commercial and Federal Litigation Section Newsletter Index

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CPLR Amendments 2004 Legislative Session (Chapters 1-713¹)

CPLR §	Chapter (§)	Change	Eff. Date
105(s-1)	128	Extends until 6/30/09 definition of “sheriff,” including authorization of New York City marshals to exercise the same duties as sheriffs in regard to execution of money judgments	6/29/04
213(8)	403	Changes statute of limitations for fraud to greater of six years from accrual or two years from discovery	8/17/04
214-b	68	Extends effective date for commencing agent orange actions until 6/16/06	5/4/04
304	384	Amendment to 1999 session law adds additional courts and types of cases to pilot program on commencement of cases by fax or e-mail	8/17/04
1349(2)(g)	398(2)	Changes cross reference to Chemical Dependence Service Fund	8/17/04
2103-a	111	Provides for confidentiality of residential and business addresses and telephone numbers of parties in certain circumstances	7/15/04
2302(b)	336(4)	Authorizes support magistrates to issue subpoena for prisoner	11/8/04
2303(a)	26	Clarifies that requirements for service of a copy of the subpoena on each party apply only in civil judicial proceedings	1/1/04
3113(d)	66	Authorizes parties to stipulate to depositions by telephone or other remote electronic means	1/1/05
4016(b)	372	Extends to opening statement prohibition on references to specific dollar amounts in personal injury and wrongful death cases	8/17/04
4508(a)	230(1)	Changes “certified social worker” to “licensed as a master social worker or a licensed clinical social worker”	7/27/04
4532-a	375	Expands rule to all cases and modifies requirements	1/1/05
8018(a)(3)	520	Eliminates repealer, making provision permanent	9/28/04
8021(a)(4)(b)	520	Eliminates repealer, making provision permanent	9/28/04
8021(b)(11)(b)	520	Eliminates repealer, making provision permanent	9/28/04
<p>1. Chapters 3, 109, 143, 151, 190, 198, 207, 215, 216, 224, 234, 237, 249, 250, 252, 268, 269, 283, 287, 297, 301, 303, 312, 314, 328, 330, 333, 341, 354, 361, 366, 392, 395, 399, 410, 412, 418, 424, 444, 452, 454, 461, 468, 473, 501, 508, 528, 548, 582, 585, 640, and 666 are not yet available.</p>			

2004 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals in the Court of Appeals and the Appellate Division, and Certain Other Rules of Interest to Civil Litigators

22 N.Y.C.R.R. §	Court	Subject (Change)	
202.5(c)	Sup./County	Specifies that “clerk of the court” with which papers commencing lawsuit must be filed is county clerk; requires posting of notice to that effect	
202.16(c)	Sup./County	Deletes “and Closing Statements” from title	
600.5(a)(3)	A.D./1st Dep’t	Corrects typo (changes “by filed” to “be filed”)	

Seeking New Members for the Committee on Pro Bono and Public Service

The Section’s Committee on Pro Bono and Public Service is seeking additional members. It is an exciting and important time for pro bono and public service in New York State. The Office of Justice Initiatives of the New York State Office of Court Administration recently issued its report, “The Future of Pro Bono in New York,” which has raised significant and interesting issues. In addition, a special inter-bar Pro Bono Working Group is working on expansion of the New York definition of pro bono, quite a controversial topic. The Committee will be working on these two issues in the near future, as well as many others, and we are looking to expand our membership. If you are interested in joining the Committee, please contact Bernie McCarthy, Committee Co-Chair, at 212-408-5397 or bmccarthy@chadbourne.com.

Notes of the Section's Executive Committee Meetings

June 17, 2004

Guest speaker Hon. Bernard J. Fried, Justice of the Supreme Court, Commercial Division, New York County, discussed his views on the Commercial Division.

Committees of the Section reported on their pending and proposed activities for the coming year. The International Litigation Committee reported on a proposed report on recognition of foreign country money judgments. The Chair announced the formation of a task force to explore the enactment of a New York Code of Evidence.

July 14, 2004

Guest speaker Hon. Loretta A. Preska, United States District Judge for the Southern District of New York,



spoke about the effects of the federal budget crisis, removal of cases to state courts, electronic filing, the federal sentencing guidelines, and electronic discovery disputes.

The Section's Task Force on the Federal Funding of the Judiciary reported on their meetings with federal court officials on the budget crisis in the federal courts. The newly formed Electronic Discovery Committee reported on its proposed activities.

September 22, 2004

Guest speaker Hon. Herman Cahn, Justice of the Supreme Court, Commercial Division, New York County, discussed proposals to address delays in deciding motions, as well as electronic discovery.

The Task Force on the Federal Funding of the Judiciary discussed its proposed report. The International Litigation Committee discussed its proposed report on "Enforcement of Foreign-Country Money Judgments."

Section Spring Meeting Will Examine the Jury in Commercial Cases

The Commercial and Federal Litigation Section will hold its Spring Meeting at the Gideon Putnam Hotel the weekend of May 13, 2005. The focus of the meeting will be on examining the role of the jury in commercial cases. The program will also include an update on antitrust developments of interest to the commercial litigator. We are working on plans to present the program in collaboration with the Corporate Counsel Section of the State Bar.

The program will be held at the historic Gideon Putnam Hotel in Saratoga Springs, New York (<http://www.gideonputnam.com>). The hotel is located on the grounds of the Saratoga State Park and has world-class facilities onsite, including two golf courses and the renowned Roosevelt Baths and Spa.

The program will begin with a dinner on Friday evening, May 13, and a speaker focusing on the jury in commercial cases. On Saturday morning, May 14, the

program will discuss how juries perceive corporations and how best to select a jury in a commercial case. With the assistance of a jury consultant, we will also present a mock jury presentation and deliberation in a commercial case. We plan to invite spouses to join us to serve as mock jurors.

On Saturday evening we will present our annual Robert L. Haig award for distinguished public service at a dinner to be held at the hotel.

On Sunday morning, May 15, we will continue the presentation about the jury in commercial cases by discussing electronic techniques for communicating to juries. We will conclude the program that morning with a review of developments in antitrust litigation to be presented by our Antitrust Committee.

Please mark the weekend of May 13 on your calendars, as this year's Spring Meeting promises to be a worthwhile event to attend.

Section Committees and Chairs

Antitrust

Jay L. Himes
NYS Attorney General's Office
(212) 416-8282
E-mail: jay.himes@oag.state.ny.us

Appellate Practice

Charles Dewey Cole, Jr.
Newman Fitch et al.
(212) 384-7047
E-mail: dcole@nfam.com

David H. Tennant
Nixon Peabody LLP
(585) 263-1000
E-mail: dtennant@nixonpeabody.com

Arbitration and Alternative Dispute Resolution

Deborah Masucci
AIG Domestic Brokerage Group
(212) 770-1288
E-mail: deborah.masucci@aig.com

Carroll E. Neesemann
Morrison & Foerster, LLP
(212) 468-8138
E-mail: cneesemann@mofo.com

Civil Practice Law and Rules

James Michael Bergin
Morrison & Foerster LLP
(212) 468-8033
E-mail: jbergin@mofo.com

Susan M. Davies
Law Offices of Gregory P. Joseph, LLC
(212) 407-1208
E-mail: sdavies@josephnyc.com

Civil Prosecutions

Neil V. Getnick
Getnick & Getnick
(212) 376-5666
E-mail: ngetnick@getnicklaw.com

Class Action

Ira A. Schochet
Goodkind Labaton Rudoff & Sucharow, LLP
(212) 907-0864
E-mail: ischochet@glrslaw.com

Commercial Division

Vincent J. Syracuse
Tannenbaum Helpert
Syracuse & Hirschtitt LLP
(212) 508-6722
E-mail: syracuse@tanhelp.com

Complex Civil Litigation

Edward A. White
Hartman & Craven LLP
(212) 753-7500
E-mail: ewhite@hartmancraven.com

Construction Litigation

J. Scott Greer
Lewis & Greer, P.C.
(845) 454-1200
E-mail: jsgreer@lewisgreer.com

John F. Grubin
Wasserman Grubin & Rogers, LLP
(212) 581-3320
E-mail: jgrubin@wgrlaw.com

Creditors' Rights and Banking Litigation

Peter J. Craig
Peter Craig & Associates PC
(585) 586-1060
E-mail: pjcraig@aol.com

Michael Luskin
Luskin Stern & Eisler, LLP
(212) 293-2700
E-mail: mluskin@lse-law.com

S. Robert Schrager
Bondy & Schloss, LLP
(212) 661-3535
E-mail: rschrager@bschloss.com

Electronic Discovery

Adam I. Cohen
Weil Gotshal & Manges LLP
(212) 310-8901
E-mail: adam.cohen@weil.com

Employment and Labor Relations

Gerald T. Hathaway
Littler Mendelson, P.C.
(212) 583-2684
E-mail: ghathaway@littler.com

Evidence

Lauren J. Wachtler
Montclare & Wachtler
(212) 509-3900
E-mail: ljwachtler@montclarewachtler.com

Ethics and Professionalism

Anthony J. Harwood
Holland and Knight LLP
(212) 513-3559
E-mail: tony.harwood@hkllaw.com

James M. Wicks
Farrell Fritz P.C.
(516) 227-0617
E-mail: jwicks@farrellfritz.com

Federal Court Attorneys

Jennifer M. Mone
NBTY, Inc.
(631) 244-1278
Email: jmone@nbty.com

Federal Judiciary

Carol E. Heckman
Harter, Secrest & Emery, LLP
(716) 853-1616
E-mail: checkman@hselaw.com

Jay G. Safer
LeBoeuf, Lamb, Greene & MacRae, LLP
(212) 424-8287
E-mail: jsafer@llgm.com

Federal Procedure

Gregory K. Arenson
Kaplan Kilsheimer & Fox, LLP
(212) 687-1980
E-mail: garensong@kaplanfox.com

Intellectual Property

Peter Brown
Brown Raysman et al.
(212) 895-2480
E-mail: pbrown@brownraysman.com

International Litigation

Stephen H. Orel
Law Offices of Kathy R. Perry
(212) 599-0916
E-mail: sorel@tplg.org

Ted G. Semaya
Eaton & Van Winkle LLP
(212) 561-3615
E-mail: tsemaya@evw.com

Internet and Litigation

Peter J. Pizzi
Connell Foley LLP
(973) 533-4221
E-mail: ppizzi@connellfoley.com

Membership

Edwin M. Baum
Proskauer Rose LLP
(212) 969-3175
E-mail: ebaum@proskauer.com

Pro Bono and Public Interest

Michael W. Martin
Fordham Univ. School of Law
(212) 636-7781
E-mail: mwmartin@mail.lawnet.fordham.edu

Bernard W. McCarthy
Chadbourne & Parke, LLP
(212) 408-5397
E-mail: bernard.w.mccarthy@chadbourne.com

Publications

Carrie H. Cohen
NYS Attorney General's Office
(212) 416-8242
E-mail: carrie.cohen@oag.state.ny.us

Real Estate Litigation

David Rosenberg
Marcus Rosenberg & Diamond LLP
(212) 755-7500
E-mail: dr@realtylaw.org

Securities Litigation

Douglas Clinton Conroy
(203) 961-7400
E-mail: douglasconroy@paulhastings.com

James D. Yellen
Morgan Stanley
(914) 225-5565
E-Mail: james.yellen@morganstanley.com

State Court Counsel

Tracee E. Davis
Zeichner Ellman & Krause LLP
(212) 223-0400
E-mail: tdavis@zeklaw.com

Kathy M. Kass
NYS Supreme Court
(212) 374-4710
E-mail: kkass@courts.state.ny.us

State Judiciary

Charles E. Dorkey, III
Torys LLP
(212) 880-6300
E-mail: cdorkey@torys.com

Technology

Daniel P. Levitt
(212) 687-3455
E-mail: levittdan@aol.com

Trial Practice

Michael J. Levin
Barger & Wolen, LLP
(212) 557-2800
E-mail: mlevin@barwol.com

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COMMERCIAL AND FEDERAL LITIGATION SECTION NEWSLETTER

Editor

Mark L. Davies
11 East Franklin Street
Tarrytown, NY 10591
(914) 631-7922 • E-mail: MLDavies@aol.com

Section Officers

Chair

Lauren J. Wachtler
Montclare & Wachtler
110 Wall Street
New York, NY 10005
(212) 509-3900 • E-mail: ljwachtler@montclarewachtler.com

Chair-Elect

Stephen P. Younger
Patterson, Belknap, Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2685 • E-mail: spyounger@pbwt.com

Vice-Chair

Lesley Friedman Rosenthal
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3092 • E-mail: lrosenthal@paulweiss.com

Secretary

Tracee E. Davis
Zeichner Ellman & Krause LLP
575 Lexington Avenue
New York, NY 10022
(212) 223-0400 • E-mail: tdavis@zeklaw.com

Treasurer

Vincent J. Syracuse
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
(212) 508-6722 • E-mail: syracuse@tanhelp.com

Delegate to the House of Delegates

Lewis M. Smoley
Davidoff Malito & Hutcher LLP
605 Third Avenue, 34th Floor
New York, NY 10158
(212) 557-7200 • E-mail: lms@dmlegal.com



Commercial and Federal Litigation Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

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