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Message from the Chair

The New Preliminary Conference Order as a Catalyst for Change

Paul Sarkozi

In the book *The Power of Habit*, Charles Duhigg discusses how Paul O'Neill, the new CEO of Alcoa, effected radical reforms in Alcoa's culture, leading to dramatic increases in profitability and morale. When O'Neill took the helm, Alcoa seemed adrift; its efforts to expand into new product lines were unsuccessful and the stock price was falling. There seemed to be a need to focus on streamlining the business or more clearly defining the business model.

But, curiously, instead of addressing these issues, O'Neill made *worker safety* his primary goal when he became CEO in 1987. His theory, which proved to be dramatically effective, was that by focusing on one key issue—a keystone habit, as Duhigg calls it—he could and did transform Alcoa's culture. Duhigg writes, "Keystone habits start a process that, over time, transforms everything.… If you focus on changing or cultivating keystone habits, you can cause widespread shifts.… This is the final way that keystone habits encourage widespread change: by creating cultures where new values become ingrained." (*The Power of Habit*, at 100, 109, 123.)

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Inside

Message from the Chair

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By now, you might be asking why I am writing about the late 1980s transformation of Alcoa in a column about today's Commercial and Federal Litigation Section. The answer is that I hope and believe that the Commercial Division is embarking on a similar path right now. In the past few months, several new Commercial Division Rules have been added that, like O'Neill's keystone safety habit, have the possibility of transforming Commercial Division practice into an even more cost-effective and efficient method of resolving business disputes. As examples, consider the new requirements that cases be designated for the Commercial Division within ninety days of service of the complaint (Sections 202.70(d)-(e) of the Uniform Rules for the Supreme and County Courts) and the model Preliminary Conference Order Form (Administrative Order AO/80a/14 of the Chief Administrative Judge of the Courts).

Under the new rules, at the earliest stages of a case, the parties will know whether the Commercial Division Rules will apply and who their judge will be. In addition, in the cases in which the new PC Order Form is used, the parties will be expected not only to set a detailed schedule for document disclosure, interrogatories, depositions, and expert disclosure, but also to discuss at the Preliminary Conference the necessity of a confidentiality order, their theories of the case and/or defenses, any key electronic discovery concerns that they expect may arise (including methods for searching and reviewing electronically stored information, preservation concerns, privilege logs, claw-back provisions, and costs), and the form and timing of any alternative dispute resolution mechanism that might facilitate settlement.

Just as the introduction of the Individual Assignment System in 1986 set new expectations for both the courts and the litigants about how a case would proceed—parties could no longer seek delay and reconsideration by bringing sequential motions before different judges—the new PC Order and early assignment permit the Court to take a more active role in keeping a case on track towards timely resolution and force the parties to consider, address, and potentially prevent certain document preservation, confidentiality, and witness problems *before* they might balloon into much larger disputes.

So far, I've had one Preliminary Conference using the new form and the impact was striking. The case involves multiple defendants and until that point, counsels' interaction had been limited, strained, and uncoordinated. There had been dispositive motion practice and disputes about discovery and confidentiality. However, the new PC Order Form's breadth and detail—coupled with Commercial Division Rule 8's requirement that the parties meet and confer about the issues that would be discussed at the conference—led the parties to squarely address their views about how the litigation would proceed. And the PC that followed yielded an especially meaningful discussion with the Court about how to resolve and address certain scheduling disputes that the parties still had. The new PC Order had given counsel and the case direction and the Court a better understanding of the issues in the case.

Federal practitioners know well the value of a substantive initial conference and thoughtful pre-conference planning. The 1993 Amendments to Federal Rules of Civil Procedure Rule 26(f), which have required parties to address many of the same issues identified in the new PC Order Form, have fostered a culture of discovery planning and case management and active court supervision. So, for example, in one case that I had, after the parties in a contract dispute submitted their joint Rule 26(f) report to District Judge Brian Cogan, Judge Cogan held the Rule 16 Conference in his chambers, reviewed the parts of the contract that were in dispute, asked specifically about the custodians and witnesses with knowledge, and set a tight time frame for discovery that led to prompt settlement on terms that both parties found to be fair. I have seen similar successes on an ad hoc basis in the Commercial Division over the years as particular judges—such as Justice Scheinkman in Westchester—have crafted detailed preliminary conference orders and required parties to make joint submissions before the Preliminary Conference.

"Keystone habits transform us by creating cultures that make clear the values that, in the heat of a difficult decision or a moment of uncertainty, we might otherwise forget." (*The Power of Habit*, at 125-26.) So, too, do keystone habits transform us when, in the heat of litigation battles and zealous advocacy, we might forget the clients' and courts' desires to expeditiously resolve cases. It is my hope and expectation that through the new Commercial Division Rules, New York commercial litigation will be transformed for the benefit of the business community and our judicial system.

Paul Sarkozi

Practice Before the New York State Supreme Court: Revisiting the Uniform Rules

By Mitchell J. Katz

The rules concerning electronically filed cases require practitioners to update email addresses in NYSECF. Uniform Rules §202.5-b(f)(2)(i). The failure to receive a notice due to the failure to update your email address may not be "law office failure," so why tempt it?

While not technically required by the Uniform Rules in electronically filed cases, sending an email directly to adverse parties indicating the filing of, or providing a copy of, a notice of motion or adjournment may help avoid calendaring errors, miscommunications, unnecessary adjournments or wasted trips to Court.

Uniform Rules Part 221 is directed at lawyer conduct at depositions. Having a copy of Part 221 at a deposition might help avoid the need to contact the assigned justice to address violations of that Rule. Many justices will entertain a telephone call during the examination to address violations. Making a written record is considered best practice in order to obtain appropriate relief in subsequent motion practice, if needed.

The refusal to provide requested discovery is not synonymous with "frivolous conduct" as defined by Part 130. A motion seeking sanctions under Part 130 can itself be considered "frivolous." Consider keeping your "powder dry" for those circumstances that clearly merit the imposition of sanctions and penalties in a discovery dispute. Remember the justices almost uniformly do not like discovery motions in the first place. Adding a request for sanctions as a standard component of every discovery motion is not likely to garner favor with chambers or help your case.

Mitchell J. Katz is Co-chair of the Section's Commercial Division Committee.

NYLitigator Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article published in the *NYLitigator* is a great way to get your name out in the legal community and advertise your knowledge. Our authors are respected statewide for their legal expertise in such areas as ADR, settlements, depositions, discovery, and corporate liability.

MCLE credit may also be earned for legal-based writing directed to an attorney audience upon application to the CLE Board.

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

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Bankruptcy Litigation Committee Practice Update

By Douglas T. Tabachnik

In the interest of fostering the Committee's continued interest in, and efforts to educate the bench and bar about, the intertwining role of bankruptcy law with other areas of the law, this article is presented to highlight one of the more interesting and developing areas in which bankruptcy law interacts with intellectual property law. The interplay of bankruptcy law and intellectual property law as it relates to licensing rights of non-debtors remains unsettled and presents a potential trap for the unwary.

In order to afford a debtor a truly fresh start in a Chapter 11 reorganization case, a debtor may reject, as burdensome, "executory" contracts. This policy was summed up by the Third Circuit Court of Appeals in its decision, *In re Exide Technologies*, 607 F.3d 957 (3rd Cir. 2010), when it noted,

> The policy behind Chapter 11 of the Bankruptcy Code is the "ultimate rehabilitation of the debtor." *Nicholas v. United States*, 384 U.S. 678, 687, 86 S. Ct. 1674, 16 L. Ed. 2d 853 (1966). The Code therefore allows debtors in possession, "subject to the court's approval,…[to] reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). But the Bankruptcy Code does not define "executory contract." Relevant legislative history demonstrates that Congress intended the term to mean a contract "on which performance is due to some extent on both sides." H.R. Rep. No. 95-595, 347 (1977); *see In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 238 (3d Cir. 1995).

Id. at 962. The *Exide* court went on, quoting itself, to qualify that, for contract to be executory, "'the obligation of both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.'" *Id*. (*quoting In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 238, 239 (3d Cir. 1995), and at 963, *(citing, Hadden v. Consolidated Edison Co.*, 34 N.Y.2d 88, 312 N.E.2d 445, 449, 356 N.Y.S.2d 249 (N.Y. 1974); *see Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 (2d Cir. 2007).

"Rejection" under the Bankruptcy Code is defined at section 365(g), which provides that rejection of an executory contract not previously assumed by the debtor, operates as a breach of the agreement occurring just before the filing of the bankruptcy case. 11 U.S.C. § 365(g). This section dovetails with section 502(g) of the Bankruptcy Code, which provides that a claim arising from rejection of a prepetition executory contract is deemed to have occurred prior to the filing of the case, thus ensuring that these claims are not afforded administrative expense priority. 11 U.S.C. § 502(g).

Complications arise, however, when a debtor in a Chapter 11 bankruptcy case is a licensor of intellectual property. In these instances, the licensee is afforded certain protection by the bankruptcy code under section 365(n), such that a licensee of certain intellectual property may continue to utilize the property, subject to the continuing terms and provisions of an existing license agreement, providing for the continued payment of royalties to the debtor, but provided, however, that it waive any rights of setoff relating to any damages claim from nonperformance by the debtor as licensor. Two controversies have arisen relating to this rule in which there has developed a split among the circuits relating to two controversial issues: (1) whether the effect of rejection is a rescission of the agreement leaving the nondebtor party with no contractual rights other than to file a prepetition proof of claim, or whether it merely results in a breach, excusing performance by the debtor, but otherwise leaving the nondebtor party with its rights under the agreement intact, including, without limitation, the discretionary option of whether or not to terminate the agreement; (2) whether, notwithstanding the limited definition of intellectual property defined under the bankruptcy code which relates to the protections afforded under section 365(n), the issue described in (1), above, effectively negates those limitations and provides for broad contractual and legal rights of the nondebtor party's continued use of a trademark in the event of the debtor's rejection of a license agreement.

In the controversial case of *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), *cert. denied*, 475 U.S. 1057, 106 S. Ct. 1285, 89 L. Ed. 2d 592 (1985), the Fourth Circuit held that a debtor's rejection of a license agreement in which it was a licensor of a nonexclusive technology license granted to Lubrizol effected a rescission of Lubrizol's rights under the agreement. In response to widespread criticism, Congress enacted section 365(n), which afforded licensees of certain kinds of intellectual property, including trade secrets and patents, the rights described in the preceding paragraph.

Congress did not include in the definition of intellectual property some of the most obvious kinds of property, including trademarks, when it defined the term for inclusion in the Bankruptcy Code as part of the addition of subsection (n) to section 365. *Act to Keep Secure the Rights of Intellectual Property Licensors and Licensees Which Come Under the Protection of Title 11 of the United States Code*, Pub. L. 100-506 (1988). However, Congressional history makes clear that Congress's omission of the other kinds of intellectual property from inclusion within the code was not the result of a deliberate intent to omit them, but rather the determination that further study was needed as to the effects and impact of such an inclusion on third parties and a reliance upon the ability of the courts, in the interim, to develop equitable principles that would further inform later Congressional action on the issue. Concurring opinion of Judge Ambro in *Exide*, at 966-67 (*citing* S. Rep. No. 100-505, at 1 (1988), as *reprinted in* 1988 U.S.C.C.A.N. 3200, 3200. Accordingly, the negative inference reasoning of the type adopted by the Supreme Court in the case of *In re Bildisco*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984), in connection with collective-bargaining agreements, is argued by Judge Ambro to be an appropriate in the context of trademark matters. *Exide* at 966.

Nevertheless, Judge Ambro points out that several courts, including some in New York, have adopted the rationale that Congress's omission of trademarks from the definition of intellectual property evinced an intention to purposely omit that category of intellectual property from the application of section 365(n). *Exide* at 966 (*citing*, among others, *In re Old Carco LLC,* 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009) ("Trademarks are not 'intellectual property' under the Bankruptcy Code…[, so] rejection of licenses by [a] licensor deprives [the] licensee of [the] right to use [a] trademark…."); *In re HQ Global Holdings, Inc.,* 290 B.R. 507, 513 (Bankr. D. Del. 2003) ("[S]ince the Bankruptcy Code does not include trademarks in its protected class of intellectual property, *Lubrizol* controls and the Franchisees' right to use the trademark stops on rejection."); *In re Chipwich, Inc.,* 54 B.R. 427, 431 (Bankr. S.D.N.Y. 1985*)* ("[B]y rejecting the [trademark] licenses[,] the debtor will deprive [the licensee] of its right to use the…trademark for its products.")). Indeed, Congress expressed concern about the holding in the *Chipwich* case while it asserted that additional study and development was necessary for the courts to develop appropriate equitable doctrines that would further inform subsequent Congressional action in connection with trademarks. Senate Report, accompanying S-1626, subsection III.D., as reprinted in Vol. F, *Collier on Bankruptcy*, App. Pt. 41(g) (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

Citing the Congressional history referenced above, Judge Ambro rejects the reasoning of these cases and notes, with the subsequent approval of the Seventh Circuit Court of Appeals, that rejection does not constitute rescission. *Exide* at 967. The Seventh Circuit, in *In re Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372, *cert denied*, 133 S. Ct. 790, 184 L. Ed. 2d 596 (7th Cir. 2012), agreed with Judge Ambro's analysis in concluding that rejection does not mean rescission and that a licensee of intellectual property, even of that which falls outside the scope of the limited categories included in the application of section 365(n), may continue to exercise its rights under a contractual license notwithstanding the rejection of same by a debtor. *Id*. at 376. Therefore, while *Lubrizol* has been overridden by Congressional action in 1988, insofar as it relates to patents and trade secrets, it remains good law in the Fourth Circuit in other areas. A split among the circuits remains with respect to the effect of rejection on licenses of intellectual property by a debtor that fall outside the scope of that statute. Given the pervasive presence of intellectual property and the constant interplay of the disposition of that kind of property in bankruptcy cases, continued attention will be necessary to this still-developing area of the law.

Douglas T. Tabachnik is Chair of the Section's Bankruptcy Litigation Committee. The views expressed in this article are related solely for the purposes of providing a general form of discussion on the subject matter, and do not necessarily constitute an opinion as to any pending litigation in which the author is involved.

Internet and IP Litigation Committee Practice Update: Federal Trade Secret Legislation Moves Forward

By Heath J. Szymczak and Bradley A. Hoppe

Heath J. Szymczak

Despite their importance to the U.S. economy, trade secrets have stood on the federal legal sidelines for years. Unlike other forms of intellectual property such as trademarks, copyrights and patents, trade secrets have not received federal civil statutory protection. As such, we are left to look to a patchwork of individual state laws. This, however, may soon be changing.

On July 29, 2014, Congressman George Holding (R-N.C.), along with two Democratic representatives from New York, introduced a bipartisan bill (H.R. 5233) in the House titled the "Trade Secret Protection Act of 2014." This followed an earlier bipartisan bill (S. 2267) introduced in the Senate on April 29, 2014 by Sens. Chris Coons (D-Del.) and Orrin Hatch (R-Utah) titled the "Defend Trade Secrets Act of 2014." Both bills seek to create, for the first time, a private federal civil remedy for theft of trade secrets by amending the Economic Espionage Act of 1996 ("EEA"), 18 USCA §§ 1831 *et seq.*, a criminal statute.

While the Senate bill seems to have stalled, the House bill was unanimously passed by the House Judiciary Committee on September 17, 2014, and is expected to be presented to the House Floor in November 2014 for a vote. While the Trade Secret Protection Act has gained twenty-one co-sponsors so far (14 Republicans and 7 Democrats), the Defend Trade Secrets Act has not yet made it to committee and still has only two co-sponsors. As between the two bills, the House bill clearly appears to have the best shot of becoming a reality, although only about 23% of bills that made it past committee were enacted between 2011 and 2013.

This legislation is likely motivated by two primary factors: (1) the ineffectiveness of federal criminal laws such as the Economic Espionage Act as a deterrent to trade secret theft (both in terms of the limited number of prosecutions and the success of those cases that are prosecuted) and (2) the variability of state laws, which has hindered prosecution of claims and undermined the predictability of litigation outcomes.

For example, the case of *United States v. Aleynikov,* 676 F3d 71 (2d Cir. 2012), exposed major holes in the EEA and the United States' ability to prosecute claims for trade secret theft. In *Aleynikov*, the United States, after being presented with evidence showing that he stole proprietary source code from Goldman Sachs' trading platform, indicted and subsequently prosecuted Mr. Aleynikov for violating the EEA. After Mr. Aleynikov was convicted and sentenced to eight years in prison, the Second Circuit reversed and vacated the conviction on the grounds that the stolen code was not a product "produced for" interstate commerce and therefore fell outside the scope of the statute. The *Aleynikov* case underscored the need for additional amendments to the EEA to provide for a private remedy for trade secret theft that crosses state borders.

Bradley A. Hoppe

Similarly, over the last thirty years, almost every state has enacted some form of the Uniform Trade Secret Act ("UTSA"). Although UTSA was supposed to provide predictability, many states have adopted their own significantly altered versions of it. Of particular note, two states—New York and Massachusetts—have rejected UTSA altogether. Massachusetts recently came close to adopting UTSA, but the legislation failed, due largely to the inclusion of a controversial ban on non-compete agreements. If Massachusetts ultimately adopts UTSA, New York would be the lone remaining holdout.

The Trade Secret Protection Act, if enacted, will provide victims of trade secret theft with a new and potentially powerful weapon. It borrows heavily from federal trademark law, including aggressive *ex parte* seizure mechanisms similar to those used to seize counterfeit goods. Like UTSA—but unlike New York law—it also provides for potential treble damages and attorney fees. It also carries a five-year limitation period, longer than both New York law and UTSA. If passed, it could be a game-changer, particularly in New York, which currently has no statutory framework for protection of trade secrets.

Heath J. Szymczak and Bradley A. Hoppe are partners with the Buffalo, New York, law firm of Jaeckle, Fleischmann & Mugel LLP.

Antitrust Litigation Committee

By Jay L. Himes and Aidan Synnott

Jay L. Himes

Aidan Synnott

The Antitrust Litigation Committee is comprised of Section members interested in federal and state antitrust and competition issues. The Committee meets monthly to monitor and discuss antitrust developments generally, as well as to pursue projects by its members, such as preparing topical articles and reports. The Committee's most recent article—"Oil in the Joints or Monkey Wrench in the Gears"—discusses the U.S. Antitrust Division's use of criminal non-prosecution and deferred prosecution agreements in antitrust cases, and the tensions that can arise between these criminal enforcement tools and the Antitrust Division's crown jewel: its corporate leniency program. The article is slated for publication in a forthcoming issue of the *NYLitigator*, the Section's flagship publication.

The Committee's immediately prior article, on the Antitrust Division's use of federal grand jury subpoenas to secure documents produced in related civil antitrust litigation, similarly appeared in the *NYLitigator*, as have many other Committee papers, covering both federal and state antitrust subjects, in recent years. For the upcoming year, the Committee intends to write on proposed whistleblower protection for individuals disclosing criminal antitrust violations. The Committee has also presented CLE programs on "*Kumho Tire* and Experts on Damages" and on "Developments in Antitrust Litigation."

The Committee is co-chaired by Jay L. Himes, Labaton Sucharow LLP, New York City, jhimes@labaton.com, and Aidan Synnott, Paul, Weiss, New York City, asynnott@paulweiss.com.

Social Media Committee Update: Com Fed CLE Upstate Highlights Social Media Legal Expertise in Rochester and Buffalo

By Mark A. Berman

Mark A. Berman

On September 10th and 16th, the Section, furthering its outreach and programming efforts in all parts of New York State, co-sponsored with the Monroe County Bar Association (Rochester) and the Bar Association of Erie County (Buffalo), a CLE on Social Media Legal Ethics. In Rochester, Scott Malouf, the Section's Twitter Account Master and an attorney who assists litigators in using social media as evidence and helps businesses merge social media and compliance practices, co-moderated the program with Justice Matthew A. Rosenbaum, the sitting Commercial Division Justice in Monroe County. In Buffalo, Scott co-moderated with Justice John M. Curran, a sitting Supreme Court Justice and a former Commercial Division Justice in Erie County, as well as the Chair of the Education Subcommittee of the New York State Court System's E-Discovery Working Group. Mark A. Berman, the Vice-Chair of the Section, attended each program and introduced the members of the local bar to the Section and introduced the panelists.

The Section understood that Western New York is home to several social media legal experts and, along with the Monroe and Erie bars, designed a CLE to highlight this "home grown" legal talent in the social media field. These events leveraged the unique capabilities of the Section and the participating local bar associations. The three panelists were, first, Nicole Black, Esq., who is Director of Business Development and Community Relations at MyCase. She is also the author of "Cloud Computing for Lawyers" and co-author of "Social Media: The Next Frontier." The second panelist was Adrian Dayton, Esq., who is the founder of the law-firm focused startup ClearView Social. He also writes a weekly column for *The National Law Journal* and is the author of "LinkedIn & Blogs for Lawyers: Building High Value Relationships in a Digital Age" and co-author of "Social Media for Lawyers." Peter Coons, the third panelist, is Senior Vice-President D4 eDiscovery and focuses on social media discovery, computer forensics, engineering eDiscovery workflow for law firms and corporations, as well as orchestrating large-scale electronic data collections relating to litigation, audits, and regulatory requests.

Adrian Dayton first addressed the risks of lawyers' ethics violations when marketing online. He stressed the need for maintaining client confidentiality when, for instance, client information is included in an attorney's biography or when an attorney is emailing, blogging, texting, or tweeting. Client names and information should not be used by an attorney in public electronic communications and geolocation (a tool that shows the sender's physical location when making a post) features should be disabled so that viewing an electronic post will not identify where a lawyer is when he or she posts. Also addressed was the need to avoid the "Streisand effect," which is the phenomenon when an attempt to remove electronic information has the unintended consequence of publicizing the information more widely. Of course, Mr. Dayton could not stress more the adage "don't say stupid things online." The fact remains that lawyers continue to not pay attention to their electronic communications, and counsel who take a considered moment before posting will avoid most electronic communication mistakes.

Nicole Black advised the audience on the ethics rules pertaining to electronically communicating with non-parties, such as when "friending" an unrepresented witness on Facebook to access information the Facebook user had "shielded" with a privacy setting such as "Friends Only." Ms. Black warned counsel of the risks of not disclosing that he or she is an attorney and the reasons why the lawyer or her agent is actually seeking to "friend" such an unrepresented individual. She discussed the New York City Bar Association's opinion that requires an attorney or her agent to use her real name and accurate "Facebook" profile and not to engage in deception or misrepresentation

in such communications, as well as the opinions from other state bar associations which have opined that much more information needs to be disclosed in order to avoid an accusation of deception. Also discussed were the problems of investigating jurors electronically and whether an ethics violation occurs if a social media platform, such as LinkedIn, notifies the juror that lawyer "XYZ" had reviewed her profile, and whether such "communication" violates the ethics rule prohibiting contacting a juror during trial. Ms. Black noted that, as per LinkedIn's description of how such service works, changing your settings on LinkedIn to be anonymous would eliminate the problem of the lawyer's name being specifically identified. Discussed was the recent ABA opinion indicating that such automatic "communication" by a social media platform did not constitute an ethics violation and comparing it to the ethics opinions of the New York City Bar Association and New York County Lawyers' Association advising that such "communication" would be ethically problematic. These issues had been specifically addressed by the Section's Social Media Ethics Guidelines that it had issued in April of this year.

Justices Rosenbaum and Curran spoke on their experiences with jurors' use of social media and lawyers' researching jurors during trial, as well as their experience with improper electronic conduct by and with jurors. Also discussed by them were whether the results of an attorney's juror research should be shared with the court and whether there was an obligation for one party to share its electronic research concerning jurors with the opposing side. Everyone agreed that if juror misconduct was uncovered it had to be promptly reported to the court. Lastly, the issue of whether courts are properly instructing jurors on the use of social media during trial and deliberations was addressed and whether improvements could be made to jury instructions to seek to minimize the likelihood of mistrials due to improper social media usage.

Peter Coons informed the audience of the fact, not well-known, that accessible and inexpensive technology exists that would allow an attorney to monitor "live" jurors' public social media communications. He then addressed the problems associated with communicating with clients electronically using portable technology, and the unique confidentiality risks associated with the use of such technology. Mr. Coons warned attendees about accessing and using confidential documents and information on public networks, for instance at an airport or at Starbucks, or free cloud services, as such usage allows for confidential information to be easily hacked. Attendees also were educated on attorneys using "kill" switches that can remotely "wipe" smart phones clean when they are lost or stolen. Significantly, Mr. Coons reminded attendees that there is an ethical duty to be up-to-speed on one's client's social media technology, especially where the features of social media service platforms constantly change. As features become more and more advanced—creating additional opportunities for people to communicate—this only increases the likelihood that attorney and client confidential information will be inadvertently disclosed. Mr. Coons finally stressed that corporations need to work with their inside and outside counsel, and ediscovery vendors when appropriate, as companies have a duty to be able to preserve social media, as necessary, and that corporate employees need guidance on their preservation duties.

Mark A. Berman is Vice-chair of the Section and Co-chair of the Section's Social Media Committee.

***Photo above: V. Baziuk and used with permission of* NY Daily Record.**

Ethics Committee Update

By Anthony J. Harwood and James M. Wicks

Anthony J. Harwood

As with so many parts of our society, technology is accelerating the pace at which the legal system evolves, and that rapid evolution creates new ethical challenges for commercial litigators. The Ethics Committee is working to provide guidance on the changing landscape through reports, articles and continuing legal education programs.

With video and audio devices now built into the cell phones that almost everyone carries, the tools to collect evidence surreptitiously are literally at the fingertips of everyday people. Building on the Committee's CLE program on investigations at the Section's last Spring Meeting, we are now examining the ethics of lawyers using undercover investigators who misrepresent their identity to gather evidence. There is an ongoing debate about whether these practices violate ethical rules prohibiting lawyers from engaging in "dishonesty, fraud, deceit or misrepresentation" (Rule 8.4(c)), making a "false statement of fact or law to a third person" (Rule 4.1), and doing so through agents such as investigators (Rule 5.3(b)). We hope to highlight the problems lawyers face in these circumstances, offer guidance on ethical conduct, and explore the possibility of amendments to the rules to create clear guidelines on permissible undercover work.

The technological advances that have made it easier for lawyers to work remotely have contributed to the rising use of temporary and contract attorneys at firms large and small. Authorities disagree on the extent to which lawyers may include an element of profit in the fees they charge their clients for the services of those temporary attorneys, and the extent to which disclosure is required. In a series of opinions, the American Bar Association has stated that disclosure of the profit element is unnecessary, provided that the lawyer bills the temporary attorney's work as legal fees rather than as an expense. The rules, however, are not clear and other authorities have either limited or prohibited the inclusion of profit.[1] The Committee hopes to make recommendations through its report that will set clear guidelines for lawyers in New York who seek to bill temporary attorneys at a profit.

Unfortunately, commercial litigation occasionally involves conduct by lawyers that violates ethical rules. Can a lawyer threaten to file a grievance with a disciplinary committee as leverage to increase a settlement? The rule is clear that a lawyer cannot threaten to file criminal charges solely to gain an advantage in settlement. However, there are conflicting opinions in New York on whether that same rule applies to grievances.[2] Can an attorney agree not to report an ethical violation as part of a settlement without violating Rule 8.3, which mandates that attorneys who know of an ethical violation report it? The Committee hopes that its report will alert lawyers to these issues and help resolve the conflicting views of other authorities.

Jame M. Wicks

With the exponential increase in document discovery that email has wrought, fulfilling the duty to protect client confidences has become fraught with difficulty. Litigators have a powerful tool to address this problem in Federal Rule of Evidence 502. The Committee has prepared an article for publication in the next *Newsletter* addressing how lawyers can utilize this procedure to discharge their ethical obligations.

With all of these issues and others requiring attention, the Committee welcomes new members and leaders who seek to improve the ethical practice of law, and to enhance their expertise, profile, and professional associations in the area of legal ethics. If you would like to help us in these worthy goals, please join us for our monthly meetings.

Endnotes

1. *See Mahaney, Geghan & Roosa v. Nelson J. Baker,* No. CR 970138281 (Conn. Super. August 9, 1999) (lawyer could not charge the client for the services of a contract lawyer at the hourly rate agreed upon for the case when the retaining lawyer paid for services of a contract lawyer at a lesser hourly rate); Texas State Bar Professional Ethics Committee Opinion 577 (2007) (rejecting the ABA's view that law firms may mark up the fees of nonfirm contract attorneys without meeting the requirements of the fee sharing rule and other restrictions); Hawaii Ethics Opinion 47 (2004) (the rate that a firm charges for a contract attorney must be the same as the firm pays absent client consent); Los Angeles Ethics Opinion 518 (2006) (a lawyer who contracts with a brief-drafting company must disclose to the client any mark-up of the fee).
2. *Compare* Nassau County Opinion 98-12 (1998) (prohibiting threats of disciplinary violations in settlement negotiations) *with* New York County Opinion 772 (2003) (disciplinary violations are not criminal and therefore threats to report disciplinary violations are permissible in settlement negotiations).

Anthony J. Harwood and James M. Wicks are Co-chairs of the Section's Ethics and Professionalism Committee.

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

By Rebecca C. Smithwick

In the Summer/Fall edition of this *Newsletter,* I reported on the significant ways the rules governing practice in the Commercial Division (the "Rules") have changed since the establishment of the Commercial Division Advisory Council in February 2013. At that time, those changes included: (i) amendments to Rule 13 to provide for robust expert disclosure; (ii) an increase in the jurisdictional threshold in New York County from $150,000 to $500,000; (iii) new Rule 11(a) setting a presumptive limit of 25 interrogatories; (iv) new Rule 9, which allows parties to consent to the streamlined procedures known as New York's "rocket docket"; (v) the commencement of a Pilot Mandatory Mediation Program; and (vi) the introduction of a new (optional) Preliminary Conference Order.

The last few months have proven to be yet another extremely busy period with respect to procedural reform in the Commercial Division.

On September 2, 2014, *five* notable additions were made to the Statewide Rules of the Commercial Division:

- New Rule 11(b)—relating to privilege logs;
- New Rule 11(c)—relating to discovery of ESI from nonparties;
- New Rule 34—relating to staggered court appearances;
- Amendment to Rule 8(a)—relating to settlement-related disclosure; and
- Amendment to §§ 202.70(d) and (e)—relating to assignment and transfer of cases.

In addition, the New York County Commercial Division adopted a pilot program involving the referral of complex discovery issues to Special Masters, also effective September 2, 2014.[1]

Privilege Logs

New Rule 11(b) creates a "preference" in the Commercial Division for the use of "categorical designations" to privilege designations, rather than the traditional document-by-document logging required by CPLR 3122. As practitioners are well aware—especially those litigating large, complex commercial lawsuits involving volumes of ESI—the latter procedure has become a painstaking, hugely time-consuming and costly process. The new rule is a giant step towards improving the efficiency and cost-effectiveness of the Commercial Division.

Parties are now expected to discuss the possible use of categorical designations at the outset of the case (*i.e.,* during the meet and confer process contemplated by Rule 8) "and to agree, where possible," to employ the categorical approach. (During the meet and confer process, the parties are also encouraged to discuss other issues relevant to a privilege review, such as the scope of the review and the amount of information to be included in the log.) *Critically, a party who unreasonably insists that the producing party prepare a traditional document-by-document log risks having the costs of that preparation—including attorneys' fees—shifted to it.*

In the event a traditional log is demanded, it must comply with CPLR 3122. There is one important caveat here, however, as the new rule specifically allows—absent a court order to the contrary—an uninterrupted e-mail chain to be logged as *one* entry. The unitary entry must provide certain identifying information, such as the beginning and end dates and times of the dialogue, the number of emails within the chain, and all of the authors/recipients.

Consistent with the onslaught of new Commercial Division Rules, Rule 11(b) was drafted to effectuate the type of reform recommended in the 2012 report issued by the Chief Judge's Task Force on Commercial Litigation in the 21st Century (the "Task Force Report").[2] A key component of the Task Force Report with respect to privilege logs was, of course, that any new rule "preserve[] the ability of the parties and the court to police unwarranted withholding or redaction of documents in discovery."[3]

The "policing" element of the rule finds its shape in subsection (b)(1), which requires a "responsible attorney" (*i.e.,* not a green attorney or paralegal) to sign a certification, pursuant to Part 130 of the Rules of the Chief Administrator, "setting forth with specificity those facts supporting the privileged or protected status of the information included within the category." (The certification must also describe the steps taken to identify the categorized documents included in the log and, where relevant, an explanation of any sampling that a party conducted.) Given the nature of the new logging procedures, the availability of attorney's fees and sanctions under Part 130 is an essential safeguard.

The new rule is expected to streamline the privilege log process and result in cost savings to the parties. Only time will tell whether these expectations are ultimately fulfilled. One thing is certain, however: in all but a limited number of cases, the new rule may well put an end to privilege log practice in commercial cases as we currently know it.

Discovery of ESI from Nonparties

New Rule 11(c) urges adherence to the Guidelines for Discovery of ESI from Nonparties appended to the Rules (the "Guidelines"). The purpose of the Guidelines is to improve the efficiency of e-discovery, reduce the potential costs and burdens imposed on non-litigants, and encourage informal dispute resolution—with the notion of "proportionality" becoming a central focus. Although some constituencies believe that the Guidelines could have extended their reach even further, the general consensus is that the Guidelines provide a welcome mechanism to fill the void in New York procedural law currently left open by the CPLR.

There are five Guidelines.

The first encourages the party and nonparty to engage in discussions regarding the ESI sought by the subpoena "as early as permissible in an action." In accordance with the stated purpose of the Guidelines, this assessment should address "the potential costs and burdens to be imposed on nonparties in preserving, retrieving, reviewing and producing" the ESI.

The second Guideline encourages the party seeking the ESI to discuss with the nonparty any request that the nonparty issue a litigation hold.

The third Guideline sets out the "proportionality factors" a party should consider in crafting discovery requests to non-litigants, namely (i) the importance of the issues at stake, (ii) the amount in controversy, (iii) the expected importance of the requested ESI, (iv) the availability of the ESI from another source, (v) the accessibility of the ESI, and (vi) the expected burden and cost to the nonparty.

The fourth Guideline encourages the party and nonparty to resolve disputes through informal mechanisms and to use motion practice "only as a last resort." As has always been the case, however, the only true enforcement mechanisms available to a party seeking discovery from an unwilling nonparty is a motion to compel or, in extreme cases, an application for contempt. This said, the Guidelines promote use in the first instance of a meet and confer process between the party and nonparty regarding such issues as the scope/timing/form/costs/claw-back mechanisms/use of discovery software/defrayal of costs with respect to the sought-after information. The Guidelines also encourage parties—prior to resorting to a motion to compel—to avail themselves first of the various court resources available to them in order to resolve the dispute, including conferences with law clerks, special referees, and unpaid mediators.

The fifth Guideline provides that the party should defray the nonparty's reasonable production expenses in accordance with CPLR 3111 and 3122(d). The categories of reimbursable expenses are broad and may encompass costs such as e-discovery consultants, an attorney's review for relevance and privilege, and the "cost of disruption to the nonparty's normal business operations" to the extent such costs are "quantifiable" and "warranted." We will all, no doubt, be watching with interest to see how the law develops with respect to the circumstances that "warrant" the reimbursement of business disruption costs and the type and quantum of proof that will be sufficient to "quantify" such costs.

Staggered Court Appearances

Languishing in the gallery on a long calendar call, waiting for the court officer to finally call your case? Not anymore. Under new Rule 34, each oral argument on a motion will be assigned a specific time slot; the length of time allotted to each case is in the court's sole discretion.

Under the rule, (i) attorneys who receive notification of the allocated date and time must notify all other parties by email (the intention here is to overcome any hiccups in the court's notification system), (ii) parties who are not directly involved in the motion before the court must still appear at the assigned time slot unless specifically excused by the court (the intention here is to avoid the appearance of holding *ex parte* communications with one or more of the parties), and (iii) *pro se* litigants must appear at every scheduled appearance, regardless of whether they anticipate being heard.

According to the Task Force Report, "[t]his practice is far preferable to asking all lawyers on all cases for a given day to appear at the same time."[4] It will "significantly reduce unnecessary attorneys' fees and dramatically improve the atmosphere of the court when each case is heard."[5]

I think it is relatively safe to assume that most practitioners in the Commercial Division will be pleased to wave goodbye to the "cattle call."

Settlement-Related Disclosure

Rule 8(a) addresses the parties' obligations to meet and confer *prior to* a preliminary conference to discuss various issues (settlement/discovery/ADR). The new amendment to Rule 8(a) adds to that list the requirement that parties also discuss "any *voluntary* and *informal* exchange of information that the parties agree would help aid early settlement of the case" (emphasis added). This early exchange of information could include both documents and limited EBTs.

Again, this amendment finds its genesis in the Task Force Report. Notably, however, the Task Force Report also recommended that settlement-related disclosure be addressed *at* the preliminary conference itself. This recommendation was considered at length by the Advisory Council but ultimately rejected amid concerns that anything other than informal and voluntary disclosures could lead to disputes over issues such as what disclosures would truly be required for "settlement" and attempts by parties to demand early examinations of top executives under the guise that such disclosure is "settlement related."

The balance struck by amending only Rule 8(a) (*i.e.*, rather than amending both Rule 8(a) and Rule 11(a) (re preliminary conference orders)) promotes more cost-effec-

tive settlement discussions through the early exchange of information, while at the same time avoiding unnecessary motion practice.

Assignment and Transfer of Cases

Parties must now seek the early assignment of cases to the Commercial Division. Under newly amended §§ 202.70(d)-(e) a party must seek assignment of a case to the Commercial Division within 90 days of service of the complaint by filing a RJI and attaching a completed Commercial Division RJI Addendum.[6] According to the Advisory Council, prior to the rule change many cases were not assigned to the Commercial Division until the cases were well into the throes of discovery and oftentimes not until summary judgment motions were made—thereby depriving litigants of the benefits of early judicial case management provided in the Division. The new rule will ensure that litigants in commercial cases obtain the benefits that accompany early judicial intervention, including assistance in streamlining discovery, facilitating quick resolution of disputes, and monitoring the parties' compliance with their discovery obligations.

Under the new rule, if the parties miss the 90-day deadline for filing the RJI, there are only two options for a later transfer into the Commercial Division: *sua sponte* transfer or a letter application to the Administrative Judge demonstrating good cause.

Given the tight timeframe—and to avoid the prospect of being precluded from assignment to the Commercial Division at a later time—counsel should prioritize the consideration of whether a newly filed case[7] warrants assignment to the Division and be sure to make the request within the 90-day deadline.

Special Masters Pilot Program

Chief Administrative Judge Gail Prudenti issued an Administrative Order on August 4, providing that beginning September 2, 2014, New York County would implement an 18-month pilot program involving the referral of complex discovery issues to Special Masters.

The August 4 Administrative Order provides limited insight into the precise procedures of the pilot program, leaving the details of the procedures/forms to be worked out with the joint input of the Justices of the Commercial Division and the Office of Court Administration. That said, the key components of the program—largely crafted upon input from Justices of the Commercial Division—are as follows: (1) the Chief Administrative Judge will designate Justices to participate in the program and appoint a *pool* of Special Masters; (2) the pool will consist of *retired* practitioners with *substantial experience* in complex commercial matters (the prerequisites are that the Special Master has no obvious *conflict* issues, does not require any further *training*, agrees to serve *pro bono*, and is able to allot sufficient *time* to deal a with complex matter); (3) matters can be designated for participation in the program only on the parties' *consent* and with their agreement to bear any *costs* related to the appointment of the Special Master; (4) if a matter is designated for participation, it is *randomly* assigned by the clerk's office to a Special Master; and (5) if there's a conflict with respect to the Special Master randomly assigned to the case (adduced through required *disclosures*) the parties may request that a different Special Master be randomly selected.

Again, this initiative finds its genesis in the Task Force Report. Noting that budget and labor-management limitations currently preclude the appointment of Commercial Division equivalents of federal court magistrates, the Task Force Report recognizes that the alternative use of Special Masters allows both litigants and the courts to draw support from New York's "rich resource of distinguished commercial litigators who are no longer in active practice but are willing to serve" in a way that will "invaluably enhance the visibility and capacity of our Commercial Division."[8]

The Advisory Council is tasked with monitoring the program over the next 18 months and will ultimately make recommendations either to expand, modify, or discontinue the program.

On the Horizon

In August, two further proposed new rules in the Commercial Division closed for public comment (relating to (i) presumptive limitations on the number and duration of depositions, and (ii) the proposed adoption of a preamble to the Commercial Division rules relating to sanctions). In addition, at the end of September and beginning of October, two further proposed changes went out for public comment (relating to (i) responses and objections to document requests, and (ii) a proposed new Model Compliance Conference Order Form). Again, we await with interest the outcome with respect to these proposed rules.

Until next time…

Endnotes

1. Copies of the new rules, and the Advisory Council's recommendations in support of the changes, are available from the New York State Unified Court System website at http://www.nycourts.gov/RULES/comments/index.shtml.
2. Chief Judge's Task Force on Commercial Litigation in the 21st Century. A copy is available at https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.
3. *Id.* at p. 17.
4. *Id.* at p. 20.
5. *Id.*
6. Under the new rule, if a RJI is filed within the 90-day period but does not designate the case as commercial, any other party is free to apply, within 10 days after receipt of the RJI, by letter to the Administrative Judge for a transfer of the case into the Commercial Division.
7. The new rule only applies to cases filed on or after September 2. *See* AO/117a/14, dated August 6, 2014.
8. Task Force Report at p. 11.

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International Litigation Committee Update

By Clara Flebus and Ted G. Semaya

Clara Flebus

In the past year, the Committee on International Litigation has focused on increasing worldwide familiarity with U.S. proceedings, heightening the profile of New York as a venue for international dispute resolution, and promoting the exchange of ideas on the practice of law in a cross-border context. One of the main methods used by the Committee was to develop educational materials and programs for foreign jurists and conduct outreach activities involving foreign judicial delegations and foreign attorneys at New York Supreme Court. The Committee also prepared programs and materials to inform the bar on recent developments in the field of international litigation and arbitration involving New York Supreme Court. While this two-pronged approach has been very successful, the Committee looks forward to developing new means and mechanisms for its stated goals.

The Committee is co-chaired by Clara Flebus and Ted Semaya. Ms. Flebus is an Appellate Court Attorney at New York Supreme Court, specializing in commercial litigation and the disposition of international arbitration related matters before the new International Arbitration Part of the Commercial Division. Mr. Semaya is an experienced commercial litigator and a partner at Eaton & Van Winkle, where he represents and counsels clients in complex and international litigation in federal and state courts.

As part of its outreach activities this year, the Committee hosted delegations from Brazil, Kosovo, and China. The delegation from Brazil included trial and appellate judges interested in learning about court-administered ADR, in light of the ongoing statutory mediation reform in Brazil. A panel comprising the Committee Co-Chairs, and several members of the court system, addressed the delegation, explaining the structure and functioning of court-annexed mediation programs, including the Commercial Division Mandatory Mediation Pilot Program, from both judicial and practitioner perspectives.

The Kosovo delegation comprised mainly trial and appellate commercial judges, who visited New York Supreme Court as part of a training program on resolution of international commercial disputes conducted by the U.S. Department of Commerce. Members of the Committee, along with former Section Chair Gregory Arenson, discussed a broad range of issues arising in international litigation in American courts, with particular attention to the effect of U.S.-style discovery on foreign parties.

Ted G. Semaya

The delegation from China was addressed by a panel comprising: Committee Co-Chair Clara Flebus; Administrative Judge Hon. Sherry Klein Heitler; Chief Clerk John Werner; Court Attorney Mediator Dean M. W. Leslie; and e-filing specialist Karen Mackin (all with New York Supreme Court). The panelists discussed innovative aspects of court operations, such as the Commercial Division Mandatory Mediation Pilot Project, the new Post-Note Non-Jury Mediation Part; the Commercial Division International Arbitration Part; and the statewide mandatory e-filing system. The Chinese delegates also met to discuss litigation matters with Justice Doris Ling-Cohan (New York Supreme Court, New York County and Appellate Term, First Department).

For members of the bar, the Committee co-sponsored a panel presentation with the Committee on Arbitration and ADR at the New York International Arbitration Center (NYIAC). The panel, moderated by Charles J. Moxley, Jr. (Chair of the Committee on Arbitration and ADR), featured several distinguished jurists, including: Commercial Division Justice Charles Ramos (who has been designated to preside over all international arbitration matters in New York Supreme Court, New York County); Stephen P. Younger (former NYSBA President and Section Chair, and a partner at Patterson Belknap Webb & Tyler); Gregory Arenson (former Chair of the Section, and a partner at Kaplan Fox & Kilsheimer); Alexandra Dosman (Executive Director of NYIAC); and Committee Co-Chair Ted Semaya.

The presentation focused on two initiatives that originated from the Report of the Task Force on New York Law in International Matters, namely, the creation of specialized chambers to hear applications related to international arbitration and the establishment of a dedicated center for international arbitration. Justice Ramos discussed the court's practices and procedures for hearing this type of cases. Alexandra Dosman reviewed the first year of operations of NYIAC. The program, which was attended by over 50 lawyers and well received, concluded with a reception at NYIAC.

In the coming year, the Committee will expand its relationship with New York Supreme Court in hosting delegations of foreign judges and lawyers, develop a set of standardized materials for the attendees, and organize specialized panel discussions suited to our foreign guests. In addition, the Committee intends to examine and report on the practical implications of recently enacted Rule 9 of the Commercial Division Rules (Accelerated Adjudication Actions). The Committee looks forward to an exciting coming year, and welcomes new members who are interested in participating in our activities.

Clara Flebus and Ted G. Semaya are Co-Chairs of the International Litigation Committee.

Suffolk County Bar Association Forms Committee on the Commercial Division

By Elizabeth Hazlitt Emerson, JSC, and Harvey B. Besunder

Elizabeth Hazlitt Emerson

In 2012 *The Chief Judge's Task Force on Commercial Litigation in the 21st Century* issued its report and recommendations to improve the Commercial Divisions within the State of New York. Subsequently Chief Judge Jonathan Lippman appointed a Commercial Division Advisory Council to implement those recommendations. Commercial Division practitioners and judges from around the state were appointed as members of the Council, and Bob Haig was aptly appointed its chair.

The Council is divided into a series of subcommittees, which include the following:

- Additional Resources for the Commercial Division
- The Role of the Commercial Division in the Court System
- Best Practices for Judicial Case Management
- Procedural Rules to Promote Efficient Case Resolution
- Alternative Dispute Resolution
- Use of Technology in Commercial Division Cases

The Council and its individual subcommittees have been regularly meeting and have made a series of proposals, many of which have already been adopted by the court.

Suffolk County has been fortunate in having a very active Commercial Division, with three judges assigned to handle Commercial Cases. The hope is that Suffolk County can continue to be an attractive venue for businesses to bring their disputes.

In furtherance of the goals of the Commission and those of our Suffolk County Court and our attorneys, the Suffolk County Bar Association has created a new committee on the Commercial Division to consider the concerns of the lawyers, litigants, and judges; promote best practices and initiatives for the Commercial Division within the State with a particular focus on those initiatives applicable to the practice and client base of the members of the SCBA and the needs of the Suffolk County court system; look for opportunities to collaborate with and coordinate its activities with Commercial Division Committees with similar mission statements at the state and local level; take other appropriate steps to support the Suffolk County Commercial Division and enhance the practice of commercial litigation and dispute resolution therein; monitor the recommendations of the Council and offer comment; take measures to attract business litigants to bring their cases to Suffolk County; and consider all avenues to improve our Commercial Division parts.

Harvey B. Besunder

The Board of Directors appointed Justice Elizabeth Hazlitt Emerson and Past President Harvey B. Besunder as co-chairs of the committee. Justice Emerson was a member of the original Task Force, and Harvey Besunder currently serves as a member of the Advisory Council. The co-chairs (with the approval of the executive committee of the association) appointed to the committee several highly regarded practitioners from both Nassau and Suffolk Counties who are actively engaged in Commercial Division cases.

An organizational meeting was held on August 26, 2014 at the Suffolk County Bar Center in order to determine how best to proceed to accomplish the goals of the Committee, including discussion between the practitioners and the three Commercial Division judges. The committee will meet regularly in the hope of satisfying the needs of the legal community and the litigants, by implementing the recommendations of the Council and creating uniformity within our three Commercial Division parts.

Part of our proposed mission is to coordinate our Commercial Division activities with similar parts in our counties. Toward that end we were pleased to be invited by current Chair Paul Sarkozi to attend the most recent meeting of the New York State Bar Association Section on Commercial and Federal Litigation held at the offices of Farrell Fritz in Hauppauge. It is our belief that by continued cooperation amongst the State and local bar associations, together with representation on the Council, we will be able to improve the workings of our Commercial Division and make it an attractive forum for lawyers and litigants.

Elizabeth Hazlitt Emerson, JSC, is a Justice of the Supreme Court, Suffolk County Commercial Division. Harvey B. Besunder is a partner in Bracken Margolin Besunder LLP.

Securities Litigation and Arbitration Committee Update

By Jonathan L. Hochman

Last year, departing from the committee's tradition of discussing developments in securities litigation and arbitration solely among its members, we began inviting distinguished speakers to address our meetings—and we are very glad we did. Our speakers last year included: Judge Jed S. Rakoff (SDNY), Judge Raymond J. Lohier, Jr. (2d Cir.), George Canellos (former SEC Co-Head of Enforcement), and Professor Stephen Choi (NYU Law School). We also hosted a panel on the Supreme Court's *Halliburton* case.

Here is a recap of some of the highlights from last year's meetings:

Judge Rakoff discussed possible reasons that high-level executives have not been successfully prosecuted in connection the financial crisis. While allowing for the possibility that no fraud was committed, Judge Rakoff noted that the government has not appeared to accept that position. Given the government's apparent view that high level criminal misconduct occurred leading up to the financial crisis, Judge Rakoff concluded that there must have been some other reason for lack of high level prosecutions. He hypothesized that three factors were at work. First, prosecutors had other priorities, including focusing on large insider trading cases and, in the wake of September 11th, on anti-terrorism and national security cases. Second, Judge Rakoff posited that the government's own contributions to the circumstances precipitating the financial crisis may have chilled prosecutions. Finally, he suggested that a misguided emphasis on prosecuting companies has detracted from the prosecutorial pursuit of individuals. Pointing out that companies can only act through their agents, Judge Rakoff concluded that the public would be better served by a prosecutorial effort to hold individuals criminally liable.

Judge Lohier discussed his experiences as the Chief of the Securities and Commodities Fraud Task Force in the U.S. Attorney's Office for the Southern District of New York. Among other things, Judge Lohier described how he brought knowledge and techniques drawn from his experience in the Office's Narcotics Unit to his work on insider trading investigations and prosecutions, and particularly, how he used wiretaps, which had not been employed in white collar cases up to that point. Judge Lohier went on to discuss his experiences serving on the Second Circuit, including issues he believes may recur over the next few years: (i) the effects of *Morrison;* (ii) arbitrability; and (iii) class certification issues.

A distinguished panel consisting of Salvatore J. Graziano (Bernstein Litowitz), Robert F. Carangelo (Weil Gotshal), and Lucy P. Allen (Senior Vice President, NERA), and moderated by committee member Jim Beha (Morrison & Foerster), discussed the then-pending Supreme Court case of *Halliburton Co. v. Erica P. John Fund, Inc. Halliburton* raised the issue of whether the Court should overrule or substantially modify *Basic v. Levinson*'s fraud-on-the market theory, a pillar of modern securities class-action litigation. The panel explored the issues raised by the case, the parties' arguments, and the ramifications of various possible outcomes for securities class action litigation. Since then, of course, *Halliburton* has been decided by a unanimous Court, which left *Basic's* fraud-on-the-market presumption intact.

George Canellos addressed the committee only weeks after stepping down as the Co-Head of Enforcement at the SEC. He discussed the increasingly common problem of simultaneous regulatory investigations by several regulators with overlapping jurisdiction. He suggested that a system should be implemented whereby a single regulator would take the lead in each investigation. In the meantime, he shared excellent practical advice for lawyers representing clients facing multiple investigations.

The issues raised by Mr. Canellos were also addressed at a regulatory roundtable CLE breakfast sponsored by the Committee. The roundtable was moderated by Andy Sidman (Bressler, Amery & Ross) and featured a panel of senior securities and commodities regulators and in-house counsel.

Professor Stephen Choi of NYU Law School spoke at the committee's final meeting last spring. He discussed his empirical study of patterns in the enforcement of the Foreign Corrupt Practices Act. Prof. Choi and his colleague Prof. Kevin Davis reviewed all FCPA actions resolved between 2004 and 2011, analyzing how settlement amounts were affected by a number of variables, including the egregiousness of the alleged fraud, the anti-corruption regime in the countries where the alleged violations occurred, and whether the defendants were foreign or domestic companies. The results of his analysis were interesting and, at times, surprising. For example, Prof. Choi concluded that voluntarily reporting a violation to regulators did not lessen the severity of the eventual sanction. Profs. Choi and Davis have since published the results of their analysis in the *Journal of Empirical Legal Studies*.

In addition to it its regular meetings and the Regulatory Roundtable, the Committee also sponsored a day-long CLE seminar on securities arbitration. This always popular program was once again well-attended, and many committee members participated as faculty.

The Committee looks forward to building on these successes this year. Chief Judge Loretta A. Preska (SDNY) and Judge Shira A. Scheindlin (SDNY) will be speaking at our first and second meetings, respectively. We once again hope to sponsor a Regulatory Roundtable and CLE program on securities arbitration. Finally, the Committee continues to recruit new members, particularly from among the ranks of in-house counsel, large firm partners, and financial regulators.

Jonathan L. Hochman is Co-chair of the Section's Securities Litigation and Arbitration Committee.

White Collar Criminal Litigation Update

By Evan T. Barr

The Committee on White Collar Criminal Litigation seeks (1) to educate its members about important developments in federal and state criminal law and related regulatory matters; (2) to provide a forum for members to share questions and experiences; and (3) to encourage discussion between the white collar bar and regulators concerning a range of issues, from trends in enforcement to the impact of new judicial decisions or congressional activity. From time to time, the Committee studies and makes recommendations on legal, ethical, and policy issues of importance to the white collar bar in New York State. Our membership has included defense lawyers, federal prosecutors and government lawyers, and in-house counsel.

Monthly meetings feature a prominent guest speaker. Speakers typically address their experience in handling a recent trial or other large matter. Other programs may focus on particularly timely issues of general interest to the white collar bar. This past year we heard from the following speakers:

- Benjamin Lawsky, Superintendent of the New York State Department of Financial Services, discussing the goals and priorities of his agency;
- Christopher Clark, a partner at Latham & Watkins, on his successful representation of Dallas Mavericks owner Mark Cuban in a highly publicized SEC insider trading trial;
- Elkan Abramowitz, a leading white collar defense lawyer and former Chief of the Criminal Division in the U.S. Attorney's Office for the Southern District of New York, discussing defense trial strategies;
- Sharon L. McCarthy, a partner at Kostelanetz & Fink LLP, discussing her successful trial defense of former BDO Seidman CEO Denis Field in the criminal tax shelter prosecution;
- Mark Cohen and Jonathan Abernethy of Cohen & Gresser LLP on their victory in the insider trading case against Nelson Obus, Peter Black, and Thomas Strickland;
- Alexandra Shapiro, a prominent criminal appellate lawyer, discussing her work on the appeal in *United States v. Newman*, an important insider trading case now pending before the Second Circuit;
- Lawrence Gerschwer, partner at Morrison & Foerster LLP, on his experience in deadlocking two Manhattan federal juries who were considering whether the founder and former CEO of Vitesse Semiconductor Corp. had committed securities fraud.

In recent years we have also had well-attended presentations from (among others): Neil Barofsky, author and former TARP Special Inspector General; the Honorable Lewis A Kaplan; Southern District U.S. Attorney Preet Bharara; well-known defense lawyers Ben Brafman, Barry Berke, Abbe Lowell, and Marc Mukasey; George Canellos, the former co-director of Enforcement at the SEC; former chief assistant district attorney Dan Alonzo; and Eastern District First Assistant AUSA Christina Dugger.

Periodically the Committee has sponsored or co-sponsored various CLE panels, which have addressed the following topics (1) Emerging Issues in Cybercrime; (2) Internet Gambling Enforcement; (3) Financial Penalties and Victim's Rights in Criminal Cases; and (4) Challenges of Multi-jurisdictional Investigations. We also issued an enlightening statistical study and report, which was published by the NYSBA, regarding the exercise of prosecutorial discretion in insider trading cases by New York federal prosecutors.

In terms of upcoming events, at the time of this writing: at our monthly meeting on October 14, 2014, our guest speakers will be Patrick Smith and John Hillebrecht, partners at DLA Piper. Pat and John will be discussing their recent experience in representing former Jefferies Group trader Jesse Litwak during a hard-fought federal securities fraud trial in the District of Connecticut.

We are in the process of planning a CLE for late January 2015 on recent trends in enforcement actions by the Department of Treasury's Office of Foreign Assets Control (OFAC), which will feature participants drawn from the government and private sector. We also hope to sponsor panels later in 2015 on developments in criminal antitrust and cross-border enforcement issues.

The Committee on White Collar Criminal Litigation is co-chaired by Evan T. Barr, Steptoe & Johnson, New York City, ebarr@steptoe.com, and Joanna C. Hendon, Spears & Imes LLP, New York City, jhendon@spearsimes.com. We welcome new members and law firms or other offices interested in hosting our monthly meetings.

E-Discovery Committee Update: Judge Scheindlin and Magistrate Judge Francis Headline a NYSBA Program on the Federal Rules Amendments, Cyber-Security and the Role of E-Discovery Counsel

By Constance M. Boland and Adam I. Cohen

Judge Scheindlin shared her view of how the new amendments to the Federal Rules of Civil Procedure will affect e-discovery issues and Magistrate Francis discussed his view of working with specialized e-discovery counsel at a recent New York State Bar Association CLE program. The E-Discovery Committee of the Commercial and Federal Litigation Section and the Law Practice Management Section of the New York State Bar Association co-sponsored that program, which was entitled "New Horizons in E-Discovery: How New Rules, Cyber-Security and Specialized eDiscovery Counsel are Shaping the Future of eDiscovery" and was held at the offices of Nixon Peabody on September 18th.

Judge Scheindlin joined Adam Cohen of Ernst & Young and Steven Bennett of Park Jensen Bennett on a panel moderated by Connie Boland of Nixon Peabody and discussed the proposed amendments to the Federal Rules, focusing on the revisions to Rules 36(e) and 26. Judge Scheindlin commented that this final version of the proposed amendments was much improved over earlier versions, but she remained concerned, among other things, that new Rule 37(e) did not clarify which party has the burden of proof. The members of the panel acknowledged that new Rule 37(e) requires a showing of "intent to deprive" another of the information before an adverse inference instruction, as a sanction, may be given. However, Judge Scheindlin explained that another type of adverse inference instruction may be given in certain circumstances, such as the adverse inference instruction upheld by the Second Circuit in *Mali v. Federal Insurance Co.*, 720 F.3d 387 (2nd Cir. 2013). In *Mali*, the court upheld a jury instruction given by the district court which stated that, if the jury found that a photograph relevant to the plaintiffs' claims existed, was in plaintiffs' exclusive control, and plaintiffs failed to produce it, then the jury may infer, but is not required to infer, that the photograph would have been adverse to plaintiffs' case. *Id*. at 393. In other words, the court "left the jury in full control of all fact finding." *Id.* Thus, Judge Scheindlin concluded that in situations like that faced by the *Mali* court, where there is a factual dispute to be submitted to the jury, a similar jury instruction may be given, even after the proposed amendment to Rule 37(e) of the Federal Rules of Civil Procedure becomes effective in December 2015. Judge Scheindlin, Mr. Cohen, and Mr. Bennett discussed that Rule 26 narrowed the scope of discovery, with proportionality now being a factor in determining the proper scope, and concluded that this new Rule would have little effect in most cases.

Next, a panel consisting of Joseph DeMarco of DeVore & DeMarco, John Elbasan of Willkie Farr, and John Bandler, an Assistant District Attorney for New York County specializing in cybercrime, discussed "E-Discovery in Data Breach Cases," with Adam Cohen acting as moderator. In response to questions posed by Mr. Cohen, Mr. Bandler provided a riveting account of a recent cybercrime case involving computer theft by a well-financed international crime ring. Mr. DeMarco warned of dire consequences when a cybercrime occurs because the method used to gain access to private information could be a virus or bug that is on the internet and therefore a threat to the general public. Mr. Elbasan elaborated on the measures one must take to keep a law firm's data secure. In addition, Adam Cohen discussed the conflict between surveillance and privacy.

Magistrate Francis joined the final panel consisting of Stacey Blaustein of IBM, Taylor Hoffman of Swiss Re, and the moderator Ian Hochman of Willkie Farr in discussing "The Role of E-Discovery Counsel." Ms. Blaustein, Mr. Hoffman, and Mr. Hochman discussed their career journeys in becoming eDiscovery Counsel and Magistrate Francis commented on how he appreciates working with counsel specializing in eDiscovery issues. They also discussed their vast responsibilities, which not only including eDiscovery, but also cross-border issues, records management, privacy issues, and, of course, litigation/litigation management.

Constance M. Boland and Adam I. Cohen are Co-chairs of the Section's Electronic Discovery Committee.

Hedge Fund and Capital Markets Litigation Committee Update

By Benjamin R. Nagin and Stephen L. Ascher

Benjamin R. Nagin

The financial crisis led to an explosion of litigation between banks, hedge funds, and other financial market participants. Many of these disputes have turned on contract law and other state law, rather than federal securities laws. Even now, six years after the pinnacle of the crisis, these disputes, typically governed by New York law, continue to work their way through the state and federal trial courts and up through the respective appellate courts.

Last fall, to create a forum for discussing the particular legal challenges and emerging issues presented by commercial litigation in the financial markets, Stephen Ascher and I formed the Hedge Fund and Capital Markets Litigation Committee. Stephen and I had recently concluded a high-stakes trial as adversaries and were delighted to join together to create a Committee to discuss the myriad challenging issues we saw in our own practices.

Members of the Committee include lawyers from well-known firms, large and small, as well as in-house lawyers from banks and hedge funds. In its inaugural year, members of the Committee presented on a range of cutting-edge litigation issues that are actively being litigated and decided in the Commercial Division and the Southern District of New York.

For example, many of our members are litigating disputes concerning RMBS—residential mortgage backed securities. One hotly contested issue involves when the statute of limitation begins to run for purposes of claims that the underlying loans included in the securitization breached representations and warranties in the underlying contract. Generally speaking, the defendants in RMBS cases—loan originators and securitizers—have argued that the claim accrued when the securitization closed, at which point the underlying alleged breach of a representation or warranty occurred. Plaintiffs—typically RMBS investors—have argued that the claim accrued years later, when the originator refused to buy back the breaching loans. Recently, the Court of Appeals granted leave to hear an appeal related to this issue, and the eventual decision no doubt will be the subject of robust discussion at future Committee meetings.

Stephen L. Ascher

The Committee also has engaged in substantive discussions on a range of other topics, including discovery in aid of foreign actions, the ability of financial market participants to sue despite "no action clauses" precluding litigation by individual bondholders, the use of SEC settlement agreements in civil litigation, and the expedited CPLR summary judgment mechanism for large and complex financial instruments.

Another practical issue our members routinely face is how best to present complex financial products and transactions at trial. In this regard, the Committee is delighted to announce that it has organized a first-rate panel on the issue for the Annual Meeting of the Commercial and Federal Litigation Section on January 28, 2015 at 10:30 am. Panelists include the Honorable Paul A. Engelmayer, United States District Judge for the Southern District of New York; the Honorable Marcy Freidman, State Supreme Court Justice in the Commercial Division; Brad Berenson, Deputy General Counsel for Worldwide Litigation for General Electric; and Stephen Ascher, Partner, Jenner & Block, Co-Head of the Securities Litigation and Enforcement Practice. I will have the honor of moderating this esteemed panel.

The Hedge Fund and Capital Markets Litigation Committee looks forward to hearing from prospective new members, and to meeting interested lawyers at our presentation at the Annual Meeting.

Benjamin R. Nagin and Stephen L. Ascher are Co-chairs of the Section's Hedge Fund and Capital Markets Litigation Committee.

Meet the District Leaders

The Section has created the position of District Leader. The Section members thus far serving in this position are:

County (District)	District Leader	Firm
Albany (3rd)	Jim Potter	Hinman Straub P.C.
Nassau (10th)	Laurel Kretzing	Jaspan Schlesinger, LLP
Monroe (7th)	Jeff Harradine	Ward Greenberg Heller & Reidy LLP
Westchester (9th)	Courtney Rockett and Patrick Rohan	Boies, Schiller & Flexner LLP

Jeff Harradine is a partner at Ward Greenberg Heller & Reidy in Rochester, New York. He handles a variety of complex commercial litigation in both state and federal court, including matters concerning corporate governance, breach of fiduciary duties, UCC disputes, and general breaches of contract. He represents multinational corporations, banks, educational institutions, and individuals, both as plaintiffs and defendants, in courts, before agencies, and in private arbitration. Jeff is a New York "Super Lawyer" and is the recipient of the 2014 Pro Bono Award from the United States District Court for the Western District of New York. He is a graduate of Cornell University and Cornell Law School and, prior to joining Ward Greenberg, served as law clerk to the Honorable Franklin S. Van Antwerpen of the United States Court of Appeals for the Third Circuit.

Laurel R. Kretzing is a member of Jaspan Schlesinger LLP, in Garden City, NY. She is in the Firm's Litigation and Appellate Practice Groups. She concentrates her practice in commercial litigation, civil rights, employment law, land use, environmental law, and construction law, representing both municipal and private clients. She has substantial trial and appellate experience litigating complex matters in both the state and federal courts. Ms. Kretzing received her Juris Doctor from Hofstra University School of Law and her Bachelor of Arts in Political Science from Pennsylvania State University. Ms. Kretzing began her legal career as a Deputy County Attorney in the Nassau County Attorney's Office, where she handled tax certiorari, construction, municipal litigation, and environmental matters.

Jim Potter is a principal at Hinman Straub, PC, in Albany and is the chair of the firm's litigation department. His practice is focused primarily on commercial litigation and also involves personal injury cases. He is a member of the Practitioner's Advisory Group to the Commercial Division, the Chief Administrative Judge's Working Group on E-Discovery, and the Committee on Character and Fitness of the Appellate Division, Third Department. He serves as a voluntary mediator for the United States District Court for the Northern District of New York and as Town Attorney for the Town of Bethlehem.

Courtney R. Rockett's main practice area is complex civil litigation, with emphasis on complex commercial transactions, securities, entertainment, and intellectual property. Representative clients include Tory Burch, LLC, Imagine Entertainment, LLC, Ron Howard, Mike Nichols, Neil Simon, Sony Corporation, Sony Corporation of America, Sony Pictures Entertainment Inc., Zurich Financial Services Group, Fox Paine & Company, LLC, Global Indemnity plc, and Gama Aviation, Inc. Before joining Boies, Schiller & Flexner LLP, Ms. Rockett was an associate at the law firm of Cahill, Gordon & Reindel. While there, her practice included asbestos-related class actions, real property, entertainment, antitrust, and intellectual property litigation. Ms. Rockett served as clerk to Hon. Joseph M. McLaughlin, United States Court of Appeals for the Second Circuit, 2000-2001, and Hon. William C. Conner, United States District Court for the Southern District of New York, 1998-1999.

Patrick J. Rohan's main practice area is complex commercial litigation, from inception through trial and appeals, in federal and state court as well as in various forms of alternative dispute resolution. Before joining Boies, Schiller & Flexner LLP, Mr. Rohan was a partner in the litigation group at Battle Fowler LLP, where his representative matters included the successful defense of the partnership which controls the Empire State Building in an action by the landlord seeking to terminate the partnership's lease, the successful defense of a large, public real estate partnership in class action and arbitration proceedings seeking judicial dissolution of the partnership, and the successful representation of the country's leading corporate barter firm in litigations defending and enforcing complex barter transactions.

CPLR Amendments: 2014 Legislative Session

(2014 N.Y. Laws ch. 1-431)

CPLR §	Chapter, Part (Subpart, §)	Change	Eff. Date
105(s-1)	29(2)	Extends expiration until June 30, 2019	6/19/14
2106	380	Permits affirmations by any person located outside U.S. territory	1/1/15
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
3113(c)	379	Makes explicit that attorney for non-party deponent may participate in deposition to same extent as attorney for party	9/23/14
3122-a(d)	314	Provides that the CPLR 3122-a certification may be used as to business records produced by non-parties whether or not pursuant to a subpoena	8/11/14
3216(a), (b)	371	Requires notice to parties, authorizes court to issue 90-day demand within six months after preliminary conference order, and requires that, where court issues demand, demand must set forth specific conduct constituting neglect, showing general pattern of delay	1/1/15
3408(a)	29(1)	Extends expiration until Feb. 13, 2020	6/19/14

Note: The expiration of the revival of Agent Orange actions was 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 1-27 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
202.5(e)	Sup.	Adds provision on omission or redaction of confidential personal information
202.6	Sup.	Amends Foreclosure RJI
202.9-a	Sup.	Adopts new rule governing special proceedings authorized by UCC § 9-518(d)
202.27-a	Sup.	Adopts new rule on proof of default judgments in consumer credit matters
202.27-b	Sup.	Adopts new rule on additional mailing of notice on action arising from consumer credit transaction
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
202.70(g), Rule 11-c	Sup.	Adopts new rule governing discovery of electronically stored information from non-parties
202.70(g), Rule 34	Sup.	Adopts new rule governing staggered court appearances

Notes: (1) The Chief Administrative Judge has added Supreme Court in Livingston and Ontario counties and surrogate's courts in Allegany, Genesee, and Wyoming counties to the list of courts with voluntary e-filing under 22 NYCRR § 202.5-b. (2) The Chief Administrative Judge has added certain matters in Sup. Ct., Queens, Bronx, and Nassau counties to the list of matters for mandatory e-filing under 22 NYCRR § 202.5-bb. (3) 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

July 8, 2014

In this special meeting, the Executive Committee approved the Section's CPLR Committee Report supporting the Proposed Amendment to CPLR 3122-a.

August 12, 2014

In this special meeting, the Executive Committee approved, with amendments, two reports of the Section's Commercial Division Committee: a report supporting a proposed Commercial Division rule change concerning sanctions and a report supporting a proposed Commercial Division rule concerning the presumptive limitations on the number and length of depositions.

September 17, 2014

Guest speaker Justice Vito M. DeStefano of the Commercial Division, Nassau County, discussed cuts in the Nassau County courts and his perspective on several new Commercial Division rules.

The Executive Committee discussed the 2015 Annual Meeting, Committee Chair and District Leader updates, upcoming CLEs in Rochester and Buffalo, a social media and jury instructions survey, and the Woman on the Move program.

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