

# 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

I am pleased to report that our Section membership has now increased to more than 2,320 and has been touted as one of the fastest growing Sections of the Bar. Indeed, there is hardly a week that goes by where our Section does not contribute in some significant way to the practice of commercial law in New York, whether in the form of a CLE program, a report, a commentary on a variety of issues affecting our Section and the legal community at large, or an event which has led to positive press coverage of our Section and its members. The week of January 24, 2005, during which the Annual Meeting of the New York State Bar Association and all of its Sections took place, was just such an example.



Lauren J. Wachtler

Tracee Davis, our Section Secretary, and I participated in the Diversity Reception that week, attended by,

among others, our Bar President Ken Standard, past Bar President Tom Levin, and the Honorable Carmen Beauchamp Ciparick of the State Court of Appeals, along with 150 members of the State Bar. Tracee, my partner Paul Montclare, and I were able to meet with those who attended the reception and speak about our Section and the many benefits it has to offer. I was encouraged with the genuine interest sparked by the discussions I had with some of the attendees, and the number of attorneys who were eager to join our Section and work on one or more of our committees.

As a result of one such discussion, one of our Section members who practices bankruptcy litigation had the excellent suggestion of adding a Bankruptcy Litigation Committee to our 29 committees, both for those of us who practice in Bankruptcy Court, and to also address some of the issues that those of us who don't routinely practice in the Bankruptcy Courts encounter in our practice. I, for one, have had clients who have been involved in bankruptcy proceedings, and it has often been necessary to reach out to other attorneys for

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advice, counsel, or even referrals. We welcome Douglas Tabachnik to our Executive Committee and as the Chair of our new Bankruptcy Litigation Committee. I encourage those of our members who are interested in this area of the law to join this new Committee.

There is no question that the highlight of that week was our Section's Annual Meeting and luncheon, which took place on Wednesday, January 26, 2005. The morning program was well attended and received excellent reviews from those who participated. Our luncheon this year broke all prior records, having been attended by 400 attorneys and more than 60 State and Federal judges. Attorney General Eliot Spitzer, who received our Section's Stanley H. Fuld award, asked Jay Himes, who Chairs our Antitrust Committee, to present the award to him. Jay's introductory remarks were not only elegantly delivered, but the substance of his remarks was matched only by that of Attorney General Spitzer's acceptance speech and its inspiring content. Following the meeting, the luncheon was covered on the front page of the *Law Journal*, and our Section was prominently featured in the article, as well as in several other Bar publications.

A round of applause is due to Lesley Rosenthal, who Co-chaired the Presidential Summit with me on behalf of State Bar President Ken Standard. Lesley's remarkable efforts resulted in what attendees have described to me as being the most engaging and substantive program among the many which they have ever attended.

Not only have our Section's contributions been recognized by the State Bar, but several weeks ago, the Section received recognition again in the *New York Law Journal* regarding our contributions to the Commercial Division Rules and Guidelines, on which Section members have been working closely with Commercial Division Judges, and in particular, their principal author, the Honorable Leonard B. Austin. The article recognized the significant contributions of our Section members, many of whom are members of the Commercial Division Advisory Committee, and have provided input into the Rules and Guidelines and the important process of their implementation.

Our work with the Commercial Division has continued in other areas, and we will again be presenting a seminar for the Commercial Division judges statewide in conjunction with the Judicial Institute at Pace University School of Law. Our program this time, at the requests of the Commercial Division judges, will focus on trade secrets, the Class Action Fairness Act, issues relating to electronic evidence, and jury instructions involving contract cases. The seminar will take place on May 11, 2005, at the Pace Law Institute. Again, I appreciate the overwhelming response by our Section members to help with this program and share their expertise with

the Commercial Division judges, who have shown their appreciation of these seminars by asking us to hold them both in New York and Westchester for the past three years. This continues to be a wonderful opportunity to work directly with the judges of the Commercial Division and involve as many of our Section members as possible in assisting the judiciary.

During the past several months, we have also provided the State Bar Executive Committee with our comments on the Jury Commission Report, the expanded definition of pro bono, and subsequent adoption of the expanded definition, which incorporated almost all of our Pro Bono Committee report's comments, and the State Bar Executive Committee's proposal to repeal New York law office requirements set forth in Judiciary Law § 470. To our Section's credit, our members have never been timid in expressing their views, even if they are contrary to the majority or popular position. They have always provided "food for thought," and the Executive Committee of the State Bar Association has consistently commended our Section on its fine work and the scholarship and excellence of our reports. Most recently, we presented our Class Action Committee's report, which the committee is chaired by Ira Schochet, and again the Section was commended by the State Bar Executive Committee.

We are presently in the process of preparing comments in response to the Civil Justice Program 2005: Study and Recommendations by Judge Ann Pfau, First Deputy Chief Administrative Judge. The Program and Study, which many of you may have seen in the *New York Law Journal* last month, contains many recommendations affecting aspects of our practice including complex litigation, New York City cases, civil jury selection, and the alternative dispute resolution process.

The Section is also part of a new mentoring program, chaired by former Chair Bernice K. Leber, who was also recently elected as Vice President for the First Judicial District of the New York State Bar Association. The program has been designed to attract young attorneys to join the Bar Association, and our Section has agreed to become part of the program. We have been asked to study and make recommendations to keep young attorneys and new members of the State Bar engaged and involved in Bar activities. Many of our Executive Committee members have agreed to participate as mentors in this program, and I am proud to say that it was based on the increase in our numbers during the past year that prompted the request of the State Bar for our Section to participate in this worthwhile endeavor.

We have also been asked to assist the Honorable Jacqueline W. Silbermann, Administrative Judge of

New York County, in filling two new positions which have been created for attorneys who wish to clerk for a Commercial Division judge. A link to the flyer advertising this opportunity can be seen on the front page our website (<http://www.nysba.org/comfed>). I am pleased to say that it was our Section which pointed out to the Administration the difficulty many attorneys were having in obtaining expeditious results on motions and other submissions based on the increased number of matters which have come into the Commercial Division in recent years. The Administration, in response to our letters and comments made in meetings, is addressing these problems, and, it is hoped, that the addition of these clerkship positions will afford some relief to the New York County Commercial Division judges in managing their caseloads and shortening the time between motion submission and adjudication.

This past March, our Executive Committee was privileged to have as our guest speaker the Honorable Robert Smith, the newest addition to the State Court of Appeals. We also welcomed to our Executive Committee at that meeting Preeta Bansal, the immediate past Solicitor General of the State of New York, and now a member of the law firm of Skadden Arps Slate Meagher & Flom, LLP. Preeta participated in the Presidential Summit and provided us with a marvelous performance on the panel that addressed the constitutionality of New York State's lobbying law. Preeta will be joining David Tennant of the law firm of Nixon, Peabody in Rochester as the Co-chair of the Appellate Practice Committee. David presented the Executive Committee with the Appellate Practice Committee's report on the use of Google and the Internet by the judiciary entitled "Judicial Ethics and The Internet: May Judges Search The Internet In Evaluating and Deciding A Case?"

The Executive Committee also welcomes as the new Chair of the Federal Court Attorney's Committee, Erich Grosz of the law firm of Debevoise & Plimpton. Erich has some great ideas to increase that Committee's membership and involvement in Section activities.

Our Section also continues to encourage other Sections to participate in the programs which we sponsor. On June 2, 2005, Bernice Leber and I will be Chairing the third annual "Women on the Move" seminar at the New Yorker Hotel. Bernice and I have created a program entitled "Women on the Move—Successful Women in the Know" to focus on career paths available to women

attorneys who are entering the job market, as well as those who are five, ten, and fifteen or more years away from law school. The panelists on the first panel, who will discuss options for those entering the job market, include the Dean of Students at Pace University School of Law, Chief of Staff and Deputy to the President of New York University, and President of the City Bar, Betsy Plevin, Esq. The second panel will focus on women who have achieved success outside of the traditional law firm practice. Panelists include, among others, Section member Sharon Grubin, Esq., General Counsel for the Metropolitan Opera; Randi Weingarten, Esq., President of the United Federation of Teachers; and Lis Wiel, Esq., Legal Analyst, Fox News Channel and author of "Winning Every Time: How to Use the Skills of a Lawyer in the Trials of Your Life." The keynote address will be given by Dr. Ellen Ostrow, of LawyersLifeCoach, and is entitled "Are You Living the Life You Dreamed After Law School?"

The Committee on Women in the Law, the Corporate Counsel Section, the Young Lawyers Section, the Committee on Diversity and Leadership Development, and the Committee on Continuing Legal Education of the New York State Bar Association have agreed to lend their names in support of what will undoubtedly be an exciting program. I hope many of you, including the male members of our Section, will attend the program in June.

Congratulations are in order to our new officers, who will commence their terms June 1, 2005: Steve Younger, Chair; Lesley Rosenthal, Chair-Elect; Carrie Cohen, Vice-Chair; and Michael D'Ambrosio, Secretary. Lew Smoley and I will continue our Section's representation in the House of Delegates. Congratulations are also in order for Tracee Davis, who has been selected to take one of the diversity seats created by our State Bar President in the House of Delegates.

As you all know, our Spring meeting takes place at the Gideon Putnam Hotel in Saratoga Springs during the weekend of May 14, 2005. The meeting is being co-sponsored by the Corporate Counsel Section. Bob Kerrey, President of the New School University in New York City and former United States Senator from the State of Nebraska, will be accepting the Robert L. Haig award at the meeting, which promises to be a wonderful event, and I look forward to seeing all of you there.

**Lauren J. Wachtler**



# Annual Meeting Program Delves into Discovery, Evidence, and Civility in Commercial Litigation

The Section's Annual Meeting program on January 26 elucidated differences between federal and state court practice in two areas: discovery and evidence. The meeting also included a segment on ethics and civility in commercial litigation.

The program was inspired by an article Judge Harold Baer published last summer in the *New York Law Journal*, comparing state and federal practices in discovery. Section Vice Chair Lesley Friedman Rosenthal, VP General Counsel for Lincoln Center for the Performing Arts, Inc., organized and chaired the program.



Lesley Friedman Rosenthal



Adam I. Cohen

Panelist Adam I. Cohen of Weil Gotshal & Manges, LLP, the Chair of the Section's Electronic Discovery committee, led with a slide show on the hottest topics in electronic discovery in federal court. According to Mr. Cohen, spoliation of electronic evidence has become the number one issue. Even large companies with sophisticated lawyers are getting sanctioned severely for destruction of electronic information. The combination of periodic deletion cycles, which may not get properly suspended when a claim is threatened or pending, and the large volume of electronic information circulating in many corporations is "combustible," according to Mr. Cohen. And the sanctions can be severe, including adverse inferences, personal monetary sanctions against corporate officers, disposition of cases, and even criminal penalties pursuant to Sarbanes-Oxley.

Mr. Cohen described amendments being considered by the Advisory Committee for the Federal Rules of Civil Procedure to deal more systematically with electronic discovery. Gerald G. Paul of Flemming, Zulack & Williamson LLP, a former



Chair of the Section who also spoke on the program, said that the CPLR has not yet addressed these issues, although there are proposed new rules in the commercial division.

Mr. Paul said that there is information that lawyers need to have, regardless of the court they're in: What's discoverable? What's accessi-

ble? What can be restored? Who should pay for it? What is needed to prove spoliation? What are the consequences of spoliation? What can lawyers do to protect clients from spoliation allegations? What can they do to prevent the adverse party from destroying critical electronic evidence? What are the implications of a document retention policy? Mr. Paul highlighted the state courts' treatment of these issues in recent cases, including *Samide v. Roman Catholic Diocese of Brooklyn* and *House of Dreams v. Lord & Taylor*.



Gerald G. Paul

Judge Harold Baer of the United States District Court for the Southern District of New York and Justice Barbara Kapnick of the New York Supreme Court contrasted other elements of practice in federal and state courts. Judge Baer noted that, when he was a state court judge, the parties often treated preliminary conference orders as an "expression of hope" by judges, and the parties regarded compliance with those orders as optional. Last-minute adjournments of depositions or additions of parties would throw schedules into



Hon. Harold Baer

disarray. Justice Kapnick stated that many of these same problems persist today in state court. By contrast, Judge Baer has found that the parties in federal court both seek and follow pretrial orders more rigorously. Justice Kapnick attributed the differences to, among other things, the fact that federal judges have lifetime tenure, while state judges are elected, mak-



The program was well received by the audience, including Peter J. Pizzi of Connell Foley

ing lawyers “a lot more afraid of the federal judges” and making the federal judges likelier to wield their power to sanction. She also pointed out that the state court system is short of funding, cutting into the judges’ ability to obtain overtime staffing. State judges also lack the kind of help that federal judges get from magistrate judges.



photo by David R. Zukerman

Panelists (l-r) Bernice K. Leber, Lauren J. Wachtler, Prof. Richard Farrell and Hon. Helen E. Freedman

LLP and Lauren J. Wachtler of Montclare & Wachtler, the current Section Chair.

The final segment of the program concerned ethics and civility in commercial litigation. Former Section Chairs Judge P. Kevin Castel of the United States District Court for the Southern District of New York and Mark C. Zauderer of DLA Piper Rudnick, discussed the importance of



Hon. Barbara Kapnick

Substantively, the judges contrasted the treatment of interlocutory appeals in state and federal court. Litigants in state court can more readily take interlocutory appeals that have the effect of staying the proceedings, although commercial division rules have eliminated this problem in commercial cases to a large extent.



Prof. Richard Farrell

Another panel, featuring Justice Helen E. Freedman of the New York Supreme Court Commercial Division and Professor Richard Farrell of Brooklyn Law School, discussed hot topics in electronic evidence: how to authenticate it, introduce it, handle it, and bring it to fruition as part of a case. The panelists also touched on some of the differences in federal and state courts pertaining to the handling of evidence, particularly business records and learned treatises. The discussion then continued with a hypothetical scenario that drew out these differences. The hypotheticals were handled by former Section Chair Bernice K. Leber of Arent Fox



Hon. Helen Freedman



Nili Moghaddam (l) and Carolyn A. Dizon role-play parts from an actual deposition transcript, as part of an interactive program on ethics and civility

maintaining civil relations with one’s adversary. Judge Castel pointed out that 98% of civil cases in federal court are settled before trial, highlighting the importance of establishing the right tone with an adversary with whom one is overwhelmingly likely to be negotiating a settlement in the end. Mr. Zauderer conducted an audience participation discussion of various ethical dilemmas that commonly arise in commercial litigation context. Associates Nili Moghaddam and Erik Knutsen of Paul Weiss LLP and Carolyn A. Dizon of DLA Piper Rudnick role-played parts from an actual deposition transcript, providing a vivid example of how not to be civil.

The program was well received by the audience, and the State Bar Association carried three stories covering the Section’s Annual Meeting programming on the front page of the *State Bar News*. The Section is grateful to the participants who helped make the meeting a success.



Bernice K. Leber



Hon. P. Kevin Castel



Mark C. Zauderer



As Judge Baer takes senior status, Section Chair Wachtler presents an award to him in recognition of his distinguished service on the federal and state benches in New York



# Commercial and Federal Litigation Section Luncheon and Presidential Summit

Wednesday, January 26, 2005 • New York Marriott Marquis



Jay L. Himes, Chief, Antitrust Bureau, Office of the Attorney General



Hon. Melanie L. Cyganowski of the U.S. Bankruptcy Court



Jay L. Himes (r) presents the Stanley H. Fuld Award to Eliot Spitzer



New York State Attorney General Eliot Spitzer



Section Chair and Presidential Summit Co-Chair Lauren J. Wachtler



Section Vice-Chair and Presidential Summit Co-Chair Lesley Friedman Rosenthal



New York State Attorney General Eliot Spitzer (l) and NYSBA President Kenneth G. Standard



New York State Attorney General Eliot Spitzer (l) and Antitrust Bureau Chief Jay L. Himes



Former Court of Appeals Chief Judge Sol Wachtler (l) and Chair-Elect Stephen P. Younger



NYSBA President Standard and NYSBA President-Elect designee Mark Alcott lead the standing ovation of the Fuld Award presentation



Hon. Sol Wachtler (l) and his daughter, Section Chair Lauren J. Wachtler



Hon. Leonard B. Austin (l) and Eliot Spitzer



The Presidential Summit's mock oral argument was presided over by 5 states' Supreme Court Chief Justices (l-r): Hon. Miguel S. Demapan (Northern Mariana Islands); Hon. Jean Hofer Toal (SC); Hon. Randall T. Shepard (IN); Hon. Nancy A. Becker (NV); and Hon. Gerry L. Alexander (WA)



(l-r) Jay L. Himes, Lesley Friedman Rosenthal, Eliot Spitzer, Lauren J. Wachtler and Stephen P. Younger

# Section Vice-Chair Rosenthal Named VP, General Counsel of Lincoln Center

Lesley Friedman Rosenthal, the Section's Vice-Chair, has become Vice President, General Counsel and Secretary of Lincoln Center for the Performing Arts, Inc. She oversees all aspects of Lincoln Center Inc.'s legal affairs, and provides ongoing support and advice to the Board of Directors, in addition to the standard complement of Corporate Secretary duties. She also plays a lead role in fashioning the legal context for redevelopment of the Lincoln Center campus.



Ms. Rosenthal came to Lincoln Center from Paul, Weiss, Rifkind, Wharton & Garrison, where she served as a commercial litigator with extensive experience serving clients in the media, entertainment, and real

estate sectors. Her expertise includes defending copyright and trademark matters, the licensing of music and other intellectual property rights, and contract negotiation involving consultants, artists, and others.

While at Paul, Weiss, she also was General Counsel to a number of not-for-profit institutions, advising and representing boards and officers on policies and practices. In addition to her service to the Section, Ms. Rosenthal is a member of the Board of Editors of the New York State Bar *Journal*, and she served as Program Co-Chair for the Presidential Summit of the New York State Bar Association in January 2005.

An avid classical violinist, Lesley Friedman Rosenthal studied music and philosophy at Harvard College, where she graduated *magna cum laude* and Phi Beta Kappa. She received her law degree from Harvard Law School.

**Available on the Web**  
***NYLitigator* and *Commercial and Federal Litigation Section Newsletter***  
**[www.nysba.org/comfed](http://www.nysba.org/comfed)**



**Back issues of the *NYLitigator* and the *Commercial and Federal Litigation Section Newsletter* (2000-present) are available on the New York State Bar Association Web site**

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](mailto:webmaster@nysba.org) or call (518) 463-3200.

***NYLitigator* and *Commercial and Federal Litigation Section Newsletter* Index**

For your convenience there is also a searchable index in pdf format. To search, click "Find" (binoculars icon) on the Adobe tool bar, and type in search word or phrase. Click "Find Again" (binoculars with arrow icon) to continue search.

# CLE Program: “Women on the Move: Successful Women in the Know”

Sponsored by the Commercial and Federal Litigation Section, the Committee on Women in the Law, the Corporate Counsel Section, the Young Lawyers Section, and the Committee on Diversity and Leadership Development

MCLE Credits: 4.5

## Why Attend?

- What can I do with my law degree other than practice law in a law firm?
- Having worked in a law firm helping clients, how do I become my client?
- What does the legal marketplace look like for lawyers in the coming years?
- How difficult is it to be in an environment different from a law firm?
- How do I make the transition to a different business 5, 10, 15 years after law school?
- Hear from educators and women who have used their law degrees as a tool for success in their careers—past, present and future

## When and Where

- Seminar: 1:00 – 5:10 P. M.
- Reception: 5:10 – 7:00 P. M.
- Thursday, June 2, 2005  
New Yorker Hotel  
New York City

## Registration Fees

### Early Registration (10 days prior to the program)

NYSBA Members:	\$190
Non-members:	\$265
NYSBA Student Members:	\$50

### Late Registration

NYSBA Members:	\$205
Non-members:	\$280
NYSBA Student Members:	\$65

## Program Overview

This seminar will focus on career paths available to women attorneys who are entering the job market as well as those who are 5, 10, 15 and more years away from law school. The focus is to study specific areas where women lawyers, on a case by case basis, have used their law degrees to advance their careers. There will also be a discussion of demographics, the legal climate, and job opportunities past, present and future. Leading representatives who have followed, as well as those who have not necessarily followed, the traditional law firm path will discuss the challenges of practicing law in a variety of settings, how they made the decision and why they made the decision to change the environment in which began practicing law and the challenges they met once they changed their jobs. Panelists will also look at the job market and how they succeeded in both the private and public sectors, corporate and media settings.

The keynote address will be given by Dr. Ellen Ostrow, Ph.D., founder of LawyersLifeCoach, which provides professional coaching services to lawyers who want to achieve professional success without sacrificing meaning and fulfillment in their lives. One of the panelists, Lis Wiehl, of Fox News, will also discuss her book “Winning Every Time: How to Use the Skills of a Lawyer in the Trials of Your Life.” This seminar should be attended by those who presently are at private law firms in order to assess where they are now, by those who wish to learn more about other career options and for those who have wondered how life outside the private law firm differs and works. There will be time for individual questions and answers from all of the panelists as well as a self-administered personality test for discerning the optimal environment in which to work for you.

There will be a networking cocktail hour following the program.



## Agenda

- 12:30 – 1:00 P. M. Registration
- 1:00 – 1:10 P. M. **Welcome and Overview**
- Speakers and Moderators **Lauren J. Wachtler, Esq.**, Program Chair  
Chair, Commercial and Federal Litigation Section  
Montclare & Wachtler
- Bernice K. Leber, Esq.**, Program Chair  
Vice President, First District, New York State Bar Association  
Arent Fox, PLLC
- 1:10 – 2:50 P. M. **Who Are We, Where Did We Come From and Where Are We Going**
- Panelists: **Diane C. Yu**  
Chief of Staff & Deputy to the President  
New York University
- Angela M. D’Agostino**  
Dean of Students  
Pace University School of Law
- Bettina B. Plevan, Esq.**  
President  
The Association of the Bar of the City of New York
- 2:50 – 3:05 P. M. Coffee Break
- 3:05 – 3:30 P. M. Keynote Speaker:
- Ellen Ostrow, Ph.D.**  
LawyersLifeCoach
- “Are You Living the Life You Dreamed After Law School?”**
- 3:30 – 4:45 P. M. **Where Can You Go with Your Law Degree and How Do You Get There?**
- Panelists: **Sharon E. Grubin, Esq.**  
General Counsel  
The Metropolitan Opera
- Anita W. Laremont, Esq.**  
Senior Vice President – Legal and General Counsel  
Empire State Development Corporation
- Joan Morgan McGivern, Esq.**  
Assistant Vice President, Legal Affairs, Office of C.E.O  
American Society of Composers, Authors and Publishers (ASCAP)
- Sara L. Peterson, Esq.**  
Principal Counsel and Manager of Insured Litigation  
Bechtel Corporation
- Margaret L. Shaw, Esq.**  
ADR Associates / JAMS
- Randi Weingarten, Esq.**  
President  
United Federation of Teachers
- Lis Wiehl**  
Fox News Channel, Legal Analyst  
Author “Winning Every Time: How to Use the Skills of a Lawyer in the Trials of Your Life”
- 4:45 – 5:10 P. M. **Questions and Answers: What Lies Ahead?**
- 5:10 - 7:00 P.M. Networking Reception (hors d’oeuvres will be served)

# 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 to examine the role of the jury in commercial cases. The program also will include an update on antitrust developments of interest to the commercial litigator. We are presenting 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 ([www.gideonputnam.com](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. Our dinner speaker will be Dennis Drasco, Chair of the ABA Section of Litigation and Vice Chair of the American Jury Project, who will speak about the role of 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 also will 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. This year's recipient will be Bob Kerrey, Co-Chair of the 9/11 Commission.

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.



## Practice made perfect.

That is our reason for being at the New York State Bar Association: to help make your practice as close to perfect as possible. Toward that end, we have established numerous member-only programs that can empower you to:

- Stay informed
- Sharpen your skills
- Save money
- Save time
- Meet CLE requirements
- Manage your career
- Make valuable contacts
- Make a difference
- Practice law better

"NYSBA has consistently yielded these benefits for my practice. I am committed to ensuring that it does the same for yours."

— Kenneth G. Standard, President  
New York State Bar Association



New York State Bar Association 518.463.3200 [www.nysba.org](http://www.nysba.org)

## CPLR Amendments 2004 Legislative Session (Chapters 1-755<sup>1</sup>)

CPLR §	Chapter (§)	Change	Eff. Date
105(s-1)	128	Extends until 6/30/09 definition of "sheriff," including authorization of NYC 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 magistrate 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
1. At the time of publication, no amendments had been enacted in the 2005 legislative session.			



## 2005 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)	Eff. Date
Part 500	Ct. of App.	Replaces Part 500, governing appeals in Ct. of Appeals, with a new Part 500	9/1/05
670.22(b)	A.D./2d Dep't	Increases certain fees of the clerk	12/8/04

## State Court of Appeals Adopts New Rules Governing Appeals in That Court, Effective Sept. 1, 2005

In February, the New York State Court of Appeals adopted a new Part 500 ("Rules of Practice"), which governs appeals in that court. The Court's February 25, 2005, Notice to the Bar announcing the new rules highlights the following changes:

- Substitution of a Court-promulgated preliminary appeal statement for the jurisdictional statement previously required for appeals (see new Rule 500.9 and form annexed to rules)
- Use of scheduling letters to set due dates for appeal papers (see new Rule 500.12(a))
- Elimination of the automatic 20-day extension for filing dates for appeals (see current Rule 500.9)
- Reduction of the time period from 80 days to 60 days for perfecting appeals, unless an extension is granted (see new Rule 500.12(b))
- Establishment of filing dates for all applications for amicus curiae relief (see new Rule 500.23)
- Increase in number of copies of record on appeal (or appendix) and briefs (original and 24 copies in most civil appeals) (see new Rule 500.12 & 500.14)
- Reduction in number of copies of papers on motions for leave to appeal, for reargument of appeals, for reargument of motions for leave to appeal, and for reargument of decisions on certified questions (original and 6 copies) and increase in number of copies of papers on other motions (original and 1 copy) (see new Rule 500.21(d))



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The New York State Bar Association presents a continuing legal education program on  
**“Recent Developments in Shareholder Litigation and  
Related Government Enforcement Initiatives”**

**Friday, June 10, 2005 • New York City**

*Co-sponsored by the Committee on Securities Litigation and Committee on Class Action of the Commercial and Federal Litigation Section and the Committee on Continuing Legal Education of the New York State Bar Association*

### **Program Description**

This program, jointly sponsored by the Committee on Securities Litigation and Committee on Class Action of the Commercial and Federal Litigation Section, will provide presentations and active exchanges between members of both the plaintiff and defense bar, as well as representatives of the judiciary and various federal and state agencies, concerning current developments in state and federal shareholder litigation. Topics covered will include developments in securities litigation and derivative actions, evolving standards of corporate governance, related criminal and regulatory proceedings, and continuing developments in director and officer insurance coverage. This full day program provides material of interest to both litigation and corporate law practitioners, at both beginning and more advanced levels.

The New York State Bar Association’s Committee on Continuing Legal Education has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York. We will gladly assist attorneys admitted in New York and those admitted in other

MCLE states in obtaining MCLE credit for attending this program. Information and/or forms for that purpose will be available at the registration desk on the day of the program.

Under New York’s MCLE Rules, this program has been approved for credit for all attorneys, including those who are newly admitted (less than 24 months). This course may be used by recently admitted attorneys for New York MCLE credit consisting of 7.0 credit hours in practice management and/or areas of professional practice. This program may be used by all other attorneys for 7.0 credit hours in practice management and/or areas of professional practice, for a total in either case of 7.0 credit hours.

The New York State Bar Association certifies that this program has been approved for MCLE credit by the state Bar of California in the amount of 6.0 hours and by the Pennsylvania Continuing Legal Education Board for 6.0 hours of substantive law. The Florida Bar approves all of our CLE programs. All inquiries regarding mandatory continuing legal education credits may be directed to (518) 487-5586.

### **Program Agenda**

**8:30-9:00 a.m. REGISTRATION** (outside meeting room)

**9:00-9:10 I. INTRODUCTION**  
**Stephen P. Younger, Esq.**

**9:10-10:00 II. OVERVIEW**

- A. Post-Reform Act developments in legal standards
- B. Trends
  - 1. Mutual fund/annuity cases, including damage calculations in market timing and late trading claims
  - 2. Analyst cases
    - a. Impact of *Lentell* (2d Cir.) *DeMarco* (SDNY) and other decisions
  - 3. Trends in numbers and types of filings
  - 4. Other battlegrounds
- C. Interplay of state and federal civil and criminal initiatives and private civil actions

**Panelists: Eric R. Dinallo, Esq. (Moderator)**  
**Fred T. Isquith, Esq.**  
**Elaine Buckberg, Ph.D.**  
**George J. Skelly, Esq.**

10:00-10:50

### III. CORPORATE GOVERNANCE LITIGATION

- A. Recent developments in Delaware case law
  - 1. Good faith after *Disney* and other recent decisions
  - 2. Special liability rules for directors with special knowledge after Emerging Communications
  - 3. Section 220 demands for books and records
  - 4. Advancement of legal expenses
  - 5. Duties to creditors: *Production Resources vs. New York Credit*
- B. Is it more dangerous to be a director today than in the past?
  - 1. In Delaware: *Disney, McKesson/HBOC*
  - 2. Out of Delaware: Outside director payments in *WorldCom* and *Enron* settlements
- C. Sarbanes-Oxley, SEC rule-making and NYSE/NASDAQ listing standards
  - 1. Impact on best practices in director conduct and corporate governance
  - 2. Tensions between federal initiatives and state law

**Panelists:** Timothy E. Hoeffner, Esq. (Moderator)  
John P. (Sean) Coffey, Esq.  
Daniel J. Kramer, Esq.  
Stephen A. Radin, Esq.  
Hon. Leo E. Strine, Jr.

10:50-11:05

Coffee Break

11:05-11:55

### IV. THE NEW WORLD OF NON-ISSUER DEFENDANTS

- A. Post-*Central Bank* developments on civil liability
  - 1. *Enron* and its progeny
  - 2. *Central Bank* developments in the Second Circuit and other circuits
  - 3. Focus on business partners, lenders and other providers under the SEC's civil aiding and abetting authority
- B. Recent developments in liability under Rules 10b-5(a) and (c)
  - 1. *Royal Ahold, In re Global Crossing* and other decisions
  - 2. SEC amicus positions

**Panelists:** Ira A. Schochet, Esq. (Moderator)  
Anthony J. Harwood, Esq.  
Jay W. Eisenhofer, Esq.  
Edward Labaton, Esq.  
Jay B. Kasner, Esq.

11:55-1:15 p.m. LUNCH (on your own)

1:15-2:05

### V. DEVELOPMENTS ON THE CRIMINAL SIDE

- A. The view from the regulator's standpoint and from the target's standpoint
  - 1. Waivers of attorney-client privilege as a condition of effective negotiations
- B. Penalties for inadequate cooperation
- C. Criminal prosecutions of violators
  - 1. Computer Associates/Kumar
  - 2. Merrill Lynch/Nigerian Barges
  - 3. The role of sentencing guidelines in corporate prosecutions
- D. Prosecutions and civil actions against "gatekeepers," including in-house counsel
- E. Ethics issues—who is the client?
- F. Implications of changes in the "know your customer" rules

**Panelists:** Meyer Eisenberg, Esq.  
Arthur D. Middlemiss, Esq.  
Peter K. Vigeland, Esq.  
Leslie R. Caldwell, Esq.  
Barry W. Rashkover, Esq.



2:05-2:20 Coffee/Soft Drink Break

2:20-3:10 VI. EVOLVING AND/OR UNSETTLED ISSUES

- A. Whither loss causation?
  - 1. *Dura Pharmaceuticals*
  - 2. Developments in the Second (*Lentell*) and other Circuits
- B. The viability of group pleading post-Reform Act
- C. Circuit splits and other recent developments in “safe harbor” and related defenses
- D. PSLRA removal and preemption
  - 1. Jockeying between federal and state claims—*WorldCom* and others
  - 2. Impact of *Dabit* decision (2d Cir.)
  - 3. Unique issues posed by 1933 Act claims
  - 4. State carve outs under the Class Action Fairness Act
- E. Institutional use of state court venues for non-class action claims
- F. Use of unidentified or “confidential” sources for pleading purposes
- G. Partial settlements and coming to grips with PSLRA’s judgment reduction provisions
  - 1. *Worldcom*
  - 2. *In re IPO Securities Litigation*

**Panelists: Douglas C. Conroy, Esq. (Moderator)**

**Gregory A. Markel, Esq.**

**Jeffrey A. Klaffer, Esq.**

**Carolyn G. Nussbaum, Esq.**

**Fred T. Isquith, Esq.**

3:10-4:00 VII. DIRECTORS AND OFFICERS LIABILITY INSURANCE

- A. How is the marketplace responding in terms of coverage being offered?
- B. What defenses to coverage are insurers actually pursuing?
  - 1. *Tyco, Health South* and other decisions
  - 2. To what extent can rescission claims be avoided/defeated by severability provisions?
  - 3. How does this impact plaintiff’s theories of recovery?
- C. Is coverage litigation by insurers increasing and is it successful?
  - 1. How have courts dealt with insurer’s claims for rescission?
- D. Personal contributions by directors on top of D & O insurance payments
  - 1. The role of institutional plaintiff’s in seeking individual contribution as a condition of settlement (*WorldCom/Enron*)

**Panelists: Steven P. Younger, Esq. (Moderator)**

**John P. (Sean) Coffey, Esq.**

**Anthony Tatulli (AIG)**

**Paul A. Ferrillo, Esq.**

**Jonathan Legge**

4:00 p.m. ADJOURNMENT

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