

APPROVED MINUTES

THE NEW YORK STATE BAR ASSOCIATION COMMERCIAL & FEDERAL LITIGATION SECTION EXECUTIVE COMMITTEE

Minutes of the Meeting of the Executive Committee of the Commercial & Federal Litigation Section held in accordance with the rules of the New York State Bar Association on Tuesday, November 10, 2015.

MEMBERS PRESENT

James M. Wicks, Chair
Mitch Katz, Vice Chair
Kayla Arias**
Brittany Aungier**
Michael Balestra**
Teresa Bennett
Daniel Berman**
Upnit Bhatti**
Roger Bradley**
Jeffrey Eaton**
Jonathan Fellows
Suzanne Galbato**
Chaim Jaffe**
Hon. Deborah Karalunas**
Liza Magley**
Scott Malouf**
Julian Modesti**
Allan Pierce**
Sandra Sabourin**
Hon. Glenn T. Suddaby*

MEMBERS PARTICIPATING BY PHONE

Mark Berman, Chair Elect
Jeremy Corapi, Secretary
Deborah Edelman, Treasurer
Benjamin Blum
Richard Dircks
Claire P. Gutekunst
Laurel R. Kretzing
Jeffrey J. Harradine
Anthony J. Harwood
Frank Maas
James Potter

**Stephen Roberts
Anne B. Sekel
Douglas T. Tabachnik**

**indicates guest speaker for the meeting*

*** indicates non-executive committee member guest*

The meeting came to order at 6:10 p.m.

Section Chair Jim Wicks' Welcome Remarks

Mr. Wicks welcomed the Executive Committee Members and guests of the Section to the meeting. He asked all Executive Committee Members attending the meeting by telephone to send Section Secretary Jeremy Corapi an email so that he could record their attendance for the meeting's minutes. Mr. Wicks also thanked Section Vice Chair Mitch Katz and the law firm of Menter, Rudin & Trivelpiece, P.C. for Hosting the meeting. He also thanked Judges Deborah Karalunas and Glenn T. Suddaby for attending.

Approval of October 2015 Executive Committee Meeting Minutes

The Minutes for the October 2015 Executive Committee Meeting were unanimously approved by all Executive Committee Members present without any changes.

Ethics and Professionalism Committee Report: Threatening Disciplinary Action Against Attorneys in New York (Final Vote)

Section Chair Jim Wicks thanked Ethics and Professionalism Committee Co-Chair Anne B. Sekel for presenting the report again. Mr. Wicks gave a brief background on the report. He then advised that the Executive Committee approved the report at the October Executive Committee Meeting, subject to minor changes. However, because there were more substantive changes made after the October Meeting, it was decided that a final vote at this meeting was appropriate.

Mr. Wicks then introduced Ms. Sekel to discuss the revisions to the report. Ms. Sekel noted that the report was deliberately neutral in tone, but the first sentence, which included a quote, was drafted in such a way that could be interpreted as the Executive Committee taking a position on the issues presented. Accordingly, the sentence was removed from the report to retain the neutral tone.

Ms. Sekel then introduced Ethics and Professionalism Committee Co-Chair Anthony J. Harwood to report on the second group of revisions to the report, which consisted of a listing of considerations in the event that a practitioner is threatened with the possibility of disciplinary action by another attorney in a civil matter. Mr. Harwood went through each of the six proposed considerations, from reporting the threat to the disciplinary committee, to reporting the threat to criminal authorities. Section Chair Mr. Wicks suggested a minor

revision to consideration number six to make it consistent with previous considerations and the tone of the report, such that it should state: “whether to report the threat to a criminal prosecutor’s office.”

Subject to Mr. Wick’s suggested minor change, all Executive Committee Members present voted in favor of adopting the report. Executive Committee Member Deborah Edelman abstained.

Section Chair Mr. Wicks recognized Ms. Sekel and Mr. Harwood and the Ethics and Professionalism Committee’s hard work on the report, and thanked Ms. Sekel and Mr. Harwood for their presentation. Mr. Harwood thanked Section Chair Mr. Wicks, who was formerly Co-Chair of the Ethics and Professionalism Committee, for taking up this issue early on and getting this report off the ground.

Reminder of 2016 Section Officer Nominations

Section Chair Mr. Wicks reminded Executive Committee Members that Section officer nominations are coming up and that Section members should email their 2016 Section officers nominations to him. Mr. Wicks encouraged people to run and/or make nominations.

Commercial Division Bench-Bar Programs

Section Vice Chair Mitch Katz reported on the Section’s past and upcoming Bench-Bar Programs.

Mr. Katz reported that the Section’s Rochester Bench-Bar Program was held on November 4, 2015. Mr. Katz reported that the program was well attended, with more than forty (40) attendees. Mr. Katz reported that Judge Rosenbaum was a pleasure to work with, and thanked Jeffrey Harradine for his work in putting the program together.

Mr. Katz reported that Jonathon Fellows, who put together the Onondaga Bench-Bar Program, as well as Judge Deborah Karalunas, who was gracious enough to volunteer her time and participate in the Onondaga Bench-Bar Program, were in attendance at the Section’s Executive Committee Meeting. Mr. Katz reported that Judge Karalunas was accepting of comments to her new Preliminary Conference Stipulation and Order. Judge Karalunas advised that she was rolling out her new Preliminary Conference Stipulation and Order, which encompasses the Commercial Division rule changes, as well as many of the suggestions and comments she received at the program.

Annual Meeting Update

Section Vice Chair Mitch Katz reported on the planning status of the Annual Meeting. Mr. Katz advised that the meeting would be held during the “big bar” week in New York City, on January 27, 2016. There would be three programs in the morning, as follows:

1. Psychology of Perception in Litigation, featuring three psychologists who will discuss what arbitrators, judges and jurors actually hear, as opposed to what attorneys think arbitrators, judges and jurors hear;
2. A 75 minute discussion led by Carla Miller focused on women in the commercial litigation world—where women find themselves in the legal profession; and
3. A panel of multiple judges.

Mr. Katz reported that Judge Abdus-Salaam will be the recipient of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation. Mr. Katz reported that Judge Abdus-Salaam keeps track of the woman's role in the legal profession and notes that she has not seen many women advocates before the Court of Appeals. Judge Karalunas noted that there were more female litigators currently in the room than male. Mr. Katz commented that the issue was not balanced across the state.

Spring Meeting Update

Section Vice Chair Mitch Katz reported that Section Chair-Elect Mark Berman would spearhead the Spring Meeting. Mr. Berman reported that the Spring Meeting would be held at the Major League Baseball Hall of Fame in Cooperstown, New York from May 13-15, 2016. Notices for the Spring Meeting will be distributed shortly.

Guest Speaker: Hon. Glenn T. Suddaby Chief U.S. District Judge, Northern District of New York

Section Chair Mr. Wicks introduced the meeting's guest speaker, the Hon. Glenn T. Suddaby. Mr. Wicks noted that Judge Suddaby began his practice as an Assistant District Attorney before entering private practice at the law firm of Menter, Rudin & Trivelpiece, P.C. Mr. Wicks noted that Judge Suddaby was then appointed Chief of Homicide for the District Attorney's Office, and subsequently was appointed U.S. Attorney for the Northern District of New York. Judge Suddaby was appointed to the bench in September 2008, and has since moved up to the esteemed position of Chief Judge for the Northern District of New York earlier this year.

Judge Suddaby began his remarks by referring to the debate often discussed between state and federal courts, and quipped that he strongly endorsed state courts and highly recommended that all cases be filed there. Judge Suddaby commented that the position was administratively demanding. By way of example, Judge Suddaby remarked that any time a judge wishes to alter chamber rules, he is required to vote on whether to endorse the change.

Judge Suddaby remarked that he was unsure what topics to discuss, but joked that he was relieved when Section Vice Chair Mitch Katz provided his law clerk with a very long list. Judge Suddaby stated his belief that he was preaching to the choir, and that the lawyers

who needed to hear his thoughts on the various topics suggested by Mr. Katz were not at the meeting, and do not participate in bar.

The first topic suggested by Mr. Katz was to discuss the issue of mind-numbing contracts, and what an attorney can do to make it easier for the judge. Judge Suddaby suggested that the attorney present the contract provisions in a way that was accessible to the court. Judge Suddaby explained that the briefing process is a way to tailor the court's view of the case. Judge Suddaby recommended that attorneys identify the key issues or contract provisions and present them in a way that permits the court to understand how they interact. Judge Suddaby also recommended hyperlinks to key contract provisions, stating that his law clerks want to send thank you notes to practitioners utilizing the hyperlinking technology.

The second topic discussed by Judge Suddaby was his position on oral argument. Judge Suddaby shared his experience with oral argument, stating that he previously embraced oral argument, as suggested by Judge McAvoy, to move cases, but he has since determined that oral argument requires more time and work for himself and his law clerks, and does not move cases. Judge Suddaby stated that requests for oral argument must be accompanied by a specific reason or justification. In response to Executive Committee Member inquiry, Judge Suddaby stated that he had requested oral argument in rare cases, and that he is amenable to argument via telephone in emergency situations.

Judge Suddaby then discussed his preferences in big paper cases, stating that he prefers to have paper and visual aids. Judge Suddaby acknowledged that many people are visual learners, and a good advocate will learn to balance the two. Judge Suddaby also explained that he goes through the questions he will ask at oral argument with his clerks.

The third topic Judge Suddaby discussed was his distaste for emergency requests for injunctive relief. Judge Suddaby shared his experience that this mechanism is the most abused motion practice he has seen since taking the bench. Judge Suddaby stated his belief that most practitioners do not know what the true purpose of an emergency injunction is, giving an example of a recent situation in which he granted an emergency injunction when an employee was walking out the door with proprietary information. Judge Suddaby explained that most of the applications he has seen do not require the emergency relief requested, and can simply be dealt with by expedited motion practice. Judge Suddaby also stated that judges are skeptical of these types of motions, and encouraged practitioners utilizing the mechanism to give notice, stating that judges are more receptive when the motion is made on notice.

Judge Suddaby next emphasized the need for parties to stipulate to the admissibility of evidence that is obviously admissible. Judge Suddaby explained that he tells every attorney at the pre-trial conference that it is their obligation to stipulate to evidence that is unquestionably admissible. Judge Suddaby stated his understanding that attorneys may have reservations on issues that may compromise the representation of a client, but explained that it is a waste of everyone's time to deal with foundation issues for obviously

admissible evidence. Judge Suddaby also encouraged partial stipulations to the admissibility of evidence, thereby isolating the issue for the judge.

Next, Judge Suddaby was asked whether he prefers to be buried with a complete copy of a deposition transcript or just the relevant parts. Judge Suddaby explained his experience that, when only a part of the transcript is submitted, opposing counsel inevitably claims that the remark quoted was taken out of context or is explained elsewhere in the transcript. Judge Suddaby recommended that the full copy of the transcript be submitted unless the parties stipulate to the relevant parts.

Judge Suddaby next emphasized certain Local Rules of Practice he believes are the most abused, ignored or misused. Judge Suddaby identified Local Rule 7.1(a)(1), stating that only 10% of Memorandums of Law include the required Table of Contents; 7.1(a)(2), stating that only 20% of the Affidavits he reviews do not contain legal arguments; 7.1(a)(3), stating that attorneys fail to provide the record citations required for the Statement of Material Facts; 7.1(a)(4), stating that he rarely receives a redline of the revisions on a motion to amend; 7.1(b)(3), stating that he often receives no correspondence from counsel opposing a motion, which is deemed consent to the relief sought; 7.1(c), stating that practitioners often try to provide two memorandums of law to avoid the issue of exceeding the page limit, and resulting in him picking one or the other to review.

Next, Judge Suddaby emphasized the usefulness of party consent in response to an inquiry regarding changes in the briefing schedule. Judge Suddaby explained that he is amenable to revisions to the briefing schedule, especially where all parties consent. Judge Suddaby is also amenable to an extension of the page limit, although he often does not give the requested number of additional pages where there is no consent or where he does not feel the issue requires an extension.

Finally, Judge Suddaby discussed bifurcation of contract cases, and stated that the issue is case specific, and often depends on whether a jury is involved. Judge Suddaby states that bifurcation may be appropriate if the jury will be overly influenced by evidence given in the liability portion of the trial. Judge Suddaby, as the trial judge, makes all determinations on bifurcation.

Judge Suddaby then fielded questions from the Executive Committee Members. When asked about the success of the mandatory mediation program in federal court, Judge Suddaby advised that it has been very successful so far, although his colleagues have differing views. Judge Suddaby believes that, if mediation is an effective tool to achieve a resolution, it is beneficial.

Judge Karalunas reflected on the first topic, contract provisions, and identified a problem shared by Judge Suddaby, that of being able to read the copies of the contracts that are provided to the Court. Judge Suddaby suggested that, to make it easier for the judge, the attorney submitting the illegible copy provide an "Attorney Certified" typed copy. Judge Suddaby also recommended that if a contract provision references other documents or

contract provisions, those referenced documents or contract provisions need to be submitted to the Court.

Judge Suddaby thanked the Executive Committee for asking him to come speak at the meeting, and for being the leaders in advocacy and approach to the law. Judge Suddaby shared a conversation early in his tenure as a District Judge in which he was told he would be shocked by the level of advocacy, and stated that he was shocked by the level of professionalism, the preparation, and the caring exhibited by litigants in federal court.

The meeting adjourned for a reception at 7:17 p.m.