

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 Wednesday, September 9, 2015.

MEMBERS PRESENT

**James M. Wicks, Chair
Jeremy Corapi, Secretary
Deborah Edelman, Treasurer
Mark Berman, Chair Elect**

**Gregory Arenson
James Bergin
Thomas C. Bivona
Hon. Melissa Crane
Hon. Stephen Crane*
Richard Dircks
Charles "Trip" Dorkey, III
Hon. Helen Freedman
Richard Friedman
Ignatius Grande
Anthony Harwood
Helene Hechtkopf
Jay Himes
Robert Holtzman
Michael Rakower
Stephen Roberts
Anne Sekel**

MEMBERS PARTICIPATING BY PHONE

**Teresa Bennett
Beth Gould**
Jeffrey Harradine
Mitch Katz, Vice Chair
Alan Mansfield
Hon. Karla Moskowitz
Carla Miller
Sandra Rampersaud
Douglas T. Tabachnik**

**indicates guest speaker for the meeting*

*** indicates non-member guest*

The Meeting came to order at 6:06 P.M.

Section Chair Jim Wicks' Welcome Remarks

Mr. Wicks welcomed the Executive Committee to the Meeting. Mr. Wicks thanked Beth Gould for being our NYSBA liaison and thanked her for her help thus far this year. Mr. Wicks also thanked the law firm of Kramer Levin Naftalis & Frankel LLP and Executive Committee Member and Kramer Levin Naftalis & Frankel LLP Partner Robert Holtzman for hosting the Section's meetings this year. Mr. Wicks also asked all Executive Committee Members participating in the Meeting by telephone to send Section Secretary Jeremy Corapi an email to let him know they are on the telephone line.

Approval of June 2015 Executive Committee Meeting Minutes

Executive Committee Member Michael Rakower suggested a change to Page 10 of the minutes pertaining to "Other Business." Mr. Rakower suggested that the phrase "supreme court" be changed to "U.S. Supreme Court." Subject to this change, the minutes for the June 2015 Executive Committee Meeting were unanimously approved by all Executive Committee Members present.

Guest Speaker: Hon. Stephen G. Crane (Ret.)

JAMS Member and Former Senior Associate Justice of the Appellate Division, Second Department and Justice of the Supreme Court, New York County, Commercial Division

Mr. Wicks introduced Judge Crane and reviewed his illustrious background both as a judge and JAMS member. Judge Crane explained that when he came to the Commercial Division in 1995, he wanted to know what mediators were doing that judges were not doing that led to such high settlement rates in mediated cases. Judge Crane explained that he and others in the Commercial Division convened committees to study how to structure a useful mediation program for the Commercial Division. Judge Crane explained that he also obtained a list of federal judges who were mediators for cases in the Southern District of New York as he thought it would be a wise idea to get S.D.N.Y mediators to participate in the Commercial Division's mediation program. Judge Crane explained that he is proud that the Commercial Division mediation program has been relatively successful from its outset.

Judge Crane shared a comical anecdote where a renowned litigator told Judge Crane she was unhappy using mediation in a particular case, but then was thrilled when the mediator was able to reach a mediated settlement. Judge Crane also discussed how the mediation program from the Commercial Division has since been utilized as a model for other practice

areas. As an example, Judge Crane explained that prominent attorneys of the personal injury bar inquired into the Commercial Division's mediation program and applied it to tort cases.

Judge Crane remarked that the best advocates and lawyers today need to have training not just in litigation, but also mediation. He explained that he felt it was a mistake to think mediation is nothing more than an extension of litigation. He advised that when he mediates a case he makes it clear that the mediation should be thought of as separate and different from the litigation. Judge Crane explained that you cannot win or lose in mediation and the parties and lawyers get control in mediation. This is a benefit that litigation does not provide (*i.e.*, the case's fate does not rest in the hands of the jury or judge).

Judge Crane explained that he has held several alternative dispute resolution positions in his career, including arbitrator, mediator, special master, and special referee. As a mediator, Judge Crane explained that he has had a tremendous number of commercial cases, including several of the Lehman Brothers bankruptcy cases as he is on the roster of mediators for those cases.

As for his mediation style, Judge Crane stated that when he starts off with the parties in a mediation, he expressly tells them this is not a litigation. In fact, he mentioned that he has a pin that he wears that says "mediate, don't litigate." Judge Crane explained that in his view, the mediator is not the settler. Rather, it is the parties' job to settle cases. Judge Crane advised that there is autonomy in mediation and that the parties' autonomy is paramount. He explained that he is first an evaluator when he is mediating a case and not a facilitator. However, as the mediation progresses, his role changes and he may take on a more facilitative role in the mediation.

Judge Crane also explained that when an attorney is representing a client in a mediation, the attorney should start out by explaining the party's bargaining position. In one mediation that was before him involving a complex software license dispute, Judge Crane recalled that the parties initially were bitter toward one another and swore that the parties' relationship could not be salvaged and that settlement could not be reached. By end of the day, settlement was obtained and the parties ended their dispute on amicable terms. Judge Crane explained that it is crucial to know beforehand who is participating in the mediation as well.

Judge Crane explained that other useful tools he uses as a mediator include taking attorneys out of the mediation room so that they are away from their clients and can speak more candidly with him. Judge Crane stated that as zealous advocates, attorneys often posture in front of clients. Judge Crane also will meet with only the clients away from the parties' attorneys if he thinks this will be helpful to the mediation.

Judge Crane then fielded questions from the Executive Committee Members.

Following Q&A, Judge Crane thanked the Executive Committee for having him and said that he appreciated being invited to speak at the first Executive Committee Meeting of the fall season.

Federal Procedure Committee Report: Rule 68 Report Addendum - Vote Held and Addendum Conditionally Approved

Stephen Roberts and Michael Rakower presented an addendum to the Federal Procedure Committee's Rule 68 Report that was previously approved at the May 2015 Executive Committee Meeting.

Mr. Roberts explained that since the Executive Committee approved the Report entitled "Rule 68 Offers of Judgment and Mootness, Especially for Collective of Class Actions," important developments have occurred that are likely to result in greater certainty regarding whether Rule 68 offers of judgment may be employed by defendants to moot the claims of individual plaintiffs who purport to assert claims on behalf of a class or collective.

Mr. Roberts made reference to the May 2015 Second Circuit case, *Tanasi v. New Alliance Bank*, Docket No. 14-1389, as well as the First Circuit case of *Bais Yaakov of Spring Valley v. Act, Inc.*, No. 14-1789, 2015 WL 4979406 (1st Cir. Aug. 21, 2015).

Most notably, Mr. Roberts pointed out that in May 2015, the Supreme Court granted certiorari in *Campbell-Ewald Co. v. Gomez*, No. 14-857, to address two (2) questions:

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.
2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

Mr. Roberts explained that in *Campbell-Ewald Co.*, the Ninth Circuit ruled that neither the plaintiff's individual claims nor class claims he asserted were rendered moot by an unaccepted offer of judgment. The U.S. Chamber and the Business roundtable filed a brief as *amici curiae* in support of the petition for certiorari.

Following Mr. Roberts' report on the Addendum, Executive Committee Member Charles "Trip" Dorkey, III pointed out that a recent Seventh Circuit decision not cited in the Addendum also recently came down that has bearing on this Report. Specifically, the Seventh Circuit in a decision written by Judge Easterbrook, overruled its own precedent and held that a defendant's offer of full compensation in an offer of judgment under Federal Rule of Civil Procedure 68 does not moot the litigation. Mr. Dorkey identified the case as *Chapman v. All-American Painting, Inc.* It was subsequently learned that the full and correct case name is *Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015)

In light of the Seventh Circuit's decision that was not identified in the Addendum, the Executive Committee debated how to proceed with the Addendum. Mr. Wicks initially proposed tabling any formal vote on the Addendum for the October 2015 Executive Committee Meeting so that the Addendum could be revised accordingly. Mr. Rakower then asked Mr. Wicks when the Federal Procedure Committee's Rule 68 Report was scheduled to appear in the *NY Litigator* and whether it was feasible to have the Report printed with the Addendum or a mention of the pending Addendum. Mr. Wicks then asked Executive Committee Member Teresa Bennett how to proceed with regard to the *NY Litigator*. It was determined that it was feasible to either have the Report printed with the Addendum or a mention of the pending Addendum, so long as the Federal Procedure Committee could get the updated Addendum to the *NY Litigator* within the next few weeks. Mr. Rakower noted that he thought this could be accomplished.

Mr. Wicks then asked Executive Committee Member Greg Arenson how to proceed with respect to the Addendum and whether it could be voted on and approved at this Executive Committee Meeting if it was agreed that the Seventh Circuit's *Chapman* decision would be added to the Addendum or if a vote had to be tabled until October. Mr. Rakower also noted that the validity of the Seventh Circuit's decision in *Chapman*, like all of the other circuit court decision's raised in the Addendum, are going to be determined by the U.S. Supreme Court in *Campbell-Ewald Co. v. Gomez*. Thus, this Addendum is essentially teeing up the issues that the U.S. Supreme Court will rule on. Therefore, there should not be a lot of overhaul needed to the Addendum such that it would be difficult to get the Addendum finalized and over to the *NY Litigator* within the next few weeks.

Accordingly, the Executive Committee Members agreed the Addendum could be put to a vote at this Executive Committee Meeting and that the Addendum, if approved, would be added as an appendix to the Federal Procedure Committee's Rule 68 Report that was approved in May 2015. Mr. Wicks then asked the Executive Committee if anyone wanted to move to adopt the Addendum as an appendix to the Federal Procedure Committee's Rule 68 Report, subject to the addition of a provision in the Addendum setting forth the outcome of the Seventh Circuit's decision in *Chapman*.

All Executive Committee members present voted in favor of adopting the Addendum as an appendix to the Federal Procedure Committee's Rule 68 Report, subject to the addition of a provision in the Addendum setting forth the outcome of the Seventh Circuit's decision in *Chapman*. Executive Committee Members the Hon. Melissa A. Crane, the Hon. Karla Moskowitz, and Deborah Edelman abstained.

Commercial Division Bench-Bar Programs

Section Chair Elect Mark Berman reported on the Section's upcoming Bench-Bar programs. Mr. Berman reported that the Syracuse Bench-Bar Program will take place on October 6, 2015, and that Judges Greenwood and Karalunas are going to participate. Mr. Berman reported that the Rochester Bench-Bar Program will take place on October 27, 2015, and that Judge Rosenbaum is going to participate. Mr. Berman reported that the Buffalo Bench-Bar Program will likely take place in the beginning of this December. The Section hopes to honor a long-

tenured court attorney who is retiring during the program. Mr. Berman reported that the date for the Albany Bench-Bar Program is still to be determined. Finally, Mr. Berman reported that it is possible that the New York City Bench-Bar Program will take place this fall, but that is only tentative and still in its planning stages.

Mr. Arenson then asked how the Section was promoting membership at these events? Beth Gould advised that the Section is reaching out to non-section member program attendees after the respective programs. Ms. Gould advised that the Section/NYSBA has sent out section offers via both email and regular mail following each program. Ms. Gould advised there has been limited success with this approach.

Section Membership Update and Membership Initiatives

Mr. Wicks and Mr. Berman reported on the Section's membership and initiatives the Section plans to undertake to boost membership. Mr. Wicks reported that membership is down in the Section and throughout NYSBA generally. Mr. Berman explained that we need to interface with law students and younger people. Ms. Gould advised that every law student at every law school in New York State is now entitled to free Bar Association membership. Upon joining, each student is automatically enrolled in the Young Lawyers Section for free and gets to choose one other section to join for free. Mr. Wicks noted that we need to capitalize on this and asked Ms. Gould whether other sections have capitalized on this opportunity? She confirmed that they have.

Mr. Wicks also reported that the Section has been working with the Young Lawyers Section to figure out how the two sections can partner to promote membership. Mr. Harwood noted that it would be a good idea to have a CLE program aimed at law students and younger attorneys.

Mr. Berman also reported that the Section's E-Discovery Committee and Internet/IP Committee are actively discussing an event aimed at younger attorneys and law students. Mr. Berman also advised that it would be beneficial to the Section's membership efforts if the Section could do something at the Legal Tech event. Executive Committee Member Ignatius Grande noted that the NYSBA always has a well-placed table at Legal Tech and it would be useful if the Section could have a similar set up. Mr. Berman also commented that hosting a webinar that is comprised of senior level associate panelists has really helped the Section develop young people, too.

Mr. Wicks also asked all Executive Committee Members, particularly those from "Big Law," to try to push membership on younger attorneys within their respective firms. Mark Berman noted that it should be each Executive Committee Member's goal to get a new member for the Section each month.

Executive Committee Member Jay Himes also asked whether the Section reduces its dues for young attorneys? Mr. Wicks and Ms. Gould confirmed that the Section does not reduce its dues for younger attorneys. Mr. Himes noted that other sections do this and that this Section should consider doing it as well. Mr. Dorkey also noted that we would add real

value for young attorneys if we provided job search services and the like to them. Mr. Dorkey stated that in his view, most young attorneys want to know how they are going to get their next job and move up the ladder.

Executive Committee Member Rich Friedman also pointed out that the Executive Committee Members could divide and conquer by going to local law schools and putting on presentations/CLEs to law students to obtain younger members.

Website - Section Committees Update

Executive Committee Member and Section Treasurer Deborah Edelman thanked the committee chairs for meeting with the Section's officers this summer. She advised that chairs should check their committees' respective portions of the NYSBA website to make sure the contact information and committee information is up to date and accurate. If it is not, she asked that committee chairs contact Section Secretary Jeremy Corapi so that the officers can correct the information.

Mr. Arenson then asked whether the Section had taken any action to update or launch the Section's "Communities" feature on the NYSBA website since the Section's June 2015 Executive Committee Meeting where a representative from the NYSBA came to speak to the Executive Committee about the feature. Mr. Wicks reported that the feature is not yet up and running and that the Section needs to take action to get this operational immediately. Mr. Grande proposed forming a sub-committee of section members that he would be a part of that would be responsible for gathering content for the feature. Mr. Grande also proposed that he would reach out to Scott Malouf to work with him on this.

Mr. Harwood also noted that content for the feature is key. He proposed having two (2) Executive Committee Members be assigned to blog on the feature each week. Essentially he suggested that we compile a list of all Executive Committee Members and each week two (2) different members would blog about a relevant topic/issue.

Mr. Rakower also suggested that the Section put together its own telephone hotline for law students and younger lawyer in their first few years of practice. Essentially, it would serve as a sounding board for legal issues, networking, and job related advice. Mr. Corapi then suggested making this a "virtual" hotline using the Communities feature.

Annual Meeting Update

Section Vice Chair Mitch Katz reported on the planning status of the Annual Meeting. Mr. Katz reported that there will be two (2) programs at the Annual Meeting. The first will be a panel discussion including three (3) Commercial Division Justices and three (3) Federal Judges. The panel will be moderated by Bob Haig. The second program is called the "Psychology of Perception." The panel will discuss and analyze what judges, jurors, and practitioners actually hear when a case is being tried. Dr. Richard Waites, renowned for his

studies in this area, is going to help form the panel. Dr. Waites has a J.D. and a Ph.D. in psychology.

Mr. Wicks also revealed that the Fuld Award Recipient for this year's Annual Meeting is Judge Sheila Abdus-Salaam. Mr. Wicks remarked that Judge Abdus-Salaam was flattered to have been chosen for the award. He also noted that she has been very supportive of the Section and that she is a great person.

Mr. Wicks also noted that the date of the Annual Meeting is January 27, 2016, and that the Section is looking for sponsors and that any ideas would be welcomed. It was also confirmed that it appears Advocates will be a sponsor of the Annual Meeting.

Publications

Mr. Wicks thanked Teresa Bennett for spearheading the *NY Litigator* for the past three (3) years. He revealed that the new editor will be Daniel Wiig. Mr. Wicks noted that the Section welcomes content for the *NY Litigator* and that it does not have to be a Section Report. Rather, it can be an article. Mr. Wicks also revealed that the Section is trying to rekindle its publishing relationship with St. John's University School of Law for. He also revealed that the Section will be moving ahead with efforts to publish and distribute the *NY Litigator* in electronic format over the next year or so.

Other Business

Mr. Berman reported on the development of an ongoing initiative that was raised at the Section's Former Chairs dinner in June to create greater female interest in the Section. Mr. Berman revealed that Executive Committee Member and Former Section Chair Judge Scheindlin has convened a meeting with Executive Committee Member and Former Section Chair Lauren Wachtler to discuss how the Section can get women more involved with the Section and in the courtroom.

The Meeting adjourned at 7:37 P.M.