

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, January 13, 2016.

MEMBERS PRESENT

**James M. Wicks, Chair
Mark Berman, Chair Elect
Deborah Edelman, Treasurer
Jeremy Corapi, Secretary
Gregory Arenson
Thomas Bivona
Carrie Cohen
Michael Cryan
Charles Dorkey, III
Hon. Helen Freedman
Stephen Ginsberg*
Claire Gutekunst
Anthony Harwood
Jay Himes
Jaclyn Grodin
Jonathan Lupkin
Kathy Kass
Laurel Kretzing
Dan Levitt
Hon. Andrea Masley
Hon. Frank Maas
Charles Moxley
Benjamin Nagin
Sophia Goring-Piard
Hon. Loretta Preska**
Michael Rakower
Stephen Roberts
Anne Sekel
Douglas Tabachnik
Daniel Wiig
Isaac Zaur**

MEMBERS PARTICIPATING BY PHONE

**Teresa Bennett
James Bergin
Benjamin Blum
Jonathan Fellows
Richard Friedman
Beth Gould*
Alan Mansfield
Carla Miller
Mitch Katz, Vice Chair
Courtney Rockett
Paul Sarkozi**

** indicates non-executive committee member guest*

***indicates guest speaker for the meeting and non-executive committee member guest*

The meeting came to order at 6:06 p.m.

Section Chair Jim Wicks' Welcome Remarks

Mr. Wicks welcomed the Executive Committee Members to the meeting. Mr. Wicks welcomed the meeting's guest speaker, the Hon. Loretta Preska, Chief Judge of the United States District Court for the Southern District of New York. Mr. Wicks noted that the Executive Committee was honored to have her as the guest speaker for 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.

Guest Speaker: Hon. Loretta A. Preska

Chief Judge of the United States District Court for the Southern District of New York

Judge Preska opened her remarks by thanking Mr. Wicks for inviting her to speak at the meeting.

Judge Preska provided the Executive Committee Members with a thorough update on the construction taking place on the federal court buildings in lower Manhattan at Foley Square. Judge Preska noted that it looks like the construction to the pavilion at 500 Pearl Street will likely be completed in February 2016. She explained that the lawyer entrance to the courthouse will be the Worth Street entrance. Judge Preska explained that all practicing lawyers should get their SDNY Identification Cards to make getting into court fast and easy. Judge Preska also explained that the Worth Street entrance to the courthouse will also be the entrance for disabled persons. Judge Preska explained that the Pearl Street entrance will be the employee entrance to the courthouse. She also stated that there will be four lines and four screening areas for the lawyers entrance on Worth Street.

Judge Preska stated that the original design for the 500 Pearl Street pavilion came from the architects of the courthouse and that the overall construction project is under budget which is good news. She then spoke at length about the sophisticated nature of certain parts of the construction being performed on the courthouse which are intended to prevent certain types of terrorist attacks.

As to the status of the SDNY judiciary, Judge Preska noted that the court was at full judicial staff, with the exception of Judge Crotty who took senior status recently. Judge Preska also explained that she recently swore in Judges McCarthy, Moses, and Caproni.

Judge Preska noted that civil filings are up about 10 percent and that there have been significant technology updates in the SDNY courtrooms. She also explained that the clerk's office is undergoing a significant technology upgrade so that filing documents will be more efficient and user friendly.

Judge Preska also discussed the SDNY's mediation program and a recently developed program that allows *pro se* litigants to obtain limited court appointed attorney representation for the discovery phase of cases. Judge Preska noted that this program was particularly good for young litigators who want to develop their discovery and deposition skills.

Judge Preska noted that the SDNY was treated very well in the recent federal budget in that it received \$6.8 billion. She noted, however, that the SDNY bankruptcy court is still overwhelmed and needs additional fiscal assistance. Judge Preska concluded her remarks about the SDNY by stating that her tenure as chief judge will come to an end on May 31, 2016. Judge Preska thanked the Executive Committee for its support over the years.

Judge Preska then fielded questions from the Executive Committee Members.

With regard to whether Judge Preska had any particular advice for seasoned attorneys she stated that an attorney always has to be sensitive to the jury and the judge. The attorney needs to focus on how to prove his or her case and really needs to pay attention to the jury. Judge Preska explained that an accomplished litigator has a "third eye" that can look at, and assess, the effect he or she is having on his or her audience. Judge Preska noted that in a jury trial, lawyers often do not do enough to take jurors through the elements of a case. She explained that these days, you have to be tech savvy or at least have someone on your trial team that is. Judge Preska noted that a lot of jurors are younger people and they will not understand the case unless they see it presented in a relevant and modern medium.

With regard to the question of whether jury trials are dead, Judge Preska remarked that to some extent that seems to be the case. However, she noted that she is hopeful that the new discovery rules will help resurrect the jury trial. Judge Preska stated that in her view one of the primary reasons cases rarely go to trial anymore is that clients cannot deal with the cost and aggravation of discovery. If the new discovery rules have the intended effect of creating proportionality in discovery this could change. Judge Preska noted, however, that it is too early to tell whether the new discovery rules will work effectively.

With regard to whether an attorney should cite the name of the judge who issued the decision when an attorney cites a given case in a brief or report, Judge Preska noted that she would not be offended if the judge's name was not cited. However, if it is an SDNY case that is being cited, Judge Preska always wants to know which judge wrote the decision.

With regard to speaking with jurors after cases, Judge Preska noted that she did not necessarily have a problem with this practice. She noted how fascinating it is to observe jurors both during and after trial. Judge Preska explained that it often surprises her what jurors focus on during trial. The one constant she sees with jurors, regardless of whether it is a civil or criminal case, is that jurors take their service very seriously. She recounted a story about a jury that underwent extensive deliberations in a case before her. When the case was over, one of the jurors explained that most of the jurors felt like when they were assigned to the jury in this particular case, they did not want to be involved in such a long process. However, the juror explained that during deliberations they all said how lucky they were to live in a country where common people have this kind of influence on the judicial process. Judge Preska also noted that one of the more recent challenges with jurors has been insulating them from the use and effect of social media. She explained that it is virtually impossible to prevent outside discovery about a case or the persons involved in a case in this day and age.

Last, Judge Preska noted that motions for Rule 11 sanctions have declined over the last decade. She recounted a case, however, involving extensive discovery issues and party non-compliance where she issued a decision on a motion that had the effect of awarding a sanction granting summary judgment on the issue of liability. Judge Preska noted that the take away from this story is to always make sure that as an attorney, you are dotting your "i's" and crossing your "t's."

Mr. Wicks thanked Judge Preska for supporting the Section during her tenure as chief judge and thanked her for her work in the Southern District over the years.

Approval of December 2015 Executive Committee Meeting Minutes

The Minutes for the December 2015 Executive Committee Meeting were unanimously approved by all Executive Committee Members present subject to Executive Committee Member Courtney Rockett's change that page 4 of the Minutes should be revised to reflect that during the December 2015 Executive Committee Meeting, Ms. Rockett suggested the term "cell phones" should not be removed from page 33 of the Social Media Committee's Report on Social Media Jury Instructions.

Federal Procedure Committee Report: Rule 19 Report (Vote Held and Report Approved)

Federal Procedure Committee Member Stephen Ginsberg presented the Federal Procedure Committee's Rule 19 Report. Mr. Ginsburg thanked the Executive Committee for giving him the opportunity to present the Report. Mr. Ginsburg explained that the genesis for the Report was that former Federal Procedure Committee Co-Chair James Parver recognized that there

was an apparent split in authority concerning the standard of review of Rule 19 motions. After the Federal Procedure Committee researched the issue, the Committee found that:

1. The 1st, 2nd, 4th, 5th and 11th Circuits applied an abuse of discretion standard to Rule 19(a) and (b) determinations.
2. The 8th Circuit applied an abuse of discretion standard to Rule 19(b), but had not decided what standard of review to apply to Rule 19(a) motions.
3. The 3rd Circuit also applied an abuse of discretion standard to Rule 19(b), but reviewed Rule 19(a) determinations de novo and fact finding issues for clear error.
4. The 6th Circuit applied an abuse of discretion standard to Rule 19(a) determinations, but de novo standard to Rule 19(b) determinations.
5. The 9th and 10th Circuits applied an abuse of discretion standard to Rule 19(a) and (b) decisions, unless the decision was based upon a legal conclusion, and then, in such case, the appellate standard applied is de novo.
6. The 7th Circuit had not adopted a standard of review.

Based upon the Federal Procedure Committee's findings, Mr. Ginsberg explained that the Committee thought that this topic was ripe for a report.

Mr. Ginsberg explained that the Committee's Report points out several notable things regarding Rule 19 motions and determinations, including that there is a trend towards application of an abuse of discretion standard in deciding these types of motions. Further, although certain circuits have not provided a rationale for such standard, certain other jurisdictions, including the 2nd Circuit, believe that the analysis required is a factually sensitive analysis and that district court judges should be provided with the flexibility and latitude in making a pragmatic determination. Additionally, even though there are nuances through the various courts of appeals (*e.g.*, the 9th and 10th Circuits review decisions based upon conclusions of law under a de novo standard), the nuances are without much significance since a reversible error occurs under either a de novo standard or an abuse of discretion standard where the district court applies the wrong law. Mr. Ginsberg also pointed out that there is an anomaly in the 6th Circuit in that it is the only circuit to apply a de novo standard of review to Rule 19(b) motions.

Mr. Ginsberg stated that the Report does not take a position on the appropriate standard to be applied. Rather, the Report is intended to provide practitioners with a useful guide for approaching Rule 19 motions and appeals.

Mr. Ginsberg then fielded comments on the Report from the Executive Committee Members.

Section Chair Mr. Wicks noted that at the end of the Report there should be a description of what the asterisks mean that follow the names of the Federal Procedure Committee Members

at the end of the Report (*i.e.*, who the principal authors of the Report are). Mr. Wicks also suggested that the last paragraph of the Report should be called “Conclusion,” instead of “Discussion.” It was also suggested by one of the Executive Committee Members that the Federal Procedure Committee should check with the Hon. Laura Taylor Swain to see if she wanted to abstain from being listed on the Report and consequently, have her name removed from the end of the final version of the Report where the Federal Procedure Committee Members are listed.

Subject to the changes identified by the Executive Committee Members, all Executive Committee Members present voted in favor of adopting the Report. Executive Committee Members Deborah Edelman and the Hon. Andrea Masley abstained.

Annual Meeting Update (Survey Reminder)

Section Vice Chair Mitch Katz reported on the planning status of the Annual Meeting. Mr. Katz reminded all Executive Committee Members to take the time to complete the survey that was emailed to them in connection with the Section’s Annual Meeting CLE Panel: *The Psychology of Perception in Litigation – What Do Arbitrators, Judges and Jurors Hear?*

Mr. Katz noted that completion of the survey is important as Cornell Law School Professor Valerie Hans will be reporting on the survey results at the Annual Meeting if the survey results are statistically significant. Mr. Katz stated that completion of the survey is also important to the Section’s goal of developing a meaningful relationship with Cornell Law School.

Mr. Katz also reminded the Executive Committee Members to sign up for the Annual Meeting’s CLE programs and luncheon if they have not already done so. Mr. Katz stated that if law firms of Executive Committee Members intend to buy tables for the Annual Meeting, they should send in their registration forms as soon as possible as spaces are filling up. Mr. Katz also stated that several judges have indicated that they plan on attending the Annual Meeting and that the Annual Meeting should be a great event featuring interesting CLE programs and the presentation of the Fuld Award to the Hon. Sheila Abdus-Salaam.

Report on Federal District Programs

Section Chair-Elect Mark Berman reported on the Section’s use of its budget monies to support the four federal New York districts in their efforts to put on useful programs and events. Mr. Berman made reference to the Section’s initiative created by previous Section Chair Paul Sarkozi, the Excellence in Federal Business Litigation Initiative. Mr. Berman reported that each of the four (4) federal New York districts will receive \$10,000.00 from the Section to put on programs and/or events. Mr. Berman noted that the Section’s officers have contacted each of the districts to remind them that the Section has this money earmarked for their use. Mr. Berman explained that all of districts seem to have not focused on using this money to date, so the Section is hoping that in the next three (3) to six (6) months each district will put together a platform to use the money. Mr. Berman stated

that the response from each district has been positive and that he is optimistic each district will use their money in a meaningful manner.

Membership Report

Section Chair Mr. Wicks reported on the Section's membership. He noted that since Summer 2015, Section membership has increased by 121 members, which is approximately a five percent (5%) increase. Mr. Wicks stated that the Section's Bench-Bar programs have really helped in achieving the goal to obtain new Section members from throughout New York State.

Former Section Chair and Executive Committee Member Gregory Arenson noted that the membership count started again on January 1, 2016, so the Section may not yet have obtained any new members for this year. NYSBA Section Liaison Beth Gould and Executive Committee Member and NYSBA President-Elect Claire Gutekunst noted that if a member registered for the Section in the last three (3) months, it counts for purposes of the Section's 2016 membership figures.

It was agreed by the Executive Committee Members that the Section should send a membership renewal reminder to all Section members following the Annual Meeting on January 27, 2016.

Spring Meeting Update

Section Chair-Elect Mr. Berman provided the Executive Committee Members with an update on the Section's Spring Meeting. Mr. Berman noted that the meeting will take place on May 13-15, 2016 in Cooperstown, New York. Mr. Berman noted that there will definitely be four (4) CLE programs, and possibly five (5). He also explained that no award recipients or speakers have been named yet. Mr. Berman noted that there would most likely be a CLE program on (1) the antitrust exemption in Major League Baseball; (2) Cost effective e-discovery; and (3) the CPLR. He also noted that there might be a shorter CLE program on how to use social media effectively for marketing purposes. Mr. Berman noted that the meeting's Friday night dinner will take place at the Baseball Hall of Fame.

Other Business

Executive Committee Member Carla Miller reported on the Section's Smooth Moves program. Ms. Miller asked all Executive Committee Members to please mark their calendars as the 10th Anniversary Smooth Moves program will take place on April 19, 2016, from 4:00 p.m. – 7:30 p.m. at the Lincoln Center for the Performing Arts, Kaplan Penthouse, the Rose Building, 165 W. 65th Street, 10th Floor, New York, New York. Ms. Miller stated that she was proud to announce that the Section will present the Hon. George Bundy Smith Pioneer Award and Lifetime Achievement Award to the Hon. Zachary Carter at the event. She also stated that rather than do a traditional structured CLE program at the event, the event will likely feature a conversation between a moderator and the Hon. Zachary Carter.

Executive Committee Member and Section Nomination Committee Co-Chair Carrie Cohen reported on the results of the Section's officer nominations for the upcoming year. Ms. Cohen stated that the Section's officers for 2016-2017 shall be as follows:

- Section Chair, Mark Berman
- Chair-Elect, Mitch Katz
- Vice Chair, Robert Holtzman
- Secretary, Jamie Sinclair
- Treasurer, Deborah Edelman

Delegates to the House of Delegates for 2016-2017 shall be:

- Jim Wicks
- Gregory Arenson
- Mark Berman
- Paul Sarkozi (alternative delegate)

Executive Committee Member and Federal Procedure Committee Co-Chair Michael Rakower reported that he, along with the Hon. Frank Maas, and Professor Alexander Reinert from Cardozo Law School will be putting on a webinar on February 10, 2016 about the recent federal rule changes regarding discovery proportionality. The webinar is intended to be casual and informative, so it is free to Section members and there is no CLE credit being given for it.

Section Treasurer Deborah Edelman reminded Executive Committee Members that if they think webinars would be good for their respective Section committees, these are something the Section encourages as they attract a lot of people.

Executive Committee Member and Arbitration and ADR Committee Co-Chair Charles Moxley reminded the Section's Executive Committee Members that on February 24, 2016 at 6:00 p.m. the Arbitration and ADR Committee will be co-hosting an event at the American Arbitration Association in Manhattan aimed at the 10 most important things for counsel and arbitrators to know in arbitration. Mr. Moxley also noted that the new co-chair of the Section's Arbitration and ADR committee is Jeff Zaino, who is a vice president of the American Arbitration Association.

Section Chair Mr. Wicks reminded the Executive Committee Members that the next Executive Committee Meeting will be held on February 9, 2016.

The meeting adjourned at 7:27 p.m.