

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

10th Anniversary of the Commercial Division

Ten years ago, Chief Judge Judith S. Kaye established the Commercial Division of the N.Y.S. Supreme Court with parts in New York and Monroe Counties. In the years that have followed, Commercial Divisions have spread to six other counties and have fundamentally changed the approach taken to commercial litigation in our State courts.



Stephen P. Younger

The idea behind the Commercial Division had its genesis in a report issued by our Section in January 1995 under the leadership of then Chair Mark H. Alcott. The Section’s report identified various reasons for creating a separate division of the New York courts to hear commercial cases, including New York’s role as a center of commerce, a role that our Section believed would be enhanced by having a commercial court, and the unique attributes of commercial cases which warrant specialized judicial treatment, particularly in light of their complexity.

Since its founding, the Commercial Division has made a major impact on the litigation of commercial cases. The Division has resolved numerous important commercial cases, helping to develop the fabric of our State’s commercial law. Commercial litigators have experienced the application of specialized judicial expertise to their cases. Efficient case management has been enhanced by the level of attention that the Commercial Division has been able to devote to its caseload. The court has used technology to help handle its caseload effectively and to make it easier for lawyers to liti-

gate in the Division. And ADR programs have been launched which have provided additional resources to help settle commercial cases.

As a result, commercial litigators now have an attractive alternative to federal court in which to litigate their cases. Our Section has been pleased to partner with the Unified Court System in the evolution of the Commercial Division, and we are quite proud of its successes.

In honor of this anniversary, at our Annual Meeting the Section will be presenting its annual Chief Judge Stanley Fuld Award to the entire Commercial Division

Inside

Securities Insight for Attorneys	
Monte-Carlo Analysis: A Tool for Evaluating Investment Returns	3
(By Steve Pomerantz)	
Court of Appeals Update: New Rules of Practice	7
(By David H. Tennant)	
CPLR Amendments	
2005 Legislative Session (Chapters 1-753)	8
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	9
Newsflash: What’s Happening in the Section	
Section’s 2006 Annual Meeting	10
Spring Meeting on May 5-7, 2006 at Lincoln Center	10
Commercial Division Tenth Anniversary Reception	10
Section Forms Appeals Task Force	11
Notes of the Section’s Executive Committee Meetings	12

bench. Chief Judge Fuld made numerous contributions to the development of commercial law in New York. It is thus quite fitting that we bestow this award on the jurists who have made the Commercial Division a success. We hope as many of you as possible will be able to join us for this important occasion.

Nonetheless, our work is not done. Our Section has been monitoring the evolution of rules for the Commercial Division. Uniform statewide rules have been proposed that include guidelines for determining the types of cases that the Commercial Division will accept. However, these rules have yet to be implemented. Our Section believes that it would be helpful for commercial litigators to have a consistent set of rules to draw upon in litigating commercial cases, and we will keep advocating for the adoption of such rules.

Last year, our Section identified delays in the resolution of motions in certain parts of the Commercial Division resulting from the absence of sufficient resources to review motions. In response to this problem, the Com-

mercial Division for New York County developed an innovative clerkship program that is designed to bring additional resources to the review of commercial motions. We will continue to review this issue to make sure that commercial cases are not subject to undue delays as a result of motion practice.

Finally, we believe that it is just as important that commercial cases be handled as efficiently and effectively as possible when they are taken up on appeal. For this reason, we have formed a blue-ribbon Task Force on State Court Appeals which will examine how commercial appeals are being processed and propose methods for improving the appellate process in New York.

Please join me in congratulating the Commercial Division on the successes it has built over the last ten years while we look forward to many more years of building on these successes.

Stephen P. Younger

Available on the Web
NYLitigator* and *Commercial and Federal Litigation Section Newsletter
www.nysba.org/comfed



http://www.

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. Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, 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.

Securities Insight for Attorneys

Monte-Carlo Analysis: A Tool for Evaluating Investment Returns

By Steve Pomerantz

Monte-Carlo is a statistical technique that is very useful in its application to a wide variety of problems, all of which involve a sense of uncertainty in their outcome. This form of analysis allows us to identify probabilities that are associated with those outcomes that may be of interest. It is important to recognize that certain transactions and analyses can not even be understood outside of the context of Monte-Carlo. Even for those situations that do not explicitly require this type of analysis, Monte-Carlo contributes enormously to one's understanding and ultimately to the decision-making process. Our primary interest here is in applying this type of analysis to situations involving investment decisions.

In particular, options and other derivatives are complicated financial transactions, each contract with its own nuance in terms of how they will affect an investment's performance or even whether or not the transaction is entered into on fair and reasonable terms.

For example, recent litigation surrounding certain options and derivative-related transactions within tax shelters involves a discussion on whether or not particular investments possess a "reasonable chance of earning a reasonable profit," as required by tax codes. While Monte-Carlo does not offer a definition of what reasonable profit means it allows one to quantify the likelihood of profit as well as the magnitude of those profits.

As another example, consider strategies that have been used to manage concentrated stock positions. How should one evaluate the relative merits of holding a large stock position, partially selling some of the stock or engaging in some type of hedging strategy be it a cost-less collar or a pre-paid forward transaction?

In addition to offering insight on investment potential, Monte-Carlo analysis provides an alternative picture of investment risk by providing different information than the standard notion of investment risk, or standard deviation. Options can be used to hedge investments but they can also be used to create additional leverage within an investment structure. Monte-Carlo is a very effective tool in identifying if a portfolio or transaction contains more or less risk than initially thought.

While standard deviation is certainly the most popular measure of risk, there is plenty we can learn about an investment by using other methods to examine possible returns. In this article we illustrate how Monte-Carlo can be used to gain insight on the qualitative behavior of an investment by identifying some of the non-traditional measures of investment performance.

While measures like expected return and volatility are very common, they offer only limited insight on investment possibilities.

As a simple example, consider the following. Suppose we have three different investments each held over a 3-month period with three equally likely outcomes for the three scenarios listed in Table 1 below.

Table 1

	Investment A	Investment B	Investment C
Scenario 1	24%	28%	14%
Scenario 2	0%	-14%	14%
Scenario 3	-24%	-14%	-28%

The traditional measures of investment return and risk will provide only limited insight. Each of these investments has an expected return of 0%, and a risk as measured by the standard deviation of returns of 20%. Yet measured by other objective investment measures we can see a different picture as Table 2 illustrates:

Table 2

	Investment A	Investment B	Investment C
Probability of Positive Return	1/3	2/3	1/3
Probability of Zero Return	1/3	0	0
Probability of Negative Return	1/3	1/3	2/3

For an investor that is averse to negative returns, Investment C is the most risky, in fact twice as risky as the other two possibilities, though traditional risk measures would not identify this.

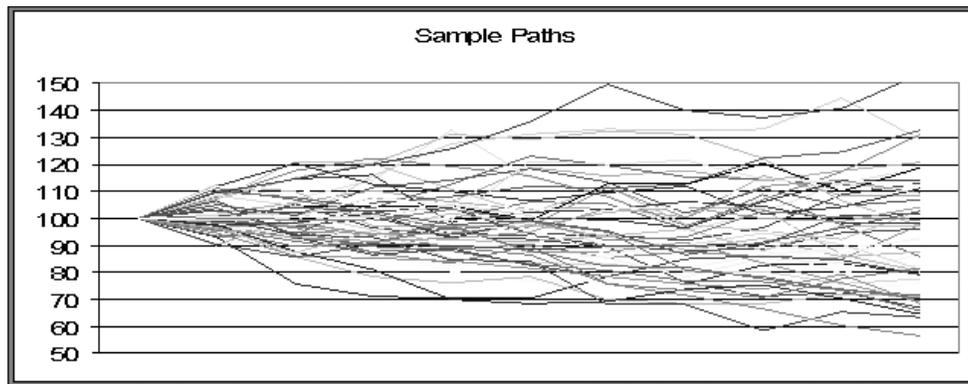
Monte-Carlo analysis provides a very effective way to picture the range of possible investment outcomes. This technique is also very useful because it allows one to analyze not just option transactions, but much more complicated transactions as well. The general techniques can be applied to a wide array of security transactions.

For example, the same analysis that is applied to a simple stock investment can be applied to very complicated "exotic" option investments, such as those embedded in recent tax shelter products.

The basic idea of Monte-Carlo is to randomly sample stock prices through the holding period of an investment and observe exactly what cash flows occur. As we choose more and more sample paths, a distribution begins to appear illustrating the range and frequency of possible outcomes for the investment. In this manner, we can create a probability distribution of outcomes rather than just providing descriptive statistics, such as expected return or standard deviation.

The important part of this technique is in selecting the paths in the simulation. In other words, what constitutes an appropriate mechanism of selecting the paths from which to determine the distribution of likely results? The standard approach in securities pricing is to use the assumptions that are embedded in the Black-

Table 3



Scholes methodology which assumes that stock returns follow a normal distribution, with an expected return equal to the prevailing risk-free (treasury) rate and a standard deviation that can be calculated

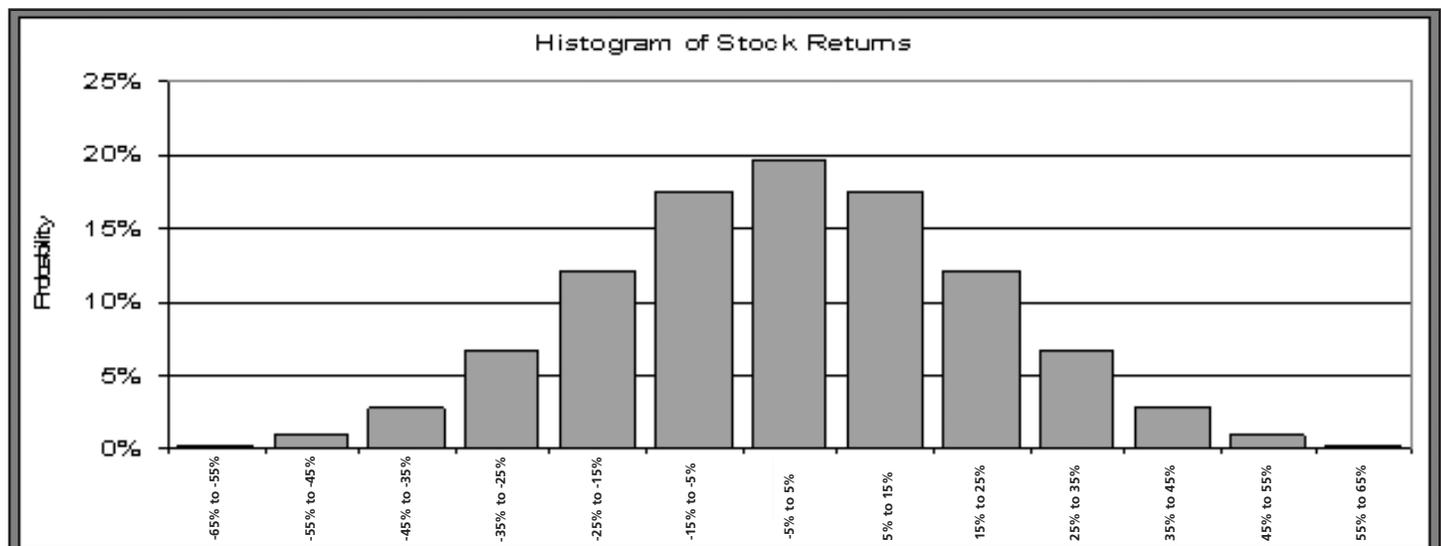
from the movements of the stock or stocks underlying the subject investments. While other applications of Monte-Carlo will rely on different types of probability distributions and parameters, the choices stated above are rather standard throughout the financial industry.

Table 3 illustrates what a representative set of paths would look like using this approach. Each path follows a random path for some specified period of time, all starting at the same point. The dispersion of terminal prices is governed by the choice of standard deviation that is used in the Monte-Carlo process.

On the final date, the stock prices form the familiar picture shown below in Table 4. Extreme returns, both positive and negative, are less likely, while returns closer to zero are the most likely outcomes.

In addition to displaying the data as a histogram of return possibilities, we can also illustrate the cumulative distribution of returns for the simple investment of purchasing a single stock. This is similar to Investment A mentioned previously, because the investment returns are symmetric.

Table 4



Several features of this investment can be read from the graph in Table 5. The 50th percentile, or median, investment return is 0%, and extreme returns are -60% and 60%.

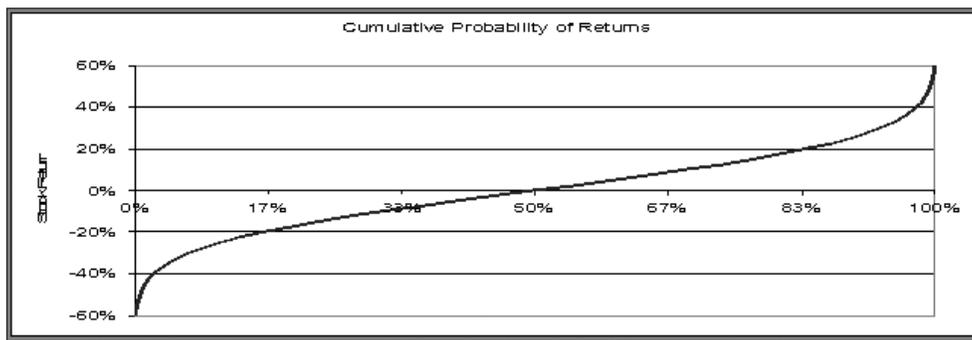
Additionally, the inner two-thirds of the investment, measured from the 17th to 83rd percentile, is between -20% and 20%. These values are a result of the assumptions that were used in generating the paths for the simulation.

We can generate similar analyses for the most complicated of investment strategies as well, but for now let's consider a simple option strategy.

Rather than investing \$100 in a stock which has the outcome illustrated above, suppose one were to purchase a certain amount of at-the-money call options on that stock, with a three-month

maturity. Assume that \$14 was invested in those options and that the remaining \$86 was held in cash. The cumulative return as illustrated in Table 6 is compared with the stock investment as well. In this manner, we can view the investment profile of both investments at the same time and visualize their respective properties. We can see how often the option strategy under performs the stock investment and by how much. We

Table 5



investment like Investment B, where the strategy will lose money if the stock declines or remains unchanged, but can have significant upside if the stock appreciates.

As the graph illustrates, there is a 67% chance that the return will be less than zero, in other words that the investor will not receive back the original investment. But there is also a 20% chance that the stock will decline

and that a simple stock purchase will under perform the downside protected call strategy.

As another example, suppose we consider a strategy where the call option is sold in exchange for a premium of \$14. If the stock

declines or remains unchanged, then the premium is kept for an enhanced return. If the stock appreciates by too much then the option will go in-the-money and there will be a payment required of the investor, which may be quite large relative to the premium received.

This is analogous to Investment C and is represented in Table 7. This graph illustrates that the probability that the investment return is negative is only 17%, yet the upside is significantly limited.

Table 6

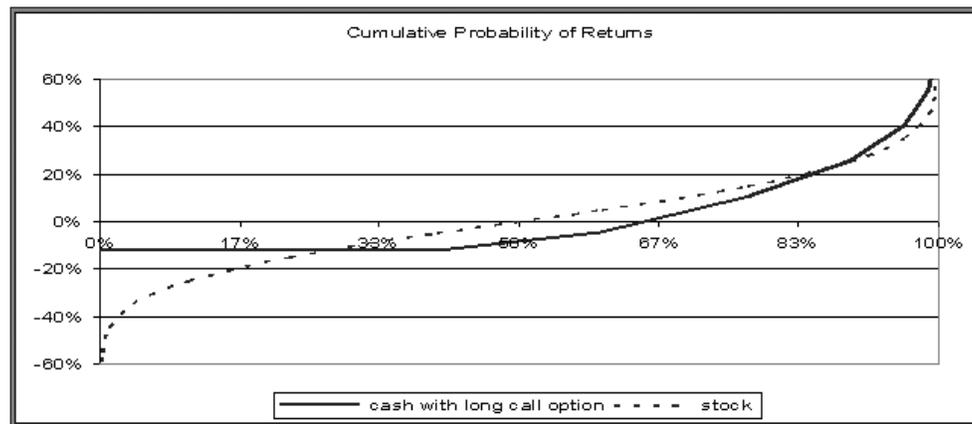
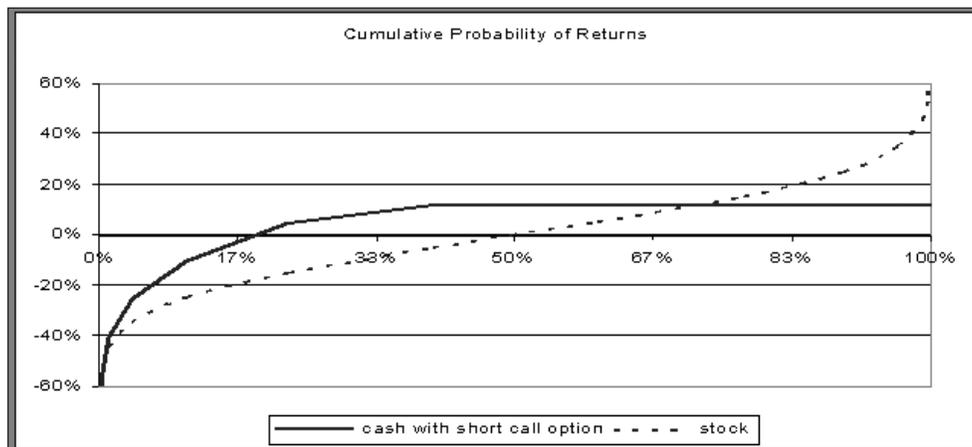


Table 7



And finally, Table 8 illustrates each of these strategies simultaneously to highlight how different they are. It is important to recognize, however, that each of these strategies has an expected return of 0% and a standard deviation, or risk, of 20%, yet clearly there are differences in both their quantitative and qualitative behaviors.

By way of comparison Table 9 illustrates the traditional payoff diagrams for these three strategies. While the shape of each curve is similar, the use of Monte-Carlo provides not just a sense of possible returns but also the likelihood of each outcome.

The traditional types of diagrams like those above provide directional information as to how investments perform if the stock goes up or down. Monte-Carlo does

Table 8

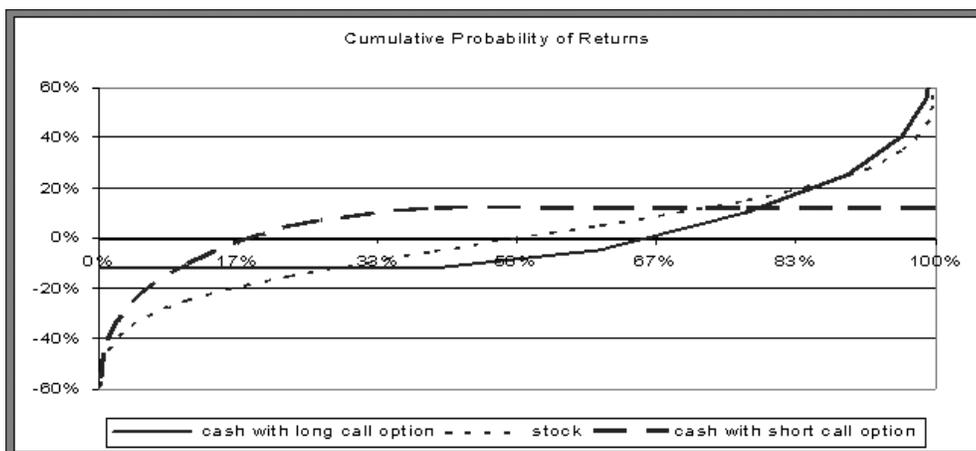
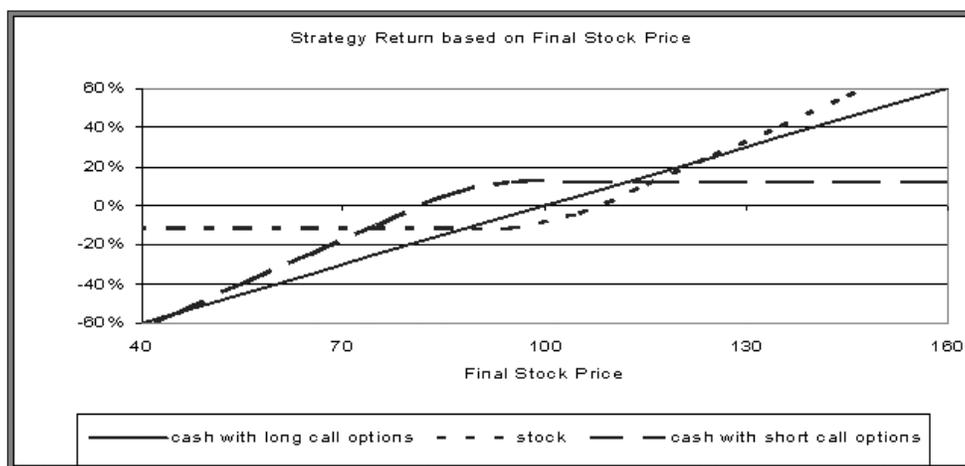


Table 9



not provide this analysis directly and so serves best to complement these more traditional methods of analysis.

What is presented with Monte-Carlo analysis is a complementary understanding of an investment's likely range of returns as well as extreme possibilities. Within litigation, this type of analysis is useful in providing as complete a picture as possible for both the quantitative and qualitative risks and opportunities embedded in an investment.

Steve Pomerantz, LLC provides economic consulting and litigation support in the areas of securities valuation, investment suitability, and investment management performance. Dr. Pomerantz can be reached at 609.921.7545 or steve@stevepomerantz.com.

Court of Appeals Update: New Rules of Practice

By David H. Tennant

The New York Court of Appeals has substantially revised its rules of practice (22 NYC part 500), effective September 1, 2005. The revised rules, along with an official commentary comparing the old and new rules, are available on the Court's web site (www.nycourts.gov/courts/appeals). The Clerk's Office is available to answer questions about the Court's rules of practice as well.

Questions about motions: 518-455-7705
(Heather Davis, Esq.)

Questions about
civil appeals: 518-455-7701
(Susan Dautel, Esq.)
518-455-7702
(James Costello, Esq.)

Clerk's Office main number: 518-455-7700

The notable changes for civil appeals are as follows:

- The time for perfecting the appeal has been reduced by 20 days. Previously, the appellant had 80 days to perfect the appeal; the new rules give appellant 60 days. If the appeal is not perfected within 60 days, the Court will issue an order dismissing the appeal (as it did at the old 80-day mark) (See Rule 500.12(b)). Appellant may still request an extension, in keeping with the Court's prior practice.
- The Court now issues a case-specific scheduling letter to set filing dates for all appeal papers. This changes the prior practice, which utilized automatic filing dates (See Rule 500.12(a)). The court issues the scheduling letter after the appellant files a "Preliminary Appeal Statement" (see below).
- The "Preliminary Appeal Statement" replaces the old jurisdictional statement. The "Preliminary

Appeal Statement" must be filed within 10 days after filing the notice of appeal or entry of the order granting a motion for leave to appeal. The "Preliminary Appeal Statement" is a court-pro-mulgated form that is available on the web site. It solicits specific information about the appeal, including the timeliness of the appeal (See Rule 500.9).

- The 20-day automatic extension for filing briefs has been eliminated, except for reply briefs (See old Rule 500.9). The party may still request additional time by telephone, in keeping with prior practice.
- The required number of briefs (and record material) has been increased from 20 to 25 (See Rule 500.12).
- Typeface and font requirements now match those recently adopted by the Appellate Division Departments, although the Court of Appeals still has no word count or page limitations for briefs (See Rule 500.1(e)).
- A party seeking amicus relief must file a motion so that it is heard no later than the Court session prior to session in which argument is scheduled (See Rule 500.23). In practice, given the short interval between commencement of the appeal and argument, an amicus needs to file its motion quickly.

For further information please see the special links under New Rules of Practice Effective September 1, 2005, at the bottom of the Court's web page.

David H. Tennant is Co-Chair of the Section's Appellate Practice Committee and a partner in Nixon Peabody LLP, Rochester.



**Catch Us on the Web at
WWW.NYSBA.ORG/COMFED**

CPLR Amendments

2005 Legislative Session (Chapters 1-753)

(Chapters 243, 434, 438, 446, 499, 553, 704, 711, 723, 727, 728, 746 are not yet available.)

CPLR §	Chapter (§)	Change	Eff. Date
304	504	Extends to Erie, Niagara, Broome, Essex, Onondaga, & Sullivan counties experimental program for filing of papers in certain cases by electronic means; extends expiration date of program to 9/1/09	8/16/05
1101(d), (f)	56(18)	Extends expiration of amendments' provisions relating to inmates until 9/1/07	4/1/05
1101(e)	3 (Part A, 64)	Adds attorney certification in family court cases	12/21/05
1602(13) [new]	394(12)	Adds exemption for certain persons convicted of violating new laws relating to manufacture of methamphetamine	10/1/05
2103(b)(5), (7)	504	Extends to Erie, Niagara, Broome, Essex, Onondaga, & Sullivan counties experimental program for filing of papers in certain cases by electronic means; extends expiration date of program to 9/1/09	8/16/05
3211(e)	616	Eliminates requirements for motions for leave to replead	1/1/06 ¹
4518(a)	741(1)	Corrects cross-reference to State Technology Law	10/18/05
5206(a), (d), (e)	623	Increases homestead exemption to \$50,000	8/30/05
5521(b)	3 (Part A, 65)	Eliminates the necessity of a motion for preferences for appeals in certain family court cases and certain cases involving guardianship or custody of children	12/21/05
6515	387(1)	Changes action "to foreclosure a mortgage" to "foreclosure action" as defined in CPLR 6516(b)	8/2/05
6516 [new]	387(2)	Provides for successive notices of pendency	8/2/05
7502(c)	703	Extends provisions for provisional remedies to international commercial arbitrations held in New York and provides for expiration of order (and attorney's fees) if an arbitration is not commenced within 30 days	10/4/05
8023	457(6)	Repeals section 8023 (replaced by amendment to Jud. Law § 212(2)(j) authorizing payment of court fees, including administrative fee, by credit card)	8/9/05 (expires 8/9/10)

Notes: (1) Sections 400, 409, and 411 of the NYC Civil Court Act, Uniform District Court Act, and Uniform City Court Act have been amended, and a new section 412 added, to require commencement of an action or special proceeding by filing rather than by service. 2005 N.Y. Laws ch. 452, effective 9/8/05. (2) A new section 399-cc of the Gen. Bus. Law has been added to impose responsibility for payment of fees for stenographic services and transcripts upon the attorney who orders them. 2005 N.Y. Laws ch. 678, effective 11/15/05.

Endnote

1. Applies only to actions and proceedings commenced on or after effective date.

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



**ADVANCE YOUR
CAREER.**

NYSBA Annual Meeting 2006

Save the Dates

**2006 New York State Bar Association
Annual Meeting**

January 23-28, 2006

**New York Marriott Marquis
1535 Broadway, New York City**

**Commercial and Federal Litigation Section Meeting
Wednesday, January 25
8:00 a.m. - 5:00 p.m.**

Online Registration: www.nysba.org/annualmeeting2006



Section's 2006 Annual Meeting

The Section's 2006 Annual Meeting will be held on January 25, 2006, from 8:00 a.m. to 5:00 p.m., at the Marriott Marquis in Times Square and promises to be another spectacular event. The morning program will focus on ethical issues, with two panel presentations. The first panel will discuss ethical considerations that arise in government investigations, and the second panel will provide a view from the bench and bar on various ethical issues that arise in litigation. In the afternoon, the Section is delighted to be co-sponsoring the Presidential Summit, hosted by State Bar President A. Vincent Buzard.

In honor of the tenth anniversary of the establishment of the Commercial Division, the Section will present the Stanley H. Fuld Award to all the sitting Judges of the Commercial Division. The Award, named after the late Chief Judge of the New York Court of Appeals, recognizes outstanding contributions to commercial law and litigation. Chief Judge Fuld made a tremendous impact on the development of commercial law in New York, so it is especially fitting that the Section will bestow this Award on the entire Commercial Division bench. Robert L. Haig, former Section Chair and one of the leaders in the movement to establish the Commercial Division, has agreed to present the award, and the Section is honored that Chief Judge Judith S. Kaye has agreed to accept the award on behalf of the Commercial Division.

Registration materials are available at www.nysba.org.

* * *

Save the Date: Spring Meeting on May 5-7, 2006, at Lincoln Center

The Section's Spring Meeting will take place on May 5-7, 2006. Section Chair-Elect and Program Chair Lesley Rosenthal has reserved select venues at Lincoln Center for the Meeting's programs and events. This year marks the first time the Section holds its spring meeting in New York City.

The 2006 recipient of the Robert L. Haig Award and keynote speaker for Saturday evening, May 6, will be Chief Judge John M. Walker, Jr. of the United States Court of Appeals for the Second Circuit.

Other details of the program will be announced shortly. Section members willing to help organize the Meeting are most welcome.

* * *

Commercial Division Tenth Anniversary Reception

On November 21, 2005, the Commercial and Federal Litigation Section celebrated the tenth anniversary of the Commercial Division with a reception at the Walter Reade Theater at Lincoln Center for the Performing Arts. Chief Judge Judith Kaye of the New York Court of Appeals and Louise M. Parent, General Counsel of American Express, were the keynote speakers for the evening. Also speaking at the event was State Bar President-elect Mark H. Alcott, who was Section Chair at the time of the Section's Report that recommended the establishment of the Commercial Division. Attendees included Chief Administrative Judge Jonathan Lippman, Associate Judges of the New York Court of Appeals, Justices of the Appellate Divisions, and the Commercial Division Justices, as well as representatives of major New York-based corporations. The program focused on the history of the Commercial Division and the contributions it has made to the practice of commercial law in New York State. The formal program was preceded and followed by a reception in which attendees were able to meet many of the attending judges.

The Section wishes to thank Morrison & Foerster LLP, Flemming Zulack Williamson Zauderer LLP, Montclare & Wachtler, and Patterson Belknap Webb & Tyler LLP for their generous support, which helped defray the costs of the event.

* * *

Section Forms Appeals Task Force

The Commercial and Federal Litigation Section has formed a Special Task Force on State Court Appeals to review how commercial appeals are handled in New York State courts. The task force will recommend measures to help ensure that New York continues to be a premier jurisdiction for the development of commercial law. The Task Force will be Chaired by Preeta Bansal, a partner in Skadden Arps Slate Meagher & Flom LLP, who formerly served as Solicitor General of New York State.

A decade ago, the Section recommended the creation of a Commercial Division in New York State Supreme Court. Among the reasons identified in the Section's report proposing the Commercial Division were helping to ensure that New York remains a center for commerce and business and furthering the development of a well-reasoned and consistent body of commercial law in the State.

"We have been very pleased by the development of the Commercial Division, which has fundamentally changed how commercial matters are litigated in New York. It is essential to the continued evolution of commercial law in New York that there be just as effective procedures for hearing commercial appeals," said Section Chair Stephen P. Younger of New York City (Patterson Belknap Webb & Tyler LLP).

Specifically, the Task Force will survey the successes and constraints associated with the development of commercial law precedent by New York's appellate courts, especially in light of the tremendous burdens placed on the Appellate Division by New York's system of interlocutory appeals. In addition, the Task Force will examine the jurisdictional and other issues that result in few commercial cases being heard by the New York Court of Appeals. The Task Force will aim to release a preliminary report by Spring 2006, proposing areas of study that may be examined further by New York's Unified Court System.

The members of the Task Force are:

Preeta D. Bansal, Chair
Skadden Arps Slate Meagher & Flom LLP

Timothy F. Nelson, Secretary
Skadden Arps Slate Meagher & Flom LLP

Joseph H. Einstein
Labaton Sucharow LLP

Hon. Stewart F. Hancock
Hancock & Estabrook, LLP

Cathi A. Hession
Flemming Zulack Williamson & Zauderer LLP

Hon. Howard A. Levine
Whiteman Osterman & Hanna

Robert MacCrate
Sullivan & Cromwell LLP

Hon. E. Leo Milonas
Pillsbury Winthrop Shaw Pittman LLP

Michael S. Oberman
Kramer Levin Naftalis & Frankel LLP

Aaron R. Pam
Dickstein Shapiro Morin & Oshinsky LLP

Sharon M. Porcellio
Lippes Mathias Wexler Friedman

Lesley Friedman Rosenthal
Lincoln Center for the Performing Arts

Gideon A. Schor
Credit Suisse First Boston

Hon. Thomas Sullivan
Tracy & Stillwell LLP

David H. Tennant
Nixon Peabody LLP

Andrew J. Turro
Meyer, Suozzi, English & Klein, PC

Milton L. Williams, Jr.
Time, Inc.

Notes of the Section's Executive Committee Meetings

June 16, 2005

Guest speaker Hon. John T. Buckley, Presiding Justice of the Appellate Division, First Department, spoke on the work of the First Department.

The Executive Committee unanimously approved a resolution before the House of Delegates opposing certain non-binding resolutions in Congress that take the position that judicial determinations about the meaning of U.S. laws should not be based on laws or pronouncements of foreign institutions.

July 14, 2005

Guest speaker Mitchell F. Borger, General Counsel of Federated Department Stores and Chair of the Corporate Counsel Section, discussed his experiences as inside counsel.

The Executive Committee approved a report on "Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?"

September 15, 2005

Guest speaker Daniel M. Weitz, ADR Coordinator for the New York State Unified Court System, discussed alternative dispute resolution in the New York State courts.



The Executive Committee unanimously approved a report of the Federal Procedure Committee on Rule 45 of the Federal Rules of Civil Procedure.

October 20, 2005

Guest speaker David D. Brown IV, Bureau Chief of the Investment Protection Bureau of the New York State Attorney General's Office, spoke about the recent work of that Office, including the investigation of illegal trading practices in the mutual fund industry and fraud and anti-corruption activity among insurance brokerage firms.

The Executive Committee discussed a report of the Federal Procedure Committee on "Is Personal Service of a Subpoena Required under Rule 45?" and reached a consensus that service of a subpoena under Rule 45 of the Federal Rules of Civil Procedure should be by the same method used for a summons and complaint under Rule 4. The Federal Procedure Committee will revise the report accordingly.

The Executive Committee unanimously approved a report of the Federal Procedure Committee opposing H.R. 420, the "Lawsuit Abuse Reduction Act" (LARA).



REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *Commercial and Federal Litigation Section Newsletter* Editor:

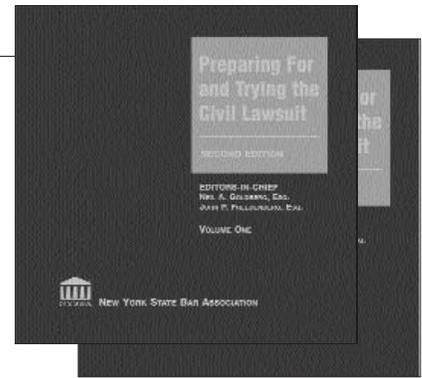
Mark L. Davies, Esq.
11 East Franklin Street
Tarrytown, NY 10591
Phone: (914) 631-7922
E-mail: MLDavies@aol.com

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

NYSBA BOOKS

Preparing For and Trying the Civil Lawsuit

Second Edition



"This publication should be on the desk of every litigator, young and old alike . . . It thoroughly examines the litigation process from the pleading state to post-trial motions . . ."

Henry G. Miller, Esq.
Clark, Gagliardi & Miller, White Plains, NY

Thirty of New York State's leading trial practitioners and other experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit.

- Ethical Considerations
- Pleadings
- Disclosure
- Investigation of Case and Use of Experts
- Conduct of Depositions
- Expert Discovery, Depositions and Motions
- Opening Statements
- Witness Examination
- Motions to Preclude Testimony
- Reliability of Testimony
- Demonstrational Evidence
- Summation
- Jury Selection and Instructions
- Settlement
- Dispute Resolution
- *and more . . .*

PN: 41953
List Price: \$225
Mmbr. Price: \$175

To order call **1-800-582-2452** or visit us
online at **www.nysba.org/pubs**

Mention code: CL2619 when ordering.



New York State Bar Association

Section Committees and Chairs

Antitrust

Jay L. Himes
NYS Attorney General's Office
(212) 416-8282
E-mail: jay.himes@oag.state.ny.us

Appellate Practice

Preeti D. Bansal
Skadden Arps Slate Meagher &
Flom LLP
(212) 735-2198
E-mail: pbansal@skadden.com

David H. Tennant
Nixon Peabody LLP
(585) 263-1000
E-mail: dtennant@
nixonpeabody.com

Arbitration and Alternative Dispute Resolution

Deborah Masucci
AIG Domestic Brokerage Group
(212) 770-1288
E-mail: deborah.masucci@
aig.com

Carroll E. Neesemann
Morrison & Foerster LLP
(212) 468-8138
E-mail: cneesemann@mofo.com

Bankruptcy Litigation

Douglas T. Tabachnik
Law Offices of
Douglas T. Tabachnik
(732) 792-2760
E-mail: dtflaw@aol.com

Civil Practice Law and Rules

James Michael Bergin
Morrison & Foerster LLP
(212) 468-8033
E-mail: jbergin@mofo.com

Susan M. Davies
Law Offices of Gregory P. Joseph,
LLC
(212) 407-1208
E-mail: sdavies@josephnyc.com

Civil Prosecutions

Neil V. Getnick
Getnick & Getnick
(212) 376-5666
E-mail: ngetnick@
getnicklaw.com

Class Action

Ira A. Schochet
Goodkind Labaton Rudoff &
Sucharow, LLP
(212) 907-0864
E-mail: ischochet@glrslaw.com

Commercial Division

Vincent J. Syracuse
Tannenbaum Helpert
Syracuse & Hirschtritt LLP
(212) 508-6722
E-mail: syracuse@tanhelp.com

Complex Civil Litigation

Edward A. White
Hartman & Craven LLP
(212) 753-7500
E-mail: ewhite@
hartmancraven.com

Construction Litigation

J. Scott Greer
Lewis & Greer, P.C.
(845) 454-1200
E-mail: jsgreer@lewisgreer.com

John F. Grubin
Wasserman, Grubin
& Rogers, LLP
(212) 581-3320
E-mail: jgrubin@wgrlaw.com

Creditors' Rights and Banking Litigation

Peter J. Craig
Peter Craig & Associates PC
(585) 586-1060
E-mail: pjrcraig@aol.com

Michael Luskin
Luskin, Stern & Eisler LLP
(212) 293-2700
E-mail: mluskin@lse-law.com

S. Robert Schrage
Hodgson Russ, LLP
(212) 661-3535
E-mail:
rschrager@hodgson
russ.com

Electronic Discovery

Adam I. Cohen
Weil Gotshal & Manges LLP
(212) 310-8901
E-mail: adam.cohen@weil.com

Employment and Labor Relations

Gerald T. Hathaway
Littler Mendelson, P.C.
(212) 583-2684
E-mail: ghathaway@littler.com

Evidence

Lauren J. Wachtler
Montclare & Wachtler
(212) 509-3900
E-mail: ljwachtler@
montclarewachtler.com

Ethics and Professionalism

Anthony J. Harwood
Goodkind Labaton Rudoff &
Sucharow, LLP
(212) 907-0873
E-mail: aharwood@glrslaw.com

James M. Wicks
Farrell Fritz P.C.
(516) 227-0617
E-mail: jwicks@farrellfritz.com

Federal Judiciary

Carol E. Heckman
Harter, Secrest & Emery, LLP
(716) 853-1616
E-mail: checkman@hselaw.com

Jay G. Safer
LeBoeuf Lamb Greene &
MacRae LLP
(212) 424-8287
E-mail: jsafer@llgm.com

Federal Procedure

Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
(212) 687-1980
E-mail: garenson@
kaplanfox.com

Intellectual Property

Peter Brown
Brown Raysman Millstein
Felder & Steiner LLP
(212) 895-2480
E-mail:
pbrown@brownraysman.com

International Litigation

Stephen H. Orel
Wolf Haldenstein Adler Freeman
& Herz, LLP
(212) 599-0916
E-mail: shorel@yahoo.com

Ted G. Semaya
Eaton & Van Winkle LLP
(212) 561-3615
E-mail: tsemaya@evw.com

Internet and Litigation

Peter J. Pizzi
Connell Foley LLP
(973) 533-4221
E-mail: ppizzi@connellfoley.com

Membership

Edwin M. Baum
Proskauer Rose LLP
(212) 969-3175
E-mail: ebaum@proskauer.com

Pro Bono and Public Interest

Michael W. Martin
Fordham Univ. School of Law
(212) 636-7781
E-mail: mwmartin@mail.lawnet.
fordham.edu

Bernard W. McCarthy
Chadbourne & Parke, LLP
(212) 408-5397
E-mail: bernard.w.mccarthy@
chadbourne.com

Publications

Carrie H. Cohen
NYS Attorney General's Office
(212) 416-8242
E-mail:
carrie.cohen@oag.state.ny.us

Real Estate Litigation

David Rosenberg
Marcus Rosenberg
& Diamond LLP
(212) 755-7500
E-mail: dr@realtylaw.org

Securities Litigation

Douglas C. Conroy
Paul, Hastings, Janofsky
& Walker LLP
(203) 961-7400
E-mail: douglasconroy@
paulhastings.com

James D. Yellen
Morgan Stanley
(914) 225-5565
E-Mail: james.yellen@
morganstanley.com

State Court Counsel

Kathy M. Kass
Supreme Court of NY County
(646) 386-3655
E-mail: kkass@courts.state.ny.us

Benjamin Tzvi Orlofsky
(646) 386-3359
E-mail: borlofsk@courts.state.
ny.us

Technology

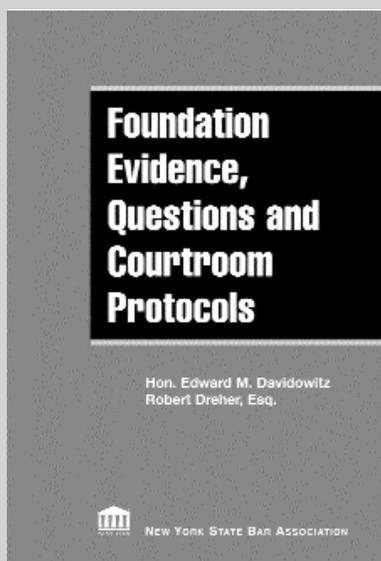
Daniel P. Levitt
(212) 687-3455
E-mail: levittdan@aol.com

Trial Practice

Michael J. Levin
Barger & Wolen, LLP
(212) 557-2800
E-mail: mlevin@barwol.com

Foundation Evidence, Questions and Courtroom Protocols

NEW



Authors:

Hon. Edward M. Davidowitz

Bronx County Supreme Court
Criminal Court

Robert Dreher, Esq.

Office of the Bronx District Attorney

- Access hundreds of questions and checklists to introduce your evidence properly
- Be prepared with proper questions and authority for a particular method of questioning

Foundation Evidence, Questions and Courtroom Protocols, written by Judge Davidowitz and Robert Dreher, aids litigators in preparing appropriate foundation testimony for the introduction of evidence and the examination of witnesses.

This manual contains a collection of forms and protocols that provide the necessary predicate or foundation questions for the introduction of common forms of evidence. It includes questions that should be answered before a document or item can be received in evidence or a witness qualified as an expert.

This publication will greatly assist attorneys in the smooth, seemingly effortless presentation of their evidence.

Book Prices*

2005 • 166 pp.,
softbound • PN: 4107

NYSBA Members \$48

Non-Members \$57

* Prices include shipping and handling
but not applicable sales tax.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs Mention Code: CL2620



Former Chairs

Robert L. Haig
Michael A. Cooper
Hon. Shira A. Scheindlin
Harry P. Trueheart, III
P. Kevin Castel
Mark H. Alcott
Gerald G. Paul
Mark C. Zauderer

Bernice K. Leber
John M. Nonna
Jack C. Auspitz
Sharon M. Porcellio
Jay G. Safer
Cathi A. Hession
Lewis M. Smoley
Lauren J. Wachtler

This *Newsletter* is distributed to members of the New York State Bar Association's Commercial and Federal Litigation Section without charge. The views expressed in articles in this *Newsletter* represent only the author's viewpoint and not necessarily the views of the Association, the Section or its Officers.

©2005 by the New York State Bar Association
ISSN 1530-4043

WWW.NYSBA.ORG/COMFED

COMMERCIAL AND FEDERAL LITIGATION SECTION NEWSLETTER

Editor

Mark L. Davies
11 East Franklin Street
Tarrytown, NY 10591
(914) 631-7922 • E-mail: MLDavies@aol.com

Section Officers

Chair

Stephen P. Younger
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2685 • E-mail: spyounger@pbwt.com

Chair-Elect

Lesley Friedman Rosenthal
Lincoln Center for the Performing Arts, Inc.
70 Lincoln Plaza, 9th Floor
New York, NY 10023
(212) 875-5125 • E-mail: lrosenthal@lincolncenter.org

Vice-Chair

Carrie H. Cohen
Attorney General's Office
Public Integrity Unit
120 Broadway, 22nd Floor
New York, NY 10271
(212) 416-8242 • E-mail: carrie.cohen@oag.state.ny.us

Secretary

Michael D. Sant'Ambrogio
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2436 • E-mail: mdsantambrogio@pbwt.com

Treasurer

Vincent J. Syracuse
Tannenbaum Helpert Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
(212) 508-6722 • E-mail: syracuse@tanhelp.com



Commercial and Federal Litigation Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON-PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155