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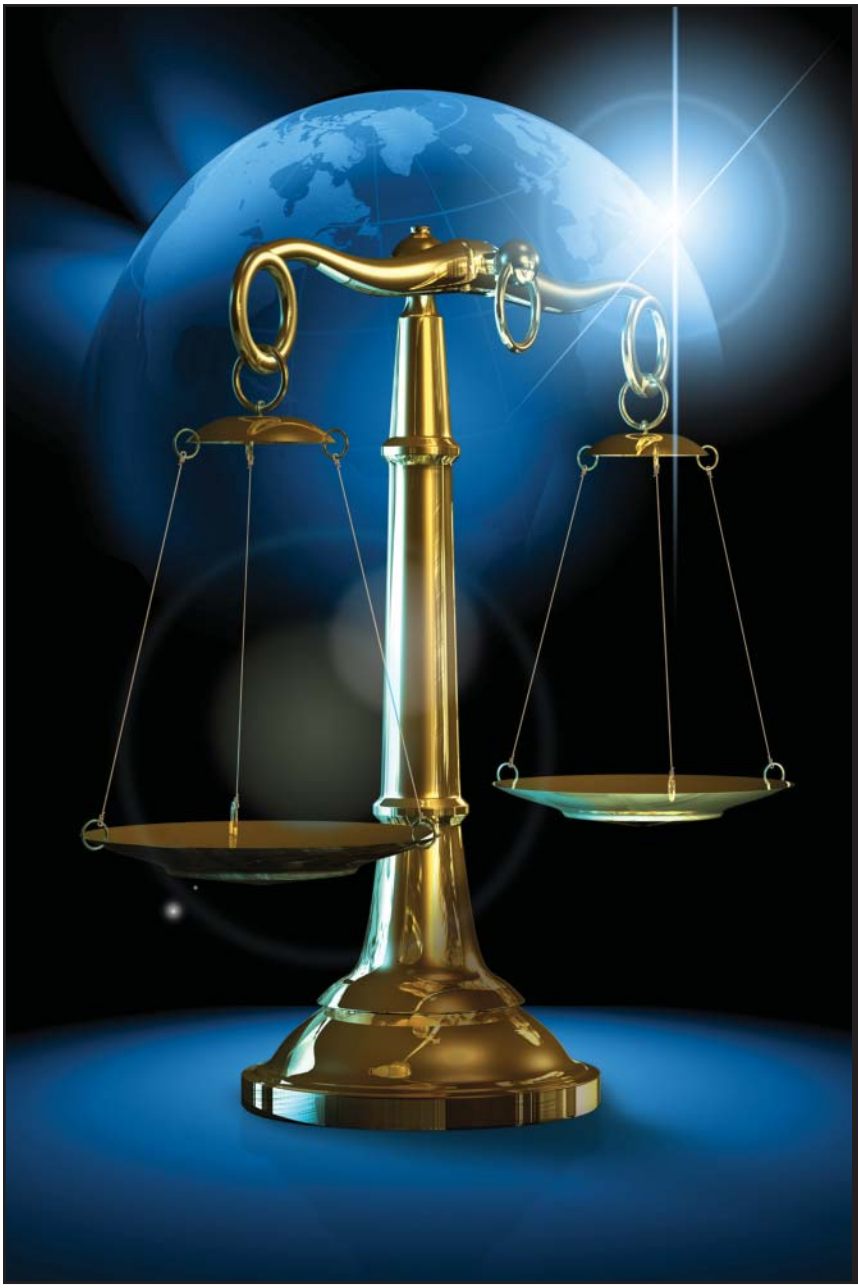
of the New York State Bar Association



Commercial and Federal Litigation Section Spring Meeting

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NYSBA

Commercial and Federal Litigation Section

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A Message from the Chair

On June 1, 2010, I became the 22nd Chair of the Commercial and Federal Litigation Section, one of the most well-respected sections of the New York State Bar Association. I am honored to have been given this extraordinary opportunity, but having been entrusted with the helm, I now shoulder a huge responsibility: a responsibility not only to promote the future of our Section, but to honor its distinguished legacy.

"We owe it both to the profession and to society at large to ensure that young attorneys evolve not into mere time-billing automatons, but into qualified, creative and ethical lawyers."

We live in difficult times. Our nation's economy is the worst it has been since the Great Depression, and industries across the spectrum are struggling. The struggle has forced us all to engage in a bit of introspection and reevaluation. "What went wrong?" and "How do we fix it?" are the questions weighing on everyone's minds.

The legal profession is no different from any other sector of the economy insofar as it has been impacted profoundly by the economy. Law firms are folding and talented young lawyers are jobless. Like everyone else, members of our legal profession are looking for a solution. Regrettably, there is no simple solution; there is no one silver bullet capable of solving the myriad problems. I, for one, do not claim to have any comprehensive cure-all.

In times like this, I think back to my middle school basketball coach, Randy Dulney. When, as was often the case, our team was trailing an opponent, Coach Dulney admonished us to get back to the fundamentals. "Fix the fundamentals," he said, "and everything else falls into place."

Like my middle school basketball team, our profession must get back to the fundamentals. Chief among these is meaningful mentoring of the next generation of lawyers. The preeminence of the billable hour has, in many cases, led firms to view young associates as "time-keepers," instead of lawyers. It has also forced many young associates who are carrying heavy student debt and facing layoffs and dwindling job prospects, to look for assignments that will "boost their billables," instead of developing their skills. We owe it both to the profession and to society at large to ensure that young attorneys evolve not into mere time-billing automatons, but into qualified, creative and ethical lawyers.

Quality mentoring— the transmission of knowledge, skills and perspective from one generation to the next— is one critical component to any meaningful solution. Given the importance of mentoring to the future of our profession, New York State Bar President (and former Section Chair) Steve Younger has urged NYSBA members to "serve as mentors to the next generation of lawyers, to represent our profession well and, most important, to be stewards of our profession."

The Commercial and Federal Litigation Section has heeded President Younger's call to action. Our Section is rolling out a mentoring program geared towards the next generation of commercial litigators. I have asked former Section Chair Lesley Friedman Rosenthal and Matthew Maron, an attorney who, himself, is part of the next generation, to spearhead this effort. Although still a work in progress, the Commercial and Federal Litigation Mentoring Program has begun to take shape. It has but one overarching goal: to provide newer attorneys with a potent and meaningful avenue for professional development.

Our program has several components. First, we have instituted, on a pilot basis, a one-on-one mentoring initiative to match experienced commercial litigators with those who are newer to the practice. (Notably, but not surprisingly, several Section stalwarts, including a former President of the New York State Bar Association, former Chairs of our Section and other prominent practitioners, have already volunteered for service.) In addition to whatever private arrangements are made between the individual mentors and mentees, we will be hosting periodic get-togethers for all participants in the program. These gatherings will permit mentees not only to meet other mentors, but to network with their professional contemporaries. If this pilot program proves successful (and I have every reason to believe it will), we intend to broaden it and create a virtual clearinghouse for mentoring requests from younger Section members.

The second component of our program involves a concept we have seen implemented in other jurisdictions: the creation of an online video library that consists of short presentations by seasoned practitioners on a variety of practice-oriented topics. These presentations, which will be available via secure web site to Section members only, will provide insight into how some of the state's

most well-respected commercial litigators approach issues that arise in everyday practice. We are hopeful that the library will also include a number of presentations by judges, which will provide practitioners with views from the bench. These video presentations will serve as a resource for attorneys in the years to come.

"To be sure, our mentoring program is ambitious. But if our Section's illustrious history of Herculean accomplishments is any indication, we are surely up for the task."

The last component of our program is continuing legal education. Over the past few years, and in an attempt to attract newer attorneys to our annual Spring Meeting, our Section has offered meeting participants a series of practical panels designed specifically for newer lawyers. These panels, which provided transitional CLE credit, covered topics such as motion practice, e-discovery, trials and appeals. We have received such positive feedback about these programs that we will be taking the concept to the next level. Under the careful oversight of Kevin Smith, our new Chair of the Committee on Continuing Legal Education, we will be offering a two-day program tailored to young commercial litigators. The program will offer a virtual primer on litigating commercial cases in the New York State and Federal courts and provide participants with the requisite number of transitional CLE credits for one full year.

To be sure, our mentoring program is ambitious. But if our Section's illustrious history of Herculean accomplishments is any indication, we are surely up for the task. We owe it to our legacy, we owe it to the newer lawyers among us who have chosen the field of commercial litigation as a profession, and we owe it to our clients, both present and future.

I urge robust participation from Section membership.

Jonathan D. Lupkin

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

COMMERCIAL AND FEDERAL LITIGATION SECTION

2010-2011 Officers

JONATHAN D. LUPKIN
Chair
Flemming Zulack Williamson Zauderer LLP
One Liberty Plaza – 35th Floor
New York, NY 10006-1404
212/412-9579
FAX 212/964-9200
jlupkin@fzwz.com

DAVID H. TENNANT
Chair-Elect
Nixon Peabody LLP
1100 Clinton Square
Rochester, NY 14604-1792
585/263-1000
FAX 866/947-0755
dtennant@nixonpeabody.com

TRACEE E. DAVIS
Vice-Chair
Zeichner Ellman & Krause LLP
575 Lexington Avenue
New York, NY 10022
212/223-0400
FAX 212/753-0396
tdavis@zeklaw.com

ERICA FABRIKANT
Secretary
Flemming Zulack Williamson Zauderer LLP
One Liberty Plaza – 35th Floor
New York, NY 10006-1404
212/412-9500
FAX 212/964-9200
efabrikant@fzwz.com

PAUL D. SARKOZI
Treasurer
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022-4728
212/508-7524
FAX 212/937-5207
sarkozi@thshlaw.com

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Mentoring Volunteer Form

Thank you for your willingness to mentor an up-and-coming member of the Commercial and Federal Litigation Section!

Name: _____

Law firm, agency or organization: _____

Address: _____

_____

Phone number: _____

E-mail: _____

Law School(s) attended and year of graduation _____

Size of Practice Setting: _____

County of practice: _____

Description of practice, specialties within commercial litigation _____

Other info you think may be relevant in matching you with a mentee (interest in work & family issues, race, gender, illness/ disability, sexual orientation, outside interests, etc.) (opt.) _____

_____

_____

_____

_____

Which Section Committees do you currently participate in or may be interested in joining? _____

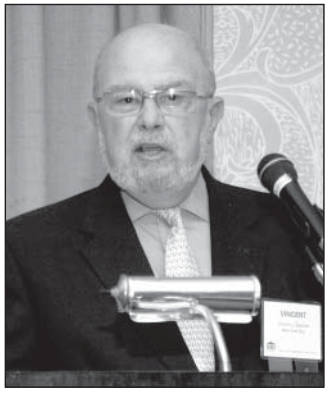
Please return this completed form to Matthew Maron (mmaron@ganfershore.com)

Remarks from the Gala Dinner

Commercial and Federal Litigation Section Spring Meeting, May 22, 2010

JONATHAN D. LUPKIN: We were fortunate to have the weather that we did. I paid extra for that to make sure we were all on good footing.

I'd like to have Vince Syracuse, the Chair of our section, come up here and then I'll have a couple of words afterwards. Thank you.



VINCENT J. SYRACUSE: One of the things I noticed, as you go up the leadership ladder, your table gets better and better. And since I am now Vince soon to be Former Chair Syracuse, I guess I have to get used to the table changing as time goes by. I hope you are enjoying your weekend. This is truly one of the best spring meetings I've ever attended, and I want to thank you for giving your time and coming. I also want to say that I'm very proud of our association Young Lawyers Section. You heard a little bit about that last night, and I have to confess that I'm prejudiced about it and have an ulterior motive because my son, Dana, is the secretary of the Young Lawyers Section and here with his wife Katie tonight, and that makes me very, very proud.

I want to thank you all for your continuous support of our section, its activities. It's very important to everybody in this room and very important to the Bar.

I want to thank the many judges who have joined us this evening and this weekend for all or part of the weekend. We have judges from virtually every court across New York State and out of New York State in the federal courts, and rather than naming them by names of court, judges please stand up for a round of applause.

This is the section that invented the Commercial Division. And I'm really proud to have so many Commercial Division judges here. And as someone said, I think Bernard Fried said it, there are a lot of fathers and mothers of the Commercial Division that are here with us over this weekend.

I want to thank, also, the former chairs of our section who are here. Former chairs, please stand up.

You are truly what this section is about. And I'll have a little more to say about that in a while.

It's truly impossible for me to believe that a year has passed since I took the helm of the section, stood here at the session in Cooperstown giving a speech about what I wanted to do. And I think I accomplished what I wanted to do. Our section is about people. As I've said on many occasions, our section owes its success to the many dedicated and talented people who volunteer their time, their precious time to our committees and activities. This year, our committees have really pulled out all of the stops. And the reports have drawn attention from across New York State and across the United States.

I'm especially proud of the committee report from our Committee on Immigration Litigation. It was chaired by Clarence Smith and Michael Patrick who gave a report about the problems in immigration appeals in the Second Circuit. And that report, I'm proud to say, was presented to both the Executive Committee and the House of Delegates, and we had young lawyers making that presentation—Steve Younger reminded me about that a little while ago—young lawyers, the future of our profession, making that presentation. That was a thrill.

Our Commercial Division Committee, which is chaired by Mitch Katz and my partner, Paul Sarkozi, this committee is unbelievable. This committee has done so much this year that it's almost mind-boggling. It is mind-boggling. For example, Bob Schrager, Howard Fischer, Steve Madra and Megan McHugh prepared a report on sealing the records of commercial litigation, which is adopted by the section's Executive Committee and the New York State Bar Association's Executive Committee. And that's a report that maybe didn't have all the answers, but it showed what the members of our profession thought could be done, and it was very well received.

Another thing we did was we tackled the so-called uniform rules and the individual rules of the Commercial Division from across the state. Victor Metsch, Lisa Coppola, Paula Estrada De Martin, Brem Moldovsky, and Daniel Wiig of our section's Commercial Division Committee did a report, a compilation of all of the individual rules so that it's on the web page and it's available, and I think it's also in the program materials for this weekend. And they did a fantastic job and they're doing a lot of things.

In October of 2009, the Commercial Division chaired a benchmark forum in collaboration with the Nassau County Bar Association. One of our themes this year was the part of the local bar associations, we did this. It was a benchmark forum. They had the Nassau and Suffolk County Commercial Division Justices, and it really was very well received. Of course, it was a lot of fun.

Joel Sternman and Bill Regan from the Katten Muchin firm prepared an amicus brief that got submitted on be-

half of the New York State Bar Association to the Second Department in support of an application for leave to appeal to the New York Court of Appeals in the *Symbol Technologies* case. The motion was denied, but it occurred to me it was a new way of having a membership initiative. Not only did I get two volunteers who weren't members of the association and weren't members of the section who wrote the report, but I said, "If you want to write this brief, you have to do both and join." We got two members out of that. I think it was a unique way of approaching it.

Evan Barr, a member of the White Collar Crimes Subcommittee on Securities Fraud, gave us an excellent report that many of you haven't seen yet. It was approved at our last Executive Committee meeting, and it has to do with prosecutorial discretion in insider trading cases. It provides statistics and useful information, whether you are in practice in that area, don't practice in that area, very important stuff. It will be posted on the web as the final touches of that report are prepared.

Greg Arenson represented our section on the Special Committee on standards for pleading and federal litigation. He did a fantastic job.

Our Appellate Practice Committee, which is chaired by David Tennant and Melissa Crane, although Melissa Crane did not participate in this, the reasons are obvious, gave a report on Ansbach Appeals and the Appellate Division, whether that was a good idea or a bad idea. Leadership of that was first done by Andrea Masley, who's here I think, whose City Bar Committee had done a report and we looked at it again.

We did more than reports. I'm sorry if I'm long, but we did a lot this year. We did more than reports.

Smooth Moves, again, reviews fantastic. Thank you to Barry Cozier, Carla Miller, Lesley Friedman, Tracee Davis and Debbie Kaplan. I applaud you all. It was fantastic.

Of course, my child, which will have a bar mitzvah in two more years, is the Ethics and Civility Program that Mark and I helped conceive 11 years ago. And that's been a huge success, presenting it in five venues. I think it's the most successful CLE program that the State Bar does. And the theme of that program, all the lawyers have a responsibility to younger lawyers to teach them that there's a difference between being aggressive and being a jerk and that civility counts. And that program succeeds. I thank our local chairs: David Tennant in Rochester, Sharon Porcellio in Buffalo, Scott Fein in Albany, and John Brickman on Long Island.

Finally, I have to thank my wife, Rita, who put up with the late night phone calls and this stuff, you know, e-mails on section business. John you have to organize this, but my wife put up with this all year saying, "Who are you texting at 11:00 o'clock at night?"

I want to thank—I forgot to mention, of course, our annual meeting. David Tennant put on a fantastic, standing-room-only meeting, which was absolutely great.

I want to thank our leadership team; Chair-Elect Jon Lupkin, please stand up.

Our Vice Chair David Tennant.

Deborah gave us two years as Secretary. She's now officially retired. I will make her Chair of our Pro Bono Committee, and she's going to do that. That's great.

(Laughing.)

VINCENT J. SYRACUSE: Jon, when you take over, I'm certain that you will know that this is a team effort and that we're nothing without the support of the people around us. I wish Jon the best of luck, our leadership team for 2010-2011; David Tennant, Jon Lupkin, Chair. Jon, stand up again, please.

David Tennant, Paul Sarkozi, Tracee Davis, our Vice-Chair.

Erica Fabrikant is our Secretary.

Now, I have to let you know a secret, I think the reason why I took this job is that someone told me that I can appoint, I can give a service award to anybody I want at the end of the year, total discretion. I said, "My God, that's better than being a federal judge, I can give an award." Well, I want to give this year's service award to Mark Zauderer. Please stand up, Mark.

(Applause.)

VINCENT J. SYRACUSE: This is the Chair's Service Award, and I think that—first of all, Mark is the face of our section. Mark has continuously supported this section, whether as Chair, as Committee Chair, as Chair of the Commission on the Jury, a member of the Board of Editors of the *New York Law Journal*, Office of Court Administration, writing the Rule 130 rules, the civility rules that he wrote, making presentations to the House of Delegates, and, I should say, CLE programs. I stopped counting at about 60. And I think that's the record that shows that our former chairs are active in our section, they continue to support our activities.

I hope that you are home on Saturday; this coming Saturday at about noon, channel 13, Mark is going to be on channel 13, and he'll be speaking about libel terrorism and the judges and judging and the confusion in the public. Mark is our ambassador to the world. Mark, I thank you, my friend.

(Applause.)

VINCENT J. SYRACUSE: Enjoy yourself.

(Applause.)

JONATHAN D. LUPKIN: Ladies and gentlemen, I'll be brief, or at least try to be. First of all, let me get a few thank yous of my own out of the way. I'd like, first, to extend a special thank you to Hudson Reporting. Hudson Reporting, for now the second or third year, has provided gratis reporting services for this conference so that we could perpetuate and preserve some of the fine CLE programs that we've done. We're very, very grateful to Geta and her team. Actually, Geta, why don't you take a stand.

(Applause.)

JONATHAN D. LUPKIN: I'd also like to thank, once again, our sponsors for this event. Our platinum sponsor, Bloomberg Law.

Our bronze level sponsor, FIRST Advantage.

JAMS, our sponsor.

And the three law firms that have sponsored this event: Kelley Drye, Getnick & Getnick, and Flemming, Zulack, Williamson, Zauderer.

(Applause.)

JONATHAN D. LUPKIN: I'd also like to extend a special thank you to a number of people who comprise, maybe, a tenth of the people in this room. I'd like to thank my family for coming out and joining and helping me celebrate today, which is really a very special day and a special weekend in my life. So with particularity, I'd like to single out my parents, Ann and Stan Lupkin, my in-laws, Mort and Elayne Dimenstein, my sister-in-law, Amy Gitlitz, my daughters, Shira, Leora, Arielle, and Ilana, and most especially, I'd like to thank my wife, Michelle.

(Applause.)

JONATHAN D. LUPKIN: She has, over the past two years of my journey on this leadership path, put up with a lot, and I'm certain will be putting up with a whole hell of a lot more.

(Laughing.)

JONATHAN D. LUPKIN: So I'm very grateful to her and for her unwavering support in this endeavor. Thank you.

(Applause.)

JONATHAN D. LUPKIN: Lastly, I'd like to thank Lori Nicoll and Kathy Heider from the State Bar.

(Applause.)

JONATHAN D. LUPKIN: Hillary Clinton said that it takes a village, and a program like this does not come off with simply the efforts of one person. This was a real team effort, and I could not have done it without the assistance of the team up in Albany. And I'd also like to single out two associates at my firm who were instrumental in helping us bring this about. Erica Fabrikant, who is here and is going to be the Secretary of our section next year.

(Applause.)

JONATHAN D. LUPKIN: And Anne Nicholson, who is not here, but really did a yeoman's job, in terms of dealing with a lot of the particulars of putting this together.

I just want to say one thing about what I envision this coming year to be. There are a lot of very substantive areas that we can delve into, that we will delve into, and the fact that we have 30 different committees that are under the umbrella of the Commercial and Federal Litigation Section speaks to the breadth of what it is that we do. I'd like to speak to a more global issue and a more global focus that I take particular interest in. In the Jewish tradition, there is a saying, *L'Dor V'Dor*, from generation to generation. It is impossible for any of us—it was certainly impossible for me—to grow up and become a lawyer who has a modicum of skill without the benefit of those who preceded me and those who took the time to mentor me. I happen to be extraordinarily fortunate, extraordinarily fortunate to have three of my key mentors in the room with me today. And again, I'd like to single them out, Judge Ed Korman, for whom I clerked right after law school.

(Applause.)

JONATHAN D. LUPKIN: Mark Zauderer, with whom I've been for the last 13 or 14 years of my practice.

(Applause.)

JONATHAN D. LUPKIN: And the longest standing mentor is my father, Stan Lupkin.

(Applause.)

JONATHAN D. LUPKIN: My father worked very hard when I was growing up, and the most abiding thing that I learned from him was the importance of integrity in the practice of law. I know that he was a vigorous advocate and still is a vigorous advocate. But to be a vigorous advocate does not necessarily mean that you have to compromise your integrity or your ethics, and I owe him a great deal for that.

(Applause.)

JONATHAN D. LUPKIN: So what I would like to focus on, and this dovetails very nicely with Steve Younger's focus for the upcoming year, is the concept of mentorship. I think it's absolutely essential that we at the

Commercial and Federal Litigation Section make a real effort to bring up the next generation of commercial litigators so that they have the same sort of benefits and opportunities that I had and that I know most of the other members of our section have had. And so my hope and my expectation is to focus a lot of my efforts and energies this year on the concept of mentoring younger lawyers to become the next generation of commercial litigators in this state. I thank you very much.

We're going to serve dessert shortly, and then we'll begin with our awards program. So thank you very much for your time.

* * *

JONATHAN D. LUPKIN: Ladies and gentlemen, we're going to start with the latter half of our program. Before we get to the main award, the Haig Award, there are a couple of preliminary matters that have to be taken care of.

First of all, I would like to extend my own personal thanks to Vince Syracuse for really being a real captain of this ship. As I mentioned last night, he was an exemplary leader, always did it with a smile, always did it with a sense of humor, and I'm humbled that I'm going to have to follow in his footsteps. I can only hope that I do half as good a job as you did.

(Applause.)

JONATHAN D. LUPKIN: And so I would like to present you with this parting award to commemorate—

VINCENT J. SYRACUSE: What a surprise.

JONATHAN D. LUPKIN: Are you surprised? (Laughing.)

(Applause.)

JONATHAN D. LUPKIN: Now, there are also a couple of other special events here, in addition to the Haig Award, that happen to have come to my attention over the course of planning this event. There are two couples here in the room that are celebrating anniversaries this week and last week, and we thought it would be nice to celebrate it with them. So let me have first Bernard Fried and Nina Gershon.

(Applause.)

JONATHAN D. LUPKIN: And there's one more couple that's celebrating an anniversary and that is Justice Leonard Austin and his wife Deborah.

(Applause.)

JONATHAN D. LUPKIN: And lastly, I've just been informed that Nadine Nogel, Vice Chancellor Nogel's wife is celebrating her birthday today.

(Applause.)

JONATHAN D. LUPKIN: So congratulations to everybody.

And now, without further ado, I'd like to turn the floor over to Steve Younger, who is the incoming president of the New York State Bar Association and, I should mention, a former chair of this section.

(Applause.)

STEPHEN P. YOUNGER: Good evening. Given the difficult economic times we're living in, I was told by the section that even your presidential message is being donated by a special sponsor. Mr. Lupkin asked me to read from this card to tell you that my address is sponsored by the firm of Getnick & Getnick.

(Laughing.)

STEPHEN P. YOUNGER: Now, I'm told that an anonymous donor from the firm of Getnick & Getnick paid handsomely for me to exercise my right to remain silent.

(Laughing.)

STEPHEN P. YOUNGER: Mike, as you said last night, there are things here that says "applause." This one says "laughter."

(Laughing.)

STEPHEN P. YOUNGER: But seriously, Mike and I have had an incredible partnership this year, and it's been very special for me. I can't think of a more beautiful place to spend it. Our last couple days together as president and president-elect in this venue, this is just an amazing place to spend the weekend. I have a few quibbles with the organizing committee, though. What lawyer came up with the idea that the longest drive has to be in the fairway, whose idea was that?

(Laughing.)

STEPHEN P. YOUNGER: But I do always feel at home with so many friends here, since this is the section where I grew up as a lawyer. This is truly the section to be in within the State Bar. This is the only section that attracts almost as many judges to its events as lawyers. Isn't that amazing?

And we attract them from as far away as Delaware to come to our events. Thank you.

Judges even put in their calendar this event to celebrate their wedding anniversary.

(Applause.)

But this is also the section where State Bar leaders are born. We all know about Mark Alcott and Bernice Leber who preceded Mike and me as president of the State Bar. We can't forget the indefatigable Bob Haig, who was our founding father who went on to serve as Bar Foundation President.

(Applause.)

STEPHEN P. YOUNGER: Bob spent so much time on Bar activities, we don't know if he actually has a legal practice. But we really appreciate it, Bob.

And tonight, we honor Bob's service by giving an award in his name to the Honorable Reena Raggi, an incredibly distinguished public servant. Congratulations to her.

(Applause.)

STEPHEN P. YOUNGER: But our section is home to so many all-stars. You saw the people who stood up who are past chairs. It's just an incredible roster. But my own personal thanks tonight go to Vince Syracuse. You are an old, old dear friend—you're not old, we're all young, but we've known each other a long time and had a lot of fun together. You've done amazing things this year. Congratulations, Vince.

(Applause.)

STEPHEN P. YOUNGER: Now, I know we'll see big things this year from the incoming chair, Jonathan Lupkin, and we know that already, because he set a record attendance at this event, but there's a footnote, he did it by bringing a hundred members of his own family.

(Laughing.)

STEPHEN P. YOUNGER: But we're glad to have them all here tonight.

JONATHAN D. LUPKIN: Whatever works.

STEPHEN P. YOUNGER: Whatever works.

But the Commercial/Federal Section is truly the powerhouse of the State Bar, and that's because we work hard. This section is now known in the State Bar for its incredibly thoughtful reports. Preparing reports is kind of like the DNA of the Commercial/Federal Section because it's the best way that you can make a difference. This section has such a rich history of making a difference, whether it's the creation of the Commercial Division, the elimination of jury exemptions. Your most recent report on immigration appeals, I can tell you personally, we have spent a lot of time with the New York Congressional Delegation, and that's the one report that they keep mentioning, because it's such an important issue, not just for our circuit, but for America. And I really congratulate you on that work. I want to encourage you to keep doing this this year. It would really make my year as a State Bar President special if we can get some more of those wonderful reports through our House of Delegates. But I also want to encourage you to do one other thing, which is to collaborate as you do with other sections within our State Bar. Now, a perfect example of this is your Smooth Moves Program. We know it was the brainchild of the ever energetic Lesley Rosenthal; we know the hard work that Tracee Davis, our Vice-Chair this year, and your Secretary Debbie Kaplan, put in. But what was not mentioned was that ten other sections co-sponsored this with the Commercial/Federal Section. And from working together with other sections, you can really pool your resources and do more. And that's why it's particularly pleasing to me that this section is working with the International Section and the Business Law Section on a report on how we can promote the use of New York Law in international contracts. And that's a very important issue for us as New York lawyers, and I really want to commend you for that.

I also want to commend Greg Arenson, who worked on the Pleading Standards Committee this year. But in my mind, that is only one half of the issue. That deals with the front door of the courthouse, what happens in terms of whether cases will be dismissed at the front end. But I would really encourage the section this year to look at the second piece of the issue, which is the proper standards for discovery once you get into the courthouse, and whether traditional discovery standards continue to make sense in our ever-more-technological world. This is a perfect project for your section to handle. And I know that Jonathan's ever energetic group will take this on.

Well, I just want to talk about one thing that I'm going to be spending a lot of time working on this year, and I'm glad to know that Jonathan already has this on his radar screen, which is the future of our legal profession. I'm taking office in a time which is in the wake of probably one of the most difficult years to be a lawyer in America in our recent history. Law students, law firms, big and small, even our clients, are really feeling the effect of the great recession. And we've been very fortunate to have the work of Lauren Wachtler on our Lawyers in Transition Committee, who has really helped us cope with the recession. But as we bounce back, we have a choice. We can either continue the status quo and keep practicing law the way we always have, or we can take a hard look at ourselves and think about whether we ought to make changes to our profession that will make it a profession that young people will want to join. And in my view, as a bar association, that is our job. Our job is to shape the legal profession. And that is why I have chosen shaping the future of our profession as one of my key issues for the year. Because out of any crisis, you have the opportunity to make change. So we at the front end really need to figure out how we can break from the hustle and bustle of the modern law practice so we can help guide our next generation of lawyers.

As Jonathan so rightly put it, we've all been blessed by wonderful mentors. I don't think there's a single

successful lawyer in this room who didn't have a great mentor. That sums up my own story. I'm here by the grace of several wonderful mentors, including one who hails from Lake George, the First Chief Administrative Judge, Richard Bartlett, and Court of Appeals Judge Hugh Jones, who was another amazing mentor of mine, and a former State Bar president. But in my mind, having benefited from strong mentors, we have a duty, a duty to give that back to the next generation of lawyers. And it's up to us to be stewards of the profession, to make sure that our profession remains the kind of profession that our own mentors would be proud of and that they would recommend to their grandchildren. And I'm so proud of Jonathan that he's going to take up the cudgels on it, because it's a really important issue.

Now, everybody in our profession is debating what the wake of this great recession is going to leave behind in terms of the practice of law. And everybody seems to agree that the changes in our profession will be permanent ones. So I believe that it's critical for us to lead that conversation. So we are forming, on June 1st, a task force on the legal profession, which will have four main components, and I'd like to give you a short preview tonight:

The first is to look at how we train our young lawyers and whether our legal education system is producing the kinds of lawyers that we want to bring into our law firms. Because from my own perspective, many young lawyers when they get out of law school are really left without a lifeline when they graduate. They learn how to think like lawyers, but they haven't been taught yet how to practice law. Now, unfortunately, we're all seeing clients who are saying, "I am not going to allow a first or second-year associate on my matter." I'm sure everybody in this room has had a corporate policy that says that from a client. And I think if we don't take the bull by the horns ourselves and fix that, it's going to be very hard for young lawyers to get their first experience. There are a number of different models we can look at. The British model has an apprentice system. I was in Mexico recently, they have something they call the *pasante* model where young students work during law school. But whatever it is, we need to figure that out for the benefit of the next generation.

The second thing we're going to look at is the law firm workplace. The president of the ABA recently said that lawyers are no longer going to hang out a shingle, they're going to register a domain name. And I think our law firm has become a virtual law firm. Now, that has always been an issue in terms of flexibility. We've talked about flexibility in the workplace for a long time. But I think we also need to start examining where the day begins and ends in a law firm. Because the BlackBerry, the cell phone have made us 24/7 lawyers. And if we are 24/7 lawyers, 7 days a week, are we really going to want to recommend this as a profession to our grandchildren?

The third thing that we will look at is our billing systems and whether we should start looking at alternative billing systems. Many have complained that the billable hour measures quantity, instead of quality. Many have said that it fails to sync-up the interests of lawyers and clients. Wouldn't we all like to be measured some other way than by tenths of an hour? I think this is a real challenge for us as a profession, because lawyers are conservative by nature, we don't like change. But if we can come up with best practices that lawyers can use and know that these systems will work, I think we will have done ourselves and our clients a service.

The last thing we're going to look at is technology and its impact on the profession. Technology is changing so rapidly. Ten years ago, we thought a BlackBerry was a fruit that we look at in the woods around Lake George. Ten years ago we thought cell phones were for talking on. Now, we have a whole generation that mostly uses them to text. How is that going to change our profession? What is the next game changing technology going to be? Because in my view, the successful law firms are going to be those that harness technology first.

Now, we don't have all the answers to these questions, but we know the future is coming and it's coming very quickly. And we also know that there could be a better way for us to practice law, so I think we owe it to ourselves, to the next generation of lawyers and to our own mentors to try to figure that out.

Now, the last thing I just want to say is to congratulate the Young Lawyers Section for being here tonight and to congratulate the Commercial/Federal Section for inviting them. We've all seen throughout Bar Association activities the way that young people are not coming to Bar Associations the way they did back in the good old days, if those good old days actually existed. And I think that it takes just what you're doing, which is to invite them into the tent and make special programs for them to make it a reality. Now, I know Vince went a little far when he ordered his own son to come, but there is—everything has its bounds.

But I do want to make a very, very special announcement that you can say that you were the first to hear, that effective June 1, we're renaming the Young Lawyers Section the Younger Lawyers Section.

(Laughing.)

STEPHEN P. YOUNGER: But seriously, there's so much for young lawyers to do in a Bar Association. Those of you who are here new tonight, I really encourage you. It can be good for your career, it can be just good for your satisfaction in the profession to interact with other more experienced lawyers, and I welcome you.

Thank you all for having me. And I look forward to working with you this year.

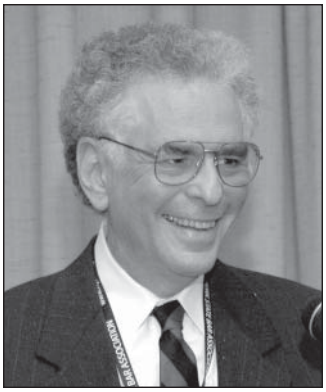
Presentation of the Robert L. Haig Award for Distinguished Public Service to the Honorable Reena Raggi

Commercial and Federal Litigation Section Spring Meeting, May 22, 2010

By the Honorable Edward R. Korman, Senior District Judge for the United States District Court for the Eastern District of New York

JONATHAN D. LUPKIN: Now, it gives me tremendous pleasure, both as the incoming chair of this section and as a lawyer, to introduce one of my mentors who I mentioned earlier, Judge Edward Korman, Senior District Judge for the United States District Court for the Eastern District of New York who is going to introduce our honoree this evening.

(Applause.)



HON. EDWARD R. KORMAN: Jon, thank you for that lengthy introduction.

(Laughing.)

HON. EDWARD R. KORMAN: Thank you for inviting me to present this award to my dear friend and colleague Reena Raggi.

Several years ago, I sat by designation on a panel of the Second Circuit with Rosemary Pooler, who now lives in Syracuse, but who actually grew up in Brooklyn and attended Brooklyn College, as I did. And as we were reminiscing, she told a story attributed to Maurice Sendak. Growing up in Brooklyn, it seemed to him that there were two kinds of Jews; happy Jews and sad Jews. It was only after he grew up that he discovered that the happy Jews were really Italians.

(Laughing.)

HON. EDWARD R. KORMAN: Unless an immigration officer at Ellis Island got the name of one of his ancestors wrong, I assume that Robert Haig shares neither my Jewish, nor Reena Raggi's Italian, heritage. Nevertheless, I know he must be happy that Reena Raggi is being honored with the award in his name. The award acknowledges the importance of public service by private members of the Bar, and it is a tribute to Bob's work and the recognition of the important public service that members of the Bar render day in and day out.

Among his many positions of service, Robert Haig was the first chair of the section on Commercial and Federal Litigation, as you know. In that capacity, he set the section on a path of encouraging and promoting involvement by the lawyers and judges in projects of importance to the Bar and the greater community, including the proposal to create a Commercial Division of the Supreme Court, a proposal which Bob played a significant role in implementing as co-chair of the Commercial Courts Task Force.

Judge Raggi exemplifies the dedication to public service represented by the Haig Award and the tireless efforts of this section. The details of her academic record are well known and her resume reads like a lawyer's wish list. She graduated in 1973 from Wellesley College where she majored in history and was elected to Phi Beta Kappa. She graduated cum laude from Harvard Law School in 1976. But let me tell you something that you won't glean from her curriculum vitae and which gives new meaning to our understanding of the concept of double jeopardy. When Judge Raggi was a student at Wellesley, she appeared on the TV show *Jeopardy* and advanced to the final rounds. When she was at Harvard Law School, she appeared again on *Jeopardy* and won the grand prize, a car. After Harvard and *Jeopardy*, Reena served as a law clerk to Judge Thomas Fairchild of the United States Court of Appeals for the Seventh Circuit. I first met Judge Raggi in 1978 shortly

after I became the United States Attorney for the Eastern District of New York. She was the first Assistant U.S. Attorney that I hired. She was a star from day one. She worked on many complex, high profile cases, including corruption in the New York City Taxi and Limousine Commission, the extradition of Italian financier Michele Sindona, and numerous drug smuggling cases involving both the Cali Cartel and the Sicilian Mafia. The qualities that she demonstrated during her career in the office—a brilliant mind, extraordinary dedication to work, and her terrific trial skills—ultimately led to her appointment as the interim United States Attorney in 1986 after the incumbent, Ray Dearie, was appointed to the bench. At that time, when such a vacancy occurred the judges of the District Court were authorized to name an interim United States Attorney to serve until the President nominated a replacement. Judge Raggi was unanimously chosen, notwithstanding her age, she was then only 34, and the fact that she was not even the most senior person in the U.S. Attorney's Office. The appointment reflected the extraordinary regard in which she was held by all the judges before whom she appeared. A mistake that Senator D'Amato told me that he regrets to this day, he did not recommend that Reena be appointed to the permanent position of the United States Attorney. His mistake turned out to be our good fortune. After a year in private practice, President Reagan appointed her a United States District Judge for the Eastern District of New York. She was not only the youngest appointee in the history of the district, but also its first woman. In 2002, President George W. Bush appointed her to the United States Court of Appeals in the Second Circuit. She was confirmed with strong bipartisan support. Indeed, Senator Schumer praised her, calling her the ideal nominee, saying that she's legally excellent and adds diversity to the bench. My colleague, Judge Amon, observed that the last woman to secure that level of bipartisan praise was Mother Teresa.

(Laughing.)

HON. EDWARD R. KORMAN: On the District Court and on the Court of Appeals, Judge Raggi has authored numerous important decisions, which I will not detail opinion by opinion. Her opinions, whether on the District Court, or the Court of Appeals, whether majority concurring or dissenting are impressive for their thoughtfulness, their clarity and their persuasiveness. Reading Judge Raggi's opinions are a joyful exercise for a District Judge, except when she is reversing you.

(Laughing.)

HON. EDWARD R. KORMAN: A measure of her reputation in the New York Bar, arguably the most sophisticated and demanding in the country, was the bestowal several years ago of the medal of the Federal Bar Council for excellence in jurisprudence. In presenting the award to her, Mark Zauderer, its then President, observed that she was, and I quote, "A judge whose achievements and contributions to federal jurisprudence place her in a firm in the stars among the most revered people in our profession."

There is, however, more to Reena's life than the professional side that I have described. Although she was an Assistant U.S. Attorney, she went outside the District to marry her beloved husband, David Denton, who was then not only a Southern District Assistant, but one who held a high administrative position in that office. She would go on to raise with him an extraordinary son who is now a second year student at Harvard Law School and a recently named finalist in the Ames Moot Court Competition. She devoted herself to her husband's care in an illness that took him from her. And these are only the bare outlines of a life of love and dedication to her family and her faith, a life to which those who are familiar with those details will acknowledge fits the description of the words of the Hebrew Bible, *eshet chayil*, or woman of valor.

I conclude with these words: Judge Harold Medina once declared that the notion of a great judge was a myth. As proof, he remarked that no one now remembers those who had been great judges in his own youth. One scholar took issue with Judge Medina and accused him of confusing greatness with notoriety. Said the scholar, "I count as a great judge, the judge who brings to the office intelligence, wisdom, and energy and the sense that life is largely a matter of loyalty and love and courage and hope and service." This description fits Reena perfectly and justifies the honor which you bestow on her tonight.

(Applause.)

Recipient of the Robert L. Haig Award for Distinguished Public Service to the Honorable Reena Raggi

Commercial and Federal Litigation Section Spring Meeting, May 22, 2010

Acceptance Remarks by the Honorable Reena Raggi

HON. REENA RAGGI: Thank you very much. Let me start by thanking Ed Korman. As you just heard, Ed effectively started my career in public service when he hired me as an Assistant United States Attorney, and as I'm fond of telling him, I've admired his judgment ever since.

(Laughing.)

HON. REENA RAGGI: And I just want to make it clear tonight, I have never reversed him. He told me I could do that, he told me that the day I was confirmed for the bench, and it was so sweet because, of course, he didn't mean it.

(Laughing.)

HON. REENA RAGGI: When I was told that I could pick someone to present this award, I immediately thought of Ed because he's probably shaped my view of public service more than anyone else. He is himself passionately committed to the ideal of public service. He brings to that ideal a real scholar's soul. His equal in the Eastern District is perhaps only Jack Weinstein. But Ed also has a keen Brooklyn eye for human nature, at its best and at its worst. And it's that combination of scholarship and common sense that makes his public service so remarkable. So I always like to try to emulate him, thinking that if I come even close, I will render pretty good public service. So to the extent the section thinks I've succeeded, I'm very grateful to you and to my mentor, Ed Korman.

It is a real honor for me to receive the Haig award tonight. I was the section's guest at last year's spring meeting, and I thought your hospitality on that occasion was pretty extraordinary. I came to the meeting knowing, perhaps, a half dozen of you. I left having so many new friends. It was a real pleasure for me to come today and to a number of events you've had over the course of the year and to see you and really think of you as friends. To have been invited back this year to receive this award, named in honor of one of the real lions of the New York Bar, and bestowed last year on the incomparable Judith Kaye is more than a bit overwhelming. I want to thank you so very, very much. You know, when I went on the District Court, the first invitation I received to participate in a Bar event came from Bob Haig. I thought it was so kind and such a real opportunity to get to know members of the Bar, and that invitation was repeated a number of times more over the years; Bob would call me and ask me to participate in various programs. I'm very grateful, Bob, it was really eye-opening, as has been the participation with this particular section.

Indeed, I owe this section a number of thanks just for this year. Most obviously for the work you've done in the immigration area, which has been triggered by a problem at the court on which I serve, and your work has just been invaluable. Thank you so very, very much.

I also want to thank the section for its assistance this year to the Judicial Conference Committee on the Federal Rules. Specifically, with respect to the study that I'm supposed to be leading regarding the effectiveness of the rules in ensuring the openness of the federal courts in this new electronic age that we're all learning to deal with, and yet avoiding unnecessarily compromising people's privacies. The section's work has really helped us in that area.

Let me say in that regard that often when the Rules Committee sends matters out for public comment, we attract comments from people who have had cases that present the particular problem, and they have a particular side they want to advocate for. That's helpful to us. But it is even more helpful if we get the views of the institutional Bar, which tries to look at the problem with a little bit of detachment and speak for the Bar. So that's why I thought it was particularly helpful that you were willing

to play a part in the work of the subcommittee study.

Well, that's just a little background to what I really want to talk about tonight. You know, it is a thrill to be honored for public service. It is so frequently that we see judges and lawyers honored for their public service. But as I came to realize shortly after I left the District Court, there's another group of persons who render invaluable service to our system of justice and who we rarely get to thank, and that's the thousands of men and women who serve on juries. Now, on the District Court, it was my privilege to preside over scores of jury trials. I have to tell you, I was not only impressed by the diligence with which juries perform their service, I was inspired by it. And so after I left the District Court bench, I started to think about that and have even spoken about the issue on other occasions. I thought the subject was relatively uncontroversial. But in recent years, I've found that I was, perhaps, wrong in that assessment. As I've gone around to law schools and had occasions to speak about juries, thinking that this is a subject on which law students, just by the nature of modern legal education, have little contact, I found myself repeatedly challenged by law students and faculty about our commitment to juries as a way of administering justice.

Indeed, shortly after receiving the invitation to come to this ceremony this year, I found myself in a rather vigorous debate over whether lawyers and judges had a right to demand that juries explain their verdicts. Now, quite apart from the practical problems we can readily imagine with asking a jury that deliberates for a week just to reach unanimity to now explain how it got there, I started to think about, theoretically, why I was troubled by that notion. And it occurred to me that it's one thing in a democratic republic for the people to expect the lawyers and judges to whom they give power to explain their exercise thereof, but I thought it was quite another thing for lawyers and judges to expect the people, represented in the jury, to explain their actions to us.

And so I've gone back to some thoughts I had a few years ago about jury service and tried to rethink them in light of some of what I've heard on some of our campuses, and I'd like to just share some of those thoughts with you.

It seems to me that, on the most basic level, we continue to trust so much of our administration of justice to 12-person juries because as a free society we are reluctant to concentrate power. Juries not only confirm the popular sovereignty that lies at the foundation of our republic. It's citizen juries that act as the democratic check on the least democratic branch of government. The simple knowledge that evidence is going to have to be presented and law explained to 12 people drawn at random from the community, I think serves as a significant deterrent to abuse of power by judges, by prosecutors, even by legislators. And so I do think it's as true now as when Blackstone wrote it, that "the most transcendent privilege that a subject can enjoy is that he cannot be affected in his liberty, property or person, except by consent of his neighbors." A robust jury system. I submit to you, together with an expansive franchise, can be viewed as the twin democratic pillars of our republic. And in neither the jury room, nor in exercise of the ballot, do we ask people to explain to us the decisions they make.

But you know, do we really view jury service in quite the same way that we view the vote? Thousands of hours and millions of dollars are spent each year by partisan and nonpartisan groups to get out the vote. But with the notable exception of Judge Kaye, few have ever called for getting out the jury. Getting out of the jury is more like it. It's surprising when we consider that a vote cast in a ballot box can afford a citizen only an indirect and never determinant voice in the affairs of government, whereas a vote cast in a jury room speaks directly and determinatively to the critical issues presented, at least in the particular case. So in that sense, juries represent the people directly executing the laws.

And viewed in this light, I think it should be further surprising that a democratic republic would consider removing certain matters from jury review, particularly on the grounds that some legal disputes are too complex for juries to understand. I think when we start to think that, it's time to relook at some of the legislation that we're drafting. The argument after all is not new, it's grounded in the distrust of the people and was heard as early as the ratification debates. I always look at a remark written by the Anti-Federalist who wrote under the name Federal Farmer. His words are as true today as when he wrote them, that "the free men of a country are not always minutely skilled in the law, but they have common sense, which seldom errs in making and applying laws to the conditions of the people. The people bear the burdens of the community; they of right ought to have control in its important concerns, both in making and executing the laws."

Presiding over jury trials taught me enormous respect for jury common sense and for the ability of average citizens to understand complex facts and laws, if they are carefully presented. Now, I do not mean to minimize the challenge of such presentations. But the benefits we all derive from meeting the challenge reach beyond individual cases. If we force ourselves, judges and lawyers, to present legal disputes in terms that lay people can understand, I think we ensure that the law not only is rational, but that it is humane. We should, therefore, I submit, be wary of arguments that special expertise is necessary to resolve certain disputes. Nothing can undermine public trust in our legal system so effectively as giving people a sense that the law operates in a world apart from them, a world whose language they cannot understand. How can we expect people to entrust their liberty to a legal system that is unwilling to make the law and facts of cases comprehensible to citizen juries? I'm not persuaded by the answer that in some cases it cannot be done. I've always thought that if a jury could understand the horizontal and vertical elements of racketeering, and it can, it can understand anything.

In any event, there is an important indirect benefit from a robust jury system that we, as a free society, should be loathe to lose, and that is an informed and active citizenry. Tocqueville observed that jury service educates people about the law, about their rights, and about available legal remedies. And those lessons don't end with individual jurors. Because when they communicate their jury experiences to family, friends, and neighbors, the law, in substance, in form, in spirit, penetrates deep into society. No book or civics lesson can duplicate that result. Jury service teaches its lesson so effectively precisely because it involves citizens in the administration of justice. Jury service demands that for a time people set aside their own concerns and focus on those of others. And it does this in a vast array of cases penetrating all interests in society. By investing average citizens with such broad powers, the jury system expands people's vision of human affairs, it helps shape their views of what is just and unjust, and, perhaps most important, it instills in them the confidence to act on that duty. And that carries over into so many aspects of civil society.

Now, I witnessed this beneficent effect countless times when individuals, somewhat sullen upon jury selection, transformed into persons proudly committed to the public service they were performing. People of diverse ethnic, religious, and economic backgrounds, people who might otherwise have no occasion to come into contact with one another, routinely join together in jury rooms throughout this state and throughout this country to apply themselves conscientiously to the task of doing justice. And so I think that when we applaud public service, we can applaud jury service as well.

Now, I recognize that there are a host of issues relating to jury trials that merit debate: from the rules of evidence necessary to ensure reliable fact-finding, to the proper measure of punitive damages, to the assignments of costs and fees. Those are subjects to be pursued on other evenings in other venues. But when you think about them, I simply urge you to be skeptical of the suggestion that comes to mind too quickly for many people, and that is that our justice system as a whole, criminal and civil, would be improved if we just had fewer jury trials.

I thank you so much for letting me share those thoughts with you tonight, and I thank you, again, for this wonderful award and for being such a wonderful and hospitable group. Thank you.

(Applause.)

JONATHAN D. LUPKIN: Thank you very much, Judge Raggi.

Presentation at the Commercial and Federal Litigation Section Spring Meeting, May 23, 2010:

Introduction to Appearing Before the Commercial Division: Preparation, Practices, and Potential Pitfalls

Panel Chairs: **Janel Alania**, Judicial Law Clerk
Hon. Bernard J. Fried, New York State Supreme Court, Commercial Division

Panelists: **Honorable James d'Auguste**, Civil Court Judge, New York County
Anna Marie Fontana, Judicial Law Clerk
Hon. Doris Ling-Cohan, New York State Supreme Court, Commercial Division
Michael L. Katz, Principal Court Attorney
Honorable Barbara R. Kapnick, New York State Supreme Court
Peter J. Glennon, Nixon Peabody, LLP

MODERATOR JANEL ALANIA: Good morning everybody. We'd like to get started if everybody who is coming is here. Before we do anything else, I want to remind you, for a CLE credit, there's a sign-in sheet outside. Remember to fill out your yellow form.

Thank you all for coming to our program this morning. My name is Janel Alania. I am one of Judge Fried's Law Clerks, I'm his Commercial Division Law Clerk. I'm going to be moderating this panel. And I'd like to introduce our panel.

Welcome everybody. Again, my name is Janel Alania. I'm Judge Fried's Commercial Division Law Clerk. And before I introduce the panel, I just wanted to introduce Clara Flebus and Debra Edelman, who are the program co-chairs, and to thank them both for all of their hard work in putting together this program and compiling the fabulous materials that you have in your book.

So moving on to introduce the panel. All of their bios are included in your materials, so I don't want to spend too much time on introductions, but I just wanted to highlight their experience. First, we have the Honorable James E. d'Auguste. He was recently elected as a Manhattan Civil Court Judge and is currently assigned to the Bronx Family Court. He offers not only to you all his insight as a judge, but he also has the perspective of a former law clerk. He was the Law Clerk to Justice Ramos in the Commercial Division in New York County, but in addition, he was also a commercial litigator with Akin Gump and he served as Section Chief in charge of liquidation for the New York Liquidation Bureau, which is the Office of the New York State Insurance Department, which handles insurance company insolvencies. Rounding out his experience, he also served as a pro bono mediator in the Commercial Division ADR Program. So he offers a wealth of information and insight to us.

To his right we have Anna M. Fontana. She is currently a Law Clerk to the Honorable Doris Ling-Cohan in Supreme Court, New York County. She, in this position, deals with cases in a variety of subject matters, including commercial and business disputes. Prior to working with Judge Ling-Cohan, she was the Commercial Division Law Clerk for two years with Justice Herman Cahn in the Commercial Division in New York County.

Next, we have Michael L. Katz. He's been the Principal Law Secretary to Justice Barbara Kapnick since 1993. And he's been working with Judge Kapnick in the Commercial Division in New York County since September of 2008.

And finally, we have Peter Glennon. Peter is a litigator and public attorney at Nixon Peabody where he focuses on complex commercial disputes, franchise law, and aviation law. Before joining Nixon Peabody, he served as a Law Clerk to the Honorable Elizabeth W. Pine, Associate Justice in New York Supreme Court, Appellate Division, Fourth Department.

So thank you panel for being here. I'm going to sit down, if that's okay with everybody.

So moving on to the program, we do want this to be an interactive experience. So to the extent that anybody has questions, please feel free to raise hands. I'll look for questions as we go forward.

Before we get into the nitty-gritty of practice before the Commercial Division, which is why you're all here, to learn the secrets and the ins and outs, but before we do that, we wanted to start a little bit and give you some background into the Commercial Division. This was touched on a little bit yesterday, but anybody who may have missed yesterday's program, Judge d'Auguste, if you could tell us a little bit about the Commercial Division.

HON. JAMES E. d'AUGUSTE: Let me open up by simply saying, if you have questions, feel free to ask at any time. This is one of the times you can interrupt a judge.

So you are either going to be one of three types of lawyers; you're either going to be a bad lawyer, you're going to be a good lawyer or you're going to be a great lawyer. Assuming you are here, you don't want to be a bad lawyer. You want to be a good or a great lawyer. The difference between a good and a great lawyer is a good lawyer knows the law and a great lawyer knows the judge,

at least the judge that they're appearing before. They should know the type of judicial philosophy they have, they should know who their court attorneys are, they should know how they handle their cases, how they push their cases from settlement onto handling things from preliminary injunctions on. We have a couple judges in the room here from the Commercial Division. I started out with Justice Ramos. The Commercial Division was established back in 1993 and was expanded thereafter in 1995 to about five judges, Justice Gammerman is present; he was one of the initial ones. His wife, Justice Taylor, is next to him. We have Justice Fried here.

With regard to becoming a great lawyer, you should understand that you develop a reputation very quickly in the commercial parts. Judges remember whether you are prepared and whether you present credible arguments. You should also be aware that judges speak about lawyers who appear before them to other judges and court attorneys speak to other court attorneys too.

By way of example, I remember distinctly a case when I was an attorney at Akin Gump, after I left my clerkship. In the case, a judge stated that previous conduct by a different attorney on our side left a bad taste in his mouth. Apparently, the attorney had employed a burned-earth strategy in a previous litigation. The judge didn't trust the lawyer or anything he had to say. I had to go back to my firm to conduct a team meeting and develop a strategy on how to separate my client from the co-defendant. This is an important distinction between non-commercial parts and commercial parts—that you have a very small cadre of judges in the commercial part that you will be appearing before if you specialize in a commercial litigation.

As you already know the pool of judges you will be appearing before, you should be able to develop a preliminary strategy for your case. That strategy, by the way, should be proactive in nature. You should map out at the beginning of the case where it is you think you want your case to go. When you are deciding your strategy, you should ask yourself what forum you want to bring your case. Do you want to be in the Commercial Division? Do you want to bring the case in Federal court? There are advantages and disadvantages for a case whether it's arbitration, whether it's in federal court, whether it's in state courts. There are advantages and disadvantages to be in any of those venues depending upon the nuances of your case.

An example might be a whether you are seeking a preliminary injunction. How important is getting the preliminary injunction to your case? Do you have the goods, for instance, to obtain a preliminary injunction? If not, you may need expedited discovery, which your client is more likely to obtain in federal court than state court. But if your case does not hinge on a preliminary injunction where discovery is needed, you may want to be in the more specialized parts of the Commercial Division.

MODERATOR JANEL ALANIA: I'm sorry, Judge, I'm going to interrupt you for a second because I do want to move into—this is a perfect segue, actually—into the Commercial Division rules, as you surely all know, provide specifically for what type of cases should or should not be brought in the Commercial Division. There's some nuance, though, in that. So I wanted to open that up to the panel.

Michael, if you could maybe tell us a little bit about some of your experience with cases that should or should not be brought in the Commercial Division.

MICHAEL L. KATZ: Well, the starting point, of course, is the first page of the Commercial Division rules lay out what category of cases are considered commercial and which are considered noncommercial cases. I'm not going to read through them because we've reviewed it already this weekend, and you have the rules in front of you.

Keep in mind that most of the categories have to meet a monetary threshold, which differs from county to county. So if you are in Albany County, for instance, it's $25,000. In Manhattan, it's $150,000. And the claim has to meet that threshold, not including the claim for punitive damages or attorneys' fees.

In terms of cases that come into the Commercial Division that don't belong in the Commercial Division, that's a big one, a big category that gets overlooked. Very often you will get a motion for summary judgment in lieu of complaint and the Request for Judicial Intervention, which must be accompanied by a statement that the case meets the criteria of the Commercial Division, will have checked off that this case meets the monetary threshold, and when you read the papers, you see that it's a claim for $120,000, not $150,000. So you should be careful about that because you are required, when you ask for a case to be assigned to the Commercial Division, to certify that it meets the criteria, and you don't want to delay your case. If it does

not meet the criteria in the opinion of the Commercial Division judge assigned the case, that judge has the right under the rule to reassign, transfer it out of the Commercial Division, and that can just cause your case to be delayed.

The rules also talk about certain kinds of cases that do not meet the Commercial Division criteria, including suits to collect professional fees. So if there's a claim for attorneys' fees that arises out of a business case, it doesn't meet the Commercial Division criteria, even if it arises out of a commercial case. So just be familiar with the rules. Be straightforward when you check off the RJI. The Commercial Division website, at least in Manhattan, has cases—well, let me backtrack.

If your case is transferred out of the Commercial Division and you feel that it does meet the criteria, you have ten days, which you are allowed to write a letter application to that administrative judge asking for that decision to be reviewed. Conversely, if your case is assigned to a noncommercial part because your adversary doesn't check off on the RJI that they wish to have the case assigned to the Commercial Division, you can also, in that same ten-day period, write a letter application to the administrative judge asking for the case to be reassigned to the Commercial Division. What you want to do in that letter is set forth why you think the case meets the criteria. I can tell you from my experience working in the general part, before we were assigned in the Commercial Division, that the judge in the general part very often will see a copy of that letter, either because you copy them on the letter or your adversary sends a copy of it or the administrative judge shows a copy to the judge, so you should be careful how you phrase why you want your case assigned. The last thing you want to do is come to court a couple weeks later after the administrative judge has turned down your request and have the judge ask you why you thought they're too stupid to understand the complex issues in your case. But you have every right to write a letter saying that this is a commercial case because it's a corporate dissolution proceeding or this is a commercial case because it's a breach of contract and meets the statutory threshold. Many of the decisions of the administrative judge reviewing those requests are available on the Manhattan Commercial Division website. I don't know if it's in the other counties' Commercial Division websites, and I'm told they're expanding that. So if you are writing a letter and you think that a prior decision of the administrative judge might be helpful to your argument, you certainly can cite to one of those decisions.

MODERATOR JANEL ALANIA: I'm going to interrupt for one second.

Peter, do you know, as a practitioner from outside of New York County, do you know whether those decisions are available on the websites of other counties?

PETER J. GLENNON: Yes, generally. Especially in the Seventh Judicial District, up in Monroe County, Rochester, New York. Judge Fisher of the Commercial Division does a great job maintaining his own website, posting his decisions. And I can also say that they're quick to remove the decisions when the Appellate Court may reverse them. So we're all appreciative of that.

I wanted to touch on one point, though, on the general rule of qualifying a case, so to speak, for the Commercial Division. I came into this not too long ago. The rules generally exclude from the Commercial Division commercial lease—I'm sorry—breaches of commercial lease agreements when you are looking for the payment of rent only. We had a matter, it was a question related to the payment of rent, but there were also other contract matters arising from the same relationship, there were other contract issues, and we really wanted to make sure that we were in the Commercial Division. It was assigned to the Commercial Division, and then it was immediately bounced out of the Commercial Division. And we considered, of course, going to the administrative judge to review this. But then the business and practical side of it came into play. We learned the Commercial Division judge was going to be out for a while for medical reasons, and we really wanted to move forward on this, so we were comfortable with the court assigned, the judge assigned, and we moved forward from there.

VOICE: Are there any kinds of residential real estate disputes that are allowed to be brought into the Commercial Division? I mean, there's a restriction on it, but what sort of disputes could you come to the Commercial Division with?

MICHAEL L. KATZ: That's a good question, and honestly, I think that that's one that could be subject to different interpretations by the administrative judge. I know we've had cases that involve disputes with a sponsor of a building or multiple apartments. I think those arguably might not just be residential real estate disputes, which the way the rule reads, it says "including landlord/tenant disputes," I think that rule is targeted primarily to the landlord/tenant disputes, but I think that particular rule could be subject to different interpretations, and I'm not exactly sure how the administrative judges around the state are ruling on that. We sometimes have had a debate about that in our own chambers, whether it's really a contract dispute that happens to involve some real estate investment or if it's a real estate dispute.

VOICE: With respect to the administrative review of the decision to designate a case as a commercial or noncommercial case, if the administrative judge reaches a conclusion that you disagree with, is there an appeal for that?

HON. JAMES E. d'AUGUSTE: No.

VOICE: So it's basically an administrative appeal and a decision of the judge's finding?

HON. JAMES E. d'AUGUSTE: There is no appeal. I would note one practice red flag with regards to timing—

MODERATOR JANEL ALANIA: I think there was one more question on the residential real estate—no, okay.

HON. JAMES E. d'AUGUSTE: The red flag relates to attempting to move a case designated as non-commercial on the RJI to the Commercial Division. The applicable rule says that the time period to request a transfer of the case commences upon receipt of the RJI. Therefore, if a party serves your client with an RJI designating the case as non-commercial with the initial pleadings, the time to request a transfer expires prior to your time to respond to the complaint. This is just one example showcasing the necessity of understanding the actual language of each rule. Indeed, in one case I litigated we designated a case as non-commercial for strategic purposes. When our adversary decided to challenge the designation in a letter to then-Administrative Judge Jacqueline Silbermann, we responded by noting that their request was too late under the rule. Justice Silbermann said, "I agree." That was the end of it..

MODERATOR JANEL ALANIA: So back on the topic of the rules again, there are—

VOICE: What about a situation where there's multiparties and some of the defendants are not served till sometime later, just by virtue of how it's done. There's been a request for judicial intervention in connection with—you know, one defendant has not yet been served, but the first defendant has, it's time for that defendant to answer, that defendant makes a motion, there's a request for judicial intervention. What happens to the later defendant in the action, just has no right with respect to whether it's in the Commercial Division or not?

HON. JAMES E. d'AUGUSTE: There's the rules and then there's the practice. Once you have a judge that's deciding motions, the administrative judge is not going to take the case away from the judge unless there's good reason. It's just basic general resource use. Sure, someone can say, "I don't agree with the case being in the Commercial Division," but when you have a judge deciding a motion to dismiss, which is a substantive motion, it's going to be very rare that you are going to find the administrative judge taking the case from that judge and giving it to someone else.

Therefore, if you don't like the judge that's going to be deciding that new motion, you need to be proactive. And a big part of being a really good lawyer, a great lawyer, is thinking proactively about the entire arc of your case from start to finish and mapping that out the way you think the case is going to go at any particular juncture within the case itself.

VOICE: On the monetary thresholds, if the initial complaint does not qualify but a counterclaim is more than the threshold, does that qualify?

HON. JAMES E. d'AUGUSTE: From my experience with Justice Ramos, I've seen it happen. Because it's an independent claim. In fact, sometimes, as you can imagine, the person who gets to the courthouse first may not even have a great claim, they're just suing in order to win the race to the courthouse. Many times in commercial cases, the real plaintiff in the case may be the defendant, and they're just counterclaiming. So you have to take a look at both. Now, certainly, the person may check off noncommercial because they, again, feel they may be better offer with a judge that doesn't have the expertise and experience. I'm not saying that they couldn't handle it, but they're not doing it every single day like the Commercial Division judges are doing it. So they may feel there's an advantage to being in the noncommercial parts. So when you are putting your letter together, you are going to want to show that your counterclaim quite clearly meets the commercial threshold.

VOICE: Can there be a reassignment if the initial plaintiff has designated it as a noncommercial case?

HON. JAMES E. d'AUGUSTE: Sure. In fact, that's the rule. But you only have ten days from receipt of the RJI.

VOICE: Even though the defendant may not have pleaded yet?

HON. JAMES E. d'AUGUSTE: Correct. It's kind of a squishy thing in the rules. So once you get that RJI and you see "noncommercial case" and you are sitting at a large firm and you know this is a commercial case, the first thing you should be thinking about is this properly assigned to the Commercial Division, and even if you say, "I don't have a"—you may want to put together your answer very quickly, can you get that thing out, or you may want to send a letter saying, "We're filing an answer in ten days and our answer is going to include a counterclaim for 'x' amount of dollars."

VOICE: Does that letter count as an appearance?

HON. JAMES E. d'AUGUSTE: It's not exactly an appearance. You are asking whether or not it's an answer, so to speak, in the case for jurisdiction purposes?

VOICE: Yeah.

HON. JAMES E. d'AUGUSTE: I've never seen a case say it is.

MICHAEL L. KATZ: But you could always reserve your rights in the letter and say you are writing it for a limited purpose.

MODERATOR JANEL ALANIA: So let's move on. This is a very interesting topic, but we are limited in time, unfortunately. So I wanted to touch on a couple of dif-

ferent things before we move on to actually appearing before the Commercial Division.

So as you probably all know, the individual justices of the Commercial Division have some specific part practices, little minutiae, shall we say, that are specific to their parts. So there is a wonderful compendium of the individual part practices that was compiled by this section. I wonder if, Peter, you could talk about that a little bit.

PETER J. GLENNON: Sure.

Every court and every judge, no surprise, has their own rules, more or less. And it's interesting too, to back up a little on the history of the Commercial Division, it started with only two courts; one in New York County and the second in Monroe County in Rochester. And at that time, of course, there was no need for a uniform set of rules. The courts set up the rules themselves, and as the number of Commercial Divisions increased, each division, each judge was setting their own rules, and it wasn't till, was it, 2006 when the standard rules came into effect. So we have standard rules, and they're set forth, and I believe they're included in your materials, and each division below has their own set of rules and then each judge beneath that has their own set.

Now, if you are in the Seventh Judicial District or some of the Upstate, Western New York areas, you tend to have one judge, maybe two, as opposed New York County has eight, ten.

VOICE: Nine.

PETER J. GLENNON: Nine, so there you have another set of rules. I'll leave it up to you to review all of those.

I'll go back to what Judge d'Auguste said earlier, it's great to know the judge and how each judge works. I do just want to point out a couple of noteworthy parts. The standard rules, for example, Rule 19-A, it's similar to the federal procedure, suggests—requires when you file a summary judgment motion, you must set forth a material statement of facts. Some call it Upstate versus Downstate, others maybe it's just based on the number of cases, but Rule 19-A is required in most of the Downstate Commercial Divisions, while most of the Upstate Divisions do not require compliance with Rule 19-A.

Another example of the difference in Commercial Division rules would be Rule 22. In the statewide rules, that requires that any party may request oral argument, but it's really up to the justices as to whether oral argument will be permitted. Now, that's, again, an Upstate/Downstate difference, and I think it's the caseload matter. But Upstate, Western New York the Commercial Division rules are that oral argument is expected, and it's only upon waiver by the parties and consent by the parties. Other Commercial Divisions more or less follow Rule 22 in that there is no oral argument expected or anticipated, but the Court may request oral argument after receiving all papers from all sides and reviewing the issues. And in many of those times, what you learn from the Commercial Division rules is that oral argument may not necessarily be on the return date of the motion either, it could be a date later than that.

So the point, I think, of that, look at your state rules, look at your Commercial Division rules, figure out which judge you have, and then talk to people who practice before that court frequently.

MODERATOR JANEL ALANIA: So one more point building on that that I think needs to be made is that in addition to the compendium that's in your materials, all of the individual part practices are available on the Commercial Division website, and you should certainly go there before you put a call in to chambers to find something out.

There's another place you can go to get your questions answered in New York County, which is the Commercial Division Support Office. There's also the Motion Support Office, by the way, in New York County, which is very helpful. So to the extent you are inclined to pick up the phone and call chambers without your adversary on the line, don't. Instead, call the Commercial Division Support Office or call Motion Support and try to get your questions answered that way.

ANNA M. FONTANA: Can I just add something, as well? Part clerks, also, for each judge have a wealth of information. Most people tend to forget there are people they can talk to without calling chambers who have answers to a lot of these questions. So there's a lot of resources, especially in New York County. And attorneys should remember they should contact all those people first, before they call chambers to deal with more procedural aspects of the case.

HON. JAMES E. d'AUGUSTE: At the end of the day, as lawyers, you are responsible for the decision making. You can get information from a clerk, and it may not be what the judge wanted in the end. So at all points in time, in terms of your decision making, you're responsible. I've seen people say, "well, the clerk told me that." The judge stated, "that's not what I ordered." So keep that in mind.

PETER J. GLENNON: That's very important outside of New York City, Upstate and Western New York, because there is no central support office, what you do end up doing is contacting chambers and speaking with the clerks or their secretaries. Yes, the ultimate responsibility is yours as the attorney.

MODERATOR JANEL ALANIA: Any questions on this before we move on to conferencing?

(No affirmative response.)

MODERATOR JANEL ALANIA: So there are several different types of conferences that happen in the Commer-

cial Division. Judge, do you want to talk a little bit about what the types of conferences are?

HON. JAMES E. d'AUGUSTE: Sure.

Every judge does it a little differently, but much of the conferencing in the Commercial Division is done by court attorneys. You'll appear before people like Michael, handle discovery conferences. Court attorneys in the Commercial Division are much like magistrate judges are in the federal courts. So don't say, well, you are not a judge or something along those lines, which I've actually had. When I was a court attorney, Law Clerk to Judge Ramos, I had people say, well, I'm not doing this without an order. And I was filling it out, here's the order.

(Laughing.)

HON. JAMES E. d'AUGUSTE: Well, now you have your order.

But it surprises me how many people get upset or mad when they're conferencing before court attorneys or they act differently with court attorneys than they do with the judges. Court attorneys are extensions of the judges. You treat the court staff or the court attorneys, part clerks or the court officers as if you would treat the judge because that's their—that's the family the judge lives with pretty much the entire day, okay.

So you have settlement conferences, you have preliminary conferences, you have pretrial conferences. Each of which you should be prepared for, most of which is to be done, in my experience, by the court attorney, with the exception of many times the pretrial conferences, the final kind of pretrial conferences when the judge is getting ready to put you down for a trial date in his calendar. Everybody except Judge Gammel, who seems to do everything himself. He's a one-stop shop, so to speak.

(Laughing.)

HON. JAMES E. d'AUGUSTE: He'll even ask the questions for you, don't worry about it.

Do you have something to add?

MICHAEL L. KATZ: I do a lot of the conferencing in our part. The only thing I—I'm not disagreeing with you. You should be respectful to the court attorney, I appreciate being treated with some respect, but I also recognize that I'm not the judge and the conferences I have are not on the record, so pick your battles. If the law secretary rules that you are going to have your deposition on April 15th instead of April 10th, you know, live with it. If you feel that you have not had an opportunity to make a record about an important point, then you don't have to say, "Oh, you are just the court attorney, I want to see the judge." But you always have a right to say, "You know, I would like to be able to brief this issue, this issue is very important to my client." You have a right to say, "Is it possible for us to make this argument on the record?" I do think you always have that right, and you should exercise it when you feel that your client is going to be prejudiced by not having that right.

HON. JAMES E. d'AUGUSTE: Just to go further a little bit on the record point. If you get an order from a—that's the result of a conference with the law secretary and it's signed, there's something in it you don't agree with, while it's true that in most, if not—virtually all orders are appealable as a matter of course. An order of that sort is not appealable because it is not based on a motion on notice. So if you have a situation like the one that Michael just described where the disagreement you want to have is something that ultimately might go up on an interlocutory appeal, you have two options. The first option is to ask for briefing, in which case you would have a record on appeal to go up. The only other option to get a piece of appealable paper to the Appellate Division would be on an order issued in that fashion. You have to make a motion for reargument on notice, and then if the judge grants the reargument and denies the relief, you now have a full record to go up on.

MICHAEL L. KATZ: It's not actually a motion to reargue, it's actually a motion to vacate. It's a motion—and that is—that would be the way to do it. So although my point is not that you don't disagree, just like you can disagree with trial court judges and take an appeal, in essence, you are taking appeal from the magistrate or the court attorney to the judge by filing a motion to vacate, which you can do at any time within the time period. What you really want to do is make sure you are respectful to the court staff at all points in time. You get nothing for your client, in my opinion, by treating court attorneys as if they're not worth the time of day, so to speak. And I've seen it happen because people get upset, they get mad because they didn't get their way, so to speak, in the conference and they don't allow themselves to take a moment to reflect on what are they getting out of treating this person poorly under the circumstances and there are—if you think about the ways in which you have to take an application directly to the judge by filing a motion to vacate the preliminary conference order, for instance, or the discovery order, if you think it through, you'll probably handle them a lot better. Again, that's the difference between different types of lawyers and whether or not you are promoting your case in a positive way or not.

VOICE: What's the range of responsibilities for case management that you have handled as a law secretary? Obviously, some will have law secretaries handle PC orders, some will deal with discovery disputes. Have you gotten involved in trying to mediate matters? What's the full range of things or things that might not be apparent to the practitioner?

HON. JAMES E. d'AUGUSTE: As a law secretary or law clerk, you will be performing two major functions. The first is well-known, which is you are doing conferencing, such as preliminary conferences, settlement conferences and pretrial conferences. You are doing it all. But, behind the scenes, you're acting as the judge's attorney. For instance, with trials and similar matters being handled directly by the judge a law clerk will many times conduct legal research or review exhibits. Moreover, he or she will act as the main liaison with the court's law department, which is a huge pool of attorneys that perform work for all of the judges. The law clerk maintains an inventory of the judge's caseload and prepares the 60-90 Day Report, which is the tool used by court administrators to keep track of motions that exceed time limitations set by court rules and to give an explanation as to why they have not been timely decided.

That said, things will be slightly different from one judge to another, which is a good reason to know your judge. If you have an important case—and the case is always important to the client—then you should take advantage of the fact that we have open courthouse to go to court and watch proceedings in front of your assigned judge. Watch the judge and law clerk in action. See the types of things that the judge gets annoyed at and make sure you don't do it. Also, if your adversary is doing it, point that out to the judge or court attorney

MODERATOR JANEL ALANIA: To get back to Paul's question. Anna, have you seen a difference compared to when you were with Judge Cahn versus where you are now in a noncommercial part, is there a difference in what the court attorneys, what you specifically do?

ANNA M. FONTANA: I think it's really important, like Judge d'Auguste is saying, that each judge handles things completely differently and expects their staff to handle things completely differently. So for instance, when I was with Judge Cahn, I handled a lot of telephone conferences with regard to discovery disputes and scheduling issues, like that. I can't say I handled so many in court appearances or preliminary conferences or things of that nature. On the flip side, where I am now, there's a lot more of the court attorneys handling all conferencing. So we do all preliminary conferences, compliance conferences, settlement conferences, pretrial conferences. So it really matters who you appear before and how much they have their court attorneys do. And it's important to keep in mind that the longer a court attorney is with the judge, the more they get a sense how the judge would feel about certain issues. So when you appear before a court attorney, just keep in mind they have a pretty good understanding of how their judge feels about certain issues. That's not a foolproof answer, and it could be wrong, but generally, they do see a lot of the same issues come up and they have very good senses as to how the judge would feel about an issue, and you should keep that in mind as you go forward and how much you want to press a particular issue.

MODERATOR JANEL ALANIA: I think another point that needs to be made is that regardless how much an individual judge has his or her court attorney do, you should prepare for every appearance before the court as though you are going to appear before the judge. And then if you appear before a court attorney, you are prepared appropriately. No matter who you are going to appear before, you should be prepared and take every appearance as though it's going to be before the judge because as the point has been made before, law clerks are an extension of the judge and should be treated as such.

Did anybody else want to make any points on that?

PETER J. GLENNON: I was just going to add that I think that is the point, be prepared regardless of who you go before. Of course, like with any court, any part, it could be the judge or the clerk, et cetera, but the preparation in the Commercial Division, one thing I would point out, although I see many seasoned litigators here, many people are familiar with Rule 3214-B of the CPLR, which states discovery be filed when you file a 3212 motion. That's not technically the case in the Commercial Division. Actually, it's Rule 11-D in the statewide rules that states that discovery will not be stated unless the court orders as much, so that's a topic you should really be contemplating, considering and prepared to discuss when you do attend conferences as well as ESI and e-discovery. But that's a whole other five hours.

VOICE: I was just wondering if you could talk a little bit about the different types of conferences that people will attend and if they're run differently and how much you think that varies from one chamber to another or different parts of the state.

MODERATOR JANEL ALANIA: Open that up to the panel.

MICHAEL L. KATZ: Well, one thing I think you were touching on, one of the first rules in the statewide rules is that counsel should—the counsel that appears should have knowledge and full authority. And whether you are showing up for a settlement conference or a preliminary conference or a compliance conference, it sort of doesn't matter what the name of the conference is because the judge or the law clerk may raise any number of subjects. You may be intending to go in to schedule discovery, but you may be asked about whether or not you have spoken to your client about alternative dispute resolution or the judge may want to convert the discovery conference into a settlement conference and you should be up to speed on that or you should know about the motion that's pending in the submission part and when it's returnable and what's going on with that. And so you just—you need to have a sense of your whole case, not just the purpose

you are showing up for court, but for any aspect that may come up, because you want to maximize your appearance. It's costing your client a lot of money for you to go to court, and you want to get the most out of it for your client. And it doesn't impress the judge or the clerk conferencing the case if they ask you about a different aspect of the case and you just say, "I don't know, that's not what I came for here." It's like, the rules say you are supposed to have knowledge about all aspects of the case.

PETER J. GLENNON: I think that's very important too, because, again, the purpose, as I understand it, of the Commercial Division is really to provide an expedient form for resolution in this matter. In my experiences and my colleagues' experiences, every conference with the court is an opportunity to reach a resolution, so I think that really drives home.

ANNA M. FONTANA: And if I can add as well, I think the other important thing is that before you appear for a lot of these conferences, you should be speaking to your adversaries and working out some of the issues ahead of time, so when you appear in court for the first time, it shouldn't be the first opportunity to talk about preliminary discovery issues or how you are going to go ahead or if you need to schedule some things. The judge and the court clerk, law secretary don't need to sit there while you hammer out some of the things that could have been worked out earlier by just making a phone call. So you should talk to your adversaries, start speaking about discovery issues, settlement issues, anything you can before you appear at these conferences.

VOICE: Yes. Question about since many of the commercial cases will turn on expert testimony, I know that one of the issues that appears in the preliminary conference is expert disclosure, just trying to get a sense, absent agreement, whether or not the judges in the experience you have had was such that they will require full-blown expert discovery—

HON. JAMES E. d'AUGUSTE: Judge Ramos was very much in favor of expert discovery. But, keep in mind, there is a limitation on how much a judge is permitted to order, beyond the CPLR, and with regard to discovery. I know with the Jamaica public service case that went up on appeal, there were expert depositions. After one side had deposed their adversary's experts, they decide, well, the rules don't require us to produce our experts for deposition. And the Appellate Division was not so kind to those particular attorneys after having taken the other side's discovery and refusing to produce their own. But it seemed to suggest to me that there are limitations, particularly on depositions of experts, on how much the court can order. Although from the practitioner's point of view, many times they want it anyway, because at the end of the day, sometimes it's the experts that are going to be what the case is going to turn on in any event.

PETER J. GLENNON: I had one other comment going back to the teleconference aspect of conferences. I'm actually curious to hear from anyone who practices more in the New York County Commercial Divisions. In the Commercial Divisions where I practice, telephone conferences are routine. It's not surprising, in my opinion, they are addressed in at least two rules of the standard rules specifically, Rule 14 and Rule 24, which actually it's a rule that I don't know if many commercial practitioners know about or follow that well, but there's advanced notice of any motion in the Commercial Division, and by the rule it's suggested that you contact the court for a teleconference on it. Now, in my experience, teleconferences occur routinely in Upstate and Western New York. I understand—I've only read about this—in 2004 New York County started a pilot program, which I think was Court Call or Call Court, a third-party vendor that sets up teleconferences for the court, and from what I've read, it hasn't really taken off that well, but it shows that more people are inclined to use the teleconference. I think that's beneficial for clients. It keeps costs down and saves time commuting back and forth from the courthouse.

MODERATOR JANEL ALANIA: In Judge Fried's chambers, we certainly do use telephone conferences with some frequency. The downside is that they are not on the record. Upside is that they do cost a lot less. They can be a really helpful way for attorneys to speak to each other. And sometimes just having the court attorney on the phone or having the judge on the phone is what they need. And I have had conferences where I'm—we hate to do it because it is—as Anna was saying, you don't just want to listen to lawyers hammer out their issues together. But at the same time, if just having me on the phone is helping them reach some kind of agreement and I can guide the conversation to some extent, it certainly is a good use of my time and a better use of the attorney's time than bringing everybody into court and spending more time and more of their client's money. So we like phone conferences. We do use them.

MICHAEL L. KATZ: We're trying to do it more and more, only because, especially in the Commercial Division, there are a lot of cases where attorneys are admitted from all over the country, and if it's going to be a five or ten minute conference, it's really bordering on abusive to ask people to fly in. Having said that, I don't think anything can substitute for an in-person conference when you are able to address different issues, as I said, like settlement or documents and go over some of the discovery disputes. So sometimes it's actually necessary and very helpful to have attorneys come to court. But for those short procedural conferences, sometimes I think we have a responsibility to at least, in the first instance, try to do it by telephone.

MODERATOR JANEL ALANIA: I think something else just to keep in mind with telephone conferences is

that they can feel informal and that can lead to some ways of interacting with each other and the law clerk—I don't think it happens with the judge, but certainly with the law clerk—that you wouldn't do it if you were in court or you were appearing in person with somebody; you start arguing with each other or you speak over each other, and it's hard for the court attorney to hear who is saying what. So just something to bear in mind, it should go without saying, civility should inform and impact everything we do as attorneys, but especially when you are on the phone and miss out on body language and facial expressions, be mindful of that.

MICHAEL L. KATZ: The only thing I would add is that, on occasion, we have had a court reporter come to chambers for a conference call. And on occasion, even in the courtroom, if one attorney can't make it down, for instance, on oral argument on the temporary restraining order, the court reporter can still take—make a transcript, provided people are careful not to talk over each other, which, as Janel points out, is a little harder on the conference call, but it can be done and you can request it.

MODERATOR JANEL ALANIA: There's a question in the back.

VOICE: My question is: How do you request a court reporter's presence, if you want them on a call?

HON. JAMES E. d'AUGUSTE: You can always ask for it. You should ask in advance because court reporters are not just sitting around waiting like that. They have to be reserved. But keep in mind that you are not entitled to it under the rules. You are only entitled to a trancript if there is an actual evidentiary hearing. But otherwise, it's up to the judge to decide whether or not to get the conference transcribed or not.

MODERATOR JANEL ALANIA: Another question?
VOICE:

Do you need to have a formal record?

I would imagine, perhaps people keep records or files of things that are going on, even if there is no court reporter, does that happen in your experiences?

MODERATOR JANEL ALANIA: Who wants to start with that?

MICHAEL L. KATZ: I'm a big note taker, so—and for each case, we have a case card and we do make notes, you know, May 12th's conference call, so and so directed to produce certain documents or—and we save copies of letters that are sent to chambers and write notes on top. And I think it's important. The advantage always to having a transcript is that the attorneys can't disagree with what was said because you can always go back to the transcript. But certainly, we do write down what's said on the conference call.

HON. JAMES E. d'AUGUSTE: Transcripts are not perfect either. It depends on what court reporter you get. I've had transcripts that it was almost impossible to decipher what was actually being said from the transcript.

MODERATOR JANEL ALANIA: On the topic of note taking, we certainly do keep extensive notes in Judge Fried's part. Something else that I have done in the past that I find useful is after a conference call, I've made my notes and then I ask the attorneys to get together and write a joint letter that memorializes everything that happens in the call, and I go through and check it against my notes and make sure that it's accurate. Judge Fried can so order it, if necessary, so there is actually an order that gets e-filed for the world to see.

ANNA M. FONTANA: This might be a little different than the commercial parts, but at least for us in general parts, we certainly do keep a lot of extensive notes and we keep files on every case we have, and Judge Ling-Cohan makes a point of writing down every order we do. So everything is written for us. So the few times we've had telephone conferences with attorneys and we've gone into extensive detail as to when things are going to be done and discovery disputes, what I've done is written it out on an order, on a gray sheet, and the judge has signed it and so ordered it and we mailed it out to them, so there really should be no confusion as to what happened, and I write it was all pursuant to the phone call. And if they have disputes at that point, they can certainly write to the judge. But at least it's in written form now and pursuant to what we had said on the phone call, so I think that makes it easier for attorneys.

MODERATOR JANEL ALANIA: Peter, you started talking about Rule 24 conferences. Can you say a little bit more about that, or maybe some of the former law clerks or law clerks want to talk about their experience with Rule 24 conferences because I think there is some confusion as to what types of motions require premotion conference and how to go about doing that.

PETER J. GLENNON: Well, Rule 24, this is in the standard rules for all of the Commercial Divisions, and it requires that the counsel request a telephone conference with the court prior to commencing or filing its motion. For me, it's more or less been every motion. We'll get into this a little bit later, but orders to show cause, TROs, preliminary injunctions, motions to dismiss, and summary judgments. And I think it goes back to that purpose of the Commercial Division of really providing an expeditious manner in which to reach a resolution. If there's—I mentioned, under Rule 14 for discovery issues, if the parties can't reach an agreement on disclosure, shocking, or if they're going back and forth over these other various motions, sometimes it is better to have the court, whether that be the judge or clerk or court attorney, really listen. And I'm not saying that anybody ever tips their hat. Sometimes

when you air these grievances, you get off the phone or leave the conference and you realize there's really no need for that motion. That saves everybody a lot of time.

MODERATOR JANEL ALANIA: I think some of the other panelists commented on that. Have you had experiences where somebody comes to you with a premotion conference, whether it's for a discovery dispute or another type of motion that they want to make, and just by virtue of having a conversation with the court, having a conference, suddenly there's no need for the motion anymore; have you seen that happen?

MICHAEL L. KATZ: Certainly, for discovery issues, I think you can often avoid motion practice by having a conference. I think most of the time discovery motions are not particularly necessary. They can be addressed in a less formal way.

I find the conferences prior to substantive motions helpful in terms of scheduling. We've all seen where someone briefs a motion for summary judgment and there's a two page opposition, but I really need that deposition of the witness that hasn't been produced, so until I have that deposition, I can't fully oppose this motion. And after you spent all this time briefing a motion, you get a short decision that says, motion is denied as premature, basically, renew after discovery. You've just delayed what you were hoping to resolve. And so very often in one of those conferences that's what happens, someone says, if I could just get that deposition next month, you know, that would help me with my opposition, and then at least when the motion is fully briefed, it's ready to go. And those are the types of subjects that often come up at those premotion conferences.

HON. JAMES E. d'AUGUSTE: Except that where you need a true record for an appeal, for instance, the issue is privileged, for instance, discovery motions are usually frowned upon by judges, at least that's been my experience, working for a judge and litigating for a number of years in commercial parts and noncommercial parts. You can put almost anything you want to put in a motion in a letter and have that as a guideline for the court attorney or for the judge, whoever is going to hear the application, go through and listen to your arguments, why it is you are entitled to discovery, what you are trying to accomplish by getting this particular set of documents. So just consider—again, know the judge that you are in front of, know what's going on and what the judge expects in terms of any particular type of dispute that comes up. Overall, most discovery disputes are resolved in conferences. That's just the experience in state court. So if you know that's what your experience is, then you should fine-tune your strategy for dealing with those discovery disputes by maximizing your time at that conference; preconference letters with maybe some citations, if they're truly on point, the case law, maybe attaching a copy of the case or two. Just because you don't have a motion doesn't mean that you are not giving the judge or the court attorney what the law is that supports your position on why you deserve the discovery.

VOICE: On the issue of citation, I was always taught that what chambers has are the official reporters. To what extent do chambers now have unfettered access to, say, Westlaw or Lexis?

HON. JAMES E. d'AUGUSTE: They have unlimited access to Westlaw and Lexis too, so they can access both, but you are supposed to cite to both. Now, sometimes, particularly when you are citing to trial court decisions, you might only have an unofficial cite, it might only be in Westlaw, for instance, or Lexis, so in that instance, you give the court the unofficial cite. If you want to give both the official and unofficial reporter, that's a matter of preference. I find it—you are already breaking up the continuity of your passage, the judge is reading or the court attorney is reading through, so you want to give as little breakup as possible, so giving one citation is usually good enough.

VOICE: To what extent do you consider it advisable when citing, say, in Westlaw to provide a copy of the decision with the letter?

HON. JAMES E. d'AUGUSTE: You are supposed to. Obviously, with the motions you are supposed to. But the same reason for providing a copy of it is equally applicable, which is you want to make it as easy as possible for the person who is deciding the issue to follow along with your argument. And so if you have something that's only obtainable from one specific source and that's an electronic source, what you want to do is have it in front of the decision maker at that time. You shouldn't attach everything, but you should attach what you think is most important.

VOICE: Just to follow-up on that point, though. I recently had a case where the adversaries did just that, cited to a trial for unpublished opinion for a really trivial unimportant point, and when I went back and looked at the case, it contained about six different points that supported our points and other aspects of our motion, and of course, we hadn't looked for that case, we hadn't found that case because we had plenty of law, and it wasn't on that point anyway—it was Judge Ramos, we happened to be in front of Judge Ramos—obviously, read the whole case.

HON. JAMES E. d'AUGUSTE: That just goes to show you, think very carefully about what decisions you are citing and whether or not you can find that point elsewhere, that particular point which is what you are really citing. I've had cases where I've said, this is great language, but look at the way it comes out. You take it, you put it aside. That's not a case I'm going to rely upon. Particularly trial court decisions, which are only persuasive and not binding and precedential in nature. So think about whether or not you want to fall in love with cases because there's

specific language in it, but there's other parts in the case which really undermine other aspects of your argument.

VOICE: Do the decisions of other Commercial Division judges get more weight?

VOICE: Can you repeat the question so everybody can hear it?

MODERATOR JANEL ALANIA: The question was whether the decisions of other Commercial Division judges get more weight than, presumably, than a decision of a non-Commercial Division judge.

HON. JAMES E. d'AUGUSTE: The weight given to decisions by other Commercial Division judges differs from judge-to-judge. It can go a long way to helping your position to have a decision supporting your position issued by another respected judge. Locating such decisions are important and not as daunting in this day and age as the Commercial Division has existed now for approximately 17 years. Yes, it's better to have appellate decisions, but persuasive decisions issued by other Commercial Division judges can go a long way to helping you prove your case. This is particularly true when you have a well thought out decision as opposed to a decision that is a paragraph in length without any legal analysis. Commercial Division judges, in my experience, give the detailed decisions a significant amount of weight in the absence of binding appellate authority

PETER J. GLENNON: Just on that point, I'd say, in my experience, the Commercial Division justices tend to write lengthier analysis and decisions. So in that regard, you have more to work with than some of these other cases. But I've found them to be very helpful.

MODERATOR JANEL ALANIA: If there's nothing else about conferences, I wanted to move on to actual motion practice in the Commercial Division. We touched on it to some extent, you have the advanced notice of motion requirements, discovery motions are obviously frowned upon. There are conferences that can assist you in all of this and in learning about all of this.

Moving on to actually appearing for a motion, though, I guess to open it up to the panel, when you—well, maybe, Peter, you are the best person to talk about this as the practitioner among us right now—when you have a motion to make, what do you do?

PETER J. GLENNON: Well, at first, of course, I confer with my client and I explain how this motion is the best angle that nobody else would have thought of and you are fortunate to have contacted me to help with your case. (Laughing.)

PETER J. GLENNON: But no, there is—we did address the Rule 24, the advanced motion. But assuming that this case has already commenced, we'll talk about how you can also commence an action by a motion in a few minutes, but assuming that a case has already commenced, generally, I find this will go to the civility part at the end, too, you want to discuss your motion, you want to understand, you want to make sure you are clear on the issues that you are bringing before you have your advance motion teleconference, perhaps with the court, but ultimately, when it comes to summary judgment or a motion to dismiss, I don't find any real difference between the Commercial Division and any other part. I think, however, what you do find in the Commercial Division is where you may—CPLR 3213 where you can commence an action by summary judgment in lieu of complaint, that rule really provides perfect Commercial Division subject matter. Where it's typically—you are seeking summary judgment on a promissory note.

It's an instrument for the payment of money only. So as long as you meet the monetary thresholds, that's a perfect avenue to commence an action with the Commercial Division. Of course, there are always orders to show cause. In commercial matters, you tend to have a timing issue, of course, with injunctions, which I believe is in another room today, but there are also other concerns that could affect your client.

But generally, I follow the steps of discussing with opposing counsel, getting on the phone with the court to explain the issues that we're going to go forward with, and generally speaking, we file and serve, look forward to oral argument when permitted.

MODERATOR JANEL ALANIA: And what about commencing an action by motion?

PETER J. GLENNON: As I mentioned, 3213 sounds nice and simple. It's a promissory note. It's an instrument for payment of money only. It's interesting where—actually, I did just do this a few months ago, and I was excited about it because you typically don't, in my experience, have that sole promissory note. Or maybe you have three or four, but it's usually tied into some overall complex commercial matter, breach of contract type of issue. But I did have this. With the CPLR 3213 motion, you also need a summons, which many people miss. I don't want to get into everything; of course, you go and you buy your index number, et cetera—but you are commencing—or filing summary judgment in lieu of a complaint also requires a summons, and you must serve it on the opposing side.

What usually comes up, though, with such a simple motion is whether the basis of the motion really is an instrument for the payment of money only. That's typically where you find your dispute among the parties, among counsel, and perhaps with the court. Those issues are usually the ones that you need to address in your motion. Otherwise, there's always the jurisdictional concerns with it, but otherwise, it moves forward with summary judgment.

And I guess I should say, actually, if you lose on your judgment—if you are wondering, mine actually was re-

moved to federal court, so I can't give you an end of case story—but if your motion for some reason is denied, your motion papers, those typically become your pleadings, unless the court directs otherwise. So your summary judgment motion paper is essentially your complaint, and any response, typically, becomes the answer.

There's also a question about counterclaims. There's a lot of case law out there that typically says counterclaims are not really permissive on a 3213 motion. However, if you can imagine your counterclaim, especially as it pertains to the promissory note or money instrument, that's really your defense. It's really a question whether there was a sum served or at least a sum that could be ascertained from the writing itself, was loaned and the breaching party failed to repay it. So if you have a defense to that, that will be more or less presented in your response, as opposed to serving a counterclaim. If it gets removed, then you follow federal rules and counterclaims are permitted.

MODERATOR JANEL ALANIA: What about filing a motion for a preliminary injunction and seeking temporary relief, how is that different in the Commercial Division than it is elsewhere?

PETER J. GLENNON: First of all, I want to start off, I'm sure everybody else knows this, but I've come across it a few times speaking with colleagues, there is a difference between an order to show cause and a temporary restraining order. Many people think if you just simply file an order to show cause, you can get a temporary restraining order. You actually have to request that relief in your order to show cause. Now, what's different with the Commercial Division, as I'm sure most people are aware, outside the Commercial Division an order to show cause may be brought ex parte. That's not the case in the Commercial Division. In fact, there is a notice requirement of the opposing counsel if known, or otherwise of the party, and that notice must provide sufficient, reasonable time for the opposing party to respond before an order to show cause is issued by the court. It gets as specific, as we go, again, down to the individual part rules. In Kings County, I believe sufficient time, sufficient notice is expressed in six hours and is set forth in that rule.

That's a difference, and I think, again, that goes to the verbiage of the courts.

VOICE: Just a point of clarification, I believe that the uniform rules of the trial court recently amended so as to require on a TRO application, whether you are in the Commercial Division or not, except within certain specified exceptions. So in my calculus in determining whether to go to the Commercial Division or go to a general IAS part, the attraction for going to an IAS part, being able to go in and seek an ex parte TRO is lessened somewhat because of the uniform rule. Having said that, I would suspect, since the rule didn't exist until very recently, there still might be a proclivity on the part of the noncommercial judge who is just coming up to speed with the rule to grant the ex parte TRO.

PETER J. GLENNON: I agree with you on the TRO. But I was also referring to the order to show cause itself.

MICHAEL L. KATZ: The only thing I would add on this subject is that if you give notice to the other side and you agree to meet at the courthouse at 2:30 to orally argue the TRO, it's not a bad idea to call the part clerk and mention that and ask if 2:30 is a convenient time for that judge. Because if the judge has three other matters on at 2:30, the judge may not want to hear your TRO at 2:30, and you may end up sitting there till 4:15. So out of courtesy to the court and to make sure you don't waste your own time, a conference call to the part clerk to alert the courtroom that you will be coming in on the TRO and ask what time to show up is really not a bad idea.

HON. JAMES E. d'AUGUSTE: To go one step further, you also have to speak to the Commercial Division Support Office because they have to review your papers, and they may be backed up. And they have an attorney that's assigned to the Commercial Division that reviews and puts—you know this—there's a motion folder, and there's a yellow sheet and the fold over has notes that the court attorney that's assigned to the Commercial Division has for the judge that's going to review the application. So they have to review it in advance of the judge seeing it. When you are going to give notice, you are going to want to take into account what you are told, when those papers are going to be reviewed by. I agree with you that there is less of a reason to go in the noncommercial parts with the elimination of the rule regarding ex parte applications. But depending upon the expertise of the judges and what type of case you have, there are the reasons to go to the noncommercial parts. I've actually seen lawyers go to noncommercial parts with noncompete agreements litigation because they seem to have better ability to get those initial TROs from the noncommercial judges than the commercial judges who hear those types of cases regularly and truly understand the finer points of what makes an enforceable noncompete agreement and what doesn't. So I've seen some practitioners go the other way just to get an advantage, so to speak, with regard to that TRO.

MODERATOR JANEL ALANIA: Just getting back to the Commercial Division Support Office for a moment. They are very, very helpful there. Judge Fried made the point yesterday—I think it was Judge Fried that said yesterday that you should bring in your order to show cause yourself. You should send it in with an attorney, not with service, not with a paralegal. You should be prepared to be there and appear before the judge when you bring in that motion.

The other piece of that, especially for a brand new practitioner, is if you have never appeared before the Commercial Division before and you really don't know what to do, the Commercial Division Support Office

will help you. They will provide so much information to you. They're really wonderful to work with and very knowledgeable.

HON. JAMES E. d'AUGUSTE: Don't forget with regard to applications or when you bring the order to show cause, you must say, no prior application has been made to this or any other court. Or if you have made it to another court, you have to explain it. This is designed to prevent judge shopping. And that's one of the things they check off. By bringing in papers yourself, if there's something that's defective in the papers, the attorney can fix it right there and then, you can literally—I've seen people write in "no prior application" on their affirmation, so that's one of the benefits of following that instruction, which is showing up with your papers will allow you to hear from the staff what's wrong with your papers, fix them right there. Particularly if you have a real emergency, that helps the process, getting the papers before a judge.

VOICE: This is slightly off topic.

Discovery, in Nassau County, Nassau County has put together some guidelines on e-discovery, they've expanded their PC order in part to address some of the e-discovery issues, what type of new e-discovery issues—this is continually evolving—do you find yourselves grappling with more and more? And based on that, what thoughts do you have for practitioners on e-discovery issues, other than discuss these issues beforehand and come prepared to discuss it with the court and try to put together a reasonable, cost effective proposal, but beyond that general framework, anything specific?

PETER J. GLENNON: Well, I can tell you as a practitioner the struggle I have with it really goes back to preparation. Everybody talks about e-discovery and everybody—Nassau County, certainly, is in the forefront with the rules and the Commercial Division itself, I believe, has a standard confidentiality agreement and what ESI will be collected. To me, it goes back to preparation. I think a lot of people know buzz words of e-discovery. I don't think a lot of people, practitioners, really understand what it is. It goes back to your client's preparation, even long before litigation comes around. You need to set up your electronic file systems and your e-mail systems and your backup systems and your counsel needs to fully understand that structure, even before you come into court with those matters. So I'm not sure exactly what the court sees day-to-day, but usually once opposing counsel and opposing parties are on the same page or at least understands where each part is, I haven't really experienced too many e-discovery disputes in my experience.

MICHAEL L. KATZ: One thing that comes up a lot in conference is what search terms to use to get to the point where you are figuring out what the scope of discovery is. And it's helpful if you've spoken to the IT people to understand, well, if we use these search terms, we're going to produce a hundred thousand documents, but if we can limit it to these search terms, it will be a much more manageable group of documents. So that takes a lot of preparation to figure it out, and that's part of the conferring process. I have on occasion seen lawyers bring IT people to the conference if they know that's going to be a big issue, because often questions come up with, well, we're not sure how they keep their e-mail system or where their archives are. And those are the issues you are going to try to hammer out in court. So either have people on standby so you can call them at a break and ask them the technical questions of what's involved or even bring them to court, if you think it would be helpful.

HON. JAMES E. d'AUGUSTE: One thing to keep in mind is to ensure that as soon as you know there's going to be litigation to send out your litigation hold letters and keep copies of it so you, as a lawyer, don't get blamed when documents get destroyed or e-mails get erased, so to speak, or backup files disappear. So very important from the start. There's the preparation of where—it's part of the whole strategy that I mentioned at the very beginning. Instead of being reactionary, be proactive, hold onto the e-mails, don't do anymore erases with regards to the specific e-mail accounts that would be relevant, and keep records of that so that you limit the ability—if you have a strong case, when you have litigators on the other side attempting to bring up issues that are attempting to stop your case, delay your case and prevent you from prevailing.

PETER J. GLENNON: I would just follow-up on the idea of having an IT person in your conferences. It's great. Our firm has a group of IT/paralegal type people, and even if you are in a smaller firm and you don't have those assets, there are these third-party vendors. You can bring these people in. They're great at helping not only your understanding of what you are doing, but they can help translate. I've been in meetings, just actually two weeks ago, I have my IT paralegal and the other side has theirs, each client's IT representative is there. These four people, the IT people, they spoke a language that I was excited that I know how to use my wife's iPhone.

(Laughing.)

PETER J. GLENNON: But at the end we can look at each other and say, are we all clear? Yes. Other than the attorneys.

(Laughing.)

PETER J. GLENNON: But it's really helpful.

And I think that's where it is. That's where—we're not going there. We're already there. So everybody needs to come up to speed.

VOICE: This is all fascinating, this is really a fabulous panel, diverse, young, very nice. Nobody has mentioned the cost of this to clients, and I wonder when, if ever, the idea of mediation ever comes up? The judges wouldn't

mind if one or two cases settled. I specialize in the First Department, Appellate Division pre-argument conferences. But very often when I'm supposed to help settle the case, they've never even thought about it. They spent a fortune, they're dying to get out of the case, nobody mentioned mediation. When does that happen, if ever?

HON. JAMES E. d'AUGUSTE: The issue of settling a case comes up often. From my perspective, whether as a litigator or my position as a judge deciding cases, I'm always bringing up the issue of a possible settlement of the cases. I constantly ask attorneys whether they have discussed a resolution of the matter? And smart attorneys will be thinking about what their end game for the case is at the beginning of the case. As a litigator this was part of what I hoped to be a winning strategy. I wanted to know what the various pressure points were likely to be in the case. This way, I could attempt to resolve the case in a manner that made my client happy or, at a minimum, provided the best possible outcome for my client. In my opinion, when you bring up settlement in commercial litigation, it is almost never too early. It used to be that attorneys would suggest that brining up ADR was a sign of weakness—that you don't have confidence in your case. But controlling costs and using mediation as a strategic tool is an important weapon in an attorney's arsenal. For those who have concerns about your adversary misusing the mediation process, initiating the process early will assist you in avoiding pre-trial attempts to misuse mediation, which can be costly in time and case positioning for trial.

MODERATOR JANEL ALANIA: I just want to add to that, the Commercial Division has an ADR Program, so the Commercial Division ADR Program has something like a 62 percent success rate at this point. They are commercially sophisticated attorneys, they're familiar with commercial disputes. Very often in Judge Fried's part, the first time the attorneys come to the part, they get referred to ADR. There may be room for discussion as to whether—attorneys always say, we want to have more discovery first, and then that's a question, do you really need to charge your clients for that discovery first? Does that really need to happen? There's some room for debate there. But to answer what I think was your question, I think at the outset it's worth discussing ADR.

VOICE: I made a statement. I wanted to make a plug. I don't think that the clients need to go through the hundreds of thousands of dollars of e-discovery before they sit down and try to work it out. And again, I would ask you guys and gals, talk about it more often because the attorneys, as we can see from sitting through this conference for two days, they think about motions, they think about letters, e-mails—most people don't write letters anymore—but this is all costing clients money. Take a shot at mediation.

ANNA M. FONTANA: And if I can add, as well, I have had people come before me who remember me from when I was working with the judge in the Commercial Division and they say, "Is there arbitration or mediation that the judge can send me to?" And I say, "Unfortunately not." That's something that's applicable in the Commercial Division. But at least in the general parts, you get sent to mediation only after you file your notice of issue and gone through discovery. So parties really should be taking advantage of this because most cases do settle and can be settled.

MICHAEL L. KATZ: And of course, Rule 8 of the Commercial Division rules say that the attorneys are supposed to confer prior to the first preliminary conference, among other things, about the possibility of ADR. Rule 3 says that the court may at any stage direct the parties to ADR. The first four hours in the court annexed mediation are free and courts can do it with or without the parties' consent. My experience is usually if you can convince the parties it's in their interest to go to mediation, it's a more successful mediation than if they're going in handcuffs. But, you know, sometimes parties don't want to, quote, consent, although you get the idea it might be helpful to get the parties in the room.

We also do a lot of mediation right in the courtroom; either the judge sits with the parties or I do, and of course, that raises issues if it's not going to be a jury trial, and so you have to talk to your clients ahead of time to see if that's something they would be interested in doing.

HON. JAMES E. d'AUGUSTE: This raises a fine point for those of you who have not done so and meet the qualifications, you should sign up to become a Commercial Division mediator. Quite frankly, you get training; that training allows you to think more strategically about your practice, in terms of how to think about resolving your case. And it also allows you, again, to handle from a different perspective commercial cases.

PETER J. GLENNON: I'd like to just slide in one final plug. If you can't get into mediation, look for the summary jury trial. It's cost effective.

MODERATOR JANEL ALANIA: So we're just about out of time, so I'm sorry to cut everybody off, but thank you all for attending this morning. I hope this was helpful.

(Applause.)

VOICE: Before everybody gets up and goes, I did want to extend a special thank you to the people who put this program together. Janel, of course, the moderator, and also Debra Edelman and Clara Flebus. Thank you.

(Applause.)

Presentation at the Commercial and Federal Litigation Section Spring Meeting on May 23, 2010:

Fundamental Ethical and Practical Considerations in E-Discovery: Views From the Bench

Panel Chair: **Emily K. Stitelman**, Flemming Zulack Williamson Zauderer LLP

Panelists: **Honorable Leonard B. Austin**, Associate Justice, Appellate Division, Second Department

Honorable Frank Maas, Magistrate Judge for the United States District Court for the Southern District of New York

Paul Taylor, First Advantage

Sheldon K. Smith, Nixon Peabody, LLP

EMILY K. STITELMAN: Good morning. Let's get started so that we can all get on the road sooner rather than later. Welcome to this presentation, "Fundamental, Ethical and Practical Considerations in E-Discovery." My name is Emily Stitelman. I'm an associate at Flemming, Zulack, Williamson, Zauderer and I will be moderating today's panel. I'm excited about today's program, and I think that it would be useful to newer and more seasoned attorneys in the audience. Each one of our panelists is an expert in the field of e-discovery, and I hope that you will take advantage of their knowledge and ask lots of questions.

Allow me to introduce the panelists. Justice Austin currently serves as an Associate Justice on the Appellate Division, Second Department, after more than ten years as a judge in Supreme Court.

Judge Maas currently serves as a Magistrate Judge for the Southern District of New York, after, among other positions, eight years as an Assistant U.S. Attorney for the Southern District of New York.

Paul Taylor oversees the Forensics Department, First Advantage Litigation Consulting, and specializes in supervising large-scale electronic evidence projects.

And finally, Sheldon Smith. Sheldon is a senior associate at Nixon Peabody's business litigation practice group, where he handles a variety of complex commercial disputes, including cases involving substantial e-discovery issues.

You should all have in your materials a hypothetical, which I believe starts on Page 77 at Volume 3. There are four topic areas contained in this hypothetical and we'll discuss each one in turn, allowing for audience questions before moving on to a new topic.

Starting with the first page of the hypothetical, Preservation 1. Hammond Communications—and I'll just summarize it, I'm not going to read the whole thing—Hammond Communications is a large telecommunications company, headquartered in New York City. Hammond also has offices in Cleveland, Ohio and also in Texas. Hammond is looking to purchase Dakin Communications, a smaller telecommunications company in serious financial trouble. To determine whether or not it makes financial sense for Hammond to acquire Dakin, Hammond hires Brad Carter to consult on the purchase to determine whether Hammond should purchase Dakin and assume all of Dakin's debt. Hammond agrees to pay Brad a total of $250,000 in three installments. One third after he submits his initial findings, one third after he's completed a full report, and one third after he's reported his findings to the Hammond Board of Directors. After Brad provides Hammond with his final report showing that it would not make financial sense for Hammond to purchase Dakin, Hammond decides not to purchase Dakin and does not pay Brad. Brad seeks to be paid for his final report and Hammond notifies in-house counsel that Brad is demanding payment. Still, after not receiving payment, Brad threatens to sue Hammond if he is not paid. And finally, Brad sues Hammond.

Turning to our panelists to discuss the legal issues raised in this portion of the hypothetical, Sheldon will speak a little bit about litigation holds and the duty to preserve.

SHELDON K. SMITH: What we're going to do is try to, from a global perspective and a general perspective, talk about the contemporary standards and the best practices that are in play for each segment, and then I'll go over some of those rules and some of the cases that you should know about or be aware of, and then we will open it up to more application of the hypothetical facts in the discussion amongst the panelists.

As Emily just alluded to, this portion, we're talking about the general rules for preservation and for the litigation hold. The rule, generally, is that a party has a duty to preserve relevant information in anticipation of litigation. That rule stems from the litigant's responsibility to refrain from conduct that impedes the administration of justice.

When does the duty arise; what's the trigger? The general rule is that the duty arises when the party reasonably anticipates litigation. That can mean a lot of things. It doesn't necessarily mean when a claim is filed. It often does mean before the complaint is filed, particularly if you

are talking about the plaintiff, because the plaintiff controls the timing. So it's pending litigation or notice of a claim or notice of an investigation.

What happens after that duty triggers? Generally, a party must suspend its routine document retention destruction policies and put a litigation hold in place.

Now, when we talk about the litigation hold and preservation, in general, there are specific cases that all practitioners should be aware of. Particularly, *Pension Committee*, that came out in January of this year, for those of you who don't know about the case. You may be aware of the *Zubulake* cases that came out in '03 and '04, Judge Scheindlin did a tremendous job, once again, in providing guidance to the bench and bar on how to handle preservation and litigation hold issues and trying to assess when a party should be sanctioned. The *Pension Committee* case revisits *Zubulake*.

But for purposes of preservation, the trigger, the hold, those are the three cases from federal court, particularly in New York, that practitioners should be aware of. They're must reads. Not only must reads, they are must understands. What Judge Scheindlin does is she lays out for us the potential culpability that can be in play, the burden of proof, and how those two interplay to determine the appropriate type of sanctions, if any. So we recommend that all practitioners read those cases or read the alerts and articles that summarize those cases, from the federal standpoint.

From the state standpoint, there are several cases out there as well that often refer to and apply *Zubulake* and *Pension Committee*. One is *Ahroner*, which lays out how preservation duties and sanctions apply in state court under 3126, CPLR 3126. When parties are talking about with their counsel when they're going to file, when they should suspend their document retention policies and destruction policies. And also, F*itzpatrick* is key because *Fitzpatrick* is a case where the court, with all these standards, contemporary standards, the rules in play, and actually decided not to sanction the party finding that there wasn't enough to go on in terms of prejudice and there was good faith. However, denied the sanctions motion without prejudice, allowing for discovery to continue and if things continued to go on in a teeter tottering sort of manner, that the sanctions could be revisited. So those are the cases that we recommend you visit, you look at, you understand, and you know about, particularly if you are facing the issue or if you are trying to defend against or bring a motion on these issues.

The litigation hold, generally, best practices, from a general standpoint, the duty to preserve is an ongoing thing. It's not just issuing a hold one time or issuing a letter or issuing an e-mail. Once the litigation hold is in place, the party and its counsel must make certain that all sources of potentially relevant documents are identified and placed in the hold. And to do this, counsel must become familiar with the data retention policies, the key custodians, and where documents are with their client. The counsel must issue a written litigation hold and communicate directly with key players, not using in-house counsel to do it or delegating it out. It's important that—the cases highlight this—that one of the things that often gets overlooked is counsel didn't communicate directly with a particular witness until maybe that witness is being deposed or maybe even called to trial, and then all of a sudden you realize there were documents there that that witness did not preserve or was aware of and didn't let the trial counsel know about. So counsel should instruct the key employees him or herself whenever possible.

Now, talking about specific obligations and best practices, when the duty is triggered, including issuing the hold in writing and including identifying key witnesses, is stopping the deletion of e-mails and suspending the policy. So to do that, we need to understand what our clients' suspension policies are, what's in play, whether it's three months, six months, two years, is there a policy, does delete mean delete, preserve backup tapes, if necessary. If the routine policy is allowed, what you know to be pertinent information to your case or you know the other side is going to ask about, then you have to consider preserving backup tapes, and we'll talk about that in a few moments. Issuing the litigation hold continuously; revising it, revisiting it, thinking about it. It's a process. Documenting the process. Who is getting the hold notices and when. And then be prepared to, at the meet and confer, the 26(f) or what have you, the Rule 16, the preliminary conference in state court, to talk about what preservation methods took place and how a litigation hold is in place.

Now, real quickly, before we move on to the next topic, I want to talk about the letter. Because everyone says, "Oh, you have to issue a litigation hold letter," and we're supposed to assume that we know what it's supposed to say. It's very important. It's usually Exhibit A. If it's going to be disclosed, even if it's disclosed on a limited basis because there may be confidential information in it, that's a key consideration. Please be aware of that in your litigation hold. If your client's conduct is challenged, it

may become discoverable. These issues have been out for a long time with the *Rambus* cases back in the day. And if you are going to draft a litigation hold letter, be conscientious of the fact that what you put in there could become discoverable, maybe just in camera to the court, it maybe can be limited or redacted, but nonetheless, you have to really think about what goes in there. But at a minimum, it must be in writing. It must have effective and clear instruction. It must be timely. And it's got to be something that's properly enforced. Again, it's just the start of the process, but what is often the most important part. I like to refer to it, when I talk about it to my clients and junior associates, as SUMR, just an abbreviation, the acronym for it, that it's got to be suspend the routine and ad hoc deletion procedures; "u" is understanding, it's got to be understandable and reasonably straightforward letter; "m" is don't forget the monitoring process and supervision; and "R" is to revise it and revisit it.

I want to talk about the key elements in a hold letter before we move on because a lot of people ask this a lot, and think they can get one off the internet, a sample form letter. You can, possibly, but every case is different and every hold is different and the instructions are different and who you are sending it to are different. But the key elements: Send it from the top, send it from somebody who is going to get the attention of the employee, you may want to get an officer, in-house counsel. You don't have to send it to all employees in every case. If it's a small company, you may. If it's a large company, you really have to take your time and plan and investigate and see who you want to send these to. Keep it simple and understandable, we talked about. ID the subject matter. State in the letter what the case is about, perhaps, and even the subject matter; we're looking for communications with this person or communications about this company or communications about this topic. Consider putting in a date range. It could be problematic, it could be deemed as an admission, if you are going above or beyond the time period or limiting it too narrowly, but consider it depending on the circumstance. Define what must be preserved. This is important. We, in our document demands, a lot of times, we just define documents with this big, long thing. Don't forget, the hold is going to employees, it's going to key custodians, people who aren't necessarily up on the legalese and the technology language. So say to them, e-mails, spreadsheets, PDFs, attachments, documents in your hard drive, in your file, say things of that nature. One of the other key considerations is promise to follow-up. Let them know that it's going to be monitored, and then do follow-up. So those are important things you can put in the hold letter. Try to keep it brief, it should be anywhere between four and six paragraphs. If you inundate an employee with six pages, it's not going to get read, it probably won't get followed, it's not going to be done, it's going to be difficult to manage.

EMILY K. STITELMAN: So just some more background from the hypothetical, which is on Page 2 of the hypothetical in your material, it deals with Hammond's IT system.

Each Hammond office maintains a hard copy document file room and computer network and server. Computer servers are backed up nightly on backup tapes, which are maintained by each Hammond office. After 30 days, each backup tape is overwritten and used to backup new data. Hammond employees have company laptops and company BlackBerrys. Each Hammond user determines how to maintain his or her e-mail, and deleted e-mails remain on Hammond's server for three weeks, at which point they're deleted and purged from the server. Documents are saved on user hard drives or company network folders.

Sheldon is going to tell us a little bit about preservation and how counsel can ensure that all relevant documents can be identified and preserved.

SHELDON K. SMITH: There's no one checklist that's going to work in every situation. Courts constantly say that. But there are best practice guidelines. There are guidelines that are published, Nassau County produces them, that all try to provide teaching and lessons on what to do and what not to do. So in going through some of these key considerations, the so-called best practices, I just want you to know there's no one list. But nonetheless, you should have a list that you can go to to try to apply and specify to your particular situation, go through with your client and in-house counsel. From a general perspective, very generally, as I said earlier, it goes beyond just sending the hold and maybe a couple follow-ups. It's really about supervision, preservation, understanding where documents are, who has them and how they may or may not be retained.

Pitfalls in these cases where counsel is getting dinged or the parties are getting dinged often include delegation—it's not the hold. Usually there is a hold. Everyone has known for a long time, even before *Pension Committee*, before *Zubulake*, you've got to issue a litigation hold letter to preserve documents. Pitfalls include the process; was it documented, there wasn't acknowledgments, there wasn't a process in place to make sure people were cooperating and providing feedback, who was getting the letters, who wasn't. So the important part is keep in mind the process. Be prepared to revise it, be prepared to explain it to opposing counsel, to a partner at the firm, to in-house counsel who comes in. We have a lot of turnover, in the last few years, we've had the turnover in our firm. It's important that you have this process documented because people may leave, and then you are dealing with the clients and you want to know where things left off and what the client said about the preservation issues, about where documents were and where documents are.

The judges may chime in and say the same thing. You really have to cover yourself. It's not just documenting paper in the file. It's a process. Keeping that in mind and understanding that some day you may have to put that in an affidavit. If you go in with that mentality, I find, if I have to document this and prove it to a senior partner or in-house counsel or general counsel who calls to check in on the case and I have to give a status report or the judge during our Rule 16 or what have you or, heaven forbid, a special master referee because you can't come to terms on some of these e-discovery issues, then you're going to have to document the process, and you want to have already done that and not going back trying to reinvent the wheel.

VOICE: So I go to Hammond and I say, you know, from what I understand, you've told me Brad has complained, and what seems to me is going to be the case, here, is Brad may wind up suing at some point, so—now, I'm trying to find out generally what this dispute is about. What I'm hearing is that the company thinks Brad did a horrible job. Whether it's true or not, the company is telling me Brad did a horrible job, we wanted to fire him, he just wasn't helpful, and we made a wholly independent reason not to go forward with the acquisition, with whatever the deal was.

So now, to defend this case—I mean, all of our reasons for deciding not to proceed with the transaction may come into place, and so we have three different offices, we have people all over and you want me to put a hold here, and you want me to tell all of these employees. Look, the contract with Brad was for $30,000, and the guy was horrible. Are you telling me that I have to do all of this? Do you know what the cost is going to be? Are you crazy? Do you have another firm I can go with? But this is the dialogue we have now.

SHELDON K. SMITH: Absolutely, absolutely. And Judge Rosenthal in *Rimkus*, another case out of Texas, which is another case that highlights, from the federal standpoint, preservation issues and hold duties and actually focuses on the proportionality issue. Taking into consideration the conduct that's reasonable or unreasonable, under these standards and under these best practices, has to be looked at by looking at the amount at issue and what's at stake in the case.

HON. FRANK MAAS: Which is why the number $250,000 probably was selected as part of the problem because the costs of doing the work that needs to be done here will be a lot, but not $250,000.

HON. LEONARD B. AUSTIN: And certainly, at even the preliminary conference, you are going to be asked how much is involved here and what's it going to cost to get there? Isn't there some wisdom in the economics of the litigation to be able to make the determination, throw the experts and forensics costs into the package and make it go away?

VOICE: One of the tricks, though, is that's at the time when you are at the complaint. I mean, sometimes you have a sense of what the exposure is going to be. Sometimes, at this very early stage, you don't. And what you do is you, as a lawyer, know you want to do all of these things, you can see down the road what things may happen, but the amount in controversy or the potential exposure to the client has not become that clear. I mean, what I would tend to do is I would say, "Look, these are the things that are going to wind up happening, this is what the court is going to wind up expecting. If you don't want to go down this road, that's a decision you can make, it's going to affect your ability to defend against that claim, potentially, because the court is going to expect this stuff." And you are making a business decision. It's a very difficult conversation to have.

SHELDON K. SMITH: Take into consideration every case is different. Judge Scheindlin points out in all of her decisions every case turns on its own facts and on its own outcome and its underlying effects. But at the end of the day, all we can do, as lawyers, is know if this is the teachings of *Zubulake* and *Pension Committee* and of *Rimkus*, if you don't know the standards, contemporary standards, if you don't employ the best practices and you don't document a reason for not preserving something, that's when a problem arises. That's when mere negligence can become gross negligence, and that can have an impact on what sanction is actually handed out, if any, or how the case detours to now go into discovery and see what you did and looking at your process. So all we can do is know the best practices, know what they are and consider them. We call them key considerations. For outside counsel, discuss the company's electronic data with in-house counsel, personnel. And as I said, make notes, make memos to refer back and to discuss this with others in your firm, other lawyers, other counsel, because counsel may be replaced too. So you have some sort of—cover your you know what—in the file and talk about it, so you can go back to it and refer to it. Get familiar with the IT. Talk to the IT. Take that into consideration in every case. These are the best practices that are out there. Define what's privileged and protected. Determining what documents and policies are in—what document retention policies are in place and who can suspend them and how they can be suspended without interrupting the business, or can they not be suspended without interrupting the business. Determine who controls and monitors hard drives and laptops of employees that are off-line, so you can figure out who to talk to. Talking to customers in a trademark case, who has been talking to a supervisor in an employment case with a laptop that's off-line, how do you get that information, who is going to take control of that information that the employee leaves. Suggesting a workable and appropriate

hold letter, that's the job of outside counsel when those things pop up. Those are the best practices to consider.

HON. FRANK MAAS: *Pension Committee* talks about every case being unto itself, and then it goes on to create some bright-line rules, one of which is the failure to preserve the ESI of key custodians is gross negligence, whereas the failure to preserve the ESI of custodians in general is mere negligence. What happens if Hammond Communications has 15,000 employees, do you have to preserve the data of all 15,000 employees to avoid a claim that you negligently destroyed some ESI?

SHELDON K. SMITH: Consideration, and—

VOICE: What does it mean to preserve in the context of deleting an e-mail, which ends up on a hard drive, is deleting the e-mail in and of itself not preserving, or if it's going to another source but that's going to be more expensive to get—

SHELDON K. SMITH: That would be the question I would ask the IT and the custodians and in-house counsel, does "delete" mean delete.

HON. FRANK MAAS: When the duty to preserve arises, you can no longer delete and move it to a less accessible form. So the mere fact that it's going to be on a backup tape, for example, and could be restored if the transition occurs after the duty to preserve arose, there's a problem.

SHELDON K. SMITH: But if it's on your laptop, I mean, when you delete your mail, it's out of your folder, your e-mail that you see, your mailbox, but it's still in your mail folder, it's in your mail file, it's still there, and everybody knows that, a lot of people know that. So that doesn't mean you can't delete it. But what the Judge is talking about is that if that is being recycled into a back-up tape that's being compressed and now there's going to be an issue about getting that out and that's after the duty to preserve has been triggered and that's the only way to get that information, and you know it's directly relevant, that's a different issue.

HON. LEONARD B. AUSTIN: And don't forget, you've got to think out of the box with regard to where the ESI can be found. We've mentioned laptops, and we're mentioning servers. Don't forget about PDAs, don't forget about cell phones, don't forget about home computers. If you are dealing with a disloyal employee, home computers can be as damaging as anything. And if you don't go in and discuss that with the court in terms of preservation, then you are losing a great deal of information.

VOICE: I suspected that there's horror—there's been horror in the Bar ever since *Zubulake I* and since, which resulted in an amendment to the federal rules, and then Judge Scheindlin has pronounced further, at the risk of offending her honor, she is a District Court Judge of great note, but she is a District Court Judge who is making our lives crazy, to be honest with you.

HON. LEONARD B. AUSTIN: Don't be shy, tell us what you think.

(Laughing.)

SHELDON K. SMITH: Don't forget you are on tape.

(Laughing.)

HON. FRANK MAAS: And your name is?

HON. LEONARD B. AUSTIN: Note your appearance, please.

VOICE: Now you have to preserve this tape, okay.

(Laughing.)

VOICE: I do think the initial process of preservation, we get it. But if the e-mail is produced in the process—it's been preserved, it's been—seven recipients have it or it's been printed, forgetting about metadata and all the other stuff for the moment, we're talking about corralling huge amounts of information that may be so readily and easily available that these topics just never come up.

SHELDON K. SMITH: I understand the resistance. We're talking about general practices and general instances. But when you say we get it, frankly, I go to court and it's not always the case. I was in a deposition, I was telling the judges this morning, not too long ago where I was talking to a former employee and I was asking him about his laptop and asking him where this information was and I looked over to counsel, and I said, I asked for this information, you said you didn't have it, he said he did provide it back. He said, well, you never told us to preserve it. My understanding of the rule is unless you send me a letter telling me to preserve it, I don't have to. So not everybody gets it, and you would be surprised how many people don't.

So these things, going over the general practices and the teachings of these cases is important because what the judge said and what she said in *Pension Committee* is these are now contemporary standards, this is the digital age, these things have been out there. If you are going to be, particularly in my court, in the Southern District Court, you have to know the cases. But it's just a guideline, it's just practical considerations.

VOICE: When you talk about sanctions, it's not just a guideline. When you start talking about imposing sanctions for failing to preserve an e-mail, that's not just a guideline, that's sanctionable conduct.

VOICE: The problem is this is completely inconsistent with the world we live in.

VOICE: It's true.

VOICE: It's a fabricated construct. Businesses don't live in this fashion, lawyers don't live in this fashion, no one lives in this fashion. What it's done is it's eliminated litigation, people refuse to go to courts on these issues, refuse to assert their rights, they've lost respect for the courts on it. It's a serious issue. Judges are not applying a proportionality—

VOICE: Yes.

HON. LEONARD B. AUSTIN: If you go back a few years, you have pretty much the same issue when you know you are about to be sued about X, Y, and Z and suddenly every shredder in the company is going and all the papers disappear. There's really not—

VOICE: Those days are long gone.

HON. LEONARD B. AUSTIN: I'm sorry?

VOICE: Those days are long gone.

HON. LEONARD B. AUSTIN: Those days are long gone. So now instead of the shredders, we have delete buttons, which are certainly not sufficient to get rid of anything, but we have a far more sophisticated electronic shredder, and all we're doing with the litigation hold is saying turn off the electronic shredder.

VOICE: And people understand that, but the sanctions for failing to produce one e-mail out of thousands of e-mails is—

SHELDON K. SMITH: The teachings of the cases are serious and they get our attention, but there are a lot of times, in my experience, where you ask for them and they get denied. You don't get made an example of. There's got to be law out there to provide some sort of guidance, some sort of framework.

HON. FRANK MAAS: The key to this, I think, is you want to act reasonably. And that's a broad precept, but I think virtually any judge you come before, if you've acted reasonably, even if, with hindsight, incorrectly, but you can defend what you did—which is why it's important to document it as you are doing it, rather than try and reconstruct it two years down the road when it hits the fan—but if you have acted reasonably and had a proportional response, I think most times sanctions are not going to be an issue. But there are no simple answers here. Take the example of what if we delete the e-mail out of the folder but it exists someplace else. Ordinarily, that may not make a difference, but if Hammond Communications' CEO has a folder for e-mail called "vendors I have shafted" and files the e-mail in there, then on the eve of litigation moves it to the trash bin, but doesn't empty the trash bin, the fact that it was in that folder may be significant.

And one of the issues, just as a footnote, in terms of the litigation hold letter, is you also have to tell people how to give you, if they're supposed to, the information. If you say we're going to need essentially all the e-mails you have about Brad, and they e-mail it to you or the person, the paralegal or the associate doing the collection, they've changed the metadata. Depending on how they send it to you, they may or may not be preserving metadata and that's something else—

VOICE: Would the metadata show that it was one time in the file folder called "vendors I have shafted"?

HON. FRANK MAAS: Not necessarily. Certainly, if you take it, move it to the trash bin, restore it to your inbox, and then forward it to me because I'm the person in charge of harvesting e-mail, probably not.

SHELDON K. SMITH: One more side note on doom and gloom and the *Pension Committee* case, beyond the sanctions and the gross negligence, which we will talk about when we get to the end of the program, about sanctions is an important note about backup tapes and the rule about backup tapes. What Judge Scheindlin did—actually, when the decision first went out, January 11th, she amended it three or four days later to clarify what she meant with respect to the duty to preserve backup tapes. Because the rules, when they came out, after *Zubulake*, 2006, when they were amended in December, actually kind of glossed over backup tapes as, we know they're not reasonably accessible, things are put in for disaster recovery and they're compressed and everything else. But what Judge Scheindlin brought back out of *Zubulake* and some other cases is this has been a hot-button topic in several cases, when we talk about *Ahroner*, *Fitzpatrick*, these recent cases in the last two years, backup tapes are an issue. So when the duty is triggered and it's reasonably anticipated there's going to be litigation, there's a duty to preserve backup tapes, if the backup tape is the sole source of relevant information. So if the client's normal retention policies have kicked in by the time you have already determined to address these issues and by the time you get the hold out and you know there's some e-mails out there, you know there's some issues about who got shafted or what have you, then there may be a duty to preserve those backup tapes and make sure they're not recycled in the ordinary course and pull them out of that cycle.

HON. FRANK MAAS: There's also a fairly simple way that you can try to protect yourself, to some extent. The case law takes the position, generally, that litigation hold letters are either work product or attorney-client privilege or both. And people tend to turn to the other side and say, "I'm not showing you my litigation hold letter." So the question is: What's the downside if you show it to the other side and they say you know you've forgotten this whole category of custodians? You can consider that, say, that's excessive, I'm not sending that to them, or they may have a point. And I think both sides agreeing

to show each other their litigation hold letters with some kind of nonwaiver or reservation of rights agreement makes a lot of sense, because at that point, you can have an intelligent discussion and confer at a fairly early stage about what will and won't be preserved.

VOICE: I have a two-part, maybe off question. Listening to the comments, I was wondering whether people were more inclined to arbitration in contracts, particularly in the $30,000 situation, in order to avoid e-discovery? And second of all, either under federal or state practice, can you get an injunction in the aid of arbitration to require the preservation of documents?

HON. LEONARD B. AUSTIN: I would certainly think in the state court's context you could get an injunction in aid of the arbitration, you certainly have the ability to get discovery within limitations, and I would think that that's certainly within the realm.

VOICE: So then why wouldn't practitioners automatically in an arbitration just automatically go in for a litigation hold, isn't that just going to increase the amount of injunctions in aid of arbitration?

VOICE: May I? In the arbitrations that I do, my preliminary conference more frequently addresses the aside, and in a conference, if there's any dispute between the attorneys about what should be preserved in the Rule 16 conference. So I don't think you are necessarily going to escape these *Zubulake* kind of considerations by going to an arbitration.

VOICE: I think it depends on the arbitral body.

VOICE: Sure.

VOICE: But it just dawned on me that we now have created a situation where we have at least, theoretically, different standards in arbitration—

VOICE: Well, that's a lesson to mediate.

SHELDON K. SMITH: Just to wrap up on the backup tapes. There are considerations, obviously to know what the suspension policies are, how the data is compressed. Are they accessible backup tapes? Are they active or are they inactive? Are they really compressed data? Those sorts of things. Being able to identify those early on so you can get to those backup tapes and maybe even get to the information that you are looking for that you know is relevant, rather than going into a fishing expedition. We want to talk to Paul about some of the ways those can be indexed and looked at. Because one of the things you may talk about early on—we're going to get to it in a minute—with the meet and confer or the Rule 16 is cost shifting. You need to know what the status of the backup tapes is if the other side is harping about it and how much it's going to cost, what the efforts are going to have to be in order to preserve that information.

PAUL TAYLOR: Yeah, I think it's very interesting, coming from the vendor side, such as myself, the other side of the case is trying to understand just how much data, the location of data, the number of custodians, the number of possible pieces of media actually may be in discussion here. Because obviously, that has an effect with regard to the actual cost. So it's not just the backup tapes themselves. I mean, the way technology has developed, even over the last couple of years since the *Zubulake* decisions, has certainly moved on a great deal; indexing of data has become a lot cheaper, a lot quicker, with search algorithms being developed by many different organizations. And so the actual burden of cost has somewhat been going down. Now, obviously, conversely, the cost has become increased because of the amount of data being required to search is increasing. So there is somewhat of a balancing or a balance act undertaken.

So one of the main things which I would certainly advise is to—as I mention—is a consulting stage to determine exactly where the responsive documents may be, in what format they may occur, and in the ease in which that data can then be extracted, if necessary, further on in the litigation.

A lot of the issues which I come across in my day-to-day work is dealing with old technology. Backup tapes which have gone back to the late 80s, early 90s, just data on systems which have since been updated and the hardware itself used to create the information has disappeared through acquisitions or maybe is in somebody's cupboards in somebody's house who is interested in the technology. Those obviously have an effect with regards to the cost of extracting that data. And of course, I'm just—preserving that data, rather. I'm just talking about the preservation stage. Obviously, then we have to—the data has to be accessed and indexed, as I mentioned, and then analyzed. And again, these are factors which often are brought in at the early stages.

Data mapping is becoming somewhat of an expertise for individuals on the vendor side. And even though there is some—there's an hourly charge for most consultants at the outset, but that can lead to cost savings down the line.

SHELDON K. SMITH: We're going to get back to some of the points. The point about sanctions, why we're scared and everything else, we're going to talk about that because the reality is you see, a lot of times, at practice, it turns into a "gotcha" game. A side doesn't have a good position and this is a way to create a counterclaim, this is a way to create a detour in litigation and drive up costs. So we're going to talk about that. I just didn't want you guys to think that we're not going to get back to the sanctions question.

EMILY K. STITELMAN: Right now we're going to switch topics and talk about the obligation of counsel to meet and confer about electronic discovery issues.

After Brad files his action, Hammond hires outside counsel DCH to handle the litigation. DCH staffs the Hammond litigation with one partner and one associate. The partner drafts the litigation hold letter and the associate is tasked with preparing all e-discovery issues for the upcoming preliminary conference before the court.

Sheldon, what rules does the DCH associate need to know about as he prepares for the preliminary conference?

SHELDON K. SMITH: Well, in federal court, the rule is 26(f), the meet and confer. It's very clear, especially with the amendments—these have become hot topics, by the way, federal and state court, because the courts really are trying to get counsel to avoid having these things blow up, create detours, turn into "gotcha" games about sanctions and turning into different claims and trying to keep costs down from detours and these things can take on new depositions, new witnesses, opening up hold letters and seeing them *in camera* or even beyond, assigning referees, special masters to deal with these things. So the big emphasis now from the courts and from other guidelines is to address these issues up front in a meaningful fashion, having a meaningful meet and confer, which means to talk about these issues. The federal rules have this in Rule 26(f), there have been lots of cases about having a meaningful meet and confer. And the state court, now, New York has for a while now had this rule in the Commercial Division. It still—we're still lagging a little bit, and there's a recent report from the Office of Court Administration about e-discovery standards and there needs to be more education and we need to get ourselves caught up, we need to be a front-runner in these things and not lagging behind, but the meet and confer commercial rule aids 22 NYCRR 202.7, 2006, there's got to be a consultation prior to preliminary conference.

HON. LEONARD B. AUSTIN: 202.70.

SHELDON K. SMITH: 202.70, I'm sorry. Thanks, Judge.

It requires counsel to meet before the preliminary conference and discuss issues. What issues? Implementation of a preservation plan, scope and form of production, anticipated costs, confidentiality and privilege, search methodologies, those sorts of things. So that's the Commercial Part rule. Nassau has taken the lead. I mean, I'm in Buffalo on the opposite side of the state and I just look and go, "Man, I wish we had that." And when I walk into some of my preliminary conferences in state or federal court, sometimes practitioners just really don't know or they just want to, you know, let's just say we talked about it. That's the sort of thing that the courts want to avoid. They found that these things were being sort of brushed aside and sort of skirting the rules, not taking these things seriously, then there would be a blow up. And the judges don't want to hear about it if you didn't really do what you were supposed to do. Particularly in Nassau, when you have forms and you have documents and you have to put in order, things of that nature, basically verifying that you did discuss all of these things and all of these considerations. I would like to hear from you guys who actually have these things in place. Do we have a form?

HON. LEONARD B. AUSTIN: No, I wasn't able to pull it up.

If you look in the Commercial Division rules, generally within the OCA website under Nassau, you'll have a section that deals with different forms. If you look at the preliminary conference form order that we have, in Nassau what we did was we said in Paragraph 12 of the order, a specific provision as to the documents to be provided and the format in which it's to be provided. So we give counsel the opportunity to check off whether it's native, however it will be with or without metadata, and we also have a check-off that says, we're not going to do it, we're opting out. And in many cases, counsel, after thinking about it, realize that it's such a monster that they're just going to litigate without electronic discovery and simply determine to opt out right at the very beginning, and it works just as well. However, some do come back later and say, we want to revisit that, obviously, we will regret some things we've committed to. And the court has been, generally, fairly open to discussing whatever needs to be discussed.

But a cautionary note, and I'm sure Judge Maas will tell you the same thing, be careful what you wish for. Cooperation is a lovely thing, and from the bench perspective, we love it. We love it. But agree to things after you've investigated it, determined the cost, and see what impact it has on your client. Because if you don't and you say, oh, sure, we'll do that, and then you stipulate to it, the court so orders it, and then two months later you come back to court and say, "Oh, my God, that costs $15,000 a month to do," the court's hands are somewhat tied in terms of what we're going to do. First of all, it's music to your adversary's ears. I mean, think about it, I had one where it was actually a $25,000—I'm sorry, it was $15,000 a month cost just to maintain voice data on a monthly basis, and it was a nightmare. And counsel realized that he should have never agreed to it, and the other side said, "Gosh, I wish I could help you." My client really wants that to be preserved.

(Laughing.)

HON. LEONARD B. AUSTIN: And really it's a problem. So cooperation and everything is good, but walk in—and that's the whole purpose of meet and confer, you've got to educate yourself before you confer and agree to stuff that it's in your client's best interest, it's

financially feasible, and it makes sense in the context of what's being litigated.

VOICE: What about agreeing subject to some sort of cost-benefit analysis or financial feasibility?

HON. LEONARD B. AUSTIN: Well, Rule 8 under the Commercial Division rules requires you to have done that in advance, and that's really what meet and confer is as well. The IT people do need to be brought in early, and I'm sure Paul will discuss that with you. But really to know what's involved, you can't go in and say, "Well, yeah, we know that's out there, we'll get back to you, Judge," is really not the way to go. I've sat on a panel with magistrate judges, Judge Maas included, to tell you—and I don't mean to speak for him—but to tell you that, "Oh, no, we expect it done there and then." You've got to do your homework before you walk in.

SHELDON K. SMITH: And that's the interesting dilemma. If I don't ask my client all those questions and talk about all the best practices and go through that detail, and if the other side doesn't opt out, again, all this stuff, forms, I've got to check all this stuff, and I'm swearing to this, this is going to be in an order. And if I don't go through it with my client before he or she fires me, you know, there it is. You have to talk about it. Even if it is a $25,000 case, if the other side is not going to opt out—or $125,000 case for the threshold.

HON. FRANK MAAS: There's another interesting study or report, which is out of the Seventh Circuit, has a pilot program that is well worth reading. They had it in place for the first year, but it's really only four or five months of cases that have been handled under it. And in addition to requiring conferences like the New York various projects in advance of the first conference, it also talks about having a discovery liaison; it can be an attorney, a young associate of the firm; it can be an outside vendor; it can be somebody in-house at the company, but each side, if there is a discovery dispute, must appoint a discovery liaison, and the report recommends discovery liaisons in other cases and it has lots of language about cooperation. They did a preliminary survey, I guess about a month ago, of the 13 judges involved, 84 percent of them thought the cooperation provisions had led to fewer disputes. Interestingly, there was a lower response rate from the attorneys involved. Only 35 percent of them thought that cooperation had led to fewer discovery disputes. But both the judges and the lawyers overwhelmingly thought that the use of discovery liaisons had simplified the issues. So that's something to consider.

And just to agree with what Justice Austin said about if you stipulate to something, you are toast. There's a federal case called *In re Fannie Mae* where—it wasn't Fannie Mae itself, it was some sort of other agency, but they entered into an agreement that would have required them to spend some ungodly sum, it was millions of dollars, and the district judge said, "Sorry, you agreed to it, that's what you have to do." And the DC Circuit affirmed that.

SHELDON K. SMITH: Another thing that we talked about and a good read and good guidelines, the Nassau Commercial Division Guidelines, they are a good and must read for those of us practicing in New York State court, because they may be adopted by other counties, other supreme courts. They're effective June 2009. They explain the expectations of parties in ESI, in preliminary conferences. It's not a simple checklist, but they do identify—and we're not going to go through them all, we've already hit on most of them—15 ESI topics that counsel must—not may, but must—be prepared to discuss at the preliminary conference and talk about and clarify that form of production is important. Because if you don't specify the form, then things can happen. You can produce things in PDFs, searchable PDFs, and people want it in a different format; now you are going to have to produce it, possibly.

HON. LEONARD B. AUSTIN: And that is in the materials, by the way, thanks to Paul Sarkozi and his group. They were instrumental in putting that together.

VOICE: Did you say that you also have an order—

HON. LEONARD B. AUSTIN: It's not in the materials. The PC order is on the Nassau website.

SHELDON K. SMITH: And it says, by the way, there's the guidelines that say breaching of the order could result in sanctions. But the other thing that the guidelines don't talk about, though, but we're going to talk about in a moment is cost shifting and what the state rule is on cost-shifting versus the federal rule.

HON. LEONARD B. AUSTIN: The guidelines are at Page 317.

VOICE: If you have an individual plaintiff who has no records versus a corporate entity or litigant who has an enormous amount of paper, and the other has none, the cost could be considered a weapon to drive a settlement because the cost of processing this business far exceeds and one side has no obligation at all, because they have no paper, no electronics; how do the courts deal with that? Have you seen that?

HON. FRANK MAAS: The so-called asymmetrical case is the toughest one, I think, for judges. And I think the answer is partly described there, there has to be a rule of reason and some proportionality. They're not going to require a half million dollars worth of discovery in a one hundred thousand dollar case. But quantifying the cost of the electronic discovery, which I guess is the topic we're about to get to, is one of the difficult areas. But there's no question when one side has tons of ESI and the other side has little, if any, it's very difficult.

HON. LEONARD B. AUSTIN: And are you in state court or federal court?

VOICE: What if there's no dollar amount?

HON. FRANK MAAS: Well, then, I think you get to issue of the importance of the case. One that comes to mind is civil rights litigation in federal court. The damages may be minor, the principle may be major. So it just gets thrown in the mix. I don't know that there's one answer to that, other than judges try to bear it in mind or should try to bear it in mind.

HON. LEONARD B. AUSTIN: Don't forget, in New York, it's the demanding party who bears the freight, at least to start, so your little guy is the one who is going to be paying.

EMILY K. STITELMAN: Before we move on to the next topic, I just want to ask Paul whether or not the DCH associate could use an e-discovery vendor in preparing for the preliminary conference, and if so, that might help keep some costs down?

PAUL TAYLOR: Yeah, absolutely. It goes back to the topic I mentioned before, it's best to know exactly what you have internally and be aware of the implications of production formats or production requests, and to really—a vendor or a good vendor should really act as a translator, almost, of the IT systems in place. A lot of vendors come from a technical background, an IT security background, and so they're aware of not just—they can speak, rather, to technical individuals, but also be able to relay that back to the attorneys. It's very similar to the example given before. I worked on a case before where the agreement was that we would maintain all backup tapes moving forward in a portion of the industry which we found out they had several hundreds of thousands of individuals who worked in the research and development—several thousand, rather, of individuals who worked on the research and development side of this industry for this company, and they're now facing a bill of over two hundred thousand dollars a month just on media costs. Now, what also would be taken into consideration, it's not just the cost of the media, but it's the storage of that media, it's the implication of what happens during the day-to-day workings of the company when they want to migrate their systems, their servers to new systems. We have to ensure or advise, rather, that the technology is still going to be there in the future. Bear in mind that most lawsuits go on for many, many years. That data has got to remain accessible through the entire process. And so we often are brought in to advise on such systems—on such issues, rather, especially, I know we're going to be talking about this, in relation to metadata. Metadata, it's a word which is thrown around a lot, but I also don't think a lot of people understand what metadata is. Simplistically, from my point of view, metadata is—you shouldn't use the word in the definition, but it is data about data. Now, there's been a lot of discussion recently in a decision with regards to defining three different kinds of metadata; the first being substantive, which refers to when alterations occurred to the file, i.e., edits, comments made by an individual. Then you have system data and metadata, which, coming from a forensic standpoint, such as myself, is the one I'm most interested in, which is related to the name of the author of the individual file, the creation date, the last access date, the modification date or time and date of the file. Then we have the embedded metadata. The embedded metadata, the best example, of course, is an Excel spreadsheet. You have formulas, which may not be accessible to an individual if the file is produced in that format, but that may be of extreme importance, especially in a case where some of these forms are in such files, they're extremely important to some clients.

But also, to compound the issue further, the amount of metadata fields available for analysis or, indeed, for production and for preservation is determined—differs, rather, between file types. Again, something which a technical person would have more understanding of, but, indeed, it can, I think, lead to extremely useful information, especially for attorneys. For instance, Outlook files have the greatest number of metadata fields available, which is anywhere between 90 and a hundred fields of data, depending on the version of Outlook. Those fields, obviously, will range from the recipient, the author, the date and time, et cetera, et cetera, all the way through to the types of attachments. But then Lotus Notes may only have 30 fields. And unfortunately, for Lotus Notes, they are somewhat customizable on an individual basis. Word files, Excel files, any Microsoft Office files have between 30 and 35 fields. And finally you have PDF files—I only made a list of the typical files which we would come across—PDF files have only 10 to 15 fields. So again, understanding what's being asked is extremely important and something which I think everybody should get some advice about.

EMILY K. STITELMAN: Thank you.

The third topic deals with the accessibility of cost-shifting.

Brad learned from a secretary who works out of Hammond's Austin office that an e-mail exchange exists between Hammond's CEO and Hammond's CFO stating that Hammond did not ever intend to pay Brad. Brad believes this e-mail was sent in or around January 2005 and requests that Hammond produce this document and all related documents. Hammond argues that its CEO and CFO have a regular practice of deleting e-mails after receiving them, and accordingly, all such e-mails would be located on backup tapes in Hammond's Cleveland or Austin offices. Hammond argued that because the e-mails are on backup tapes, it would be an undue cost and burden to search those backup tapes for the relevant e-mails,

and argues that if Brad wants the e-mails, he should bear the cost of searching them.

Sheldon, what does Brad need to know about accessibility and cost-shifting?

SHELDON K. SMITH: Let's focus on federal court. In federal court, the rules are consistent, they're established, they're relatively straightforward. Under 26(b)(2)(b), the producing party pays the cost, unless it's shown that ESI is not reasonably accessible. So basically the rule is the party does not need to produce ESI from a source that it has identified and can show the court is not reasonably accessible because of undue burden or cost. The burden is on the person who is imposing production. You need to show that whatever reason, taking costs into consideration, that the ESI is not reasonably accessible under the standard. If that showing is made, it still doesn't mean that all costs are going to be shifted or even part of the costs are going to be shifted. The court can then take into consideration 22(b)(2)(c) and go through a bunch of factors. These arguments, the costs are high, they can be very difficult to make, sometimes they require special proof, if they have a deposition or bring in a vendor to do some sampling, some tech support, declarations, so even that cost can be expensive just to try to shift the cost. The factors the courts consider in the federal courts and in the state courts came from the *Zubulake 3*. There's a lot of interesting *Zubulake* decisions. *Zubulake 3* dealt with cost-shifting, that's 2003. *Zubulake 4* dealt with the trigger and the hold, that was 2003 as well. And then *Zubulake 5* was 2005, that sort of talked about the whole process and everything else.

But for the NRA, the not reasonably accessible standards of the federal courts, *Zubulake 3*, some of the high points of the factors, getting back to your question, what would the court consider: The total cost of production, what's going to be at stake here versus the case; the resources and relative means of the parties, who can really control costs; how important are these issues; is this something that's really a fishing expedition or is this pertinent to the case; the producing parties, have they already preserved evidence prior to that; has there already been some evidence that's been lost or not preserved, then you know what, then don't cry to the court to shift costs if you are culpable in some way for destroying other information that was more accessible. So those are the sorts of factors that the courts look into to try to determine accessibility. Federal court, it's been relatively consistent, like I said.

You go to state court, it gives me a headache and it makes me sigh because my clients ask this question in the Commercial Part all the time, and it's difficult to try to get them to understand, because in-house counsel may have been at some seminar and said, "Hey, I read Justice Austin's decision, and the requesting party has to pay, why am I paying for all this stuff, there's a rule out there in the CPLR that says the requesting party has to pay, and we shouldn't have to pay when we have to produce 95,000 pages and that employee has to produce two pages, and we have to go fishing for all these things and track down supervisors and old supervisors and old employees and do all these things, what is the rule?" And it makes me sigh. It's very inconsistent. The general rule in state court is that the requesting party pays. However, it's been meshed and melded with federal court rules that have come out and the tests that have come out in *Zubulake* and what have you that basically the federal rule is really what's followed in the most part, in terms of each party pays its own way for cost for production, unless there can be a showing for undue burden in cost to shift that. Courts will consider—and I will have the judge, and I'd love to hear it myself, talk about—I think it's just really a smell test, almost, from a practical standpoint, from my view of having to deal with this issue so many times, if I do what I'm supposed to do and my client has preserved everything they're supposed to, and there's not a spoliation issue, and we've already produced everything we think is pertinent to our case and we think you're going to ask for and reasonable, and we've argued about the scope and how broad your demands are and the time and date range and everything else, and everything else I think is just—it's going to be marginally utilized, if at all, you are just trying to make us throw other employees into the case, look at other computers, look at backup tapes, you are really fishing, that's when I would bring the motion and bring it in front of the court and try to push it and try to use the state court rule, make sure you are doing what you're supposed to do. But the rules are at odds. And it's funny because we tell you the must reads, the guidelines from Nassau County, we tell you the report from the Unified Court System, read it, both of them, in their reports and in their recommendations and in their best recommendations say, cost-shifting, read these cases, moving on. It's just so inconsistent in state court. So that being said, where are we at?

HON. LEONARD B. AUSTIN: Lake George.

(Laughing.)

HON. LEONARD B. AUSTIN: I think if you look at Rule 8 and our PC order, Paragraph 12, you are going to see that the court is aware that there needs to be a discussion of cost-shifting very, very early and the guidelines, obviously, as well. So there is nothing hard and fast in Nassau or, I think, in state practice generally that says that it has to be, other than that initial provision, and our view of discovery is that the demanding party pays. That being said, I think all of the cases that I've seen that have come out of the state courts have demonstrated a sensitivity to the need for understanding that cost-shifting is ultimately going to have to come into play. In *Litgo*, I dealt with the judge on a decision in *Zubulake*, and said,

we recognize it. The first paragraph was actually a cost shifting discussion before it even got into the merits of the ultimate determination that was made, because it was clearly something to be recognized.

And just as a bit of a quick side note on Litgo, the issue there was a homemade program for the documents made by the brother-in-law of one of the parties, and it was backup tapes on a program that had long since been abandoned by the parties, and the party making the demand saying, "We don't trust your hard copy documents, and therefore, we want to go back in." And that really was part of what drove who was going to initially pay for that search. I think the brother-in-law, interestingly, was the first part of the expense, but it was a very difficult kind of case, but it really epitomized the difficulty, especially with backup tapes, that you have as a general statement. But the rule is, in New York, requesting party pays. But that's not the end of the story, as I see it.

HON. FRANK MAAS: An interesting question under both state and federal law is what costs somebody is required to pay. In the *MBIA* case, which is in your materials, Justice Branson, who I guess is in the Commercial Division in New York County, said, reading one of the Appellate Division cases, quoting it, in fact, "cost of an examination by the producing party to see if material should not be produced due to privilege or on relevancy grounds should be borne by the producing party." Once you've loaded the ESI into some sort of discovery tool, querying it and saying, give me all the documents that have the key word in them doesn't cost any money, basically. What costs a lot of money is exactly what Justice Branson says the producing party pays, namely the privilege and relevancy review. So it may be that the state rule and the federal rule are not as far apart as the boilerplate would suggest. And I think that if you were to look at federal cases, there's generally a consensus, although there were exceptions to it, that the producing party pays the cost of privilege and relevancy review, but you will find cases that shift that cost to the requesting party.

The problem with the New York State rule, to my mind, is it's fine in the old days when there were 30 boxes of documents, we're going to have to send the paralegal or somebody in to look through the 30 boxes. Fine, the requesting party can narrow it by year, by custodian, by the color of the box, some sort of way in an effort to reduce his or her costs. When you are talking about ESI, at the stage you are having that discussion, the requesting party frequently doesn't know how much material will be responsive. You could have a thousand search terms and come up with twelve documents. You could have three search terms and come up with a hundred thousand documents. So I wonder whether over time the boilerplate rule, requesting party pays because the requesting party can narrow its search, will still make as much sense.

SHELDON K. SMITH: And we talk about cases, cost-shifting and what's reasonably accessible, the reason we wanted to point this out and talk about it and bring it out today is because we have two judges who wrote on it. Their opinions are often cited. We have the *Litgo* case with Justice Austin and we have *Capitol Records v. MP3 Tunes* that Judge Maas wrote.

And Judge Maas' decision actually was interesting to me for the reason that I always thought about not reasonably accessible, since the federal rules came out and amended this, that's backup, it's backup tapes, accessibility is about something that's compressed and encrypted. He had a different issue there. It was the voluminous nature, how many employees have potentially responsive information—17, 20, 60, 80—how many we're going to go track down and get this information from off-line and whatever sources. And the question was how to limit the search capabilities and whether or not that was undue burden of cost and actually analyze whether "not reasonably accessible" actually applies to voluminousness, as opposed to just something that's compressed and hidden and encoded. Those are great cases to read on those issues.

We had a couple questions. I'm sorry.

VOICE: And for that reason, whether it's the Rule 16 conference in federal court, or Rule 8 conference in state court, the importance is, I think, to do the background to figure out what the costs are going to be to educate yourself, and then whether it's federal or state, Commercial Division court, what they're going to try to do is they're going to help you try to focus the issue, focus the search, focus the pool of people who are going to have to be searched as much as possible, and that's the only way out of the ridiculous cost that's imposed by e-discovery. It's really tremendous.

HON. FRANK MAAS: But the problem, Paul, is I'm interested in this area, my individual practices say you must tell me at the initial pretrial conference about any ESI issues. And notwithstanding that, I would say in 99.9 percent of the cases when they get to that box as to any issues, the word that's filled in is "none." And it's six months, a year, two years down the road where it first surfaces. And judges have enough cases that it's the rare judge who, when the parties come in and say we've got no problems, is going to search for them. One exception I heard about is Milton Shadur who is a District Judge, I think, he's senior—I know he's a Senior District Judge in Chicago who sits in on every Rule 26 meet and confer that his litigants have in an effort to head-off those issues, but that's not feasible for mere mortals.

VOICE: Quick question: What's the explanation for why it took two years later for it to then arise as an issue, as opposed to it happening at the preliminary conference?

HON. FRANK MAAS: One answer is drive-by meet and confers. Meet and confer, the rule was originally you have to meet face to face. It got modified to deal with places like North Dakota where you might have to drive for hours to meet and confer face to face. It has led to the more typical, I suspect, you would know better than I do, meet and confer in federal court, which is a phone call the day before the order has to be—the proposed order has to be submitted. That's one answer.

The other is either lack of candor or lack of knowledge or both on behalf of the lawyers and sometimes the parties when they meet and confer about what they have. I was the magistrate judge assigned to *Pension Committee* and largely for settlement, but also for frequent discovery disputes over the course of several years. Each and every one of those discovery disputes was the plaintiff saying, the defendant is holding us up, they're not producing relevant documents, et cetera, et cetera, et cetera. There was discovery about discovery, all the bad things you read about. And the ultimate irony was it was the plaintiffs who got banged when they had not done that which they were complaining about. So lack of discussion, lack of candor, sometimes lack of knowledge.

HON. LEONARD B. AUSTIN: I think the lack of knowledge point is well taken. If you think about it, how many people are in this room, how many people outside of the Commercial Division where there is the rule where we do deal with that on a more regular basis, really understand what e-discovery is? When the reality is short of taking a pen to a piece of paper, everything is electronic in one way, shape or form, and I suspect with the iPads, in a few years, we'll be taking notes on those, instead of paper and pen. Pens will be become obsolete. So everything, everything is going to have an element of ESI to it. The practitioners outside of the Commercial Division in New York, and I'm sticking with New York at the moment, really don't have the sensitivity to the issues that the practitioners in the Commercial Division do. And I will suggest to you that—and I'm talking state practitioners, the federal practitioners obviously have a far greater need to know—but even so, the practitioners out there generally, and the judges out there generally, don't have a real sophistication or knowledge or ability to get into it. And I will tell you, those of us that are sophisticated and knowledgeable are somewhere ten, five, three years behind the curve in any event, and we're always playing catch-up with the technology.

HON. FRANK MAAS: If you want to have some fun and also have a sense of the train wreck that potentially is coming, if you go to YouTube and plug in e-discovery as a key word, you may need to narrow it with more terms. Jason Baron and a fellow named Ralph Losey created a music video about e-discovery, and it talks about how data is exploding in the way—electronic data in the way that Justice Austin described. I'll just tell you one of the facts it has within it—but it's a lot of fun to watch, it's about seven minutes long—it has a screen which says, number of Google searches since Google was started, and the next screen shows an enormous number. And then it has with a question mark, number of Google searches that have been saved, and it flashes the same number. Google has saved every search since the day the company began, and they mine that data and that data is available, and that's true of many Google-like companies. We are dealing with a really astonishing explosion of information.

One interesting thing is that even though, if you were to plot the curve of how much electronic information there is, it's clearly going up, the cost of retrieving it and analyzing it and sorting it is going down. I was at a session recently where one of the general counsel who was keeping track of this for a large company said they had begun to reach the point where they see real dollar declines in terms of, for a massive company, responding to discovery requests each year because the search engine capability is exceeding the explosion of data.

EMILY K. STITELMAN: Any other questions?

(No affirmative response.)

EMILY K. STITELMAN: So to come full circle, we're going to talk about discovery sanctions.

Over the course of discovery, Brad produced several e-mails between him and Hammond, which Hammond did not produce. Hammond only sent out a litigation hold letter after Brad filed his action in December of 2005, and even then only sent that litigation hold letter to Hammond's New York office. Hammond only forwarded the litigation hold letter to Hammond's other officers in February of '06, by which time many Hammond employees had deleted their e-mails and Hammond's backup tapes had been overwritten. Brad was seeking sanctions and claimed that Hammond should have sent the litigation hold letter in February of 2005 when Hammond reached the agreement with Brad.

Sheldon, you spoke about litigation hold letters, and we talked a little bit about sanctions at that time. What type of sanctions exist?

SHELDON K. SMITH: Well, the rule in New York is that if you want to move for sanction, the party moving for sanction has to—it's a three-part test. They have to show that the spoliating party had a duty to preserve at the time the information was destroyed, the trigger had passed, the reasonable date for the trigger had passed. They failed to preserve that information with a culpable state of mind, anywhere from negligence to gross negligence, recklessness to willful conduct. And that the lost evidence was relevant. That's the three tests, that's the three-part test that you have to show to get sanctions.

Now, under New York Law, what is spoliation? Spoliation is defined as the destruction of material, alteration of evidence, or failure to preserve in pending or reason-

ably foreseeable litigation. Bottom line, with respect to ESI, sanctions can result, as *Pension Committee* points out, from a failure to act consistently with contemporary standards. What we will talk about in a moment is the types of sanctions. What Judge Scheindlin did, and Judge Maas, you are involved, so—

(Laughing.)

HON. FRANK MAAS: I take no credit or blame.

SHELDON K. SMITH: Mitch is looking at you through the top of his glasses.

(Laughing.)

SHELDON K. SMITH: So the framework that came out of this, and it came out of *Zubulake*, but the other cases sort of tie it all, in Second Circuit precedent is important because it's basically three parts to the case:

One is a legal framework to assess the sanction, and there's three parts to that. What's the culpability? Where did somebody go wrong? And what scale from negligence to gross negligence, recklessness to willful conduct, what are we going to assign? The burden of proof, is it the spoliating party's or the innocent party's burden to show prejudice? And then number three, what type of sanction are we going to apply? That's the framework she came up with and the findings are important and the holdings are important.

But in terms of negligence, the ordinary person standard, gross negligence, something that even an unreasonable person wouldn't have done, wouldn't engage in that conduct. And of course, willful and those sorts of things. Interplay between the culpability level and the sanction is important, but also who has to show prejudice. What the court found and what other courts have been applying and adopting, is if you are merely negligent on the culpability side, then it is the innocent party's burden to show that the evidence would have been favorable and is relevant. If it's gross negligence or beyond, then the burden may shift to the spoliating party because what happens is that it can be presumed if you are grossly negligent that the information was both relevant and favorable. So depending on your culpability, the burden of proof, depending on the culpability also can lead to the sanctions.

There's basically four types of sanctions that are employed in New York Court, in state court and federal court. One is dismissal or default, depending if you are the plaintiff or a defendant, dismissal of your case if you are a plaintiff and default if you are a defendant, for engaging in willful and egregious—that's a very harsh thing—wiping of a hard drive, destroying things, shredding documents, those sorts of things. There's also preclusion or an admission on a particular issue. If you withheld documents and failed to produce them for a certain amount of time, in the *Bonjour* case, then you are going to be precluded from putting on proof as to that matter, or default, I'm sorry, or if deemed admitted, if you are the defendant and you withheld documents or destroyed documents on a more egregious level, a willful, bad-faith level, then the court could also basically say that those matters against you are deemed admitted. Those are the high ones. Very rare. The ones we've been seeing a lot of lately, the gross negligence, particularly with the Second Circuit, is the adverse inference instruction. And there's three types; there is the direct adverse inference, which is the jury is directed to find that this evidence was relevant and favorable to the other side, and that's why it was destroyed. There is the presumption, the jury is to presume that this evidence was favorable and relevant, and that may be rebutted. Then there's the third kind of adverse inference, which is employed in *Pension Committee*, which is the permissible presumption, which is the jury may presume that it was relevant and favorable and then the other side can rebut that. So those are the three types of jury instructions that can be employed. And the important part about this is in our circuit, gross negligence can result in an adverse inference instruction. Now, *Rimkus*, the case that came up in February, the ink wasn't even dry on Judge Scheindlin's decision, and Judge Rosenthal came out with her decision and said, well, in our circuit and other circuits, you really need bad faith at a higher level to have that sort of harsh remedy, which is the adverse inference instruction. So that should be noted, outside of our circuit, the general rule seems to be it's more than gross negligence to get an adverse inference, whether it's rebuttable or not.

The other one is obviously cost and fees. You have dismissal, default, preclusion, admitted, the adverse inference and then cost and fees. Interesting, a couple weeks ago, a Southern District case came out, a *Merck* decision came out and the court found that the defendant just contumacious and just avoided discovery and made the plaintiff jump through all these hoops, dragged things out, produced things last minute, did a bunch of things and the court awarded not only cost and fees to the plaintiff for having to jump through all those hoops and chase the information down, but a fine, a $25,000 fine to be paid to the court, and on top of that sanction was the sanction of you, counsel, and you your client figure out how you are going to pay that. So they didn't even divvy that up, which would have been favorable, but let the client and the counsel have to figure out—imagine going to your client and trying to say, we have a $25,000 fee to pay, and plus we have to pay the other side's costs, and you owe me for my last couple of months, how are we going to work this out? So the fine is also—that's basically the fifth.

And there's a couple of cases where—it's rare, but I've seen it—where they actually, from the plaintiff side, if the plaintiff is the spoliator, will increase the burden of proof, instead of preponderance of the evidence, take it up to clear and convincing.

So those are the types of sanctions that are available. The cases we talked about earlier, state court, if you really want to see the things not to do or the list of things not to do, read *Ahroner*, read *Bonjour*, and read *Fitzpatrick*.

And in federal court it really starts with *Pension Committee*, *Zubulake* revisited. She lays out the framework, she goes through the sanctions. And what she found in this case—really quickly, I know we're running out of time, here—*Pension Committee* was a case about two hedge funds that folded, and there's about 96 plaintiffs, a bunch of investors trying to get their money back and there was bankruptcy proceedings and all kinds of investment proceedings and securities issues going on, it started in Florida, 2003, 2004, then got transferred to New York in 2005. So during that time, there was a stay for all kinds of reasons, basically '04 to '07, there's a stay in place for securities reasons and for liquidation reasons and when everything was stayed, everyone kind of just basically was in this hiatus, not doing anything in discovery, a lot of plaintiffs weren't issuing their holds, things of that nature. And 20 plaintiffs in particular got called out by a couple of defendants for shirking their responsibility and not issuing a hold in time, not producing documents, doing things down the line. And what happened was Judge Scheindlin said, okay, when you were in Florida, I see maybe you didn't understand the rules about holds. When you came to my court and *Zubulake* was out there, it's a contemporary standard, and so what would have been maybe negligence is now gross negligence for failure to issue a litigation hold, failure to supervise preservation and collection of employees, failure to collect records from the employees, and of course, they submitted—there was testimony from a lot of the plaintiffs that they kind of were denying that they did anything wrong, saying they produced everything, when they really didn't. So if you really look at it, it was teetering on bad faith because there were misrepresentations, but it didn't actually get there. So she actually said, it's gross negligence to not be in conformity with contemporary standards and the teachings of the court. And what we really want to talk about, in terms of tying this together, is in this case, the hold letter, when it went out, the trigger, the backup tapes, so this issue here, talk about culpability, was there a time when the hold should have gone out that destruction occurred? Well, we know that in February 2005, from the facts in this case, that the other side, the plaintiff made a demand for his money, said I want to get paid, and there was consideration among counsel, but not until December was the complaint filed, and they didn't issue their litigation hold till later. But did the trigger happen actually in February? Because of their policies, their backup tapes were recycled every month, their e-mails were deleted, evidence was lost. So the question is, what kind of culpability can be assigned to that? Was there a preservation that was lost? Who would have the burden of proof? And what type of sanctions, of those six or seven sanctions we talked about, would be applicable in this case? Thoughts, questions?

VOICE: Is there any obligation for a witness to preserve—

SHELDON K. SMITH: A nonparty?

VOICE: Yes.

SHELDON K. SMITH: It really stems from the party first. If the party controls the nonparty, that's—

VOICE: Totally disconnected, unrelated.

SHELDON K. SMITH: And not if they're not reasonably anticipating a litigation or investigation, that's the rule. They'd have to be anticipating some sort of investigation, something else.

Any other questions?

EMILY K. STITELMAN: I think we actually should wrap up. We've gone over our time already. But thank you so much to our panelists.

(Applause.)

Presentation at the Commercial and Federal Litigation Section Spring Meeting on May 23, 2010:

Discussion Following a Screening of "The Response"

Panelists: **Sig Libowitz,** Writer & Producer
Peter Riegert, Actor
Professor Matthew Waxman, Columbia Law School, Associate Professor of Law
Brigadier General James Cullen (retired), United States Army

SIG LIBOWITZ: First of all, thank you all so much for coming and for watching the movie. It's really great to be here. And as mentioned, we have an incredible panel. I'm not going to go through all the bios because you have it on your table, but I would just like to introduce, again, this is Brigadier General James Cullen. Thank you very much for being here.

(Applause.)

SIG LIBOWITZ: We have Peter Riegert, who needs no introduction.

(Applause.)

SIG LIBOWITZ: And Professor Matthew Waxman of Columbia.

(Applause.)

SIG LIBOWITZ: As you'll see, and I think I mentioned, the thing we really want to do is get to your questions because we really want to make this as interactive as possible. As we've been taking it across the country, that's what we've been doing. But I think, since we have this panel, I would like to ask just a couple questions just to get some context to what we're saying. So General Cullen, if I may start with you, if you would, I would love to just get your impressions on the film particularly as a JAG, and also, if you could give us a little context as to how we got into the CSRTs, their origins, and the issues that come up because of them.

BRIGADIER GENERAL JAMES CULLEN: I'm going to address a couple remarks from the podium. I have a couple things I want to touch upon, mostly because I want to give you a nickel's worth of context because I hope that that's going to encourage you to ask questions.

I think this film very dramatically, but very credibly, presented the dilemmas that are faced by the panel members as they look at these cases brought before them. The panel members, on the one hand, they're very aware that if you let somebody go and they rejoin the fight against your troops, that's not good. But on the other hand, if you pick up, detain and imprison innocent people, you are lending assistance to the recruiting sergeants of al Qaeda and the Taliban.

I think that we should step back for a moment and establish a few rules. First, the law of war has always recognized that you can pick up and detain prisoners of war and others who are charged with violating the laws of war until the cessation of active hostilities. That's sort of the standard. The third Geneva Convention at Article 5 provides for a competent tribunal to determine any doubtful cases as to whether a detainee is entitled to prisoner of war status, which gives you the very highest level of protection afforded by the Geneva Conventions, or is it some innocent civilian that was picked up in the confusion of the battlefield as the infantry is moving through and we have an obligation as soon as its safe to release innocent civilians, let them return home, or a third choice, do we have someone who is not a qualified prisoner of war, who is an unlawful, illegal or unprivileged combatant subject to prosecution under the law of war? The Article 5 tribunals established under the United Nations are there for that purpose. Now, one doesn't automatically become a prisoner of war. You have to meet several criteria, four criteria all together. Unless the civilian is actually part of a militia, of a resistance, then the criteria drop to two; that you carry arms openly and that you yourself abide by the laws of war. Assuming, however, that you are not a member of a militia, often referred to as a levee en masse, then once you are picked up resisting a force, the detaining force, you can be prosecuted for violating the domestic law of the detaining force or violating international law because you violated one of the rules and customs of war.

Now, we used the Article 5 tribunals quite successfully in the First Gulf War. There were almost 1,200 of these tribunals, which had the power to say someone was a prisoner of war or an innocent civilian or could be held for trial for violating rules of war. But when we moved to the Second Gulf War, President Bush announced that the war in Afghanistan was not subject to the Geneva Conventions and that all fighters would be regarded as unlawful combatants. What happened between the First Gulf War

and the Second Gulf War and the policies followed by the first administration, compared to the policies followed by the second Bush administration? On the second administration, we were told we were going to work on the dark side by a Vice President. The White House Counsel pronounced the Geneva Conventions quaint. The Secretary of Defense authorized interrogation techniques that, at least in my opinion, violated international law. The Office of Legal Counsel of the Justice Department prepared a 42 page memo in January 2002 laying out what needed to be done so that key people in the administration could avoid prosecution for the policies they then had under consideration and which they later implemented in some instances. The Defense Department General Counsel, William J. Haynes, II, deliberately avoided having any of these issues submitted to the service Judge Advocate Generals because he knew that they would never sanction violations of the Geneva Conventions or, in some cases, violations of our own domestic law, such as the War Crimes Act. When Guantanamo was selected to house what Rumsfeld called the worst of the worst, it was done with a supreme arrogance that the courts would never be able to look at what happened at Guantanamo or some of the other interrogation sites from which detainees were taken before they were sent to Guantanamo. The photos of Abu Ghraib, however, and this arrogant disdain for the judiciary produced a political and a legal watershed in the spring and summer of 2004. Several Supreme Court decisions addressed detainee rights, the Combatant Status Review Tribunals or CSRTs, as we often refer to them, and the military commissions. The administration lost in all of those decisions. The Court held in the first one, in *Rasul*, in 2004 that detainees could indeed challenge their detention. It was in response to the *Rasul* decision that the administration established these Combatant Status Review Tribunals. They were established by order of the Deputy Defense Secretary Paul Wolfowitz on July 7th, 2004.

The purpose of the CSRTs, as the film made clear, is not to make any determination. It's just merely to confirm that the decisions of the intelligence people, that these people are unlawful combatants, can be confirmed. The CSRTs are certainly not Article 5 tribunals. They do not meet qualifications under international law as a competent tribunal.

The test on paper to hold somebody as an unlawful or, the term now used, an unprivileged combatant, is were they a member or did they support the Taliban, al Qaeda or associated forces engaged in hostilities against the United States or its allies? And certainly, if that proof was there, I think there would be a unanimous view that they should be held and, where we have the proof, prosecuted.

The Defense Department in 2005 released a summary of the allegations against 516 of the detainees held at Guantanamo. It was in response to a FOIL request. The well-respected Combating Terrorism Center at the United States Military Academy examined those 516 cases and found that only 25 of the detainees, or 4 percent of the total, had been captured by American forces. The rest were taken into custody by someone else and were being held on the foot of intelligence files that could not be reviewed and to which the detainee could not have access. The classified file of one individual was accidently released and declassified. It involved a German of Turkish decent; Judge Green of the Federal District Court in DC, in a subsequent habeas petition, reviewed the file and found there were over a hundred pages in which German and American investigators found no indication that this individual had any ties to terrorism. But very shortly before the habeas hearing, a conclusory memo, unsigned, had been placed in the file saying that this person was a member of al Qaeda. There was no effort to reconcile the conclusory memo, which lacked details to its basis, with the hundred pages in that file that directly contradicted the conclusions.

There have been other indications, sadly, about the shortcomings of the CSRT process. It was a Military Intelligence Officer, Lieutenant Colonel Steven Abraham, who prepared files for the CSRTs. You saw in the film that there was a recorder who has the responsibility for pulling together the files and presenting them to the tribunal. Well, he just doesn't do it on his own. There's a whole cadre of people who put these files together in preparation for those hearings. And Lieutenant Colonel Abraham, who served on a CSRT himself, said in a statement in support of a petition to the Supreme Court, described some of the deeply fought procedures that go into making up these files and what is lacking in the files. We had one Major who sat on 49 of these CSRTs, and he said in six of them, there was a unanimous opinion among all of the panel members that there was no evidence to believe that the person before them was an unlawful enemy combatant. And yet, when their recommendation went up—because that's all they do is make a recommendation—it was turned down and the matter was sent back to another panel, presumably until they got it right.

I'd like to conclude just this little brief context with one sentence from a statement by Lieutenant Colonel Abraham when he testified before the House Armed Services Committee. He said, "Under the guise of implementing the Supreme Court's decision in *Rasul*, the CSRT process completely frustrated it."

At the end of the day, we want to make sure that we don't release people who are going to be a threat to our forces. But neither do we want to be keeping people whose detention is going to cause our enemies to gain more converts talking about American justice or the lack thereof. Thank you.

(Applause.)

SIG LIBOWITZ: Thank you very much.

Professor Waxman, if I could—feel free to talk from the chair or come to the podium, whatever you want to do—if

you could, again, I'd love your impression of the film, particularly as an academic and someone who served in the administration, on the film, and particularly, if you could take us through the later Supreme Court cases, that would be great. Thank you.

PROF. MATTHEW WAXMAN: Sure, sure. I'd be happy to. I really enjoyed the film a lot. I wanted to use it as a teaching device for national security law courses that I teach. And to me, I think it's useful to separate three big dilemmas that are present in the film that I think are analytically related, but distinct; and those are a legal dilemma, a moral dilemma and a strategic dilemma.

I think the legal question—and General Cullen started to get at this—the legal question, I think, is in these situations of uncertainty, in a situation involving groups that intend to do us great harm, a set of circumstances that bears some strong resemblance to warfare, but also some resemblance to crime, and has attributes of both, as a legal matter, to what set of processes is a suspect entitled and to what standard of proof, what quantum of proof ought the government have to come forward with in order to continue to detain that person? That's sort of the strictly legal question. As a moral question, I think the way I frame it is independent of what the Constitution requires, independent of what international law requires, as a matter of our morality, how should we balance the risk to us as an American society versus individual foreigners who get swept up in this conflict, some of whom are trying to do us harm, some of whom are mistakenly picked up?

And by the way, I should say, my own experience in working with the CSRT process and detention issues at Guantanamo over a number of years is I think some terrible mistakes were made in both directions. I think there were people who were probably innocent who have been detained for very long periods of time. I think there were people who were released on the belief that they were innocent who have gone back and killed U.S. soldiers or foreign civilians and soldiers who may be participating in terrorism today. I think we've made mistakes in both directions. But that's sort of the moral dilemma.

And then the third that General Cullen also addressed is a strategic dilemma, strategic question. How do we balance on the one hand the security imperative of incapacitating those who are trying to do us harm, questioning them, custodial interrogation, versus the recruitment or propaganda advantages that we may be supplying to the enemy by appearing to violate certain principles or by continuing to detain individuals who should not be detained?

I think those three dilemmas—the legal, the moral and the strategic—were not only not gotten right during the Bush administration, but I don't think we've gotten them right during the Obama administration. I'd also, just to conclude, say that since those Supreme Court decisions of 2004 that essentially said that habeas corpus rights would extend, at least as a statutory matter, to Guantanamo in 2006—I'm sorry, in 2008, the Supreme Court said as a constitutional matter, habeas corpus rights extend to Guantanamo, those Supreme Court decisions don't really sort a lot of this stuff out. For example, it is now by 5-4 decision in *Boumediene*, the supreme law of the land that detainees at Guantanamo have a right to habeas corpus, to challenge their detention. The Supreme Court in the *Boumediene* case did not say what the standard of proof is that the government has to meet, what quantum of proof is required as a constitutional matter to continue detaining somebody as in that film. Just today, in a case called al Maqaleh, the DC Circuit reversed a District Court Judge, and the DC Circuit held that those same habeas corpus rights that had been extended to Guantanamo do not extend to very similarly situated detainees held in Bagram, Afghanistan. So I think General Cullen is right that in 2004, then again in 2006 and 2008, the Supreme Court on a number of occasions repudiated legal positions taken by the Bush administration. But they have not really provided, the Supreme Court, much clarity when it comes to either of—to any of the three big dilemmas that I laid out.

SIG LIBOWITZ: Thank you for that.

Now, let's really move to the audience. And I really ask you and challenge you to ask any questions you want about the movie, about the issues. Obviously, again, it's a great panel. Obviously, I have some questions for Peter, but I'll hold those so we can get to your questions. But if you have questions for Peter, by all means, whether it be in terms of playing the role and what he learned, please, I open it up. We're here.

Yes, we have a question.

VOICE: The film, the panel, and the courts have had great criticism of the Bush administration and the processes, but I haven't heard any solutions as to how we should go about performing these functions without criticism. So what do you suggest?

SIG LIBOWITZ: Did everybody hear that question? Just to repeat it so that everybody can hear it, the question is that the film and the panel and everyone talks about the different criticisms that might have happened from the prior handling of these issues, but what are the solutions and do we have any suggestions for what those are? And by the way, sir, if you have those solutions, I'm voting for you. So please, if someone on the panel will take that.

BRIGADIER GENERAL JAMES CULLEN: Well, I think one of the—we need to almost step back. This is not the first insurgency in which we've been involved. We can go back to the Philippines, we can go to Vietnam. There's a lot in our history. Putting even aside our own Civil War, the interesting history of military commissions, not CSRTs, but military commissions there. I come back—and I certainly welcome Professor Waxman to correct me on this—to the three-prong decision that you make with each detainee that's taken into your custody: Is he a prisoner of

war, or she? If he is, you put him into one lane, treated as a prisoner of war, they remain until the cessation of active hostilities or they start dribbling on themselves or they cease to give you valuable intelligence, choose any one of those criteria. Or they're a civilian that doesn't really have a part in this conflict, they were swept up. That's sort of a—can be easy, can be a little tricky, as the film pointed out. Then we get to the third one. The third one is the bad guy who set off the bomb in the marketplace killing people. Well, that one, the law is fairly clear on. We should be prosecuting this guy, not playing footsy. We need to get that story out, just like we did with the terrorists of World War II at Nuremberg. We set up tribunals, we tried them on the basis of proof that was credible, that could be spread out before the world, and which upon conviction, the world said, here's the record. We didn't do it based on secret evidence. We laid out the bad things that people did and those convictions can stand before history today. I'm suggesting we can still make those triage decisions to which pot do we put these people in and take appropriate action. We don't need to feel paralyzed.

PROF. MATTHEW WAXMAN: I would actually take—I agree with much of what General Cullen said. I would say that on the third category, unprivileged belligerence, so in other words, members of an enemy fighting force who are not, however, entitled to prisoner of war protections and privileges, I think as a matter of international law and now as a matter of, at least as so far decided by the Supreme Court, as a matter of constitutional law, can be detained under the laws of war. The question that is still left open is: Short of criminal trial, what set of procedural protections satisfies our due process requirements, satisfies international legal requirements and satisfies, as a moral and strategic matter, our own requirements regardless of the law?

So I'm not convinced that strictly speaking as either a legal matter, a moral matter or a strategic matter the answer must be criminal trials and you prosecute them. And if you can't prosecute them beyond a reasonable doubt for a trial by jury, the answer is release them right away. I think they're a space between what we saw in that film, which was insufficient process, and a full-fledged criminal trial.

SIG LIBOWITZ: What would that be, then?

PROF. MATTHEW WAXMAN: I agree with some of the suggestions that General Cullen was getting at and I think your film highlights quite well as some deficiencies. I think any adequate process to satisfy my criteria would include a robust opportunity to confront the main evidence against an individual with the assistance of some counsel, a meaningful opportunity to actually contest the evidence. I think, regardless of whether, as a constitutional matter, it's required, there are many cases where the involvement of an independent judge would provide both important scrutiny of the evidence and some additional legitimacy to a process that we don't see now in places like Bagram, Afghanistan. Those are among the ingredients, in my mind, sort of minimum procedural requirements for something—for a process that in the long term, I think, could better meet our legal needs, our moral needs and our strategic needs.

SIG LIBOWITZ: We have a question right over here. Please, sir.

VOICE: I'm the only foreigner here.

SIG LIBOWITZ: Welcome to our country.

VOICE: I'm from Canada.

SIG LIBOWITZ: Welcome neighbor from the north.

VOICE: My question is: What is the training of these judges? What's their background? How independent are they? What is their training in law? Who are they?

SIG LIBOWITZ: If I may take that, I think the question is—again, I'll just repeat it—who are the judges from the film, who are the tribunal members on these CSRTs? I'll take this, and then please, by all means, add on.

To answer your question, you have to give a little history. In 2002 when the war started, the initial reaction from the prior administration was, we don't have to provide any process whatsoever, even what you saw in the movie. There was the feeling that under a unitary theory of government, in a matter of foreign war, that it's the executive president who has full control and that these people who were captured and detained were unlawful enemy combatants; therefore, they did not fall under the rules of the Geneva Convention and no tribunal had to be provided. And that's what happened for two years, until 2004, when there's a case that was mentioned in the film, and I believe some of our panel mentioned, which was *Rasul*. And in that case, the first time, the Supreme Court said, no, in fact—it's a famous line—you have to provide some process. Within two weeks after that decision, the Department of Defense developed these Combatant Status Review Tribunals to provide the "some process" that would be given.

So within six months, nearly 600 of these CSRTs took place. It happened so fast that they couldn't constantly get just JAGs, military attorneys, for the panels. So often—it was always military officers. Sometimes you would have JAGs, sometimes the panel of three would be a JAG and two officers who were not. Maybe one officer who was a lawyer, but not a JAG, maybe a reservist. And that's how it was done. It was done very quickly.

Again, I think, from the other perspective, it was, hey, we have to get on this quickly, so this is how we're going to do it. And that's how these CSRTs, these Combatant Status Review Tribunals, were held. There's a little difference in something now called the military commissions, which I'm sure we'll get into in the panel. I know that the professor and the general can speak about that a lot. So it happened very quickly, and that's who these people were.

And again, what we tried to do with the movie is—the hope was, let's deal with the people on the ground, the officers who actually have to make these determinations. What is it like for them sitting on this tribunal and trying to make a decision with the evidence that you're given and with the time that you have? And as you can see, they were done very quickly. So that's—does that begin to answer your question, sir?

(Affirmative response.)

VOICE: No.

SIG LIBOWITZ: Okay. Someone said no. Someone has a follow-up question, okay. We'll get to that later.

Does someone want to add to that? Hey, I passed with the general and the professor, I'm doing okay.

Please, Jon.

JONATHAN D. LUPKIN: I had a question. General, you mentioned that prior to the Second Gulf War, during the First Gulf War, there was a process in place that dealt with these precise questions. What about that—well, first of all, what were the processes that were afforded to those that were brought before the tribunal in that context? And what, in your view, warranted the change from what had been to what became these tribunals that we saw in the movie?

BRIGADIER GENERAL JAMES CULLEN: The process used in the First Gulf War was a traditional Article 5 tribunal, there were about 1,196 of them all together. About 300 and some odd, they found that the party was entitled to prisoner of war status. The rest of them, they found were civilians that had been scooped up and could be released. No one was found to have committed a war crime or a domestic crime, so we never reached the third branch of the decision tree.

What is important to us always is we have to consider—when I say "we," the military in particular, speaking parochial terms—what precedent are we creating for Americans who may not yet be born who are going to be prisoners of war in future conflicts because the precedent we create today is going to be applied to them in the future. And quite frankly, when you look across the world, you look at the culture of military commissions, you don't come away with a real satisfying feeling in your stomach. We take our obligations quite seriously. The military commissions have been around since the very early days, although during the Revolution, they were typically only used to try spies. If you look back at Jackson and General Scott, there were some notoriously bad uses of military commissions. They were just created, you might say, in the early view of unitary executive authority; General Jackson not only put in prison a federal judge, Judge Hall down in New Orleans, right after the battle because the judge had the temerity to order the release on a habeas application of a reporter who criticized the maintenance of military martial law after the British had been defeated. And Jackson, when he got the order, put the judge in jail right next to the reporter who had originally been cast. No, it's told that the judge did not have a sense of humor. And when he got out—he waited for the celebrations after the victory to die down a little bit—but when he got out, he convened a contempt hearing, and General Jackson did show up, and paid a thousand dollar fine, which was a considerable amount of money in those days. But it was that kind of arbitrariness that concerned. There were well over a thousand of these military commissions during the Civil War. And some of them, the results would make your hair stand on end. So we're very, very aware of that and how other countries have used military commissions. We can—and I think in the 2009 Military Commissions Act, there's been major improvements and safeguards put in there, but we are very concerned about the precedential value, what are we creating today. The Article 5 tribunals handled the initial triage issues; is somebody a prisoner of war, are they not, have they committed a crime, channel them into prosecution. We've never had these CSRTs before. This was a pickup game of basketball, quite frankly, I think, purely personal decision, after some of what occurred overseas at Guantanamo, at Bagram, started to get into the public arena. It was damage control. They didn't want evidence of what happened in some of these interrogations to get out.

SIG LIBOWITZ: Do you want to add to that?

PROF. MATTHEW WAXMAN: Well, I guess one thing that I would just want to add, and this is where I think I would answer different from General Cullen, I don't think—I don't think Article 5 of the Geneva Conventions answers the critical question, here. Article 5 of the Geneva Convention, which says that in a case of doubt about the status of an enemy belligerent, you'll have a hearing before a competent tribunal. For decades, as General Cullen said, and including during the First Gulf War, the U.S. Military followed standard regulations, Army regulation 190-8, which has specific regulations about what a tribunal, competent tribunal should look like, what standards it would apply.

And for example, the standard it applied, the standard of proof was preponderance of the evidence, 51 percent. When the *Rasul* case was decided in 2004, it was a splintered decision. The Supreme Court said, look, at least for a citizen detainee—this was actually about the *Hamdi* case involving a U.S. citizen detainee that had due process rights, the Supreme Court had to say, well, what process is due? This individual has due process; what process is due? The Supreme Court was fairly split on that. Justice O'Connor in a plurality opinion said, well, one thing that might—she didn't want to state definitively, but she said, one thing that might pass muster here would be these traditional 190-8 hearings, like we used in the First Gulf War, preponderance of the evidence, uncounseled, no right to counsel. That's what the CSRT was modeled on was 190-8 procedures. It didn't work, in part because, I think, those

procedures were set up to make determinations, to make factual determinations on a battlefield that were very different from the kinds of factual determinations that we saw in this film. I think those rules and procedures that had served us well for decades on the battlefield did not do a good job, were not well suited for making—for doing the kind of sorting that General Cullen is talking about.

SIG LIBOWITZ: I do just want to add one quick thing to that, something that has come up, just to make it clear. Prior to this Second Gulf War and the war in Afghanistan, what you've heard about is in other battles, whether it was World War II, Vietnam, the First Gulf War, there was something called field hearings, which is what they're talking about where you would do a hearing. You've picked up someone, you would do a hearing, and you would do it quickly. You would do it within a couple days or a week. And obviously, the benefit of that, as we know from regular trials, speedy trials, is you can actually bring in the villagers, hey, do you know this guy; is he someone friendly, is he bad? You can bring in the soldiers who picked him up; was this guy shooting, what was he holding, what did you see? Part of the problem is, what you see with Guantanamo is for the first two years there was a decision that nothing had to be done, they could just be held indefinitely until the end of the war on terror. Then, suddenly, two, three, four, five years later, okay, let's try to make some determinations here. Obviously, now, time has passed, they're now 3,000 miles away in Guantanamo, and while technically there was this idea that they could bring in witnesses, there were never any witnesses that came in except for other detainees. So obviously, that just—you can see that just created, I think, some of the problems that happened.

But please, there were other questions.

VOICE: I have a question for Peter. The question is not about *Animal House*, which is one of my favorite movies—

PETER RIEGERT: I can answer that.

VOICE: Later.

But how did you prepare for this role and what were the challenges in playing it?

PETER RIEGERT: Well, I was sent the material, and I decided to do it as I choose anything else, and that is: Is it a good story and is it well told and is the writing and/or the director interested in editorializing the information, whether it's a story about law, whether it's a story about—whether it's a love story, editorializing from the point of view of the writer, director and actors doesn't interest me. So this fit the criteria of being, what I basically would call, a good yarn.

In terms of preparing, my approach—

SIG LIBOWITZ: By the way, just to back up some, Peter actually gave me a call, which was a very nerve-racking phone call; Peter says, I'm very interested, but I have one question. I went, "Oh, my God, what the heck is this going to be?

PETER RIEGERT: Well, I just said, do you have an agenda, are you trying to prove something? And he said, well, I think I'm just telling a good story, but I—he was going to leave it up to me. So my conclusion was that this was, like I said, a good yarn.

In terms of preparing for it, the myth of acting is that actors go off and prepare by following lawyers or joining the military for a week and a half. My theory is basically learn the lines, say the lines, and the rest will take care of itself.

But for me, it was such a compelling story because I hadn't really given it too much thought, other than as an average citizen. And I would say that the thing that was most disturbing from my point of view as a citizen was that Guantanamo seemed to have been created as a legal nowhere in which there really—it didn't exist even though it existed. And it raised the question for me, as a citizen, as I say, because I'm not—I don't have expertise as a lawyer or from the military—are we a nation that's led by laws or are we a nation led by men? And if Guantanamo is dictated by the President, whoever that President may be, and it doesn't matter to me who the President is, whether it's a Republican or Democrat, that raised a really interesting question. And then just as—when we finished the movie, when I saw the film, my initial reaction was how much I take for granted, whatever freedom I have. Which, of course, the definition of freedom is that you should take it for granted. You can't spend your entire day going, am I free, am I free? You should take it for granted. But that raised one other point for me that I can relate to, and that is if Guantanamo is so confusing to us, it must be terribly confusing to the rest of the world who looks in on us. And if I'm traveling around the world innocently and I'm picked up by somebody who thinks I'm useful to them, I would want to have some redress.

And the most immediate case that comes to example are these three kids who were wandering around the east side of Kurdistan and Iraq. Now, I think they were stupid to be wandering over there, but they can't get any legal help at all. And I'm sure the Iranian government is saying, well, why should we give you any help; you don't give anybody else any help.

So I appreciate it from its dramatic complexity. I think I have an average idea about what law is. But what's been the most rewarding part of traveling around the country is that the reaction to Guantanamo and the whole argument about its value and its problems has come from—it's not a left-wing cabal. It's Military lawyers, Conservative lawyers, Republican lawyers, obviously Liberal lawyers on the left. That's the good news. I think it's—we're here in front of judges and lawyers, and I think that speaks wonderfully

about the courage of American lawyers to question who we are.

The flip side of that is in order to create, if I'm right, a legal nowhere, that meant that the government needed lawyers, and that makes for compelling drama to me.

It's a long-winded answer, but what the hell.

SIG LIBOWITZ: I saw a hand. Please.

I know I wanted—I'll get to you in one second—I know I wanted to add just something to that, two quick points. One, as Peter was talking about the actor's preparation and I know you were asking about that, all three of the actors brought great different levels of preparation to it. If you don't know, the woman playing Colonel Simms is Kate Mulgrew, who you may know best as Captain Janeway from *Star Trek*, but also is well known for a lot of theater and a lot of movies as well, she wanted a lot of preparation. She wanted a lot of books. I couldn't send her enough books on what Guantanamo was and what was happening from different interrogators who had written back about it. And then the gentleman who played the detainee, if you know, is Aasif Mandvi from the *Daily Show.* So a lot of people know him as a comedic actor. But I just think he did a—as did Peter and Kate—just a brilliant job. He had a different level of experience. He had done a play in New York dealing with the British detainees. So he had a lot of experience as well. But what was interesting for him is he said, so much of what we had seen and so much of what we hear is the living conditions, what's going on, but he didn't know about it from the legal perspective. And I think as we've taken this thing around the country and what's been interesting is we're not just playing to lawyers. I'd say the majority of people who see it is not lawyers. It's large general audiences at various film festivals or we go to different universities, and it's people from the community, as well as a number of people who are not lawyers. And I think what we sort of said is, and Pete can talk more about this, the idea that I think we came at this starting to think it's a legal thing, but now maybe it's actually how various people deal with this, because it's something that's an issue for all of us.

So let me take your question. And I think this will be the last question, but we're certainly around to answer more questions, later. Please.

VOICE: Just real quick I wanted to know, how closely did the actual trial mirror or track the transcripts that you found?

SIG LIBOWITZ: Thank you very much. Well, as I mentioned, this is based upon the actual transcripts. It's the composite of a detainee and the composite of the judges. In the transcripts, they don't tell you any information about the judges. You don't know their names or anything. When you saw at the beginning of the movie where the tribunal members cover up their names on their name tags, that's really what happens.

We had a number of ex-military people serve as consultants on the film, including, in fact, the gentleman who played the MP is actually a Captain, was a Captain in the U.S. Marines. So he demoted himself to Sergeant to be in our movie, which I thought was great. And he served at Guantanamo for over six months and he talked about that. And it was really interesting, the thought being, we have to cover up our names, because if we don't, somehow these detainees will get word of our names back to al Qaeda and they'll come and they could hurt our families is what he saw. So for he himself, he said, after about four months, he stopped doing that. But we just thought that was really fascinating. So again, there wasn't any information given about the tribunal members, except for what they said. And I was really captured by the degree that you see there where I thought a lot of the tribunal members, a lot of the military really took the time to try and explain the process to the degree that they could and wanted the detainee to understand what was going on, but the—I wanted to with the detainee really keep that as close to the actual transcripts as possible. And again, in reading through the hundreds and the thousands of pages, it was the same questions that kept coming up again and again. Who said this? I want to see the evidence. Why don't I have a lawyer? Who is this person sitting next to me? You saw the officer. It's called a personal representative. Each of the detainees was given one. This is someone who, by law, could not be a lawyer. And it was there to help them, to explain the process to them. However, as mentioned in the film, there was no attorney-client confidentiality; obviously they're not an attorney, so anything that was said had to be turned over to the tribunal. So these were the questions that just kept coming up again and again and again.

And I do want to say, since I know we're ending, and I would love to just see if there are any final comments from the panel. Before I do, this movie is really dedicated to the JAGs. I had an opportunity with this to get to know our military's lawyers. I was just so blown away. I think if people could see how dedicated and how valiant they are. I had an opportunity after we did the Pentagon screenings to go to Guantanamo and I got to see them in action during some of the military commissions, during the hearings for the prosecution and the defense; I was saying to the Department of Defense, I really think you should let the world know what kind of defense and what's going on down here. Because I think if the world saw that, they would be very impressed. It's a different impression, I think, than the world has of us. Because the JAGs are just really something to be incredibly proud of.

But if there's any last comments from the panel, or if Peter just wants to tell us something interesting.

Well, in that case, thank you, Jonathan. Thank you all. I really appreciate it.

(Applause.)

Scenes from the Commercial and Federal Litigation Section

SPRING MEETING

May 21-23, 2010

The Sagamore
Bolton Landing, NY









SECTION REPORT

En Banc Review for Intermediate Appellate Courts in New York State

Prepared by the Appellate Practice Committee

This report analyzes a cogent and well-researched report from the New York City Bar's Committee of State Courts of Superior Jurisdiction (City Bar Report). The City Bar Report has detected conflicting decisions on the same appellate court and has proposed en banc review as a possible solution to resolving these perceived conflicts. We have analyzed the City Bar's Report with a focus on commercial cases.

We have not researched independently the extent of the problem, but have assumed from the City Bar Report that at least conflicting decisions do sometimes occur. Nevertheless, we conclude that en banc review is not advisable.

I. Identification of the Problem: Decisions in Conflict

The City Bar Report points out that at times different benches from the same appellate division have issued seemingly contradictory rulings. Sometimes this occurs with the judges on the subsequent case recognizing their departure from prior precedent.[1] Other times conflict comes about seemingly accidentally.[2] Of concern to our section is that these discrepancies occur far more in commercial cases than in other areas. Ninety-nine percent of the examples in the City Bar Report involved a commercial issue. It is true that, in the majority of instances, the Court of Appeals has resolved the conflict or reasserted a rule that the appellate court seemingly did not follow.[3] However, on its own, the Court of Appeals cannot take a case that the court below has not finally resolved. The only way for a non-final, civil decision of an appellate division to reach the Court of Appeals is if that appellate division grants leave upon motion.[4] In a civil case, it has become customary in the Appellate Division, First Department, to grant leave as long as two justices agree to do so. The Appellate Division, Second Department, requires the consent of only one justice in order to grant leave. Thus, there are cases that invariably fall through the cracks, because: (1) the decision is non final (such as denial of a summary judgment motion) and (2) there are not enough or no justices who wish to grant leave. Given the economic realities of litigating a commercial case to conclusion, it is likely that the appellate division is truly the court of last resort for commercial cases in this procedural posture. This is because, while there may be a discrepancy with another decision from the same court, it is more economical to settle than to proceed through trial.

II. Possible Solution: En Banc Review

Currently, the New York State Constitution Art. 6 § 4 limits the number of justices that can sit on any case in an appellate division to five. The City Bar Report advocates amending the Constitution to remove this impediment, thereby clearing the way for rehearings en banc. An en banc rehearing occurs when all active judges on an intermediate court sit together to rehear and decide an appeal. This is intended to be a rare occurrence, reserved only for cases where there is a lack of uniformity of decisions in that particular court and the matter is of great importance.

Although New York does not currently allow for en banc review, Federal Rule of Appellate Procedure 35 has long permitted en banc review in the federal courts of appeals if: (1) necessary to secure or maintain uniformity of the court's decisions and (2) the proceeding involves a question of "exceptional importance." About 4,855 petitions for rehearings en banc were filed in the federal courts in 2008. The application usually tags along with a motion for rehearing before the original panel and therefore, as a practical matter, does not increase the court's workload. The same should hold true were en banc review to come to fruition in state court. Applications are rarely granted. En banc hearings comprise less than one percent of all cases in the federal court of appeals.

The City Bar Report stated that Delaware provides for some form of en banc review. This drew our initial interest given how well Delaware handles commercial cases. However, as there is no intermediate appellate court in Delaware, it is only the state's highest court, the Supreme Court of Delaware, that utilizes an en banc procedure. This court usually sits in panels of three, while there are five judges on the court in total. Accordingly, en banc review in Delaware would involve all five judges on that court. As all the judges on our Court of Appeals preside over appeals, the procedure in Delaware is not a useful guide for New York. It is noteworthy, however, that in Delaware, litigants can appeal a decision from Delaware Chancery court (the court that handles nearly all commercial cases) directly to the Supreme Court of Delaware on an expedited and interlocutory basis.[5] This "bee line" to the highest court in Delaware for even non final commercial decisions is important to preserve Delaware's dominance in the area of commercial law.

III. Conclusion: En Banc Review Is Unnecessary and Not Feasible; Alternative Solutions Preferable

While the City Bar Report's recommendation to amend New York law to allow for en banc review purports to alleviate the perceived problem of conflicting decisions, we conclude that this extreme measure is not necessary, particularly not on a statewide basis. The appellate divisions in the third and fourth departments are quite small comparatively. The Appellate Division, Third Department, has twelve justices and the Appellate Division, Fourth Department, has eleven. Accordingly, when five justices sit, there is already close to a majority of the entire court on that case. The case law reflects this reality. There are relatively few conflicts in these two jurisdictions. Indeed, the City Bar Report cites to no instances of conflict in either upstate Appellate Division. Accordingly, calling for en banc review on a statewide basis is unnecessary. It also does not solve conflicting decisions. What if the court decides not to grant en banc? Then, the conflict remains. It is interesting to note that the federal courts of appeals do not suffer from any lack of conflict while they already have en banc review.

It is also not practical from a political standpoint. Involving the legislature on something as grand as amending the constitution could take years. It would require much more time and effort than the situation really needs. This is because there are alternative, less intrusive means for addressing the perceived problem of conflicting decisions downstate.

One approach would be to encourage the use of a "mini en banc." Mini en banc involves a panel circulating a proposed decision to the entire court on an informal basis for comment. Panels on the federal courts of appeal have used this procedure when deciding to depart from prior precedent, but the use of mini en banc could easily include instances where there is a conflict among decisions on the court. This would at least give a panel a sense of what the majority of the judges would do, and, if the majority differs from the result that panel was about to reach, might lend itself to a reconsideration of that position.

Another approach would be to encourage the appellate divisions to grant more applications for leave to appeal to the Court of Appeals. This could, at the very least, take the form of a letter from the section to the First and Second Departments or perhaps a meeting with the new clerks in both downstate departments. We could even invite the new clerks to one of our executive committee meetings.

We also cannot overlook the importance of e-filing to this matter. It is possible, indeed highly likely, that in many of the cases where there is a perceived conflict, there is some difference in the fact patterns that engendered the difference in the decisions. Currently, the record on appeal is not available over the internet. A curious attorney seeking to distinguish between the two cases would have to personally come into court to pull the records. This is both time consuming and disruptive. Were the records available electronically, attorneys could see for themselves the reason for the discrepancy without the hassle. Reference to the record on appeal would occur far more frequently and would enlighten everyone.

Finally, there are legislative changes we may want to encourage that would cut down on the impact of any lack of uniformity, but are less intrusive than amending the State Constitution. Currently, New York Judiciary law §§ 431 and 433a require the publication of every Appellate Division decision, no matter how short and no matter its precedential value. Perhaps amending this publication requirement, so that judges publish only what they want in an official publication, or choose what may be cited for precedential value, would cut down on the impact of these seemingly disparate decisions, particularly in those cases where an unusual fact pattern has perhaps led to the apparent conflict. We might also recommend an end to the rule of finality so that the Court of Appeals could hear more commercial cases, but this remains a distant hope.

Endnotes

1. *Compare Fieldston Property Owners Ass'n v. Heritage Ins. Co.*, 61 A.D.3d 185 (1st Dep't 2009) *with Sport Rock International, Inc. v. Am. Cas. Co. of Reading PA.*, 65 A.D.3d 12 (1st Dep't 2009) (interpreting "other insurance" clauses).
2. *Compare Matter of United Service Auto Assn. v. Melendez*, 27 A.D.3d 296 (1st Dep't 2006) (holding that arbitration was required under an out of state policy only if both parties agreed) *with In re National Grange Mut. Ins Co. v. Louie*, 39 A.D.3d 293 (1st Dep't 2007) (holding that where there is an obligation to arbitrate imposed on the policy by the New York State Insurance Law it is also imposed on policies written for nonresidents when their vehicles are operated in the state and the insurer is authorized to transact business there).
3. *See, e.g., Great Canal Realty Corp v. Seneca Ins. Co. Inc.*, 5 N.Y.3d 742 (2005); *Samuel v. Druckman & Sinel, LLP*, 12 N.Y.3d 205 (2009).
4. N.Y.Civ.Prac.L.R. 5601 (McKinney 1986).
5. *See, e.g., In re Topps Co. Shareholders Lit.*, 924 A2d 951, 954 (Del. Ch. Ct. 2007).

This report was prepared by the Appellate Practice Committee of the Commercial and Federal Litigation Section which is co-chaired by Section Vice-Chair David H. Tennant and Melissa Crane. The report was approved by the Section's Executive Committee on March 16, 2010. Committee co-chair and Executive Committee member Crane, who works in the Appellate Division, First Department, abstained from all votes concerning this report. The views expressed in this report are not intended to express the views of the Appellate Division, First Department, or any judge of that court.

SECTION REPORT

Criminal Prosecutorial Discretion in Insider Trading Cases: Let's Look at the Numbers

Prepared by the Securities Subcommittee of the White Collar Criminal Litigation Committee

Introduction

The Securities and Exchange Commission ("SEC"), a civil agency, has statutory authority to bring suit against inside traders (tippers and tippees) in federal district court to obtain injunctive relief, disgorgement of profits gained or losses avoided plus interest, civil penalties of up to three times the amount of profits gained or losses avoided, and individual bars from acting as officers or directors of public companies. The SEC may also bring administrative proceedings to secure individual bars from association with entities regulated by the SEC.

But the trials of the inside trader do not always end with the SEC. The SEC can and often does advise the Department of Justice ("DOJ") of its insider trading investigations, and the SEC and DOJ may conduct parallel investigations.[1] It is not unusual for the SEC to file suit against an inside trader in federal district court on the same day the DOJ announces that it has obtained an indictment against that inside trader. The criminal penalties for insider trading may be severe depending on the circumstances of the case, including fines of up to $5,000,000 and prison sentences of up to 20 years.

Robert Khuzami, the SEC's Director of Enforcement, at the recent joint DOJ/SEC press conference announcing the filing of parallel civil and criminal insider trading actions related to the Galleon hedge fund, stated: "Our law enforcement agencies are together much more than the sum of our parts. That is why coordination, of which today's actions are a prime example, is critically important to the goal of rooting out fraud and misconduct in our markets."[2]

In determining whether to bring parallel criminal actions to SEC civil insider trading actions, Assistant United States Attorneys ("AUSAs") are guided by the prosecution principles outlined in the DOJ's United States Attorneys' Manual ("Manual"). In short, it is the responsibility of the DOJ prosecutor to make "certain that the general purposes of the criminal law…are adequately [met.]"[3] Under the Manual, even though a AUSA may believe that a person's conduct constitutes a Federal offense, and the admissible evidence will probably be sufficient to obtain and sustain a conviction, the AUSA should decline prosecution of such person if: (1) "no substantial Federal interest would be served by prosecution"[4]; (2) "the person is subject to effective prosecution in another jurisdiction;" or (3) "there exists an adequate non-criminal alternative to prosecution."[5]

In light of these considerations, AUSAs routinely exercise their discretion to decline criminal prosecution of inside traders sued by the SEC. In fact, as more fully described below, the DOJ pursued criminal cases with respect to only 65 of the 159 individuals sued by the SEC in the New York federal courts over a recent six year period.[6] This statistic raises the question, why? Why does the DOJ bring criminal insider trading charges against certain individuals sued by the SEC, but not others? What factors determine which civil investigations become criminal ones?

To answer this question, we analyzed the DOJ's prosecution or non-prosecution of defendants named in SEC insider trading complaints filed in the New York federal district courts during SEC fiscal years 2004 to 2009.[7] The analysis revealed the following, which should be of interest to lawyers practicing in this area: licensed professionals (*e.g.*, investment bankers, brokers, traders, investment advisers, attorneys, and accountants) face a very high likelihood of prosecution by the DOJ. During the relevant time period, the SEC brought insider-trading cases against 69 licensed professionals, and the DOJ pursued criminal charges against 42, or sixty-one percent of these SEC defendants. The analysis also suggests that licensed professionals are substantially more likely to face criminal prosecution than officers and directors of public companies who conduct insider trading in the stocks of their companies. Our analysis showed that the DOJ brought criminal insider trading charges against only one out of every three officers or directors of public companies sued by the SEC.

The analysis also suggests that tippers face a far higher risk of criminal prosecution than do tippees or sole actors. Fifty-eight percent of the SEC defendants selected by the DOJ for prosecution tipped inside information to others, whereas thirty-six percent of defendants were mere tippees, and six percent of defendants were sole actors who did not tip anyone.

Especially large trading gains or losses avoided by the defendant do not result in criminal prosecution as frequently as one might expect. The DOJ prosecuted only slightly more than half of the defendants accused by the SEC of earning profits or avoiding losses of more than $100,000. On the other hand, defendants accused of pocketing smaller gains or avoiding smaller losses (between $25,000 and $100,000) appear statistically less likely to be prosecuted.

On the other hand, the analysis suggests that certain aggravating factors have an impact on the DOJ's exercise of discretion, such as the defendant's criminal misconduct during the investigation (*e.g.*, obstructing justice and making false statements to the SEC), and the defendant's commission of substantive crimes in addition to insider trading (*e.g.*, falsifying books and records, bribery and violating grand jury secrecy laws). The analysis also suggests that certain mitigating factors, such as the defendants' age and marital relationship to other defendants or relevant parties had an impact on the DOJ's charging decisions. And the analysis shows that individuals who consent to settlements with the SEC prior to the filing of the SEC's complaints are, on a statistical basis, rarely the subjects of a parallel criminal prosecution.

While the empirical analysis does not (and likely cannot) account for the array of factors that influence the DOJ to prosecute or not prosecute any particular defendant, the findings set forth in this article should be useful to practitioners representing clients in insider trading investigations, particularly in the current environment of increased coordination between the SEC and federal prosecutors.

A. The Methodology

1. Which Cases, Which Defendants

We reviewed the complaints filed by the SEC in the United States District Courts for the Southern District of New York ("SDNY") and Eastern District of New York ("EDNY")[8] for all cases characterized by the SEC in its annual reports for fiscal years 2004-2009 as "insider trading" cases (excluding administrative proceedings instituted as a follow-up to injunctive relief or criminal conviction) (these cases are referred to herein as the "relevant case set"), and checked to see if the DOJ in any district also brought criminal charges against the defendants named in those complaints. Usually it is the Offices of the United States Attorney for the SDNY and for the EDNY which bring proceedings parallel to SEC insider trading cases filed in SDNY or EDNY, but this is not always the case. To the extent the SEC filed separate complaints arising from the same insider trading scheme, we looked at the totality of the complaints filed arising from the scheme to determine whether the DOJ prosecuted none or some of the defendants.

We excluded from the analysis defendants who were "unknown purchasers" sued by the SEC; corporate entities or partnerships (which, for the most part, simply were trading vehicles for the individual inside traders); and individuals specifically named as relief defendants only. During the relevant period there were three "unknown purchasers" complaints filed by the SEC in the SDNY. In two cases, the SEC never identified the purchasers and terminated the actions. In the other case, the SEC later amended the complaint to name two entities and an individual, then without explanation subsequently agreed to a dismissal of the action against all defendants without prejudice.

If a tippee or tipper was mentioned, but not named, in a complaint in the relevant case set, but was named in an action that fell outside the relevant time period (2004-2009) or was not commenced in a district court in New York, we did not analyze the profile of that defendant.

Using this methodology, we found and reviewed sixty-two insider-trading cases against 159 defendants filed by the SEC in the SDNY and EDNY during fiscal years 2004-2009 (during that period the SEC filed a total of 220 insider trading complaints throughout the country, 103 of which named multiple defendants). Of those sixty-two SEC cases filed in the SDNY and EDNY, we found forty complaints, naming sixty-seven total defendants, where the DOJ prosecuted none of the defendants named in the SEC's Complaint. As such, the forty SEC cases filed in the SDNY and EDNY where the DOJ took no action against any of the defendants (plus the three "unknown purchaser" cases filed by the SEC in the SDNY where the DOJ also took no criminal action) represent sixty-nine percent of all SEC insider trading complaints filed in the New York federal courts during the relevant period. In other words, the DOJ declined to bring any parallel criminal proceedings in over two-thirds of all SEC insider trading cases filed in the SDNY and EDNY for SEC fiscal years 2004 through 2009.

We found ten complaints filed by the SEC in the SDNY and EDNY during the same time period where the DOJ prosecuted some (a total of twenty-five) but not all of the defendants, and ten SEC complaints where all of the defendants (a total of eleven) were charged by the DOJ. We also found two additional SEC complaints, involving six additional defendants who were sued for insider trading violations, but those cases were not classified by the SEC in its Annual Reports as insider trading cases. Each of the defendants, however, were described as tippers in other SEC complaints in the relevant case set, and each of these defendants were prosecuted by the DOJ.

2. Categorizing the Defendants

Based on information contained in the SEC Complaints and Releases, we placed each of the SEC insider trading defendants into one or more applicable categories that, based on our experience, we believe would be relevant to a non-prosecution analysis. Those categories are: (1) tippers (including tippees who subsequently tipped); (2) mere tippees (tippees who did not tip); (3) "downstream" tippees (second-generation or later tippees); (4) sole actors (defendants who were not improperly tipped/did not tip); (5) size of profits generated/losses avoided; (6) licensed professionals (*e.g.*, investment bankers, brokers, traders, attorneys and accountants); (7) officers or directors of public companies; (8) overseas defendants; (9) defendants who negotiated settlements with the SEC prior to the filing of the SEC complaints; and (10) per-

sonal considerations (age, and marital relationship with tipper/tippee).

With respect to the size of profits generated/losses avoided category, we assigned the defendants to one of three classes: negligible profits/losses avoided (less than $25,000); moderate profits/losses avoided ($25,000 to $99,999); and substantial profits/losses avoided ($100,000 and above). Where a tipper did not trade, we grouped the tipper with the tippee for purposes of the profits/losses avoided categorization. Also, to the extent the SEC did not provide a breakdown of profits/losses avoided by defendant, but provided a gross profit/losses avoided for all defendants, we applied that gross profit/losses avoided number for all defendants.

We initially sought to test the relevance of another factor, the defendants' cooperation or self-reporting to the SEC. Out of the ninety-four individual defendants we isolated those who were sued by the SEC but not prosecuted by the DOJ, the SEC's public releases referenced the defendant's cooperation with respect to only two defendants. Because the SEC does not always reference a defendant's cooperation in its public releases, and a defendant's cooperation with the DOJ is virtually never mentioned in the releases, and because, from our experience as practitioners, we believe more than two of the ninety-four defendants likely cooperated with the SEC, we determined that there was not enough information available to include this as a separate category.

Finally, with respect to the defendants prosecuted by the DOJ, we sought to review the criminal record (if any) of each to determine whether these defendants (1) engaged in any aggravating criminal conduct during the SEC investigation (*i.e.*, false statements to government officials, perjury, obstruction of justice); and (2) whether these defendants were charged with any other substantive crimes in addition to insider trading.

3. Considerations Not Subject to Empirical Analysis

The methodology suffers from some shortcomings. With respect to cases where the DOJ prosecuted none of the defendants, it is possible that the SEC did not refer the matter to the DOJ, the DOJ otherwise never learned of the matter, the DOJ was too busy with other mandates at the time of the referral to focus on a particular case, the DOJ initiated an investigation that subsequently fell through the cracks, or the case suffered from evidentiary or legal theory problems. Further, with respect to cases where the DOJ prosecuted some but not all of the defendants, it is possible that non-prosecution decisions were based on cooperation of certain defendants, or other factors such as those described above that are not apparent from the public record. Although the DOJ is required to keep records detailing the reasons for non-prosecution in a given case,[9] these records are not public.

B. The Results

1. Factors Increasing the Likelihood of Criminal Prosecution by the DOJ

The analysis suggests that the DOJ holds licensed professionals to a higher standard than other individuals engaged in insider trading schemes. The DOJ prosecuted sixty-one percent of the defendants who were licensed securities professionals, and sixty percent of the defendants who were other types of licensed professionals (attorneys, CPAs and actuaries). By contrast, the DOJ prosecuted only thirty-three percent of the defendants in the relevant case set who were officers or directors of a public company who traded their company's stock on inside information.

Defendants who tip others are more likely to be criminally prosecuted than those who are tippees only or sole actors. Fifty-eight percent of the defendants who were prosecuted by the DOJ were tippers (including direct tippees or remote tippees who thereafter tipped the information to others). Thirty-six percent of the defendants in the relevant case set who were prosecuted by the DOJ were mere tippees (tippees who did not tip anyone else). These findings are unsurprising. We would expect the DOJ to take a greater interest in those who pass material nonpublic information to others who then trade than in those who trade without doing so.

Defendants who engage in aggravating criminal conduct in the course of investigations, such as making false statements to government officials, perjury, and obstruction of justice are also more likely to be criminally prosecuted. The likelihood of prosecution also increases where the defendant engages in substantive criminal misconduct in addition to the insider trading, such as falsifying books and records, bribery, and violating grand jury secrecy laws. Of the 64 SEC defendants prosecuted by the DOJ, thirteen percent were also criminally charged with aggravating conduct, and twenty-three percent were charged with additional substantive crimes.

2. Factors Reducing the Likelihood of Criminal Prosecution by the DOJ

With respect to avoiding criminal prosecution for insider trading, the analysis suggests it is better, as a defendant, to have acted alone. In forty-eight percent of the forty SEC insider trading cases filed in the SDNY and EDNY where the DOJ brought no criminal action, the case involved a sole actor—typically an individual who was granted access to material nonpublic information in the course of his employment, but who could not resist the temptation to make a quick profit by trading on such information. Of the sixty-seven individual defendants not prosecuted by the DOJ in those cases, a total of twenty-one, or thirty-one percent of the defendants, were sole actors. Overall, only sixteen percent of the sole actors

named in SEC complaints were criminally prosecuted by the DOJ.

The argument in favor of non-prosecution of sole actors would appear self-evident. Their misconduct generally is limited in scope and time, and may have been attributable to a momentary lapse of judgment facilitated by the ease of placing securities trades through online accounts. Where there is no evidence of conspiratorial conduct or coordinated wrongdoing, the equities weigh heavily in favor of letting the SEC enforcement process handle the matter.

Forty-one of the 159 total defendants in our study (one-quarter of all defendants) settled with the SEC simultaneous with the filing of the SEC's complaint (*i.e.*, the settlements had been reached well in advance of the filing of the complaints), and consented to the imposition of some form of remedial and/or punitive relief, including injunctions, disgorgement payments, civil penalty payments, bars from serving as officers or directors of public companies, or bars from association with securities investment firms. The raw numbers show that the DOJ did not criminally prosecute approximately ninety-five percent (39 out of 41) of these individuals.

It is impossible to know whether in these cases the DOJ declined to prosecute because it believed the SEC settlements constituted an adequate, non-criminal alternative to prosecution.[10] It may be that these non-prosecutions predominantly are the conveyance of two unrelated considerations. First, the SEC may never have referred the matter to the DOJ, because it believed such a referral was unwarranted.[11] Second, the SEC may have referred the matter to the DOJ, but the DOJ determined there was insufficient evidence to support a criminal prosecution against, or the expenditure of DOJ resources on, some or all of the individuals who settled civil charges with the SEC. But from a purely statistical standpoint, individuals who agreed up-front to settle SEC insider trading cases enjoyed the lowest criminal prosecution rates of all categories of defendants in our analysis.

During the relevant period, the DOJ criminally prosecuted only thirty-two percent of the downstream tippees named in SEC complaints. Not surprisingly, the factor that weighs in favor of non-prosecution of downstream tippees generally is their lesser degree of culpability in insider trading schemes.[12] Downstream tippees are neither the original tipper who breached the fiduciary, nor any other duty to the source of the information to maintain the confidentiality of the material nonpublic information, or the original tippee with the relationship with the tipper who was in the best position to know that the tipper breached a particular duty of confidentiality. As the information is tipped down the line, knowledge and proximity to the source of the breach, and resultant derivative legal assumption of duty to maintain confidentiality, is diluted.

The DOJ's principles of non-prosecution do not delve deeply into the defendant's personal characteristics extrinsic to the crime, such as age, health, family responsibilities, *etc*. Our analysis showed that certain personal characteristics—age and marital relationship with another defendant—appear to be significant.

In cases where the DOJ criminally charged none of the SEC defendants, fifteen percent of defendants were over sixty years old. Overall, the DOJ prosecuted only twenty-three percent of the defendants in the relevant case set who were over sixty years of age. The DOJ's exercise of discretion with respect to more elderly persons may be based on the Manual's proscription that prosecutors should consider the "probable sentence or other consequences if the person is convicted."[13]

In SEC insider trading cases where the DOJ did not prosecute any of the defendants, twenty-two percent of those defendants either were married to another defendant, to the source of the leaked information, or to the tippee. Overall, the DOJ prosecuted twenty-nine percent of the defendants in the relevant case set who were married to another defendant, to the source of the leaked information, or to a tippee. These results tend to show that the DOJ may be sensitive to the potential legal and other complications that may arise from prosecuting husband and wife, or to the probable and unfortunate consequences that may arise where one or both parents of younger children could be sent to prison if convicted.

Prior to fiscal year 2009, none of the seventeen overseas defendants in the relevant case set were prosecuted by the DOJ, even though in many of these cases the DOJ criminally prosecuted some of their co-defendants. During fiscal year 2009, four out of the six total overseas defendants charged by the SEC in the relevant case set were also charged criminally. However, because all four defendants who were criminally charged were part of the same insider trading case, it is not clear whether future overseas defendants would be more or less likely to be charged criminally post-2009.

3. Impact of Size of Defendants' Profits Gained/ Losses Avoided on the Likelihood of Prosecution by the DOJ

The DOJ prosecuted only five of the twenty-seven defendants (nineteen percent) who reaped profits or avoided trading losses of less than $25,000. Although one would expect the prosecution rate to consistently increase as dollar amounts increased, the analysis showed that only one of the 17 defendants (six percent) who earned profits or avoided losses of between $25,000 and $99,000 was criminally prosecuted. This strikes us as anomalous and not easily accounted for. There is a substantial increase in prosecution rates where the dollar amounts gained or losses avoided exceeds six figures. Fifty-nine of the 115 defendants (fifty-one percent) who earned profits

or avoided losses of more than $100,000 found themselves named as defendants in a parallel criminal case.

Conclusion

In New York, licensed professionals stand a greater chance of being prosecuted than others (including officers of public companies); tippers tend to be treated more harshly than tippees; sole actors may be treated more leniently than those who advance a fraudulent scheme by tipping others; clients who made or stood to make less money, or avoid smaller losses, on their unlawful trading may be viewed more favorably than those who enjoy greater gains; those who consent up-front to settlements with the SEC do not tend to be prosecuted by the criminal authorities; and those who commit aggravating or additional stand-alone crimes are more likely to find themselves defendants in parallel criminal cases.

Whether advising a client concerning his or her settlement (or guilty plea) options or advocating to the DOJ why a particular case—based on the Department's historical handling of such cases—should not be treated criminally, these findings should be of value to New York lawyers representing clients in insider trading cases. This is particularly true given the stated aim of the SEC's Enforcement Division to coordinate closely with federal prosecutors in such cases.

Endnotes

1. For a discussion of the considerations and processes for referral of SEC matters to the DOJ, *see* SEC Division of Enforcement Manual, Section 5.2.1 at 108-111, and Section 5.6.1 at 115-118 (Jan. 13, 2010).
2. Remarks by Robert Khuzami at *SEC v. Galleon Management, LP* Press Conference (Oct. 16, 2009), available at *http://www.sec.gov/news/speech/2009/spch101609rk.htm*.
3. Manual at 9-27.110.
4. Manual at 9-27.230.
5. Manual at 9-27.110.
6. Analysis reflects prosecutions by the DOJ as of April 13, 2010 against insider trading defendants who were charged by the SEC during fiscal years 2004-2009.
7. The SEC's fiscal year begins on October 1st of the previous calendar year. For example, fiscal year 2009 began on October 1, 2008 and ended on September 30, 2009. The SEC's annual report for fiscal year 2008 noted that fiscal year 2008 saw the highest number of insider trading cases brought by the SEC in the agency's history. *See* SEC 2008 Performance and Accountability Report (Nov. 14, 2008), available at *http://www.sec.gov/about/secpar/secpar2008.pdf*.
8. During the relevant time period, the SEC filed no insider trading complaints in the Western or Northern Districts of New York.
9. The Manual, at 9-27.270, states:

   > A. Whenever the attorney for the government declines to commence or recommend Federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.
   >
   > B. Comment. USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in Federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up.

10. One of the DOJ's principles of federal prosecution is that prosecution may be declined where "there exists an adequate, non-criminal alternative to prosecution." The Manual notes that "resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity," particularly where "Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include…civil actions under the securities… laws." Manual at 9-27.250. In determining whether these civil remedies provide an effective substitute for criminal prosecution, the attorneys should consider the "sanctions available under the alternative means of disposition" and "the nature and severity of the sanctions." *Id.*
11. As discussed above, with regard to two out of every three insider trading complaints filed by the SEC in New York during the analysis period, the DOJ took no parallel criminal action against any of the named defendants.
12. The Manual provides: "Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offenses, both in the abstract and in comparison with any others involved in the offense. If for example, the person was a relatively minor participant in a criminal enterprise conducted by others, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate." Manual at 9-27.230 B.4.
13. Manual at 9-27.230.

This report was prepared in May 2010 by the Securities Subcommittee of the White Collar Criminal Litigation Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. Jeffrey Plotkin and Barry Rashkover are co-chairs of the Subcommittee. From 1986-1991, Mr. Plotkin worked in the Enforcement Division of the SEC where, among other positions, he served as Assistant Regional Administrator of the SEC's Northeast Regional Office. From 1995-2004, Mr. Rashkover worked in the Enforcement Division of the SEC where, among other positions, he served as Associate Regional Director and Co-Head of Enforcement for the SEC's Northeast Regional Office. Evan Barr and Joanna C. Hendon are co-chairs of the Committee. Ms. Hendon and Mr. Barr served as Assistant United States Attorneys in the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, from 1995-2001 and from 1995-2004, respectively.

Mr. Plotkin was the principal author of this report and was assisted by committee members Lorraine Bellard and Kerry Land. On May 12, 2010, this report was unanimously approved by the Executive Committee of the Commercial and Federal Litigation Section.

Experiments in the Lab: Donnelly Act Diversions from Federal Antitrust Law

Prepared by the Antitrust Committee

I. Introduction

Antitrust began in the States. In New York itself, protecting the competitive process, under the common law and through statutes, goes back at least two hundred years.[1] Bid-rigging was held to be "against public policy" as early as 1810.[2] In 1828—more than 60 years before the Sherman Act—the New York legislature made conspiracy "to commit any act injurious to…trade or commerce" a misdemeanor.[3] A few years later, conspiracy to restrain trade in salt was also made criminal by statute.[4] During this same time period, at common law, price-fixing agreements by shippers on upstate canals were held to be void,[5] and thereafter restrictions on steamboat competition were invalidated.[6]

Nationally, the first general purpose antitrust law was passed in Kansas in 1889, before the Sherman Act.[7] National legislation directed to preserving the competitive process was the by-product of agitation at the state level, where western and southern states took the lead.[8] By the time Congress passed the Sherman Act, some 20 states had antitrust statutes or constitutional provisions prohibiting or invalidating restraints of trade.[9] As Professor Hovenkamp has written, "the legislative history of the Sherman Act is replete with statements that the Act was designated to supplement rather than to abrogate existing state antitrust enforcement…."[10]

Flash forward 100-plus years. Today, federal antitrust law is regularly held out, either by virtue of statute or judicial decision, as the competition standard that state antitrust law should emulate. So, for example, in neighboring Connecticut, we find a statute directing that, "in construing" the state's antitrust provisions, "the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes."[11] In New York, the approach is a bit different, as the Court of Appeals has instructed that the state's antitrust statute, the Donnelly Act,[12] "should generally be construed in light of federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result."[13]

In this paper, we examine several of these differences between New York State and federal antitrust law. Specifically, we discuss the following subjects, comparing treatment under New York's Donnelly Act to that under the federal Sherman or Clayton Acts: (1) the requirement of "concerted" action as an element of a restraint on trade violation; (2) treatment of group boycotts as an obstacle to free and open competition; (3) restraints by professionals and non-profit entities; (4) restraints arising from action by the State itself; (5) restrictions on mergers and acquisitions; and (6) the availability of class actions as a means to pursue antitrust claims.

We do not attempt here to detail every difference between state and federal antitrust law. For example, another significant difference concerns "vertical" price-fixing between a supplier and its customers, often referred to as retail price maintenance, or "RPM." The Supreme Court's 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[14] holds that RPM is subject to a rule of reason, rather than a *per se*, analysis.[15] *Leegin* reversed nearly 100 years of federal *per se* treatment,[16] and pre-*Leegin* Donnelly Act rulings in recent years have likewise applied the *per se* rule.[17] New York State's treatment of RPM in view of *Leegin* is the subject of a recent article, thus obviating a need to revisit the subject here.[18]

Similarly, like many other states, New York has rejected the Supreme Court's *Illinois Brick*[19] "direct purchaser" rule, which holds that as a matter of federal law, only those who buy directly from (or sell directly to) an antitrust violator are entitled to sue for treble damages.[20] Countless papers have discussed this fundamental policy dispute during the 30 plus years since the Supreme Court's ruling.[21] Any contribution that we could make would be, at most, marginal.

We explore, instead, differences less notorious, which may well go unappreciated.

II. Concerted Action

Section 1 of the Sherman Act states that "[e]very contract, combination…or conspiracy, in restraint of trade or commerce…is declared to be illegal."[22] This language requires (1) concerted actions, not unilateral activity—that is, conduct in which two or more economically distinct persons participate, which (2) produce an *unreasonable* restraint on trade.[23] For a *single* firm to violate the Sherman Act, it must engage in acts that constitute or threaten monopolization, thus giving rise to a violation of Section 2.[24] Absent monopolization or attempted monopolization, single firm conduct is unobjectionable, regardless of the restraint that results.[25]

The Donnelly Act was patterned after Section 1 of the Sherman Act and likewise reaches only unreasonable restraints on trade.[26] However, the Donnelly Act contains

different concerted action language. Specifically, the Act describes as "illegal":

> [e]very contract, agreement, *arrangement* or combination whereby a monopoly in the conduct of any business…may be established or maintained, or whereby competition or the free exercise of any activity in the conduct of any business… may be restrained or whereby for the purpose of establishing or maintaining any such monopoly…trade or commerce…may be restrained.[27]

There apparently is no relevant legislative history explaining inclusion of the term "arrangement" as part of the Sherman Act.[28] New York courts generally agree that the term renders the Donnelly Act broader in scope than its federal counterpart. Yet, it is unclear what conduct amounts to an "arrangement" that the Donnelly Act declares illegal, but that the Sherman Act does not reach.

The first decision to wrestle with the term "arrangement" was *People v. American Ice Co.*,[29] decided shortly after the Donnelly Act's enactment in 1899. There, the defendant was criminally charged with attempting to monopolize the ice industry by acquiring ice producers and distributors and obtaining non-compete agreements from them.[30] Explaining the term "arrangement" in a jury charge, the trial court wrote:

> In our judgment it has a broader meaning than either the word "contract," "agreement," or "combination." It may include each and all of these things, and more.…It is []defined as: "The disposition of measures for the accomplishment of a purpose; preparation for successful performance." [or] "A structure or combination of things in a particular way for any purpose." I think these definitions of the word "arrangement" are sufficient to convey to your minds what was meant and intended by the Legislature when it passed this act.
>
> It is the theory of the people in this case (and the indictment is drawn accordingly) that all the various contracts, agreements, acquisition of property and rights, by purchase or merger of other corporations, and the various acts set forth in the indictment and proven on this trial, constituted an "arrangement" within the meaning of the statute whereby a monopoly was created, or attempted, and competition restrained or attempted to be restrained.[31]

Similarly, in *Eagle Spring Water Co. v. Webb & Knapp, Inc.*,[32] the trial court granted an injunction against the defendant landlord, who sought to exclude the plaintiff's water delivery and installation personnel from entering its buildings because the landlord had an exclusive agreement with a rival water provider. The court said that "arrangement" "has a broader meaning than the words 'contract,' 'agreement' or 'combination,' and it may include each and all of these things and more—that is, all of the various acts, devices and agreements under which the participants are operating for the accomplishment of their purpose."[33]

Notably, in both *American Ice* and *Eagle Spring Water*, the defendant seemingly had actually made one or more agreements, which likely could have satisfied the Donnelly Act's "concert of action" element. Nevertheless, each court invoked the term "arrangement" to reach the restraint, and explicitly construed that term to cover conduct beyond "agreement."[34] In *Alexander's Department Stores v. Ohrbachs, Inc.*,[35] the court similarly concluded that "[a]n arrangement condemned by these statutes is unlawful even if it does not rise to the dignity of a contractual obligation." In short, the term expresses "extreme broadness of content."[36]

The New York Court of Appeals itself has addressed this aspect of the Donnelly Act only once. In *State v. Mobil Oil Corp.*,[37] the Court stated that:

> Although undoubtedly the sweep of Donnelly may be broader than that of Sherman, we conclude that under the familiar canon of statutory construction, *noscitur a sociis*, the term, 'arrangement', takes on a connotation similar to that of the other terms with which it is found in company, and thus must be interpreted as contemplating a *reciprocal relationship of commitment between two or more legal or economic entities* similar to but not embraced within the more exacting terms, "contract", "combination" or "conspiracy."[38]

By comparison, under federal antitrust law, the *Monsanto* standard for concerted action, at least where supplier-customer restraints are involved, requires "a conscious commitment to a common scheme designed to achieve an unlawful objective."[39]

While the Donnelly Act seems to be broader than Section 1 of the Sherman Act, applying the difference in specific cases is challenging. For example, in *U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers Local Union No. 3, AFL-CIO*,[40] the plaintiff contractors accused the defendants of excluding them from the low-voltage telecommunications and data wiring market. The Southern District of New York dismissed the Section

1 claim with prejudice on summary judgment because plaintiffs failed to meet the Supreme Court's "heightened standard" for proving a conspiracy under *Matsushita*.[41] There, the Supreme Court ruled that the plaintiff must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently."[42] The Southern District then considered whether to dismiss the Donnelly Act claim as well:

> [I]t is not clear that the heightened standard for demonstrating an antitrust conspiracy that governs claims under § 1 of the Sherman Act also applies to the Donnelly Act. The parties have not identified a case from the New York state courts that establishes such a principle, and I have found none. It is therefore prudent to dismiss the Donnelly claims without prejudice.[43]

Thus, although the Sherman Act dismissal was with prejudice, the Donnelly Act dismissal was not—an implicit recognition that the State's antitrust law may impose liability where federal law does not.

One area in which the Donnelly Act may be more encompassing than the Sherman Act concerns dealings of affiliated business entities—typically between parent and subsidiary corporations, or between other entities under common ownership. The Supreme Court's *Copperweld*[44] decision held that a parent and its wholly-owned subsidiaries constitute a single economic entity, and, while separate legal "persons," nevertheless are incapable of satisfying the concerted action element of Section 1 of the Sherman Act. The courts apply this same principle under the Donnelly Act.[45] Where the ownership level is less than 100%, however, the concurrence of federal and state law is less pronounced.[46]

In *People v. Schwartz*,[47] the individual defendant, Schwartz, and three corporations of which he owned up to 75%, were charged under the Donnelly Act with conspiring to submit collusive bids to nursing homes, thereby subverting competitive bidding requirements. The trial court upheld the indictment despite a *Copperweld* argument. The court relied on the *Mobil Oil* court's discussion of "arrangement," quoted above, in holding that "even if corporations are wholly-owned, they will still fall under the Donnelly Act as individual economic entities."[48] As an alternative holding, however, the court noted that the indictment alleged a conspiracy involving a "second person" who had "no relationship with the defendant or his corporation. Such person is a legal entity independent of the defendants and this fact removes the case from the parent-subsidiary theory since there is no unity of purpose."[49]

Affirming the defendants' conviction, the Appellate Division wrote that Schwartz and his companies "entered into an arrangement with the administrator of the nursing home…whereby the bids of independent competitors were summarily rejected by the administrator in favor of the defendants' bids."[50] By this "arrangement with the administrator," the defendants "committed per se anti-competitive acts of bid rigging."[51] While the Donnelly Act's "arrangement" language appears to have formed a basis for the Appellate Division's ruling, the court seemingly could just as easily have described the relationship with the nursing home administrator as one of "agreement." This individual, a co-conspirator who testified under immunity, undoubtedly received money for participating in the scheme.

Bevilacque v. Ford Motor Co.[52] is another decision rejecting *Copperweld* where the subsidiary was less than wholly-owned, but nonetheless parent-controlled. Ford, the 78% owner, allegedly conspired with the subsidiary to prevent the minority owner from selling his interest, and then terminated him. By contrast, federal courts have applied *Copperweld's* "single entity" exclusion despite significantly lower ownership levels.[53] However, the federal cases clearly are not uniform on this point.[54]

One can debate the point at which less-than-100% ownership sufficiently dilutes both control-in-fact and economic unity-of-interest so as to make applying antitrust principles appropriate. The Donnelly Act's term "arrangement" could, arguably, provide a basis for choosing a higher, rather than lower, demarcation level. However, as one court has noted, "the *Copperweld* inquiry is more substantively about determining whether there existed control and a so-called 'unity of purpose' rather than the establishment of any magic number percentage of ownership."[55] By emphasizing a fact inquiry, such an approach suggests a reduced likelihood of dismissal at the motion to dismiss, rather than summary judgment stage. Moreover, were this analysis to take hold, it is not self-evident that the Donnelly Act's "arrangement" could identify those fact settings in which *Copperweld* does not apply better than the Sherman Act's "contract" or "combination" language. *Schwartz* aside, the case law to date does not generally invoke the Donnelly Act's unique terminology as the basis for whether to apply *Copperweld*.

Thus, while the Donnelly Act's concerted action element is broader than Section 1 of the Sherman Act, the circumstances in which a legally sufficient state antitrust claim can be proven, while a federal claim cannot, are elusive. This difference between state and federal antitrust law, although recognized, remains to be developed.

III. Group Boycotts

New York law differs from federal antitrust law in the standard applied to group boycotts, or concerted refusals to deal. New York law has consistently applied the rule of reason to group boycotts. Federal law, however, has evolved from the *per se* rule to an analysis of each alleged boycott on a case-by-case basis to determine whether *per se* or rule of reason treatment is warranted.

Under federal law, the United States Supreme Court held group boycotts illegal in such early cases as *Eastern States Retail Lumber Dealers' Ass'n v. United States*,[56] and *Fashion Originators' Guild of Am. Inc. v. Federal Trade Commission*.[57] These rulings set the stage for the Court's *per se* condemnation of group boycotts in *Klor's Inc. v. Broadway-Hale Stores, Inc*.[58]

Klor's arose after a group of suppliers to a leading San Francisco department store refused to sell to the department store's competitor. Applying the *per se* rule, the Court noted:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality."[59]

These kinds of justifications—unavailing under federal law—are ones that the New York courts have expressed a willingness to consider in applying a rule of reason.

Early New York state decisions analyzing group boycotts tended to assess the reasonableness of the defendant's motives. For example, in *Heim v. The New York Stock Exchange*,[60] the court summarized the existing precedents:

> [I]f the combination not to do business with the plaintiff is for the purpose of injuring and destroying him, it is illegal; but, if injury to him follows as an incident from action sought to protect, increase and strengthen the business of the associates, then it is as legitimate as other forms of competition which the law leaves parties and combinations free to indulge in.[61]

Applying this distinction, the court held that the refusal of all members of the New York Stock Exchange to trade bonds with any active member of the rival Consolidated Exchange was not illegal.[62] The court reasoned that the concerted refusal to deal was not guided by "any bad motives or for the purpose of injuring the plaintiff," but rather arose because "the plaintiff belongs to and is actually engaged in building up and strengthening a rival to their detriment."[63]

Similarly, in *Wolfenstein v. Fashion Originators Guild of America, Inc.*,[64] the court upheld a group boycott as a reasonable restraint intended to protect industry participants. Plaintiff was a member of an association of retailers of women's dresses. The association expelled plaintiff for selling dresses from her apartment instead of at a retail outlet, a violation of the association's rules. For the same conduct, the Fashion Originators Guild, an association of dress manufacturers, also refused to allow its members to sell their dresses to the plaintiff.[65] Rejecting the plaintiff's Donnelly Act group boycott claim, the court noted that there was "no intent or power to regulate prices nor even to control production."[66] Rather, the two organizations had merely "united in denouncing as inimical to the trade," the practice of selling garments out of one's apartment.[67] "In this," the court concluded, "we perceive nothing arbitrary, unreasonable or unduly in restraint of trade."[68]

By contrast, where the defendants' motives were to drive competitors out of business, rather than to protect the business of a trade association's membership, early New York State decisions condemned group boycotts as unlawful. For instance, in *Peekskill Theatre, Inc. v. Advance Theatrical Co. of New York*,[69] the court granted an injunction against Loew's movie theaters prohibiting the company from inducing film producers not to supply their films to the plaintiff, Peekskill Theater. Ruling the boycott illegal, the court emphasized that the defendants' motives were to "ruin the plaintiff's business and not allow the plaintiff to procure films for exhibition."[70]

While the *Klor's per se* rule was the federal law standard, federal courts presented with Donnelly Act claims recognized that the state standard was different. For example, in *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*,[71] the plaintiff, a co-op buyer, alleged that various players in the food industry boycotted it in an effort to put it out of business. In analyzing the Donnelly Act claims, the Southern District of New York explained:

> The New York law under § 340 of the General Business Law is substantially similar to the federal law under § 1 of the Sherman Act. Certain decisions suggest, however, that under New York law, a "rule of reason" analysis must be applied to Donnelly Act claims rather than the per se approach applied…as to § 1 of the Sherman Act.[72]

The court then concluded that the plaintiff's evidence was sufficient to survive dismissal of the Donnelly Act claim, based on the "alleged combination of business and union power which allegedly induced the plaintiff's suppliers not to deal with the Co-op."[73]

In another Southern District of New York case, *International Television Productions Ltd. v. Twentieth Century-Fox Television*,[74] the court similarly construed New York State law as calling for rule of reason analysis for a group boycott. The court dismissed the plaintiff's claim for failure to allege an anticompetitive effect in the market in which the plaintiff competed.[75]

More recent New York state Donnelly Act cases tend to analyze all non-price restraints uniformly, often making it difficult to discern from the brief opinions and sparse facts whether a group boycott is, indeed, alleged. These decisions consistently recite the rule of reason standard, stating that:

> A party asserting a violation of the Donnelly Act must identify the relevant market, describe the nature and effects of the purported conspiracy, allege how the economic impact of that conspiracy does or could restrain trade in the market, and set forth a conspiracy or reciprocal relationship between two or more legal or economic entities.[76]

In issuing these brief rulings, the courts do not acknowledge that different standards may apply to different types of Donnelly Act claims. Nor do they refer to the federal standard for group boycotts.

In applying the rule of reason during a period in which the federal standard was *per se*, New York law departed from the practice of construing the Donnelly Act in light of Sherman Act standards.[77] For this reason, the relatively recent shift in the federal analysis, which began with *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*,[78] has not affected state law treatment of group boycott claims.

In *Northwest Wholesale Stationers*, the Supreme Court declined to apply the *per se* rule to all group boycotts.[79] Northwest, the defendant, was "a purchasing cooperative made up of approximately 100 office supply retailers," which permitted its members "to achieve economies of scale in purchasing and warehousing that would otherwise be unavailable to them."[80] The plaintiff was a retailer that Northwest expelled from the cooperative without providing a reason.[81] Rejecting *per se* treatment, the Supreme Court held that, "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted."[82] The Court further explained that "[a] plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects."[83]

Shortly after *Northwest Wholesale Stationers*, the Supreme Court declined to apply the *per se* rule in *FTC v. Indiana Federation of Dentists*.[84] There, a group of dentists refused to send x-rays to health insurance companies. The Court noted the limited scope of the *per se* rule, stating that "the category of restraints classed as group boycotts is not to be expanded indiscriminately, and [that] the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.…"[85] In requiring an analysis of market power and anticompetitive effects, the federal standard has moved toward the rule of reason standard consistently applied to Donnelly Act claims.

Although *Northwest Wholesale Stationers* and *Indiana Federation of Dentists* limited the application of the *per se* rule to group boycotts under federal law, these rulings did not eliminate it entirely. In *FTC v. Superior Court Trial Lawyers Association*,[86] the Supreme Court applied the *per se* rule to an agreement by bar association members to refuse to represent criminal defendants until the District of Columbia raised their pay. Emphasizing that the group boycott was intended to raise prices, and that horizontal price fixing is *per se* illegal, the Court concluded that it need not consider pro-competitive justifications or market power to hold the association's activity unlawful.[87]

The Supreme Court's 1999 decision in *Nynex Corp. v. Discon, Inc.*[88] made clear that *Klor's* is still good law, even as the Court declined to apply the *per se* rule to the case at hand.[89] In *Nynex*, a single buyer of removal services for obsolete telephone equipment began buying the services from a company that competed with the plaintiff. Although the plaintiff alleged that the buyer's shift was motivated by anticompetitive reasons, the Court held that this agreement—by a single buyer to purchase services from a single supplier—could not be condemned as unlawful *per se*, even if the buyer lacked a legitimate business justification for its decision. The Court noted that "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors."[90]

In sum, although federal and state antitrust treatment of group boycotts differed for much of the twentieth century, the two bodies of law are currently converging. Absent a boycott with horizontal elements, federal analysis has come to adopt the rule of reason, historically the test under the Donnelly Act.

Thus far, we have considered two areas of conduct where the Donnelly Act differs from federal law. There are differences, too, in judicially-created exemptions from coverage for various restraints, which we consider next.[91]

IV. Professional and Nonprofit Organizations

In discussing the Donnelly Act's application to professionals and nonprofit organizations, beginning against the background of federal antitrust law is helpful. Simply put, neither professionals nor nonprofits are exempt from federal antitrust liability.[92] At most, some federal courts have been receptive to arguments that, under particular circumstances, the professional or nonprofit character of an organization can be relevant to antitrust liability.[93]

By contrast, the professional character of an individual or organization is determinative in assessing its liability under New York's Donnelly Act. The general characteristics said to distinguish professions from businesses give

rise to an exemption for professionals from state antitrust scrutiny, while federal antitrust law remains applicable.

A. The Professional Exemption from the Donnelly Act

In re Freeman's Estate[94] is the leading New York case. There, the Monroe County Bar Association's minimum fee schedule was challenged as amounting to fixing fees for legal services in Monroe County, thus violating the Donnelly Act. The New York Court of Appeals upheld the minimum fee schedule, holding that "the law is a profession and not a business and therefore not subject to the Donnelly Act which prohibits business arrangements restraining competition."[95]

In reaching this conclusion, the Court of Appeals construed a 1933 statutory amendment which added "service" to the Donnelly Act's coverage.[96] The Court rejected the argument that the amendment was intended to encompass all manner of services. Rather, it found that in light of contemporary statements by the amendment's drafters, the "use of the word 'service' was confined to a commercial or business setting."[97]

The Court framed the key question as "whether the legal profession is a business or trade as that term is used in section 340."[98] To answer it, the Court enumerated factors that "distinguish professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions, whether civil or criminal:"[99]

> [1] the requirements of extensive formal training and learning, [2] admission to practice by a qualifying licensure, [3] a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, [4] a system for discipline of its members for violation of the code of ethics, [5] a duty to subordinate financial reward to social responsibility, and, notably, [6] an obligation on its members, even in non professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.[100]

"Interwoven with professional standards," the Court also wrote, "is pursuit of the ideal and that the profession not be debased by lesser commercial standards."[101] Professional organizations, in turn, "justify their existence to the extent that they further the standards and the ideal."[102]

Applying these factors, the Court of Appeals held that the practice of law qualifies as a profession, not as a "business or trade," and that the Donnelly Act was inapplicable.[103] Bar associations—in view of their role in controlling lawyers' conduct, promulgating and enforcing canons of ethics, maintaining a "professional disciplinary machinery," and fostering public service without financial reward—were held to be within the professional exemption.[104]

The facts in *Freeman* were similar to those in *Goldfarb v. Virginia State Bar*,[105] decided by the United States Supreme Court one year later. At issue was a fee schedule, published by the Fairfax County Bar Association and enforced by the Virginia State Bar, with recommended minimum prices to be charged by lawyers for performing common legal services.[106] The Fourth Circuit held that the existence of state regulation of lawyers, as well as the public service aspect of the practice of law, rendered the practice of law a "learned profession," rather than "trade or commerce" within the meaning of Sherman Act § 1.[107] However, the Supreme Court held otherwise and reversed.

The Supreme Court found that any "learned profession" exemption for lawyers was "at odds" with Congress' intent "to strike as broadly as it could in § 1 of the Sherman Act."[108] The Court held that the exchange of a lawyer's services for money qualifies as "commerce," and that the Sherman Act therefore applies to such an exchange.[109] The Court further held that the "nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act…nor is the public service aspect of professional practice controlling in determining whether § 1 includes professions."[110]

In light of *Goldfarb*, *Freeman*'s viability was tested. In *People v. Roth*,[111] two doctors were indicted under the Donnelly Act for organizing a concerted refusal to furnish professional services to non-emergency workers' compensation and no-fault insurance patients as a protest against the low fee schedules established by law for these plans. The Court of Appeals affirmed dismissal of the indictment because there was "no principled basis for distinguishing between the legal profession and the medical profession."[112] Thus, Freeman was "dispositive of the issue."[113]

The *Roth* court declined to reexamine *Freeman*'s professional exemption. The Court of Appeals reasoned that *Goldfarb* had no bearing on New York's professional exemption because the exemption established in *Freeman* rested on a "specific analysis of the legislative history underlying the Donnelly Act and the intent of our own State Legislature in enacting that statute."[114] *Roth* thus affirmed a professional exemption from the Donnelly Act and extended that exemption to the medical profession.[115]

Pharmaceutical Society of the State of N.Y. v. Abrams[116] extended the professional exemption to pharmacists. The case involved a prescription drug plan for state employees and retirees, proposed by the Pharmaceutical Society of the State of New York. The proposed plan had incentives to use generic drugs, including a provision to reimburse pharmacies for the drugs at a percentage discount

from their average wholesale price. Many pharmacists and pharmacies declined to participate and lobbied to register their disapproval. In response, the Pharmaceutical Society increased the reimbursement rate, thereby increasing the state's program cost by approximately $6 million. The New York State Attorney General served a Donnelly Act subpoena on the Pharmaceutical Society to investigate the proposed plan.[117] The Society moved to quash the subpoena, arguing that pharmacy was a profession and that the Society was, therefore, exempt from the Donnelly Act.[118]

Denying the motion to quash, the trial court held that pharmacy was not an exempt profession.[119] The Third Department, however, disagreed.[120] Although a pharmacist's services included dispensing medicines, the Appellate Division held that "the dispensing and advising of patients with respect to prescription drugs is professional rather than commercial in nature."[121] The court rested this holding on the fact that pharmacists are "highly regulated" and their licenses can be revoked or suspended by the State Board of Pharmacy.[122] Further, the court found it significant that medicine and pharmacy are grouped together for regulation under a single scheme, 8 NYCRR Part 29, entitled "Unprofessional Conduct," that the provisions for the two callings are "almost identical," and that the statutory guidelines for pharmacy are more extensive than for medicine.[123] In view of these considerations, and giving "great weight" to the factors enumerated in *Freeman*, the Third Department held that pharmacists are exempt from the Donnelly Act.[124]

This holding did not lead to quashing the subpoena issued to the Pharmaceutical Society, however. Although pharmacists are exempt from the Donnelly Act as professionals, the Pharmaceutical Society was not. The Society could not avail itself of the distinction between a profession and a business, wrote the court, because "[f]rom the point of view of the employer for whom a pharmacist works, the sale of drugs is trade or commerce."[125] The Third Department distinguished *Freeman* on the ground that, there, only members of the legal profession belonged to the County Bar Association; similarly in *Roth*, the only defendants were licensed physicians.[126] By contrast, the Pharmaceutical Society was "composed of both members and nonmembers of the pharmaceutical profession," and hence could not be held exempt from the Donnelly Act.[127] As the court explained, "[p]ersons and business organizations subject to the Donnelly Act cannot escape liability by cloaking their actions with participation of exempt individuals."[128]

Jaffee v. Horton Memorial Hosp.[129] offers additional guidance on whether there is a Donnelly Act exemption for an organization not composed entirely of professionals. The Donnelly Act claim there arose from Arden Hill Hospital's denial of staff privileges to a licensed physician.[130] Relying on *Pharmaceutical Society*, the physician argued that the hospital was not exempt from the Donnelly Act because it included both members and nonmembers of the medical profession. The Orange County Supreme Court interpreted *Pharmaceutical Society* as requiring an inquiry into: (1) the nature of the activity in question; and (2) the composition of the organization whose activities are challenged.[131]

The *Jaffee* court characterized the activity in *Pharmaceutical Society*—the control of reimbursement rates from the sale of drugs—as "decidedly commercial."[132] Accordingly, the holding of that case "was not directed at pharmacists as professionals, but at pharmacies engaged in a profit-oriented business."[133] On the other hand, the physician's claim in *Jaffee* concerned a hospital, defined in the relevant statute as "a facility or institution engaged principally in providing services by or under the supervision of a physician…for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition."[134] These were "services traditionally supplied by the medical profession."[135]

Therefore, in alleging an improper denial of staff privileges, the physician was not "alleging claims against the hospital as a commercial enterprise, but as an integral part of the medical profession."[136] Given this core of "traditionally exempt" activity, the court found it "incidental" that certain hospital staff members were not licensed physicians, and that a physician's nonparticipation in the staff could have economic repercussions.[137] Just as the professional exemption of some of an organization's members should not operate as a shield to protect nonprofessional members engaging in commercial activity, "neither should the Donnelly Act be transformed into a sword against those professionals, traditionally exempt from liability, due to mere participation with nonexempt individuals."[138] Considering the nature of the activity involved, the court held the hospital exempt from the Donnelly Act and dismissed the claim.

In summary, the New York Court of Appeals' antitrust treatment of professionals—in marked contrast with that of the United States Supreme Court—has been categorical rather than policy-based. In deciding whether an individual or organization should be exempt, the Court of Appeals did *not* ask what competition-related policies would be served or disserved by applying the antitrust laws to the particular activity at issue. Rather, it asked whether as a matter of language and common sense the individual or organization's practices are best characterized as a "business" or a "profession," and came up with six factors to assist in answering this question.

B. Treatment of Non-Professional Non-Profit Entities

The extent to which the Donnelly Act applies to *non-professional* nonprofit organizations is less clear. The only case to consider the issue, *International Service Agencies v. United Way of New York State*,[139] does not offer any substantial analysis.

International Service Agencies (ISA), an association of charitable organizations, brought action against other charitable organizations and officials of the State of New York, alleging that they had violated the Donnelly Act by monopolizing the solicitation of charitable donations among New York state employees. ISA's antitrust violation claim arose from state requirements prescribing an organization's eligibility to participate in charitable fundraising from New York state employees through payroll deductions—requirements that precluded ISA from participating.

Defendants moved for summary judgment, arguing that the Donnelly Act does not extend to nonprofit charitable corporations. ISA countered that charitable fundraising, which generates millions of dollars to buy supplies and services, is "big business," and that charitable organizations are, accordingly, entitled to compete for contributions on an equal footing.[140] The court characterized the determinative inquiry as "whether ISA's view of charitable fund raising is sufficient to convert the work of charitable corporations and associations into commercial enterprise."[141] It rejected ISA's argument that the Donnelly Act could apply to charitable fundraising, and concluded instead that "regulation of business activity through the Donnelly Act was never intended to extend to the fund raising of charitable corporations and associations."[142] In offering this conclusion, the court did not engage in any textual, legislative-history, doctrinal, or policy analysis.

The *International Service Agencies* opinion is shallow. A New York court deciding whether the Donnelly Act applies to activities such as fundraising by charitable organizations is bound by the Court of Appeals' analysis in *Freeman*. As we have seen, that case held that that the Donnelly Act's "use of the word 'service' was confined to a commercial or business setting" and focused on whether the activity at issue constitutes "business, trade or commerce" under § 340(1) of the Act.[143] To this extent, *International Service Agencies* may have it right. From here on, though, it is not as easy as the court makes it seem.

Given *Freeman's* approach of categorizing activity as either a "business" or a "profession," nonprofit organizations, like professionals, probably will tend to be held exempt from the Donnelly Act on the ground that they do not generally engage in "business, trade or commerce." On the other hand, the lesson from the cases applying the professional exemption to the pharmaceutical industry—*Pharmaceutical Society*, *Westchester County*, and *Jaffee*—is that what matters is not merely the composition and general character of the organization, but also the particular activity at issue. In consequence, although the Donnelly Act treats professionals and nonprofits more leniently than the Sherman Act, a nonprofit organization that would generally be exempt could conceivably engage in activities sufficiently related to profit-making to extinguish that exemption. Fund-raising to the tune of millions of dollars may well be such an activity. So, though it is by no means clear that *International Service Agencies* should have been decided the other way, deciding whether the Donnelly Act applies calls for more analysis than the court offered.

C. The Differences Summarized

By way of summary, the most significant difference between federal and New York antitrust law as applied to professionals is that, unlike federal law, New York law recognizes a categorical antitrust exemption for professionals. New York law asks the following two questions:

(1) Is the *practice* in question a profession and therefore exempt?

(2) Even if a profession is involved, are the *particular activities* at issue professional activities and are the particular *members* engaging in them as professionals?

The answer to the first question is determined largely by the six *Freeman* factors. The second question involves a more context-specific analysis. However, it is directed more at examining the membership composition of an organization, and whether an act is professional or commercial, than it is at examining competition policy.

The jurisprudence on the application of the Donnelly Act to *non*-professional nonprofits is not as developed as the jurisprudence on professional organizations. But there is reason to believe, in light of *Freeman*, that the same inquiries into the extent to which an activity and an organization are motivated by profit and commercial considerations will control.

V. Antitrust and the State

This section examines two related questions of antitrust and the state under New York law: (1) the extent to which the Donnelly Act applies to activity taken by the government or pursuant to government conduct; and (2) the extent to which the Donnelly Act applies to the efforts of private actors to influence government action. We discuss these questions against the backdrop of federal law.

Under federal law, the state-action doctrine—first expressed in *Parker v. Brown*[144] –generally immunizes state government action from antitrust challenge. New York law lacks an equivalent doctrine. Instead, the Donnelly Act's applicability to state action is analyzed in a framework that considers the proper extent of the State's police power. Under this approach, in various circumstances, New York courts have held that the actions of state and local governments violate the Donnelly Act.

Where antitrust scrutiny of private efforts to influence government action is sought, under federal law the question is governed by the *Noerr-Pennington* doctrine, which, broadly speaking, exempts such efforts from antitrust liability.[145] New York does has not have an equivalent

state law doctrine, and the New York courts have not decided whether the *Noerr-Pennington* doctrine applies as a defense to a Donnelly Act claim. However, case law indicates that New York courts will probably import the *Noerr-Pennington* doctrine to Donnelly Act claims.

A. Antitrust and State Action

Under federal law, the *Parker* doctrine can preclude antitrust challenges to conduct undertaken pursuant to state law. *Parker* involved a challenge under the Sherman Act to a California statute governing the marketing of raisins. The Supreme Court assumed that the State's marketing program would violate the Sherman Act if adopted by private persons, but upheld the program nonetheless because it was mandated and enforced by California itself. Mindful of a "a dual system of government in which, under the Constitution, the states are sovereign," the Court held that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[146] Rather, "in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action."[147]

The Supreme Court subsequently clarified that the reference to the state "legislature" in *Parker* was not limiting, and that the state-action doctrine also immunizes other branches of state government when acting in a legislative capacity.[148] Moreover, although *Parker* involved a suit against a state official, the Supreme Court subsequently clarified that *Parker* immunity could also attach to private parties when acting pursuant to state regulation.[149] Briefly, when a private party seeks to defend a restraint, based on state action, the private party must show that the challenged restraint is: (1) "one clearly articulated and affirmatively expressed as state policy," and (2) "the policy must be 'actively supervised' by the State itself."[150]

New York does not recognize a doctrine exempting state action from antitrust liability. As the Second Department has said, "the state action immunity doctrine… deals with application of the Sherman Act to state and municipal conduct and not to the application of the Donnelly Act to municipal conduct."[151] The absence of a state-action doctrine does not mean, however, that New York courts resolve challenges to government conduct, or to activity undertaken pursuant to government conduct, using the same antitrust analysis as that applied to private conduct. Rather, to determine whether such activity violates the Donnelly Act, the courts inquire whether the challenged conduct represents a proper exercise of the police power.

For example, in *American Consumer Industries, Inc. v. New York*,[152] plaintiff challenged the grant of an exclusive franchise as violative of the state and federal constitutions and the Donnelly Act.[153] The First Department noted that "if the granting of the exclusive franchise was a proper exercise of the police power of the City of New York it is not subject to successful attack."[154] Further, the court stated "a monopoly or agreement in restraint of trade may, upon occasion, be warranted in the exercise of the police power."[155] The court defined the proper boundaries of the police power as follows:

> Generally, the privilege or franchise granted in the exercise of the police power must not be in conflict with any general statute or with the constitution, and it should be reasonable, necessary and appropriate for the protection of the public health and comfort. It must not violate fundamental law, interfere with the enjoyment of fundamental rights beyond the necessities of the case, and must bear a real, substantial relation to the object to be achieved.[156]

Applying this standard, the *American Consumer* court struck down a grant by the New York City Commissioner of Markets for an exclusive franchise to sell and deliver ice to the occupants of the Hunts Point market.[157] The court found it significant that the applicable law, the Agriculture and Markets Law, did not empower the Commissioner to grant an exclusive franchise.[158] Furthermore, there was no notice that a franchise would be granted or that it was granted, nor was there an investigation of the successful bidder's ability to perform the contract.[159] Moreover, there was no evidence that the market tenants' private selection of ice suppliers had led to confusion, health hazards, or inefficiencies, or that the grant of a franchise was necessary to prevent such conditions from developing.[160] Thus, the court concluded that "[t]he letting of the franchise was solely a revenue-producing device," not a proper exercise of the police power, and was hence invalid.[161]

Atlantic-Inland, Inc. v. Union[162] also analyzed a Donnelly Act claim under the rubric of police power. The town of Union's ordinances required municipal electrical code inspections and compliance services be performed solely by the New York Board of Fire Underwriters.[163] Atlantic-Inland, a competitor of the Board, brought action asserting that the town ordinance violated the Donnelly Act. The court found that the ordinance: (1) designated the Board to inspect electrical installations; (2) deputized Board inspectors, whose selection the Board controlled, to act as agents of the Town; and (3) surrendered to the Board the discretion to approve or disapprove electrical installations.[164] Furthermore, the Board was authorized, in its sole discretion, to establish and retain fees for the inspection services.[165]

In view of these facts, the court held that the Town had improperly delegated its "inalienable" police power to a private entity and, in so doing, had run afoul of the Town Law's command that all fees received shall be-

long to the Town.[166] Further, because Atlantic-Inland was as qualified as the Board, the Town's designation of the Board as its exclusive agent was "arbitrary and confiscatory" as to Atlantic-Inland.[167] The court also found that competition between Atlantic-Inland and the Board would be workable.[168] At the same time, the court found no merit to the Town's contention that the Board's monopoly was justified by administrative ease, or by the danger that non-qualified firms would be permitted to perform inspections.[169] The ordinance was thus "constitutionally infirm and *ultra vires*," and violative of the Donnelly Act.[170]

Professional Ambulance Service, Inc. v. Abramowitz,[171] another state-action case, involved the Niagara Falls Police Department's refusal to place an ambulance company on the Department's list of ambulance service providers. The refusal was detrimental to the plaintiff's business because, when individuals called the police for ambulance services, most were referred to a company on the Department's list.[172] While noting that an exclusive franchise may be legal if it is an appropriate exercise of state police power, the court found a Donnelly Act violation because no reason was proffered for excluding the plaintiff from the list.[173]

Similarly, in *S-P Drug Co., Inc. v. Smith,*[174] the New York County Supreme Court enjoined an exclusive contract between the State Department of Social Services and RX Data Corp. Under the contract, RX furnished the State with drug acquisition cost and other information. In exchange, the State granted RX the right to obtain statutory copyright for a list of prices calculated based on this information and to refrain from disclosing the documentation underlying its calculation.[175] These price lists were required by law for pharmaceutical retailers to obtain Medicaid reimbursements. As a result of RX's exclusivity agreement with the State, no RX competitor had access to the price lists, and RX was able to profit by selling them.[176] The contract was also executed without any public announcement or bidding.[177]

The court held that the contract violated the Public Officers Law by granting a private company exclusive access to information that the law required to be in the public domain.[178] Such an award—granted in the absence of competitive bidding and without a showing that only RX was capable of providing the requested information to the State—constituted "a bargaining away of public property without proper consideration."[179] The court did not independently analyze the Donnelly Act claim, but stated that "[i]t is this very same grant of exclusivity which vitiates the contract on other grounds," citing the Donnelly Act.[180] The court found it "anomalous indeed to have the State itself creating such a monopoly and restricting effective competition in a private business."[181] While *S-P Drug* does not include an explicit police power analysis, it is in accordance with other New York state-action cases. Rather than invoking the state-action immunity, the court analyzed the claim by determining whether the contractually-derived restraint was a legal exercise of state power.[182]

In *Harvey & Corky Corp. v. Erie County*,[183] another exclusive dealing case, a promoter of pop concerts asserted that the Buffalo Bills' denial of its request to sublease Erie County's Rich Stadium violated the Donnelly Act and deprived it of equal protection of the laws in violation of the federal and state constitutions. The promoter sued the County of Erie, the stadium's owner, which had leased the facility exclusively to the Buffalo Bills. The court held that the "mere fact that the Bills are the lessees of public property is insufficient, standing alone, to show state action."[184] Nevertheless, the court evaluated the claims against the County on the merits, and found no violation of the Donnelly Act. Because the grant of an exclusive lease was a proper exercise of the State's police power, no Donnelly Act claim was stated by alleging only an exclusive lease, without further allegation of an "overt act or other non-conclusory allegation from which a conspiracy to violate the antitrust laws could be inferred."[185]

In sum, New York does not exempt state action from its antitrust laws. Many New York cases have dealt with antitrust challenges to activity pursuant to government conduct, particularly grants of exclusive franchises, contracts, or concessions. These cases recognize that such grants may be valid if they are a proper exercise of the police power. In determining their validity, courts have examined the government's authority under the New York constitution and the relevant authorizing statute to engage in the conduct, as well as the public interest arguments proffered by the government to justify its conduct.

B. Private Efforts to Influence State Action

Under federal law, the *Noerr-Pennington* doctrine—derived from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[186] *United Mine Workers of America v. Pennington*,[187] and their progeny—generally immunizes from antitrust liability private attempts to influence state action. Whether the *Noerr-Pennington* doctrine or a corollary of it applies to Donnelly Act actions depends on the doctrine's underpinning. If *Noerr-Pennington* immunity is derivative of *Parker* immunity, it should not apply to Donnelly Act claims because New York does not recognize *Parker* immunity or an equivalent state-action exemption. But if *Noerr-Pennington* immunity derives from the First Amendment, it should apply to actions under the Donnelly Act because the Fourteenth Amendment extends First Amendment guarantees of free speech, free assembly, and the freedom to petition the government action by the states.[188]

In *Noerr*, the Supreme Court based its decision on a construction of the Sherman Act, and did not directly apply the First Amendment.[189] But the decision mentions both the reasons underlying the *Parker* doctrine and constitutional considerations as grounds for its ruling that

the Sherman Act did not apply to private efforts to influence government action.[190] Supreme Court opinions since *Noerr* have repeated both rationales.[191]

What do New York courts say? The Second Circuit wrestled with *Noerr-Pennington*'s constitutional character and consequent applicability to state law claims in *Suburban Restoration Co. v. ACMAT Corp.*[192] The court recognized that whether the *Noerr-Pennington* doctrine applied to statutory and common law claims under Connecticut law depended on whether it "is mandated by the United States Constitution," and held that "[i]f indeed the *Noerr-Pennington* doctrine is mandated by the first amendment, then the doctrine must also apply to Connecticut's statute and common law."[193] The court noted that it had previously described the doctrine as "an application of the first amendment," and that federal courts in other jurisdictions treated the doctrine as First Amendment-mandated.[194] But it ultimately found it "unnecessary to decide this constitutional question."[195] Rather, the Second Circuit reasoned that in construing the Connecticut statute, Connecticut courts would probably look to federal interpretations of the Federal Trade Commission Act and the Sherman Act, and in so doing "would carve out a similar exception [*i.e., Noerr-Pennington*] to [the Connecticut statute] and the common law, whether or not they believed that they were required to do so by the Constitution."[196]

The Southern District of New York similarly dodged the applicability of *Noerr-Pennington* to state law claims in *Bio-Technology General Corp. v. Genentech, Inc.*[197] While addressing a Sherman Act claim, the court described the *Noerr-Pennington* doctrine as having "its roots in the First Amendment."[198] However, the court did not decide whether the doctrine applied to the New York Donnelly Act and common law claims, and dismissed the claims on unrelated grounds.[199]

Like the federal courts, New York State courts have not explicitly decided whether *Noerr-Pennington* applies to Donnelly Act claims. But their decisions applying *Noerr-Pennington* to other state law claims strongly suggest that it does. For instance, in *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*,[200] the Second Department held that *Noerr-Pennington* can shield against liability under the New York common law of tortious interference and prima facie tort, and under the State's deceptive trade practices statute. There, the defendant, Big V Supermarkets, enlisted neighborhood associations and a retained firm to oppose Weisman's application to the Yonkers City Council to rezone land so that he could lease it to a competing supermarket.[201] Deciding whether *Noerr-Pennington* applied to the state law claims, the court presented the doctrine as one that "arose" in antitrust, but that the courts had "expanded" to protect First Amendment petitioning of the government from claims brought under both federal and state law.[202] This framing suggests that *Noerr-Pennington* began as a statutory construction of the Sherman Act, but because of its constitutional moorings, evolved to apply to claims under other laws as a matter of constitutional supremacy.[203] The Second Department concluded that the plaintiff's state law claims went "to the very heart of the *Noerr-Pennington* doctrine" and held that the doctrine shielded the defendants from liability.[204]

Likewise, *Concourse Nursing Home v. Engelstein*[205] applied *Noerr-Pennington* to state business tort claims based on defendants' meetings with Department of Health officials to discuss a settlement process involving the Department.[206] The court characterized *Noerr* as holding that certain conduct was "immune from antitrust scrutiny under the First Amendment"[207] and *Pennington* as holding that certain conduct "was protected by the First Amendment and immune from the antitrust laws."[208] Without directly citing the supremacy of federal law, the court reasoned that "the right to petition [the] government is privileged and is superior to [the] right to maintain an action for interference,"[209] and held that the defendants were "entitled to First Amendment immunity."[210]

The *Concourse* opinion—discussing *Noerr-Pennington* in detail and then basing its holding on "First Amendment immunity"—leaves unclear whether the court was applying *Noerr-Pennington*, a doctrine it thought was derived from the First Amendment, or was directly applying the First Amendment. The First Department's short affirmance does not resolve the ambiguity.[211] Still, *Concourse Nursing* is safely placed alongside other New York cases, following *Alfred Weissman*, which suggest, if not hold, that the *Noerr-Pennington* doctrine is mandated by the First Amendment and applies to New York State law claims.[212]

A more recent case, *Villanova Estates, Inc. v. Fieldston Property Owners Ass'n, Inc.*,[213] also described *Noerr-Pennington* as a doctrine that "protects the First Amendment right of petitioning the government"[214] and applied it to New York State law claims. The court held that *Noerr-Pennington* barred a claim for injurious falsehood, but not claims for interference with property rights and prima facie tort.[215] Discussing the injurious falsehood claim, the First Department held that *Noerr-Pennington* immunized the defendants from suit because the plaintiffs made the alleged false statements to public officials in a uniform land use application proceeding.[216] By contrast, the court rejected *Noerr-Pennington* immunity for the interference and prima facie tort claims because the complained-of conduct was directed at the plaintiff, did not involve speech, and was not addressed to any public official during the application process.[217]

Finally, the Second Department, in *Singh v. Sukhram*, has described *Noerr-Pennington* as a doctrine "which provides First Amendment protections for persons petitioning the government for redress."[218] The court held that *Noerr-Pennington* did not apply to libel claims because another doctrine, derived from *McDonald v. Smith*[219] and

grounded in the First Amendment, applied "in lieu of the *Noerr-Pennington* doctrine."[220] This analysis shows that the Second Department thought of *Noerr-Pennington* as a doctrine mandated by the First Amendment, but displaced, in a particular First Amendment area, by another doctrine.

As this case law demonstrates, in applying *Noerr-Pennington* to non-antitrust state statutory and common law claims, New York courts appear to consider *Noerr-Pennington* to be mandated by the First Amendment. Under this analysis, *Noerr-Pennington* should apply to all state law claims, including those pleaded under the Donnelly Act.

* * *

We shift focus now, from Donnelly Act conduct prohibitions and exemptions to the area of mergers and acquisitions. In the next section, we discuss the Act's application to anticompetitive mergers and acquisitions.

VI. Merger Enforcement Under the Donnelly Act

Section 7 of the Clayton Act is the primary federal statute under which mergers may be challenged as anticompetitive.[221] Section 7, in pertinent part, provides as follows:

> No person…shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person…shall acquire the whole or any part of the assets of another person…, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[222]

Although the Donnelly Act has been amended many times since passage of Section 7 in 1914, New York has not added language that parallels the federal statute. Nor have the courts imported into the Donnelly Act prohibitions such as those reached by the Clayton Act. Although in *State v. Mobil Oil Corp.*,[223] the Court of Appeals said that "undoubtedly the sweep of the Donnelly Act may be broader than that of Sherman,"[224] no judicial authority to date has invoked this dicta in the merger context to import Section 7 law into Donnelly Act analysis.

Sections 1 and 2 of the Sherman Act, however, also afford means to challenge mergers under federal antitrust law. Section 1, it may be recalled, declares illegal "[e]very contract, combination…or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.…"[225] Section 2 prohibits monopolization, attempted monopolization and conspiracy to monopolize "any part of the trade or commerce among the several States, or with foreign nations.…"[226]

As noted earlier, the Donnelly Act was modeled after the Sherman Act, having been enacted shortly thereafter and containing language proscribing similar anticompetitive or monopolistic practices.[227] To reiterate, the Donnelly Act declares illegal:

> Every contract, agreement, arrangement or combination whereby [a] monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> * * *
>
> For the purpose of establishing or maintaining any such monopoly…in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained.…[228]

Accordingly, as the New York Court of Appeals has written:

> Although we do not move in lockstep with the Federal Courts in our interpretation of antitrust law, the Donnelly Act—often called a "Little Sherman Act"—should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or the legislative history justify such a result.[229]

Despite the Donnelly Act's established Sherman Act lineage and the absence of Donnelly Act language comparable to the Clayton Act's merger prohibitions, at least one federal court has entertained the possibility that the Donnelly Act may contain merger enforcement authority similar to that available under Section 7. In *Reading International, Inc. v. Oaktree Capital Management LLC*,[230] Judge Lynch noted that the Donnelly Act had been used "though rarely, to prohibit mergers and acquisitions having anticompetitive effect, covered under section 7 of the Clayton Act."[231] The *Reading* court also acknowledged that "[t]he Donnelly Act was modeled on the Sherman Act, not the Clayton Act, and the court [was] unaware of any case that has specifically held that such Donnelly Act claims are to be interpreted in light of section 7 of the Clayton Act."[232] Judge Lynch did not reach the issue, however. Recognizing that "state courts interpret the Donnelly Act in light of federal antitrust law," Judge Lynch held that because the plaintiffs' Section 7 claim was dismissed, "the state law claim cannot survive where the federal one has failed."[233]

Reading holds out only a slim hope, at best, of importing Section 7 merger authority into the Donnelly Act. However, the Sherman Act provides a sturdier foundation for state law merger enforcement authority. Both prior to and after the Clayton Act's passage in 1914, the United States successfully prosecuted challenges to mergers under Sections 1 and 2 of the Sherman Act.

The first such case was *Northern Securities. Co. v. United States*,[234] where the Supreme Court's 5-4 split reflects the controversial nature of applying the Sherman Act to mergers. There, an attempt was made to combine the Northern Pacific Railway Co., controlled by J. Pierpont Morgan, and the Great Northern Railway Company, controlled by James J. Hill. The Supreme Court invalidated the effort, however, as unlawful under Minnesota law.[235] In consequence, a holding company was created to own and control the two railroads. The transaction produced a "virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."[236]

A majority of the Supreme Court held that Sections 1 and 2 of the Sherman Act reached the transaction because the statutes "declare[d] illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbid[] attempts to monopolize such commerce or any part of it."[237] Indeed, in the majority's view, such a transaction offended the rationale at the heart of the Sherman Act:

> If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory.[238]

Four justices dissented, arguing that construing the Sherman Act to bar a "virtual consolidation" was neither constitutional nor a correct reading of the Sherman Act. Writing in dissent, Justice Holmes argued that the majority had expanded Sherman Act enforcement beyond Congress' intended purposes.[239] His dissent criticized the majority's reliance on the merger's effect on competition. "The act," Justice Holmes wrote, "says nothing about competition."[240]

Northern Securities validated using the Sherman Act to bar anticompetitive mergers. Thus, in *United States v. American Tobacco Co.*,[241] a challenge to the tobacco trust, the Supreme Court wrote that:

> [T]he history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible.[242]

Likewise in *United States v. Terminal Railroad Ass'n of St. Louis*,[243] the Court invalidated a combination that controlled the only bridge in St. Louis over the Mississippi River:

> [W]hen, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the [Sherman] act, in that it constitutes a contract or combination in restraint of commerce among the States and an attempt to monopolize commerce among the States which must pass through the gateway at St. Louis.[244]

Since passage of the Clayton Act and its express merger provision, the Sherman Act's role in merger enforcement has receded, but not disappeared. While a narrow 4-3 Supreme Court majority rejected the Antitrust Division's Sherman Act challenge in *United States v. United States Steel Corp.*,[245] in subsequent years, the courts applied the Sherman Act to mergers, albeit not nearly as often as they applied Section 7.[246]

More recently, a line of decisions, beginning with Judge Posner's opinion in *United States v. Rockford Memorial Corp.*,[247] recognize that Sections 1 and 7 have "converged" to provide similar merger protections. As Judge Posner put it, "[t]he defendants' argument that section 7 prevents probable restraints and section 1 actual ones is word play. Both statutes as currently understood prevent transactions likely to reduce competition substantially."[248] Similarly, the current *Horizontal Merger Guidelines*, established by the DOJ and the FTC in 1992 and revised in 1997, identify the Sherman Act as a tool in merger enforcement, along with Section 7 of the Clayton Act and Section 5 of the FTC Act.[249]

Therefore, applying the New York Court of Appeals' teaching that the Donnelly Act is informed by Sherman Act precedents, there is a solid basis for state law merger enforcement. The language of the Donnelly Act itself reinforces the statute's application to mergers. Section 340(1) expressly prohibits agreements: (1) "whereby a monopoly…is or may be established or maintained," or (2) "whereby [f]or the purpose of establishing or maintaining any such monopoly…any business, trade or commerce…is or may be restrained."[250] Thus, like Section 2 of the Sherman Act, the statute specifically addresses activity that creates or maintains a monopoly. Further, like Clayton Act Section 7, the Donnelly Act extends as well to activity in its incipiency where the effect "may be" to create or maintain a monopoly. And, in addition, like Section 1, the Donnelly Act reaches actual or incipient "restrain[ts]" produced by activity undertaken "[f]or the purpose" of creating or maintaining a monopoly.[251]

Finally, the absence of an express merger provision in the Donnelly Act has not hindered the New York State Attorney General from engaging in merger challenges. Although the State has relied primarily on Clayton Act Section 7, it also has pleaded supplemental Donnelly Act claims in merger cases. This approach is found in cases where New York has acted alone,[252] with other States,[253] and with federal enforcers.[254] However, in none of these cases have the courts construed the Donnelly Act's merger reach independent of the Clayton Act's merger provision.[255]

A recent lawsuit by the City of New York, challenging the merger of Group Health, Inc. (GHI) and the HIP Foundation, Inc., afforded an opportunity to shed further light on the use of the Donnelly Act to regulate mergers. In 2006, the City sued to prevent the merger, alleging that the transaction would create a monopoly in the New York metropolitan market for low cost health insurance purchased by the City, its current and retired employees, and its employee unions. The City's complaint—which alleged that the merger constituted an unreasonable restraint in the relevant market—pleaded claims under the Donnelly Act, as well as under Clayton Act Section 7, and Sherman Act Sections 1 and 2.[256] However, the district court granted summary judgment dismissing both the federal and state claims, holding that the City had failed to define a relevant market.[257]

VII. The Prohibition of Class Action "Penalty" Cases

The New York Court of Appeals' decision in *Sperry v. Crompton*[258] holds that, by virtue of New York CPLR 901(b), state courts may not hear Donnelly Act class actions seeking treble damages. Although derived from the CPLR and not the Donnelly Act, the inability to pursue state law treble damages class actions distinguishes state antitrust law from its federal counterpart. However, under a recent United States Supreme Court ruling, *Shady Grove Orthopedic Associates, P.A., v. Allstate Ins. Co.*,[259] the federal district courts probably are empowered to hear Donnelly Act class actions under Rule 23 of the Federal Rules of Civil Procedure. The forum choice thus makes a real difference. An additional unresolved question, not answered by either *Sperry* or *Shady Grove*, is whether a Donnelly Act plaintiff may waive antitrust treble damages, and having done so, pursue a class action. We consider these matters below.

A. CPLR 901(b)'s Application to the Donnelly Act

CPLR 901(b) provides that:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.[260]

The Donnelly Act's damages provision states that "any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby."[261] In *Sperry*,[262] the New York Court of Appeals held that "Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned."[263] Because nothing in the Donnelly Act provision expressly authorizes class actions, § 901(b) prohibits such actions.[264] Accordingly, New York state courts and federal courts across the country have barred Donnelly Act class action claims.

The inability to proceed on a class basis has particular significance for consumers, who typically pay, individually, a relatively modest overcharge from price-fixing or other anticompetitive misconduct. Consumers, however, generally do not purchase directly from a price-fixer, and, as a result, are unable to sue for damages under federal antitrust law under *Illinois Brick Co. v. Illinois*.[265] By contrast, New York has enacted an "*Illinois Brick* repealer" statute to allow consumers to sue under the Donnelly Act, despite the absence of direct dealings with any price-fixer.[266] By denying consumers the opportunity to aggregate their individual damages claims using the class action mechanism, the *Sperry* court's construction of § 901(b) weakens considerably the thrust of New York's indirect purchaser statute.

1. Exporting the Prohibition to Federal Cases

Rule 23 of the Federal Rules of Civil Procedure authorizes class actions in federal court. Because there is no federal counterpart to CPLR 901(b), the question has arisen whether the New York statute also bars Donnelly Act class actions in cases where a federal court has diversity jurisdiction over the Donnelly Act claim.

The Class Action Fairness Act of 2005 ("CAFA")[267] greatly expanded federal jurisdiction over diversity actions asserting state law claims, such as state antitrust violations. Prior to CAFA, however, there were relatively few circumstances in which a federal forum was available for a Donnelly Act class action. The state claim could be asserted as supplemental where there was federal jurisdiction under another claim—not uncommon where direct purchasers sue for federal antitrust violations. But the value of the Donnelly Act, rather than the federal antitrust claim, lies mostly for indirect-purchaser consumers who generally cannot sue under federal antitrust law to begin with.[268] Then, federal jurisdiction over the Donnelly Act claim would have to be based on diversity of citizenship, and with the current $75,000 diversity amount-in-controversy requirement, few consumer class actions could be brought in federal court.[269] By expanding federal jurisdiction in class actions, CAFA creates opportunities to bring Donnelly Act indirect purchaser claims in federal court that could not be brought pre-CAFA.

The lower federal courts consistently held that § 901(b) applied and precluded class litigation, despite Rule 23. This body of case law typically employed a "procedure versus substantive" analysis—derived from *Erie R. Co. v. Tompkins*[270]—and held that CPLR 901(b) is "substantive." Under this approach, because federal courts sitting in diversity cases apply federal procedural law, while the substantive law to be applied is "the law of the state," the federal courts were constrained to follow CPLR 901(b). Then, like the New York state courts, federal courts sitting in diversity cases could not hear Donnelly Act class actions.

These decisions were based heavily on the notion that judicial outcomes should not differ whether brought in state or federal court. In *Guaranty Trust Co. v. York*,[271] the Supreme Court held that:

> [I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.[272]

This approach serves both to discourage forum shopping and to ensure equal administration of law.[273]

Leider v. Ralfe[274] is illustrative. Applying CPLR § 901(b) is necessary, the court wrote, because "to allow plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court" would "contravene both of these mandates," articulated in *Guaranty Trust*.[275] Thus, "the bulk of cases to address the applicability of N.Y. C.P.L.R. § 901(b) have decided that the statute is substantive."[276]

The Supreme Court's *Shady Grove* decision, which considered the applicability of § 901(b) outside of the Donnelly Act context, casts significant doubt on the soundness of these prior federal rulings.

2. The *Shady Grove* Case

Shady Grove involved a penalty provision found in the New York Insurance Law. The district court refused to permit a class action to proceed, and the Second Circuit affirmed.[277] The Court of Appeals held that Rule 23 is *procedural*—it sets forth the prerequisites to maintain a class action in federal court—while CPLR § 901(b) is a *substantive* rule that specifically provides which remedies class plaintiffs may seek under New York law, thereby restricting the types of cases that may be brought as a class action.[278] Accordingly, failure to apply CPLR § 901(b) in federal court would "clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the 'substantial advantages' of class actions."[279] The Supreme Court granted certiorari, despite the absence of any split in the courts of appeal.

Before the Supreme Court, Shady Grove argued that *Hanna v. Plumer*,[280] rather than *Erie*, governed disposition of the case.[281] *Hanna* holds that a federal court in a diversity action must apply a valid rule of civil procedure, regardless of contrary state law, so long as the federal rule does not abridge, expand or modify substantive state-created rights.[282] Shady Grove further argued that § 901(b) "governs only the mode of enforcing substantive rights, which is a matter properly considered procedural under *Erie*."[283] Moreover, according to Shady Grove, § 901(b) conflicted with Rule 23 because the New York law addressed "precisely the same issue as Rule 23: Whether claims for various forms of relief may be pursued through class actions."[284] Thus, as a valid procedural provision under *Hanna*, Rule 23 should prevail over CPLR 901(b).[285]

Allstate, on the other hand, argued that CPLR § 901(b) was "substantive" because it reflected a New York policy to limit the state statutory penalty imposed in a lawsuit. Thus, under *Erie*, the federal courts must give effect to such substantive state policy choices in cases arising under state law.[286] Allstate further argued that no conflict existed between Rule 23 and CPLR 901(b)—§ 901(b) simply categorized certain claims as ineligible for class certification, regardless of whether they met Rule 23's requirements. In consequence, CPLR 901(b) must apply in federal court in order to prevent inequitable administration of the laws and forum-shopping.[287]

As thus framed for the Supreme Court, the central issue was whether § 901(b) was procedural, and thus trumped by Rule 23 in federal court, or, instead, substantive in nature such that New York's state law trumps Rule 23. A fractured Supreme Court agreed with Shady Grove and reversed the Second Circuit.

Justice Scalia's Opinion: Justice Scalia, writing for himself, Chief Justice Roberts, and Justices Thomas and Sotomayor, adopted a two-part analysis:

- "We must first determine whether Rule 23 answers the question in dispute…[:] whether Shady Grove's suit may proceed as a class action."[288]
- "If it does, it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power."[289]

Rejecting the Second Circuit's conclusion that Rule 23 and § 901(b) did not conflict, Justice Scalia wrote:

> Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because §901(b) attempts to answer the same question—i.e., it states that Shady Grove's suit "may *not* be maintained as a class action"…because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is ultra vires.[290]

Justice Scalia therefore considered whether Rule 23 is authorized by the Rules Enabling Act, by which Congress empowered the Supreme Court to promulgate rules of procedure, provided that the rules "shall not abridge, enlarge or modify any substantive right."[291] This limitation, Justice Scalia said, "means that the Rule must 'really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'"[292] On this score, the Federal Rules of Civil Procedure bat 1.000, as the Supreme Court has rejected every Rules Enabling Act challenge presented since the Rules were promulgated. As Justice Scalia explained, "[e]ach of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing these rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either."[293]

Applying this test, Justice Scalia 23 kept the batting average perfect. The class action device, recognized by Rule 23, was simply "a species" of joinder that "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties legal rights and duties intact and the rules of decision unchanged."[294] Thus, Justice Scalia reasoned that § 901(b) had to give way, even though "open[ing] the door to [federal court] class actions that cannot proceed in state court will produce forum shopping."[295] According to Justice Scalia, "a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping."[296]

Justice Ginsburg's Dissenting Opinion: Justice Ginsburg dissented in an opinion that Justices Kennedy, Breyer and Alito joined. Justice Ginsburg agreed that if a federal rule controls an issue, and conflicts directly with state law, then the federal rule must be applied in diversity cases so long as it does not violate the Rules Enabling Act prohibition against "abridg[ing], enlarg[ing] or modify[ing]" a state-created substantive right. On the other hand, if no Federal Rule controls, then state law must be applied in diversity cases under the Rules of Decision Act.[297] This approach was necessary to ensure that the Federal Rules are construed "with sensitivity to important state interests."[298] Justice Ginsburg then undertook to demonstrate why, in her view, Rule 23 did not conflict with § 901(b).As Justice Ginsburg explained, § 901(b) was designed "[t]o prevent excessive damages" by controlling "the penalty to which a defendant may be exposed in a single suit."[299] Thus, unlike Federal Rule 23, the New York provision "was not designed with the fair conduct or efficiency of litigation in mind."[300] Because § 901(b) controlled the remedy available in class actions, while Rule 23 addressed matters of procedure, there was no conflict between the two:

> Sensibly read, Rule 23 governs procedural aspects of class litigation, but allows state law to control the size of a monetary award a class plaintiff may pursue.
>
> In other words, Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself.
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> * * *
>
> The fair and efficient *conduct* of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers.[301]

Viewed in this way, there was no inevitable conflict between Rule 23 and § 901(b). Any plaintiff seeking to proceed under Rule 23 could, according to Justice Ginsburg, "forgo statutory damages and instead seek actual damages or injunctive or declaratory relief; any putative class member who objects can opt out and pursue actual damages, if available, and the statutory penalty in an individual action."[302]

Finding no unavoidable conflict, the question became "whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court."[303] Here, there could be no genuine doubt. The relief sought by Shady Grove was estimated to be "ten thousand times greater than the individual remedy available to it in state court…. [F]orum shopping will undoubtedly result if a plaintiff

need only file in federal court instead of state court to seek a massive monetary award explicitly barred by state law."[304] As *Erie* teaches, the fortuity of diversity jurisdiction "should not subject a defendant to such augmented liability."[305]

Justice Stevens' Concurring Opinion: Justice Stevens provided the key vote for reversal. Justice Stevens concurred in parts of Justice Scalia's opinion, and in the result, because he agreed that § 901(b) "is a procedural rule that is not part of New York's substantive law."[306] For Justice Stevens, however, the fact that a state rule may be characterized as "procedural" was not in itself determinative. Indeed, "the line between procedural and substantive law is hazy."[307] In his view, if a state rule denominated as "procedural" operated as "part of the State's definition of substantive rights and remedies," then the federal courts must apply it in diversity cases, regardless of the law's label.[308]Accordingly, Justice Stevens maintained that, in each case, the nature of the state law sought to be displaced by the federal rule had to be analyzed to determine whether "the state law actually is part of a state's framework of substantive rights or remedies."[309] Under this approach, the federal rule would have to give way in any case where "the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[310] This approach was necessary to preserve the balance "that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies."[311] As Justice Stevens saw it, §901(b) was not sufficiently "intertwined" with a New York right or remedy and, therefore, did not trigger a need for this further stage of review.[312] Justice Stevens thus provided the fifth vote for reversing the Second Circuit.

The Ruling's Impact on the Donnelly Act: The 4-4 split in the Supreme Court on the Insurance Law provision makes the application of *Shady Grove* to the Donnelly Act uncertain. A lower federal court could perhaps consider it an open question as to whether the relationship between § 901(b) and the Donnelly Act is sufficiently different from that presented by the Insurance Law provision in *Shady Grove*. If it is, then a court might inquire whether the individualized analysis that Justice Stevens envisioned leads to applying § 901(b) in Donnelly Act cases heard in federal court under diversity jurisdiction.[313]Although this issue may, strictly speaking, be regarded as "open," the argument for treating the Donnelly Act differently seems strained. Justice Stevens was satisfied that § 901(b), which applies to penalty actions generally, was procedural. He did not see the provision as implicating rights or remedies under the state's Insurance Law. That being so, changing the penalty statute to which § 901(b) itself is applied—here, from the Insurance Law to the Donnelly Act—does not appear likely to change the assessment, in Justice Stevens' mind, that § 901(b) is not "intertwined" with state-created rights and remedies. More likely, before Justice Stevens would reconsider his conclusion, the state law would have to be different in kind from CPLR 901(b). If this assessment is correct, then *Shady Grove* should permit Donnelly Act class actions to proceed in federal district court.

Nevertheless, one might argue that § 901(b) restricts the Donnelly Act's menu of remedies, in the sense that it tempers the impact of the State's "Illinois Brick repealer," Gen. Bus. L. § 340(6). While the repealer authorizes a damages claim that federal law itself rejects, § 901(b) limits the state antitrust claim to individual treble damages actions. In this way, § 901(b), arguably, is linked to Donnelly Act rights and remedies differently than the Insurance Law provision was considered in *Shady Grove*.

Although § 901(b) has the effect of limiting the impact of § 340(6), that clearly was not its intent. When § 901(b) was enacted in 1975, New York's Donnelly Act did not even have a treble damages provision, much less an Illinois Brick repealer, the latter of which was first adopted in 1998.[314] Accordingly, it seems unsound to argue a § 901(b) connection to § 340(6) is sufficient to satisfy Justice Stevens' particular analysis.

B. Waiver of Treble Damages

In her *Shady Grove* dissent, Justice Ginsburg wrote that "New York Courts routinely authorize" class actions where the plaintiffs waive the right to recover an available statutory penalty.[315] However, this assertion seems overstated. The case law is split on whether a waiver of penalties will permit class claims to proceed, despite § 901(b). More specifically, with respect to the Donnelly Act, limited case law rejects approving a waiver of treble damages in order to pursue class litigation. The New York Court of Appeals has not thus far weighed in, either generally or as to the Donnelly Act.

1. Penalty Waivers Under the Donnelly Act and Other Statutes

New York law has long-recognized that a party may, if it chooses, "stipulate away statutory, and even constitutional rights."[316] This principle suggests that a Donnelly Act plaintiff should be permitted to waive part of the non-compensatory part of the recovery available under the treble damages provision. When that is done, the case would proceed only for single damages, and there would be no "penalty" for purposes of CPLR 901(b). This construction of § 901(b) comports with the legislative history of CPLR Article 9, which demonstrates that the legislature intended to increase the availability of the class action device.[317]

Some courts, however, have precluded waiver of Donnelly Act treble damages because the treble damages provision is stated in mandatory language. In *Rubin v.*

Nine West Group, Inc.,[318] the court held that because the Donnelly Act expressly provides that antitrust victims "*shall* recover three-fold the actual damages," treble damages cannot be waived.[319] Similarly, in *Asher v. Abbott Labs.*,[320] the First Department cited *Nine West*, among other authorities, for the notion that the Donnelly Act treble damages remedy is not only a "penalty," by also one "the imposition of which cannot be waived."[321] Under this view, a class representative's willingness to waive treble damages is simply immaterial.

By contrast, the *Nine West* court *allowed* the class plaintiff to waive the New York's Deceptive Acts and Practices statutory penalty. Section 349 of the New York General Business law declares deceptive acts and practices in the conduct of business unlawful.[322] A plaintiff suing under the statute may seek either actual damages or a statutory minimum for violations, which the court may then increase:

> [A]ny person who has been injured by reason of any violation of this section may bring…an action to recover his actual damages or fifty dollars, whichever is greater…. The court *may, in its discretion,* increase the award of damages to an amount not to exceed three times the actual damages.[323]

Thus, § 349's provision makes the damage multiple discretionary, whereas the Donnelly Act calls for what the *Nine West* court held were mandatory treble damages. Several other state and federal courts have relied on the language difference between § 349(h) and the Donnelly Act treble damages provision to permit waiver under § 349, thus permitting class litigation.[324]

At the same time, however, New York courts have attached no significance to mandatory "shall" language in other penalty damages provisions, and have permitted a waiver that avoided § 901(b). For example, prior to a recent amendment, New York Labor Law § 198(1-a) provided that:

> [T]he court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was wilful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.

Like the Donnelly Act, § 198(1-a) instructs that courts "*shall*" award liquidated damages if willfulness is proven. However, in *Pesantez v. Boyle Environmental Services, Inc.*,[325] the First Department permitted waiver of liquidated damages and allowed a class action to proceed—a result contrary to that reached by the Donnelly Act rulings.[326]

A 2009 amendment shifted to the employer the burden to show grounds to deny liquidated damages, whereas previously the employee had to prove the facts required to trigger the award. But the amended statute still contains mandatory language—directing that the court "shall allow…an additional amount as liquidated damages"—where the employer fails to discharge its burden.[327]

The case law under the Donnelly Act thus suggests that no waiver of treble damages will be permitted to avoid the class action barrier that CPLR 901(b) erects. However, the Labor Law rulings leave open the opportunity to argue to the New York Court of Appeals, should the issue be presented, that the Donnelly Act's mandatory language should not necessarily preclude waiving treble damages.

2. Adequacy of a Class Representative Willing to Forgo Penalties

Courts also are divided on whether a class representative who is willing to waive treble damages in order to proceed as on behalf of a class adequately represents the interests of the class. In *Pesantez*, the First Department held that the class representative was adequate, despite having waived the available penalty to avoid § 901(b) because class members could opt out of the class if they objected to the waiver and preferred to independently prosecute their claims and seek punitive damages.[328] In *Ansoumana v. Gristede's Operating Corp.*,[329] the Southern District of New York similarly permitted plaintiffs to waive their right to recover liquidated damages as a condition of proceeding as a class because "any who object may opt out of the class."[330]

Where a class would have no viable means of recovery were it not for the waiver of the penalty—because proceeding on individuals claims would be cost prohibitive, even with the penalty recovery—courts have recognized a waiver of penalties in order to support the class mechanism. As the Second Department said in permitting waiver in *Super Glue*: "there can be little doubt that a class action is the only feasible mechanism of addressing the claims of the individual members of the proposed class. The small amount of damages sustained by the individual class members would discourage many of them from pursuing their claims individually."[331]

However, other courts have also reached a contrary conclusion. Prior to *Pesantez*, the Supreme Court in *Hauptman v. Helena Rubinstein, Inc*.[332] held that a plaintiff willing to waive punitive damages was an inadequate representative because waiver amounted to impermissible claim-splitting. Although no New York appellate court has expressly rejected *Hauptman*, the *Ansoumana* court stated that *Pesantez* effectively did so because *Hauptman* prohibited waiver without addressing the class members' right to opt out and individually to seek punitive damag-

es.[333] Yet, since *Ansoumana,* at least one court has deemed the plaintiffs inadequate class representatives where they were willing to waive treble damages.[334]

If these issues do percolate up to the Court of Appeals, the Donnelly Act non-waiver rulings do not seem defensible. The *Super Glue* court got it right. If the choice is between an effective single damages remedy and no remedy at all—as is typically the case in Donnelly Act consumer class actions—there is no significant interest to be served by prohibiting waiver. That would simply permit price-fixers and other antitrust miscreants to inflict widespread, but diffused, injury on victims without ever being held accountable to make the victims whole. Moreover, elementary algebra teaches that one times something is always greater than three times nothing. The waiver decision shows rationality—not representational inadequacy or conflict with class member interests. Any individual class member who thinks him- or herself aggrieved by the treble damages waiver is protected by the right to opt out when notice of class certification is given or when a settlement notice is distributed.

VIII. Conclusion

As the topics discussed reflect, any notion that New York State antitrust law merely replicates federal antitrust law is incorrect. While there are very substantial similarities, this should not obscure—or, indeed, misdirect attention from—the differences. Businesses looking for certainty, or at least predictability, may bemoan this state of affairs. But it is part and parcel of our federal system. The dual regime for antitrust similarly is found in other areas as well—securities regulation, products liability, consumer protection, and environmental law, to name just a few.

The States are supposed to experiment. The nation as a whole is enriched when they do. The ability to experiment is strength of our federalism, not a weakness.

May 2010

Endnotes

1. *See generally* Jack Greenberg, *New York Antitrust Law and Its Role in the Federal System* ia, 1a—5a, reprinted in Robert L. Hubbard & Pamela Jones Harbour, *Antitrust Law in New York State* 77 (2d ed. 2002) ("Greenberg, *New York Antitrust*," with book page in brackets).
2. *Doolin v. Ward*, 6 Johns. 194, 195 (Sup. Ct. N.Y. County 1810); *See also Wilbur v. How*, 8 Johns. 444 (Sup. Ct. N.Y. County 1811); *Atcheson v. Mallon*, 43 N.Y. 147 (1870).
3. 2 R.S. 691, § 8(6) (enacted Dec. 10, 1828).
4. L. 1841, ch. 183, § 16; *See also Clancey v. Onondaga Fine Salt Mfg. Co.*, 62 Barb. 395, 1862 WL 4637 (Sup. Ct. N.Y. County 1862) (agreement to increase the price of salt was illegal).
5. *Stanton v. Allen*, 5 Denio 434, 1848 WL 4511 (Sup. Ct. N.Y. County 1848). *See also Hooker & Woodward v. Vandewater*, 4 Denio 349, 1847 WL 4279 (Sup. Ct. N.Y. County 1847) (holding the price-fixing agreement illegal by statute).
6. *Watson v. Harlem & N.Y. Navigation Co.*, 52 How. Prac. 348 (Sup. Ct. N.Y. County 1877).
7. *See generally* Testimony of Lloyd C. Constantine before the Antitrust Modernization Commission at 2 (Washington, D.C. July 28, 2005), at http://govinfo.library.unt.edu/amc/ commission_ hearings/pdf/Constantine.pdf; Richard Franklin Bensel, *The Political Economy of American Industrialization* 1877-1900, at 338-39 (2000).
8. Hans B. Thorelli, *The Federal Antitrust Policy: Origination Of An American Tradition* 155 (1955) ("*Federal Antitrust Policy*"); Greenberg, *New York Antitrust* at 6a, n.42 [85].
9. Thorelli, *Federal Antitrust Policy* at 155; Greenberg, *New York Antitrust* at 6a; American Bar Association, Section of Antitrust Law, *Antitrust Federalism: The Role of State Law* 2-3 (1988).
10. Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 378 (1983). *See generally id.* at 379-84. *See also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman: the proposed legislation was intended to "supplement the enforcement of the established rules of the common law and statute law by the court of the several States").
11. Conn. Gen. Stat. § 35-44b.
12. N.Y. Gen. Bus. Law §§ 340 *et seq.*
13. *People v. Rattenni*, 81 N.Y.2d 166, 171 (1993) (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988)).
14. 551 U.S. 877 (2007).
15. *Id.* at 878.
16. *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).
17. *See, e.g., George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 2 A.D.3d 1341, 1343 (4th Dep't 2003), *on remand*, 9 Misc. 3d at 155, 167-70 (declining to apply the rule of reason); *Worldhomecenter.com, Inc. v. L.D. Kichler Co.*, No. 05-cv-3297, 2007 WL 963206, at *4 (E.D.N.Y. Mar. 28, 2007); *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762 (S.D.N.Y. 1980); *Uniroyal, Inc. v. Jetco Auto Serv., Inc.*, 461 F. Supp. 350, 357 & n.7 (S.D.N.Y. 1978).
18. *See* Jay L. Himes, *New York's Prohibition of Vertical Price-Fixing*, N.Y.L.J., Jan. 29, 2008, at 4.
19. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
20. *See* N.Y. Gen. Bus. Law § 340(6) (providing, in pertinent part, that in any Donnelly Act treble damages action, the fact that the plaintiff "has not dealt directly with the defendant shall not bar or otherwise limit recovery").
21. *See generally* ANTITRUST MODERNIZATION COMMISSION, *REPORT AND RECOMMENDATIONS* 265 (Apr. 2, 2007) (Chapter III.B—Indirect Purchaser Litigation); *See also* Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, 15 Antitrust 34 (Summer 2001).
22. 15 U.S.C. § 1.
23. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 766- 767 (1984); *Board of Trade of Chicago v. United States*, 246 U.S. 231, 237-38 (1918); *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 59-62 (1911).
24. 15 U.S.C. § 2 ("Every person who shall monopolize or attempt to monopolize…any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony").
25. *See, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell").

26. *See*, *e.g.*, *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 333 (1988) ("as construed by State and Federal courts, the antitrust laws prohibit only 'unreasonable' restraints on trade") (authorities omitted).

27. N.Y. Gen. Bus. Law § 340(1) (emphasis added).

28. In the leading historical study, Jack Greenberg wrote regarding the Donnelly Act's predecessor-statute, from which the Act's substantive provision was taken, that:

> The new statute did not merely condemn "conspiracies" (under which contracts, agreements and combinations probably could be subsumed) as did 2 R.S. § 691, but also proscribed "arrangements." It also forbade…attempts to restrain trade; this, too, the conspiracy statute might not be able to reach. Substantive changes were, therefore, not very material.

New York Antitrust at 12a [91]. No specific legislative history is cited, however. The "conspiracy statute" referred to, 2 R.S. § 691, prohibited conspiracies "injurious to…trade or commerce…." n.3. *See id.* at 2a [81]; text at n.3, above.

29. 120 N.Y.S. 443, 450 (Sup. Ct. N.Y. County 1909).

30. *See id.* at 447, 451.

31. *Id.* at 449.

32. 236 N.Y.S.2d 266 (Sup. Ct. N.Y. County 1962).

33. *Id.* at 275. *See also People v. Schwartz*, No. 1557/86, 1986 WL 55321, at *2 (Sup. Ct. Queens County Oct. 17, 1986) (citing *State v. Mobil Oil Corp.* 38 NY2D 460, 464 (N.Y. 1976) ("the sweep of the Donnelly Act is broader than the Sherman Act"); *H.L. Hayden Co. of NY, Inc. v. Siemens Medical Sys. Inc.*, 672 F. Supp. 724, 745 n.28 (S.D.N.Y. 1987), *aff'd*, 879 F.2d 1005 (2d Cir. 1989) ("the word 'arrangement' in section 340 may include relationships beyond the "contract[s], combination[s], or conspirac[ies]" proscribed by section 1 of the Sherman Act, and, to that extent, the Donnelly Act may be slightly broader in scope."); *Harlem River Consumers Co-op., Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1283 (S.D.N.Y. 1976) ("The term 'arrangement' has been interpreted in a way which gives the Donnelly Act a scope somewhat broader than that of § 1 of the Sherman Act.") (citing *American Ice*, 120 N.Y.S. 443); *But see Nichols v. Mahoney*, 608 F. Supp. 2d 526, 545 (S.D.N.Y. 2009) (the Donnelly Act's use of the term "arrangement" does not broaden standing to sue beyond that recognized under federal law).

34. *See People v. American Ice Co.*, 120 N.Y.S. 443, 449 (Sup. Ct. N.Y. County 1909); *See also Eagle Spring Water Co. v. Webb & Knapp, Inc.*, 236 N.Y.S.2d 266, 275 (Sup. Ct. N.Y. County 1962).

35. 180 Misc. 18, 26 (Sup. Ct. N.Y. County 1943), *rev'd on other grounds*, 266 A.D. 535 (1st Dep't 1943), *appeal dismissed*, 291 N.Y. 707 (1943).

36. Greenberg, *New York Antitrust* at 21a [100] (footnote omitted).

37. 38 N.Y.2d 460 (1976).

38. *Id.* at 464 (emphasis added); *See also Harlem River Consumers Co-op*, 408 F. Supp. at 1283 ("[S]ome showing of concerted action is still an essential element of proof under this section."); *Otis Elevator Co. v. John J. Reynolds, Inc.*, 81 Misc. 2d 314, 315 (Sup. Ct. N.Y. County 1975) (because the Donnelly Act "prohibits only bilateral activity in restraint of trade," a "threat" by a supplier to cut-off a customer from supplies was not actionable).

39. *Monsanto*, 465 U.S. at 764 (derived from *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (CA3 1980), *cert. denied*, 451 U.S. 911 (1981)).

40. No. 00-civ-4763, 2007 WL 2219513 (S.D.N.Y. Aug. 3, 2007).

41. *Id.* at *15; *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

42. *Matsushita*, 475 U.S. at 588.

43. *U.S. Info. Sys., Inc.*, 2007 WL 2219513, at *15.

44. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 762 (1984).

45. *See*, *e.g.*, *N. Atl. Utils., Inc. v. Keyspan Corp.*, 307 A.D.2d 342 (2d Dep't 2003) (conspiracy may not be established between a parent and its wholly-owned subsidiaries), *leave to appeal denied*, 1 N.Y.3d 503, 775 N.Y.S.2d 780 (2003); *Barnem Circular Distribs., Inc. v. Distribution Sys. of Am., Inc.*, 281 A.D.2d 576, 577 (2d Dep't 2001) ("[a] parent corporation and its wholly-owned subsidiary are incapable of conspiring with each other").

46. *See Copperweld Corp.*, 467 U.S. 762, 765 (1984).

47. 1986 WL 55321, at *3, *conviction upheld*, 160 A.D. 2d 964 (2d Dep't 1990).

48. *Id.* at *3.

49. *Id.*

50. 160 A.D.2d at 965.

51. *Id.* (authorities omitted).

52. 125 A.D.2d 516, 518-519 (2d Dep't 1986).

53. *See*, *e.g.*, *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1217 (S.D. Ga. 1997) (parent and its 51% owned subsidiary were incapable of conspiring); *Gucci v. Gucci Shops, Inc.*, 651 F. Supp. 194 (S.D.N.Y. 1986) (where all the shareholders in one corporation were beneficial owners of the other, and a 50% owner of both corporations effectively controlled the business of both corporations, the entities were incapable of conspiring with each other; employees of the corporations were also incapable of conspiring with each other); *Novatel Commc'ns v. Cellular Tel. Supply*, No. Civ.A.C85-2674A, 1986 WL 798475, at *9 (N.D. Ga. Dec. 23, 1986) (a parent and its 51% owned subsidiary were legally incapable of conspiring; the subsidiary also was incapable of conspiring with a wholly-owned subsidiary of the same parent). *See also Leaco Enter., Inc. v. Gen. Elec. Co.*, 737 F. Supp. 605, 608-09 (D.Or. 1990) (*Copperweld* applies so long as the parent could effect the subsidiary's merger under applicable corporate law).

54. *See*, *e.g.*, *Rosen v. Hyundai Group (Korea)*, 829 F. Supp. 41, 45 n.6 (E.D.N.Y. 1993) (*Copperweld* did not apply where the parent owned 80% of subsidiary, and one of the parent's managing directors owned the remaining 20%); *Am. Vision Ctrs, Inc. v. Cohen*, 711 F. Supp. 721 (E.D.N.Y. 1989) (*Copperweld* did not apply where the defendants, who owned 54% of one publicly-traded company and 100% of another, allegedly prohibited the first company from competing with the second).

55. *Yankees Entm't and Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002).

56. 234 U.S. , 611-12 (1914) (holding an agreement or combination by retailers to refuse to buy from boycott wholesalers who sell directly to consumers interferes with the free and normal flow of trade and therefore violates the Anti-trust Act).

57. 312 U.S. 668 (1941).

58. 359 U.S. 207 (1959).

59. *Id.* at 212 (quoting *Fashion Originators' Guild*; citations omitted).

60. 64 Misc. 529 (Sup. Ct. N.Y. County 1909).

61. *Id.* at 531-32.

62. *Id.* at 532.

63. *Id.* at 531, 532.

64. 244 A.D. 656 (1st Dep't 1935).

65. *Id.* at 658.

66. *Id.* at 659.

67. *Id.*

68. *Id.*

69. 206 A.D. 138 (1st Dep't 1923).

70. *Id.* at 140. *See also Alexander's Dept. Stores v. Ohrbach's Inc.*, 266 A.D. 535, 539 (1st Dep't 1943) (applying the rule of reason to hold unlawful conduct by a retailer with "superior buying power," who endeavored "to eliminate one by one smaller competitors by

seeking arrangements with manufacturers…to refuse to sell to competitors and cut off their supply").

71. 408 F. Supp. 1251 (S.D.N.Y. 1976).
72. *Id.* at 1286 (citations omitted).
73. *Id.*
74. 622 F. Supp. 1532 (S.D.N.Y. 1985).
75. *See id.* at 1540.
76. *Watts v. Clark Assocs. Funeral Home, Inc.*, 234 A.D.2d 538, 538 (2d Dep't 1996) (citing *Anand v. Soni*, 215 A.D.2d 420, 421 (2d Dep't 1995) (citing *Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc.*, 136 A.D.2d 461, 462 (1st Dep't 1988), *reh'g* 148 A.D.2d 352, *rev'd on other grounds*, 75 N.Y.2d 830 (1990))).
77. *See, e.g., Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988).
78. 472 U.S. 284 (1985).
79. *Id.* at 298.
80. *Id.* at 286-87.
81. *Id.* at 284.
82. *Id.* at 296.
83. *Id.* at 298.
84. 476 U.S. 447 (1986).
85. *Id.* at 458.
86. 493 U.S. 411 (1990).
87. *Id.* at 424.
88. 525 U.S. 128 (1999).
89. *Id.* at 135.
90. *Id.*
91. Both the Donnelly Act and federal antitrust law also have many statutory exemptions. We do not undertake here to discuss similarities or differences among these carve-outs.
92. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) (holding that the "nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act…nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions"); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) (noting that there is no "broad exemption under the Rule of Reason for learned professions" in affirming the Sherman Act liability of a professional society of engineers); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101, n.22 (1984) (stating that "There is no doubt that the sweeping language of § 1 applies to nonprofit entities.").
93. *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (holding that a dental association's ban on price-based advertisements should have been subjected to a full-blown rule of reason analysis, rather than a "quick-look" analysis, because, in view of the vast informational asymmetry between dentists and patients, such a ban could promote competition); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (per curiam) (refusing to enjoin a merger between two nonprofit hospitals under § 7 of the Clayton Act despite finding that the proposed merger would result in a significant increase in market power in the relevant market, in view of evidence that a nonprofit hospital—unlike a for-profit counterpart under similar circumstances—would tend to decrease rather than increase the price of its services).
94. 34 N.Y.2d 1 (1974).
95. *Id.* at 6.
96. With the amendment, the Donnelly Act, in pertinent part, declares illegal:

> Every contract, agreement, arrangement or combination whereby
>
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any *service* in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
>
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any *service* in this state any business, trade or commerce or the furnishing of any *service* is or may be restrained.…

N.Y. Gen. Bus. Law § 340(1) (emphasis added).

97. *Matter of Freeman*, 34 N.Y.2d at 7.
98. *Id.*
99. *Id.* at 7-8.
100. *Id.* at 7 (numbers in brackets added).
101. *Id.* at 8.
102. *Id.*
103. *Id.* at 8-9.
104. *Id.*
105. 421 U.S. 773 (1975).
106. *Id.* at 773.
107. *Id.* at 779, 780.
108. *Id.* at 787.
109. *Id.* at 787-88.
110. *Id.* at 787. *See also supra* nn.82-83, and accompanying text (citing Supreme Court cases establishing that the professional or nonprofit nature of an organization does not entitle it to an exemption from the Sherman Act).
111. 52 N.Y.2d 440 (1981).
112. *Id.* at 447.
113. *Id.*
114. *Id.* at 448.
115. *See also Glen Cove Assocs., L.P. v. North Shore Univ. Hosp.*, 240 A.D.2d 701, 701 (2d Dep't 1997) ("the medical profession is exempt from the proscriptions of the Donnelly Act"). *Compare People v. D.H. Blair & Co., Inc.*, No. 3282/2000, 2002 WL 766119, at *30 (Sup. Ct. N.Y. Co. 2002) (analyzing the *Freeman* factors in concluding that a securities broker-dealer was not exempt from the Donnelly Act).
116. 132 A.D.2d 129 (3d Dep't 1987).
117. *See* N.Y. Gen. Bus. Law § 343.
118. *Pharm. Soc'y of the State of N.Y. v. Abrams*, 132 A.D.2d 129, 130 (3d Dep't 1987).
119. *Id.* at 131.
120. *Id.*
121. *Id.*
122. *Id.* at 132.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 133.

128. *Id.* at 132. *See also Westchester County Pharm. Soc'y, Inc. v. Abrams*, 138 A.D.2d 721 (2d Dep't 1988) (affirming the denial of a motion to quash a Donnelly Act subpoena served on an organization comprising both pharmacists and pharmacies, while recognizing that pharmacists as professionals are exempt from the Donnelly Act).

129. *Jaffee v. Horton Mem'l Hosp.*, No. 2843/88, 1988 WL 247973 (Sup. Ct. Orange Co. 1988).

130. *Id.* at *1.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (internal citations and quotation marks omitted).

135. *Jaffee v. Horton Mem'l Hosp.*, No. 2843/88, 1988 WL 247973, at *1 (Sup. Ct. Orange Co. 1988) (citing *People v. Roth,* 52 N.Y.2d 440 (1981)).

136. *Id.*

137. *Id.*

138. *Id.*

139. 108 Misc.2d 305 (Sup. Ct. Albany County 1981).

140. *Id.* at 307.

141. *Id.* at 308.

142. *Id.*

143. *Freeman*, 34 N.Y.2d at 7.

144. 317 U.S. 341 (1943).

145. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

146. *Parker*, 317 U.S. at 350-51.

147. *Id.* at 352.

148. *Hoover v. Ronwin*, 466 U.S. 558, 558-59 (1984) (characterizing *Bates* as holding that "[a] state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature for purposes of the state-action doctrine"); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977) (holding that the Arizona Supreme Court's enactment and enforcement of a disciplinary rule restricting attorney advertising was "compelled by direction of the State acting as a sovereign" (citation omitted) and thus exempt from the Sherman Act).

149. *See, e.g., Patrick v. Burget*, 486 U.S. 94, 99-100 (1988).

150. C*alifornia Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

151. *Elec. Inspectors, Inc. v. Village of Lynbrook*, 293 A.D.2d 537, 538 (2d Dep't 2002); *see also Capital Tel. Co. Inc. v. New York Tel. Co.*, 146 A.D.2d 312, 315 (3d Dep't 1989) (citing without disapproval a federal district court's recognition, in dismissing a Sherman Act claim on state-action grounds, that "no comparable immunity doctrine exists under New York law as to Donnelly Act claims"). *But see Cohen v. Metro. Life Ins. Co.*, 143 Misc. 2d 641, 644 (Sup. Ct. N.Y. County 1988) (holding, in an action under the Donnelly Act, that the "State's licensing limitations applicable to optometrists constitute direct state action which, as a matter of law, is exempt from the antitrust laws").

152. 28 A.D.2d 38 (1st Dep't 1967).

153. *Id*. at 39.

154. *Id*. at 40.

155. *Id*. at 41.

156. *Id.* at 41 (citing *California Reduction Co. v. Sanitary Works*, 199 U.S. 306, 318 (1905)).

157. *Id.* at 40.

158. *Id.*

159. *Id.* at 41 (The plaintiff, an ice supplier who was not granted the franchise, allegedly did not have notice of a bid opening and, accordingly, did not submit a bid); *See id.* at 40.

160. *Id.* at 40-42.

161. *Id.* at 41-43. *See also AFA Protective Sys., Inc. v. Crouchley*, 63 Misc. 2d 695 (Sup. Ct. Nassau Co. 1970).

162. 126 Misc. 2d 509 (Sup. Ct. Broome Co. 1984).

163. *Id.* at 509.

164. *Id.* at 509-11, 514-5.

165. *See id.* at 515.

166. See *id.* at 515-16.

167. *Id.* at 516.

168. *See id.* at 516-17.

169. *Id.* at 516-17.

170. *Id.* at 516-17.

171. 68 Misc. 2d 941 (Sup. Ct. Niagara Co. 1972), *aff'd*, 39 A.D.2d 1018 (4th Dep't 1972).

172. *Id.* at 942.

173. *Id.* at 943.

174. 96 Misc. 2d 305 (Sup. Ct. N.Y. Co. 1978).

175. *Id.* at 309.

176. *Id.*

177. *Id.*

178. *Id.* at 310-12.

179. *S-P Drug Co., Inc. v. Smith*, 96 Misc. 2d 305, 312-313 (Sup. Ct. N.Y. Co. 1978).

180. *Id.* at 311.

181. *Id.* at 311-12.

182. *Id.* at 311.

183. 56 A.D.2d 136 (4th Dep't 1977).

184. *Id.* at 139-40.

185. *Id.* at 140 (citing *Murphy v. Erie County*, 28 N.Y.2d 80 (1971) for the proposition that the grant of an exclusive lease is a proper exercise of state police power).

186. 365 U.S. 127.

187. 381 U.S. 657.

188. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *See also* U.S. Const. art. VI, cl. 2 (the "Supremacy Clause"). Of course, even if it were held that the *Noerr-Pennington* doctrine is not constitutionally required, the First Amendment would still apply in deciding whether a private effort to bring about anticompetitive action by a New York state or local government is lawful. However, that inquiry would not be controlled by the *Noerr-Pennington* doctrine. By contrast, if the *Noerr-Pennington* doctrine applied, it would seem in most cases to settle both the question of the applicability of antitrust laws and the application of the First Amendment. This is so because if the *Noerr-Pennington* doctrine is rooted in the First Amendment, it would not allow the antitrust laws to condemn as a violation conduct that the First Amendment protects.

189. *Noerr*, 365 U.S. at 132 n.6 (finding it "unnecessary" to consider the First Amendment "[b]ecause of the view we take of the proper construction of the Sherman Act").

190. *See generally id.* at 135-38.

191. *See, e.g.*, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (restating both *Noerr* rationales); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503-04 (1988) (emphasizing the *Parker* rationale that the antitrust laws are not aimed at regulating political activity); *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 379-80, 383 (1991) (emphasizing the *Parker* rationale, but also alluding to the First Amendment).

192. 700 F.2d 98 (2d Cir. 1983).

193. *Id.* at 100, 101.

194. *Id.* at 101 (citing authorities from the Second Circuit and other jurisdictions).

195. *Id.* at 101.

196. *Id.* at 101-02.

197. 886 F. Supp. 377 (S.D.N.Y. 1995), *aff'd*, 267 F.3d 1325 (Fed. Cir. 2001).

198. *Id.* at 380.

199. *Id.* at 382 n.3, 383.

200. 268 A.D.2d 101 (2d Dep't 2000).

201. *Id.* at 103-06.

202. *Id.* at 106-07.

203. *Id*.

204. *Id.* at 107-08; *see also Singh v. Sukhram*, 56 A.D.3d 187, 191 (2d Dep't 2008) (making the same point about the origins and growth of *Noerr-Pennington*).

205. 181 Misc. 2d 85 (Sup. Ct. N.Y. Co. 1999), *aff'd*, 278 A.D.2d 35 (1st Dep't 2000).

206. *See id.* 85.

207. *Id*. at 89.

208. *Id.* at 90. (making this characterization is wrong because regardless of whether the *Noerr-Pennington* doctrine is constitutionally mandated, *Noerr* and *Pennington* clearly construed the Sherman Act and did not apply the First Amendment. The *Noerr* Court explicitly stated that it was not applying the First Amendment. *See supra* at n.166 (citing *Noerr*, 365 U.S. at 132 n.6)).

209. *Id.* at 91 (internal citations and quotation marks omitted).

210. *Id.* at 92.

211. The opinion reads, in pertinent part:

> The action was properly dismissed on the ground that the tortious conduct alleged involved the petitioning of a governmental agency that is immune from suit under the First Amendment of the U.S. Constitution. Although the *Noerr Pennington* doctrine initially arose in the antitrust field, the courts have expanded it to protect First Amendment petitioning of the government from claims brought under Federal and State law. *Concourse Nursing Home v. Engelstein*, 278 A.D.2d 35 (1st Dep't 2000)(citing *Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101, 107 (2d Dep't 2000).

212. See e.g. *Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101, 107 (2d Dep't 2000).

213. 23 A.D.3d 160, 161 (1st Dep't 2005).

214. *Id.* at 161 (citing *Alfred Weissman Real Estate Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101, 106-107 (2d Dep't 2000).

215. *See generally*, *id.* at 161-62.

216. *See id.* at 161.

217. *See id.* at 161-62.

218. *Singh v. Sukhram*, 56 A.D.3d 187, 188 (2d Dep't 2008).

219. 472 U.S. 479 (1985). *McDonald* held that the First Amendment provides qualified, not absolute, immunity to defendants charged with libel in petitions to government officials, and further held that North Carolina state law requiring proof of malice for recovery of damages in such a libel action need not be expanded to comply with the First Amendment. *See McDonald*, 472 U.S. at 483-85; *Singh*, 56 A.D.3d at 193.

220. *Singh v. Sukhram*, 56 A.D.3d 187, 188, 193 (2d Dep't 2008).

221. For simplicity's sake, we use the term "merger" here to include acquisitions and other forms of business combinations as well.

222. 15 U.S.C. §18.

223. 38 N.Y.2d 460 (1976) (holding that the Donnelly Act does not contain price discrimination prohibitions such as those in the Clayton Act).

224. *Id.* at 463-64.

225. 15 U.S.C. §1.

226. 15 U.S.C. §2.

227. *See, e.g.*, *People v. Rattenni*, 81 N.Y.2d 166, 171 (1993).

228. N.Y. Gen. Bus. Law §340(1).

229. *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d at 334-35 (1988) (internal citations omitted).

230. 317 F. Supp. 2d 301 (S.D.N.Y. 2003).

231. *Id*. at 333 (citing *State v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995); *Big Apple Concrete Corp. v. Abrams*, 103 A.D.2d 609 (1st Dep't 1984)).

232. 317 F. Supp. 2d at 333 n.22. *See also Kasada, Inc. v. Access Capital, Inc.*, No. 01 civ 8893, 2004 WL 2903776 at *13 (S.D.N.Y. Dec. 10, 2004) ("The Donnelly Act…has been narrowly construed to encompass only those causes of action falling within the Sherman Act," citing *State v. Mobil Oil Corp, 3*8 N.Y.2d 460 (1976)).

233. 317 F. Supp. 2d at 333 n.22. Interestingly, however, acceding to the what he termed the "general mandate to interpret the New York statute in light of equivalent federal antitrust precedent[,]" Judge Lynch denied the defendants' motion to dismiss other Donnelly Act claims where their federal counterpart survived a Clayton Act analysis. *Id.* at 333.

234. 193 U.S. 197 (1903).

235. *Northern Sec. Co. v. United States*, 193 U.S. 197, 320-321 (1903) (discussing *Pearsall v. Great Northern R.R. Co.*, 161 U.S. 646 (1896)).

236. *Id.* at 322.

237. *Id*. at 325.

238. *Id*. at 327-28.

239. *Id.* at 403.

240. *Northern Sec. Co. v. United States*, 193 U.S. 197, 403 (1903) (Holmes, J., dissenting). This comment by Justice Holmes, long since forgotten, should not detract from another memorable part of the dissent. It was this dissent where he said that "[g]reat cases like hard cases make bad law." *Id.* at 364.

241. 221 U.S. 106 (1911).

242. *Id.* at 181-82.

243. 224 U.S. 383 (1912).

244. *Id.* at 409.

245. 251 U.S. 417, 461 (1920).

246. *See, e.g.*, *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964) (bank merger invalidated under Section 1).

247. 898 F.2d 1278 (7th Cir. 1990).

248. *Id.* at 1281. *See also Vantico Holdings S.A. v. Apollo Mgmt.*, 247 F. Supp. 2d 437, 458 (S.D.N.Y. 2003) ("Because §1 of the Sherman Act looks to the probable effects of an agreement, there is no substantive difference between the standards underlying a violation of §7 and §1.") (citing United States v. *Rockford Memorial*, 898 F.2d 1278, 1281-1283 (7th Cir 1990)).

249. 15 U.S.C. §45. *See* Merger Guidelines, §0 (*Purpose, Underlying Policy Assumptions, and Overview*); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn*, 98 F. Supp. 2d 729, 731 (W.D. Va. 2000) (noting that the Merger Guidelines detail the agencies' enforcement policy "concerning horizontal acquisitions and mergers subject to Section 1 of the Sherman Act. *See* Merger Guidelines, §0."). *But see* Judge Bork's opinion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 220 (D.C. Cir. 1986) ("the Guidelines apply to mergers tested under section 7 of the Clayton Act, a statute aimed at halting 'incipient monopolies and trade restraints *outside the scope of the Sherman Act*,' *Brown Shoe [Co. v. United States]*, 370 U.S. [294,] 318 n.32 [(1962)], and which therefore applies a much more stringent test than does rule-of-reason analysis under section 1 of the Sherman Act.") (emphasis added).

250. N.Y. Gen. Bus. Law § 340(1).

251. *Id.*

252. *See Bon-Ton Stores, Inc. v. The May Dep't Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994); *State v. Kraft Gen. Foods, Inc.*, 862 F. Supp. 1030 (S.D.N.Y. 1993), *aff'd*, 14 F. 3d 590 (2d Cir. 1993). The New York Attorney General merger challenges under the Clayton or Donnelly Acts have also resulted in unpublished settlements, available on the Attorney General's website (http://www.oag.state.ny.us), and consent decrees. *See, e.g.*, *New York v. The Great Atl. & Pacific Tea Co., Inc.* (Nov. 26, 2007) (Assurance of Discontinuance); *New York v. El Paso Energy Corp.*, No. 01-cv-0059S (W.D.N.Y. Apr. 6, 2001) Consent Decree and Final Judgment and Order; *New York v. Allied Waste Indus., Inc.*, No. 00-cv-0363 (S.D.N.Y. Dec. 1, 2000) (Final Judgment); *New York v. Service Corp. Int'l*, No. 99-cv-11391 (S.D.N.Y. Nov. 18, 1999) (Final Judgment).

253. *See, e.g.*, *New York v. Visa U.S.A.*, 1990-1 Trade Cas. (CCH) ¶ 69,016 (S.D.N.Y. 1990). Again, merger challenges by the New York Attorney General and other state attorneys general under the Clayton Act and their respective state antitrust laws have produced unpublished settlements (available at http://www.oag.state.ny.us) and consent decrees. *See, e.g.*, *New York v. Rite Aid Corp.* (June 1, 2007) (Assurance of Discontinuance); *New York v. Federated Dep't Stores* (Aug. 30, 2005) (Assurance); *New York v. Primestar Partners, L.P.*, No. 93 civ. 3868, 1993 U.S. Dist. LEXIS 21122 (Sept. 10, 1993).

254. *See, e.g.*, *United States v. Sony Corp. of Am.*, 2000-1 Trade Cas. (CCH) ¶ 72, 787 (S.D.N.Y. 1998); *United States v. Cargill, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 71,893 (W.D.N.Y. 1997). In more recent years, however, challenges with the DOJ have alleged only Section 7 claims. *See United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *United States v. Echostar Comm'ns Corp.*, No. 1:02CV02138 (D.D.C. Oct. 31, 2002).

255. *See generally* Robert L. Hubbard & Sondra Roberto, *State Merger Enforcement*, 6 SEDONA CONF. J. 1, 1-6 (2005); Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 Geo. Mason L. Rev. 37, 45-51 (2002).

256. *New York v. Group Health Inc.*, No. 1:06-cv-13122-RJS, 2008 WL 4974578 (S.D.N.Y. 2008).

257. *See New York v. Group Health Inc.*, No. 06-cv-13122-RJS, 2010 WL 2132246 at *6 (S.D.N.Y. 2010).

258. 8 N.Y.3d 204 (2007).

259. 130, S. Ct. 1431 (2010), *rev'g*, 549 F.3d 137 (2d Cir. 2008).

260. N.Y. C.P.L.R. § 901(b) (McKinney 2005).

261. N.Y. Gen. Bus. Law § 340(5) (McKinney 2004).

262. 8 N.Y.3d 204.

263. 8 N.Y.3d at 214. The lower court rulings leading up to *Sperry* were to the same effect. *See, e.g.*, *Paltre v. Gen. Motors Corp.*, 26 A.D.3d 481, 483 (2d Dep't 2006) ("The treble damages provision is a penalty within the meaning of CPLR 901(b)."); *Asher v. Abbott Labs.*, 290 A.D.2d 208, 208 (1st Dep't 2002) ("the treble damages remedy provided in [Gen. Bus. Law.] § 340(5) is a 'penalty' within the meaning of CPLR 901(b), the recovery of which in a class action is not specifically authorized") (citations omitted); *Cox v. Microsoft Corp.*, 290 A.D.2d 206, 206 (1st Dep't 2002) ("Private persons are precluded from bringing a class action under the Donnelly Act…because the treble damages remedy provided for in subdivision (5) constitutes a 'penalty' within the meaning of CPLR 901(b)"); *Lennon v. Philip Morris Cos., Inc.*, 189 Misc. 2d 577, 583 (Sup. Ct. N.Y. Co. 2001) ("Although federal courts have held that treble damages are remedial, not punitive, New York state courts have historically concluded that treble damages are punitive in nature") (citation omitted).

264. The *Sperry* Court noted that although "§ 342-b contemplates that the Attorney General may bring class actions on behalf of governmental entities, General Business Law § 340, in contrast, makes no reference to class actions for private litigants." 8 N.Y.3d at 216, n.7. *See also Cox v. Microsoft*, 290 A.D.2d at 206. The Attorney General—who, as amicus curiae, consistently advocated permitting Donnelly Act class actions—has argued that § 342-b does not preclude private class actions under the Donnelly Act. *See* Notice of Motion, Affidavit, Exhibits and Brief of the Attorney General of the State of New York in Support of Motion For Amicus Curiae Relief, at 53, *filed in Cox v. Microsoft Corp.*, 749 N.Y.S.2d 478 (2002).

265. 431 U.S. 720 (1977) (holding that only those who purchase directly from a price-fixer are entitled to sue for antitrust treble damages).

266. N.Y. Gen. Bus. Law, § 340(6) of the Donnelly Act.

267. 28 U.S.C. §§ 1332(d), 1453, and 1711-15. *See generally* Pub. L. No. 109-2, 119 Stat. 4; Jay L. Himes, *The Class Action Fairness Act: A Wolf in Wolves' Clothing*, 10 Class Action Litig. Rep. (BNA) 452 (No. 9, May 8, 2009).

268. *See New York v. Cedar Park Concrete Corp.*, 741 F. Supp. 494, 497 (S.D.N.Y. 1990).

269. For a number of years, *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), precluded aggregating individual class member injury to reach the diversity jurisdictional amount. Because, under *Zahn*, each individual class member's claim had to exceed the amount-in-controversy requirement in order to satisfy diversity, most state law-based class actions had to be litigated in state court. In *Exxon-Mobil v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Supreme Court held that the supplemental jurisdiction statute, 28 U.S.C. § 1367, effectively overruled *Zahn*. Thus, so long as one named plaintiff class representative satisfied the amount in controversy, the district court could exercise supplemental jurisdiction over the other class members' claims, even though they were below the jurisdictional amount. While eliminating *Zahn*'s "non-aggregation" rule, *Exxon-Mobil* has little practical effect in most consumer antitrust cases, where individual damages are likely to be far south of $75,000.

270. 304 U.S. 64, 78 (1938).

271. 326 U.S. 99 (1945).

272. *Id.* at 109.

273. *See, e.g., In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004) (Donnelly Act class actions in federal court would encourage forum-shopping and "inequitably injure plaintiffs unable to demonstrate diversity of citizenship"); *In re Auto. Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549-50 (E.D. Pa. 2007) (federal courts sitting in diversity must apply state substantive law to prevent inconsistent results).

274. 387 F. Supp. 2d 283 (S.D.N.Y. 2005).

275. *Id.* at 291.

276. *Id. See also In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 580 (M.D. Pa. 2009) (Donnelly Act's penalties "cannot be advanced on behalf of a class"); *In re Onstar Contract Litig.*, 600 F. Supp. 2d 861, 875 (E.D. Mich. 2009) (because CPLR 901(b) is a substantive law, it must be applied in federal courts); *Gordon v. Kaleida Health*, No. 08-CV-378S, 2008 WL 5114217, at *10

(W.D.N.Y. Nov. 25, 2008) (same); *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26, 39 (D.D.C. 2008) (dismissing Donnelly Act claims because CPLR 901(b) prohibits Donnelly Act class actions in both federal and state court); *Gratt v. ETourAndTravel, Inc.*, No. 06-CV-1965, 2007 WL 2693903, at *1-2 (E.D.N.Y. Sept. 10, 2007), *aff'd*, No. 08-3511 cv, 2009 WL 3161310 (2d Cir. Oct. 2, 2009) (whether filed in state or federal court, CPLR 901(b) bars plaintiffs from maintaining a class action because it is substantive and does not conflict with procedural Rule 23); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 415 (D. Del. 2007) ("application of CPLR § 901(b) is appropriate" because it does not conflict with Rule 23); *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 185, & n.3 (E.D.N.Y. 2007) (applying CPLR 901(b) to claims for statutory penalties brought under the Telephone Consumer Protection Act because "the majority of courts have concluded that § 901(b) is a substantive law which must be applied in the federal forum"), *aff'd*, No. 07-2191-cv, 2008 U.S. App. LEXIS 23203 (2d Cir. Oct. 31, 2008) (summary order), *vacated and remanded*, ___ U.S. ___, No. 08-1307, 2010 WL 1525998 (U.S. Apr. 19, 2010); *Bonime v. Avaya, Inc.*, No. 06-CV-1630, 2006 WL 3751219, at *3 n.2 (E.D.N.Y. Dec. 20, 2006), *aff'd*, 547 F.3d 497 (2d Cir. 2008) (Rule 23 and CPLR 901(b) do not conflict); *United States v. Dentsply Int'l, Inc.*, No. Civ. A. 99-005, 2001 WL 624807, at *15-16 (D. Del. Mar. 30, 2001), *aff'd sub nom, Howard Hess Dental Labs Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363 (3d Cir. 2005) (same); *Dornberger v. Metro. Life Ins. Co.*, 182 F.R.D 72, 84 (S.D.N.Y. 1998) (applying CPLR 901(b), and thus barring a class action brought under N.Y. Ins. L. § 4226,"which provides for the recovery of a specific penalty" for insurer misrepresentation, and "does not expressly permit class actions").

277. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (S.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008) *overruled by* 130 S.Ct. 1431 (2010).
278. *Shady Grove Orthopedic Assocs., P.A.*, 549 F.3d. at 143.
279. *Id.* at 145 (quoting *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004)).
280. 380 U.S. 460, 471 (1965).
281. Brief for Petitioner, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, 2009 WL 2040421, at *9-10, 12-15, 31-32 (U.S. July 10, 2009) ("Shady Grove's Opening Brief").
282. *See* the Rules Enabling Act, 28 U.S.C. § 2072(b).
283. Shady Grove's Opening Brief, 2009 WL 2040421, at *11.
284. Petitioner's Reply Brief, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, 2009 WL 3143700, at *2 (U.S. Sept. 28, 2009). *See also* Shady Grove's Opening Brief, 2009 WL 2040421, at *23-24.
285. Shady Grove's Opening Brief, 2009 WL 2040421, at *25-27.
286. Brief for Respondent, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, No. 08-1008, 2009 WL 2777648, at *43-44 (U.S. Aug. 28, 2009).
287. *Id.* at *46-47.
288. *Shady Grove*, 559 U.S. at ___, No. 08-1008, 2010 WL 1222272, at *4.
289. *Id*.
290. *Id*. (emphasis in original).
291. 28 U.S.C. § 2072(b).
292. *Shady Grove*, 559 U.S. at ___, 2010 WL 1222272, at *8 (*quoting Sibbach v. Wilson & Co*., 312 U.S. 1, 14 (1941)).
293. *Id*. at *8.
294. *Id*.
295. *Id*. at 12.
296. *Id*.
297. *Shady Grove*, 559 U.S. ___, No. 08-1008, 2010 WL 1222272, at *11 (Ginsburg, J, dissenting op.).
298. *Id*. at *16 (*quoting Gasperini v. Center for Humanities, Inc*., 518 U.S. 415, 427 n. 7 (1996)). *See also id*. at *25 (criticizing Justice Scalia's opinion as reflecting "a mechanical reading of the Federal Rules, insensitive to state interests and productive of discord").
299. *Id*. at *26.
300. *Id*. at *27.
301. *Id*. at *28 (emphasis in original).
302. *Id*. *See also id*. at *28, n.9 (noting that "New York Courts routinely authorize class actions when the class waives its right to receive statutory penalties") (citing authorities). Justice Scalia, however, was less confident that waiver was available. *See id*. at *6, n. 5.
303. *Id*. at *30 (*quoting Hanna v. Plumer*, 380 U.S. 460, 468 n. 9 (1968)).
304. *Id*. at *32.
305. *Id*.
306. *Shady Grove*, 559 U.S. ___, No. 08-1008, 2010 WL 1222272, at *2 (Stevens, J., concurring op.).
307. *Id*. at *14, (*quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring)).
308. *Id*. at *13. *See also id*. at *10 (noting that a state procedural law "may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy").
309. *Id*. at *14.
310. *Id*. at *16.
311. *Id*. at *17.
312. Shortly after the decision in *Shady Grove*, the Supreme Court vacated a ruling by the Second Circuit, which held that § 901(b) barred class actions brought under the private right of action provision of the Telephone Consumer Protection Act ("TCPA") of 1991, 47 U.S.C. § 227. *Holster v. Gatco, Inc.*, ___ U.S. ___, No. 08-1307, 2010 WL 1525998 (U.S. Apr. 19, 2010), *vacating and remanding*, No. 07-2191-cv, 2008 U.S. App. LEXIS 23203 (2d Cir. Oct. 31, 2008) (summary order), *aff'g*, 485 F. Supp. 2d 179 (E.D.N.Y. 2007). The TCPA is a peculiar piece of legislation, as it creates a private right of action to recover a specified penalty "if otherwise permitted by the laws or rules of court of a State…. " 47 U.S.C. § 227(b)(3). The Court's disposition, which included a remand to the Court of Appeals, will give the Second Circuit an opportunity to revisit its earlier ruling in light of *Shady Grove*.
313. To be sure, this approach may seem dubious given Justice Stevens' retirement. However, with the Supreme Court otherwise equally divided in *Shady Grove*, it is hard to see how the lower federal courts could resolve subsequent § 901(b) issues other than by at least taking account of Justice Stevens' approach.
314. Section 901(b) was added by L.1975, ch. 207. Later in that same legislative session, the Donnelly Act's treble damages provision was enacted by L.1975, ch. 333. There is no evidence in either law's legislative history of a connection between the two. The Legislature added the Illinois Brick repealer by L.1998, ch. 653, § 1.
315. *Shady Grove*, 559 U.S. ___, No. 08-1008, 2010 WL 1222272, at *28, n.9 (Ginsburg, J, dissenting op.) (citing authorities).
316. *In re New York, Lackawanna & W. R. R. Co.*, 98 N.Y. 447, 453 (1885); *Trump v. Trump*, 179 A.D.2d 201, 203 (1st Dep't 1992).
317. *See* Brief for Appellant at *10, *Sperry v. Crompton Corp.*, No. 2004-06517, 2006 WL 4389252 (1st Dep't Dec. 1, 2006) (quoting Memorandum of Governor Carey, *McKinney's Session of Laws of New York* 1748 (1975) ("This bill provides the people of New York with the type of strong class action statute which I have repeatedly requested")).
318. No. 0763/99, 1999 WL 1425364 (Sup. Ct. N.Y. County Nov. 3, 1999).
319. *Id*. at *4-5 (*citing* GBL 340(5)) (emphasis added).
320. 290 A.D.2d 208.

321. 290 A.D.2d at 208. Justice Scalia cited *Asher* in *Shady Grove*, suggesting that Justice Ginsburg's comment should not be uncritically accepted. 559 U.S. at ___, Slip Op. at 7, n. 5.
322. N.Y. Gen. Bus. Law § 349(a).
323. N.Y. Gen. Bus. Law § 349(h) (emphasis added).
324. *See Cox v. Microsoft Corp.*, 8 A.D.3d 39, 40-41 (1st Dep't 2004) (permitting the plaintiffs to pursue a class action under § 349 after they had waived the right to minimum damages); *Ho v. Visa U.S.A. Inc.*, No. 112316/00, 2004 WL 1118534, at *3 (Sup. Ct. N.Y. County Apr. 21, 2004), *aff'd*, 16 A.D.3d 256 (1st Dep't 2005) (after dismissing Donnelly Act claims, the court permitted the plaintiffs to waive treble damages and proceed as a class asserting § 349 claims); *Leider,* 387 F. Supp. 2d at 293 (noting that §901(b) does not bar class certification where the plaintiff waives treble damages, and allowing the plaintiffs to waive the penalty and proceed as a class asserting § 349 claims). *Cf. Ridge Meadows Homeowners' Ass'n, Inc. v. Tara Dev. Co., Inc.*, 242 A.D.2d 947 (4th Dep't 1997) (while § 901(b) bars the plaintiffs from maintaining a class action for treble damages under § 349(h), the court allowed a class action to proceed if the class limited their demand to actual damages); *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604 (2d Dep't 1987) (sustaining a class action under § 349, where the plaintiffs agreed to waive treble damages); *Beckler v. Visa U.S.A. Inc.*, No. 09-04-C-00030, 2004 WL 2115144 (N.D. Dist. Aug. 23, 2004) (noting that the availability of treble damages does not preclude the plaintiffs' class claims under § 349, so long as they agree to waive treble damages and so long as class members could opt out of the class and pursue their treble damages claims individually).
325. 251 A.D.2d 11 (1st Dep't 1998).
326. 251 A.D.2d at 12. *See also Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001) (permitting waiver of the penalty and allowing the class action to proceed).
327. L.2009, c. 372, § 1.
328. 251 A.D.2d at 12.
329. 201 F.R.D. 81.
330. *Id.* at 95. *See also* Vincent C. Alexander, *McKinney's Statutes Practice Commentaries*, N.Y. C.P.L.R. C901.11 (McKinney 2005) ("the class representative's surrender of a penalty or minimum recovery arguably calls into question the adequacy of representation [], but courts have overcome this hurdle by giving class members the opportunity to opt out of the class").
331. 132 A.D.2d at 607-08.
332. 114 Misc. 2d 935 (Sup. Ct. N.Y. County 1981).
333. *Ansoumana,* 201 F.R.D. at 95.
334. *See Relafen,* 221 F.R.D. at 286 (a class representative's willingness to waive claims for treble damages "casts doubt on the named plaintiffs' fitness to represent class members who might prefer to pursue statutory or punitive remedies individually"). *See also Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 480 (E.D. Pa. 1997) ("named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class") (pre-*Pesantez*).

This report was prepared by Morissa Falk, Andrew Finch, Jay L. Himes, Sarah Hubbard, Ryan Kriger, Hollis L. Salzman, Aidan Synnott and Joseph Tusa, who are members of the Antitrust Committee of the Commercial and Federal Litigation Section. It was approved by unanimous votes of the Section's Executive Committee on March 16, 2010 and May 12, 2010.

Section Committees and Chairs

ADR
Carroll E. Neesemann
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
cneesemann@mofo.com

Antitrust
Jay L. Himes
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
jhimes@labaton.com

Hollis L. Salzman
Labaton Sucharow LLP
140 Broadway, 34th Fl.
New York, NY 10005
hsalzman@labaton.com

Appellate Practice
David H. Tennant
Nixon Peabody LLP
1100 Clinton Square
Rochester, NY 14604-1792
dtennant@nixonpeabody.com

Melissa A. Crane
Appellate Division: First Department
27 Madison Avenue, Room 406
New York, NY 10010
macrane@courts.state.ny.us

Bankruptcy Litigation
Douglas T. Tabachnik
Law Offices of Douglas T. Tabachnik, PC
63 West Main Street, Ste. C
Freehold, NJ 07728
dtabachnik@dttlaw.com

Civil Practice Law and Rules
Thomas C. Bivona
Milbank Tweed Hadley McCloy LLP
One Chase Manhattan Plaza, 45th Fl.
New York, NY 10005-1413
tbivona@milbank.com

James Michael Bergin
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
jbergin@mofo.com

Civil Prosecution
Neil V. Getnick
Getnick & Getnick
620 Fifth Avenue
New York, NY 10020
ngetnick@getnicklaw.com

Richard J. Dircks
Getnick & Getnick
620 Fifth Avenue
New York, NY 10020
rdircks@getnicklaw.com

Class Action
Ira A. Schochet
Labaton Sucharow LLP
140 Broadway, 34th Fl.
New York, NY 10005
ischochet@labaton.com

Commercial Division
Mitchell J. Katz
Menter, Rudin & Trivelpiece, P.C.
308 Maltbie Street, Ste. 200
Syracuse, NY 13204-1498
mkatz@menterlaw.com

Paul D. Sarkozi
Tannenbaum Helpern Syracuse &
Hirschtritt LLP
900 Third Avenue
New York, NY 10022
sarkozi@thshlaw.com

Commercial Division Law Report
Paul D. Sarkozi
Tannenbaum Helpern Syracuse &
Hirschtritt LLP
900 Third Avenue
New York, NY 10022
sarkozi@thshlaw.com

Megan P. Davis
Flemming Zulack Williamson Zauderer
LLP
One Liberty Plaza
New York, NY 10006
mdavis@fzwz.com

Scott E. Kossove
L'Abbate Balkan Colavita & Contini, LLP
1001 Franklin Avenue, Suite 300
Garden City, NY 11530-2901
skossove@lbcclaw.com

Complex Civil Litigation
Edward A. White
Hartman & Craven LLP
488 Madison Avenue, 16th Fl.
New York, NY 10022
ewhite@hartmancraven.com

Corporate Litigation Counsel
Jamie E. Stern
ING
230 Park Avenue, 15th Fl.
New York, NY 10169
jamie.stern@us.ing.com

Carla M. Miller
Universal Music Group
1755 Broadway, 4th Fl.
New York, NY 10019
carla.miller@umusic.com

Creditors' Rights and Banking Litigation
S. Robert Schrager
Hodgson Russ LLP
60 East 42nd Street, 37th Fl.
New York, NY 10165
rschrager@hodgsonruss.com

Michael Luskin
Hughes Hubbard & Reed, LLP
1 Battery Park Plaza, 17th Fl.
New York, NY 10004-1482
luskin@hugheshubbard.com

Diversity
Tracee E. Davis
Zeichner Ellman & Krause LLP
575 Lexington Avenue
New York, NY 10022
tdavis@zeklaw.com

Electronic Discovery
Constance M. Boland
Nixon Peabody LLP
437 Madison Avenue, 23rd Fl.
New York, NY 10022
cboland@nixonpeabody.com

Adam I. Cohen
FTI Consulting, Inc.
3 Times Square
New York, NY 10036
adam.cohen@fticonsulting.com

Employment and Labor Relations
Gerald T. Hathaway
Littler Mendelson P.C.
900 3rd Avenue, 8th Fl.
New York, NY 10022-3298
ghathaway@littler.com

Ethics and Professionalism
Anthony J. Harwood
100 Park Avenue, 18th Fl.
New York, NY 10017-5590
tony.harwood@aharwoodlaw.com

James M. Wicks
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jwicks@farrellfritz.com

Evidence
Lauren J. Wachtler
Mitchell Silberberg & Knupp LLP
12 East 49th Street, 30th Fl.
New York, NY 10017
ljw@msk.com

Michael Gerard
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
mgerard@mofo.com

Federal Judiciary
Jay G. Safer
Locke Lord Bissell & Liddell, LLP
3 World Financial Center, 20th Fl.
New York, NY 10281
jsafer@lockelord.com

John D. Winter
Patterson Belknap Webb & Tyler
1133 Avenue of the Americas, Ste. 3500
New York, NY 10036-6710
jwinter@pbwt.com

Federal Procedure
Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, Ste. 1400
New York, NY 10022-7237
garenson@kaplanfox.com

Immigration Litigation
Michael D. Patrick
Fragomen, Del Rey, Bernsen & Loewy LLP
7 Hanover Square, 10th Fl.
New York, NY 10004-2756
mpatrick@fragomen.com

Clarence Smith Jr.
Law Office of Clarence Smith Jr.
305 Broadway, Ste. 806
New York, NY 10007
smithjr.clarence@gmail.com

International Litigation
Ted G. Semaya
Eaton & Van Winkle LLP
Three Park Avenue, 16th Fl.
New York, NY 10016
tsemaya@evw.com

Internet and Intellectual Property Litigation
Joseph V. DeMarco
DeVore & DeMarco, LLP
99 Park Avenue, 16th Fl.
New York, NY 10016
jvd@devoredemarco.com

Peter J. Pizzi
Connell Foley LLP
85 Livingston Avenue
Roseland, NJ 07068
ppizzi@connellfoley.com

Oren J. Warshavsky
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
owarshavsky@bakerlaw.com

Membership
Peter Andrew Mahler
Farrell Fritz PC
370 Lexington Avenue, Room 500
New York, NY 10017-6593
pmahler@farrellfritz.com

Edwin M. Baum
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
ebaum@proskauer.com

Nominations
Melanie L. Cyganowski
Otterbourg, Steindler, Houston & Rosen
230 Park Avenue
New York, NY 10169-0075
mcyganowski@oshr.com

Pro Bono and Public Interest
Robert L. Becker
Raff & Becker, LLP
470 Park Avenue South
3rd Floor North
New York, NY 10016
beckerr@raffbecker.com

Real Estate and Construction Litigation
David Rosenberg
Marcus Rosenberg & Diamond LLP
488 Madison Avenue, 17th Fl.
New York, NY 10022-5702
dr@realtylaw.org

Robert L. Sweeney
Whiteman Osterman & Hanna LLP
99 Washington Avenue, 19th Fl.
Albany, NY 12210
rsweeney@woh.com

Edward Henderson
Kilpatrick Stockton LLP
31 West 52nd Street
New York, NY 10019
ehenderson@kilpatrickstockton.com

Securities Litigation and Arbitration
James D. Yellen
Yellen Arbitration and Mediation Services
156 East 79th Street, Ste. 1C
New York, NY 10021-0435
jamesyellen@yahoo.com

Jonathan L. Hochman
Schindler Cohen & Hochman LLP
100 Wall Street, 15th Fl.
New York, NY 10005-3701
jhochman@schlaw.com

State Court Counsel
Deborah E. Edelman
30 West 63rd Street
New York, NY 10023
dedelman@courts.state.ny.us

Janel R. Alania
Unified Court System
Chambers of The Hon. Bernard J. Fried
60 Centre St, Room 626
New York, NY 10007
jalania@courts.state.ny.us

State Judiciary
Charles E. Dorkey III
McKenna Long & Aldridge LLP
230 Park Avenue, 17th Fl.
New York, NY 10169
cdorkey@mckennalong.com

White Collar Criminal Litigation
Evan T. Barr
Steptoe & Johnson LLP
750 Seventh Avenue, Ste. 1900
New York, NY 10019-6834
ebarr@steptoe.com

Task Force on the State of our Courthouses
Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, Ste. 1400
New York, NY 10022-7237
garenson@kaplanfox.com

Melanie L. Cyganowski
Otterbourg, Steindler, Houston & Rosen
230 Park Avenue
New York, NY 10169-0075
mcyganowski@oshr.com

Sharon M. Porcellio
Ward Greenberg Heller & Reidy LLP
300 State Street
Rochester, NY 14614-1020
sporcellio@wardgreenberg.com

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Authors

Brendan F. Baynes, Esq.
Eileen E. Buholtz, Esq.
J. Peter Coll, Jr., Esq.
Gary A. Cusano, Esq.
Barbara Decrow Goldberg, Esq.
Joseph M. Hanna, Esq.
Richard A. Jacobsen, Esq.
Matthew S. Lerner, Esq.
Justice Sallie Manzanet-Daniels
Thomas J. Maroney, Esq.
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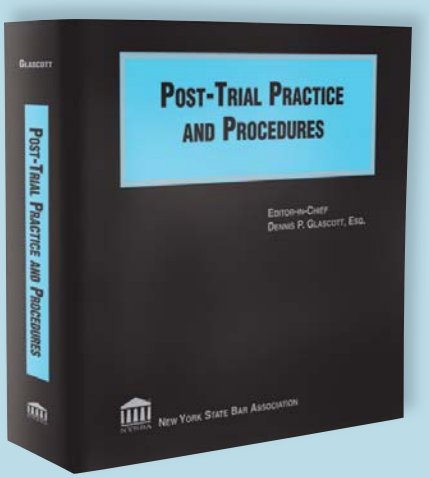

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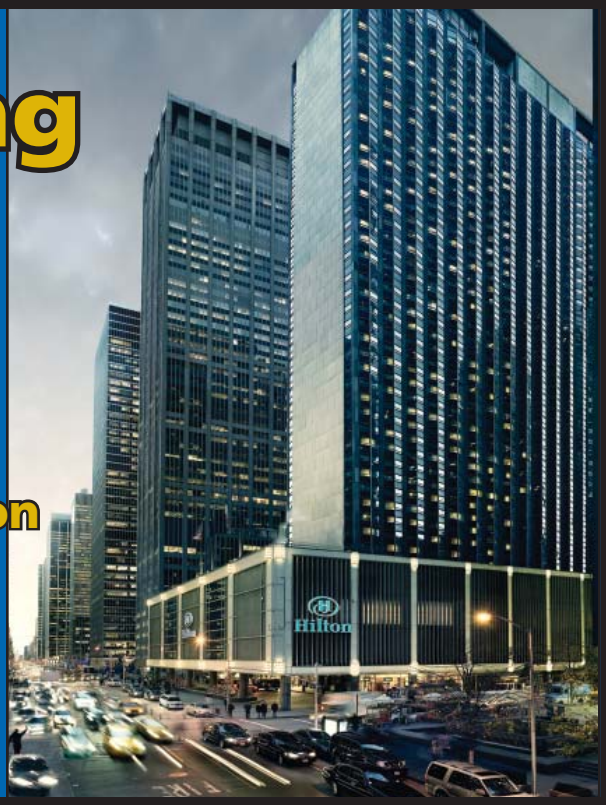

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