

# Commercial and Federal Litigation Section Newsletter

A publication of the Commercial and Federal Litigation Section of the New York State Bar Association

## Message from the Outgoing Chair

Through the hard work of our committees and Executive Committee members, the New York State Bar Association’s Commercial and Federal Litigation Section has accomplished much over the past year to strengthen its ties to our Commercial Division and Federal Courts, to identify and promote new leaders and to ensure that we are both in name and in substance an organization that serves commercial lawyers, business clients, and courts from Buffalo to Riverhead. As I end my term, I wanted to highlight some of those accomplishments and briefly discuss two areas that the Section should consider for future initiatives—(1) associate training initiatives to help transform the practice of commercial litigation to one that more readily achieves



Paul Sarkozi

(continued on page 2)

## Message from the Incoming Chair

It is an honor to assume the duties and responsibilities of Chair of this great Section. The bar has been set high to continue the legacy of the great and productive work of my predecessors. This year marks several key anniversaries that we will recognize and celebrate throughout the year: 10 years of our highly successful *Smooth Moves* program, and 20 years of the formation of the Commercial Division. Our Section will continue the initiatives from last year—Bench Bar programs throughout the State, Executive Committee meetings held in each of the four districts of the federal courts, and increasing responsibilities and involvement of our newly appointed District Leaders. However, we do have three specific initiatives planned for the upcoming year.



James M. Wicks

(continued on page 4)

## Inside

|   |    |   |    |
|---|----|---|----|
| The Spring Meeting.....   | 4  | The Section’s District Leaders.....   | 15 |
| The Use of Technology in Court.....   | 8  | Judge Elizabeth Wolford (WDNY) Speaks to Section Executive Committee Meeting in Rochester.....  | 16 |
| (Mark A. Berman)  |    | (Brian J. Jacek)  |    |
| Attorneys’ Fees Disputes.....   | 10 | Meet the Commercial Division Judges of Nassau and Suffolk Counties.....   | 17 |
| (Michael Cardello III)  |    | (Kevin Schlosser and Harvey B. Besunder)  |    |
| Ethically Outsourcing Legal Work.....   | 11 | CPLR Amendments: 2015 Legislative Session.....  | 19 |
| (Anthony Harwood)   |    | 2015 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators..... | 19 |
| What Lawyers Need to Know to Practice Law in the Social Media Age.....  | 13 | Notes of the Section’s Executive Committee Meetings.....  | 20 |
| (Yitzy Nissenbaum)  |    |   |    |
| Section Presents Ninth Annual “Smooth Moves” CLE Program for Attorneys of Color and Bestows the Honorable George Bundy Smith Pioneer Award on the Honorable Denny Chin..... | 14 |   |    |
| (Sara Chang)  |    |   |    |

## Message from the Outgoing Chair

(Continued from page 1)

the cost-effective results that our clients require and demand and (2) taking even greater steps to promote racial and gender diversity among our membership and leadership so that our Section becomes even more representative of the community we seek to serve.

### Two Proposals for the Section's Future

**Associate Training for the 21st Century.** Following Chief Judge Jonathan Lippman's Task Force on Commercial Litigation for the 21st Century, new rules for the Commercial Division have been promulgated, and through Bench-Bar programs, the Section is working hard to educate litigators about the new rules. But to realize the potential that the new rules are designed to achieve, we need to break the habits of scorched earth discovery and aggressive motion practice that were the hallmarks of sophisticated business litigation at the end of the 20th century. Our clients and their general counsel insist on efficiency and cost-effective approaches to resolving disputes. Yet the habits bred through the training programs developed from another era will not be reshaped until—with the collaboration of law firms, clients, and judges—we help articulate a new model of excellence and develop associate training programs to redefine best practices in case assessment, early resolution, discovery and evidence presentation. Our Section helped spearhead the movement to promote the cost-effective early resolution of business disputes through our 2012 Faster Cheaper Smarter Task Force. We should lead the charge in educating the next generation of top litigators to best meet our clients' interests.

**Enhanced Diversity Among Section Members and Section Leaders.** At our March Executive Committee, Court of Appeals Associate Judge Sheila Abdus-Salaam looked around the table and observed that we still have work to do to ensure that our leadership and our membership reflect the diversity of the business clients we serve. The Section has unquestionably been committed to promoting diversity. Indeed, our signature *Smooth Moves* program, which recognized Judge Denny Chin with the George Bundy Smith Pioneer Award this year, has sought to provide networking and education opportunities for lawyers of color for the past nine years. But we need to work harder to attract the top lawyers of color and top women lawyers to join our leadership ranks. Just as we need to update our training programs to reflect the new reality of business litigation practice, we need to update our leadership and membership to represent and mirror the clients and judges that we serve.

### Highlights from the Past Year

**Federal Court Initiatives.** The Section celebrated the anniversaries of the United States District Courts for the

Eastern, Southern, Northern, and Western Districts by featuring remarks by EDNY and SDNY Chief Judges Carol Bagley Amon and Loretta Preska at our Annual Meeting, reviewing the history of the NDNY with District Judge Mae D'Agostino at our Spring Meeting, and honoring outgoing WDNY Chief Judge William Skretny with the Section's Robert L. Haig Award at our Spring Gala Dinner. In addition, we launched the Section's Excellence in Federal Business Litigation Initiative, through which we earmarked \$40,000 in Section funds to collaborate with each of the federal district courts in New York on education initiatives, pilot projects, rule reforms, and other programs to enhance Bench-Bar collaboration involving our federal courts. I want to give special thanks to former Section Chair Jay Safer, who worked tirelessly all year long to help coordinate the Section's celebration initiatives.

**Commercial Division Initiatives.** The Section remains committed to the development of the Commercial Division as the premier state court forum to resolve business disputes. We honored Chief Administrative Judge A. Gail Prudenti with the Stanley H. Fuld Award at our Annual Meeting to recognize her work in shepherding new rules for the Commercial Division. Notably, our Committee on the Commercial Division, led by new Section Vice-Chair Mitch Katz and Committee Co-Chair Julie North, helped shape these new rules by providing timely comments that reflected our members' ideas and concerns. The Committee on the Commercial Division also has been organizing a Bench-Bar Forum in each of the Commercial Division Districts around the state to educate practitioners about the new rules and to foster a discussion between Justices and lawyers about how the rules can most effectively be applied.

**Active Statewide Involvement.** The Section placed a priority this year on ensuring that it was engaging commercial litigators and judges throughout the state. We held Executive Committee meetings in Albany, Hauppauge, Manhattan, and Rochester that featured both Federal and Commercial Division judges. We organized social media ethics programs in Buffalo, Manhattan, Rochester, and Syracuse. Most significantly, we undertook efforts to coordinate local bar initiatives with Section statewide initiatives by identifying the following District Leaders, who have helped plan CLEs and other business litigation programs throughout the state: Jim Potter (Albany), Sheldon Smith (Buffalo), Richard Klass (Brooklyn), Laurel Kretzing (Nassau/Suffolk), Jonathan Fellows (Syracuse), Jeff Harradine (Rochester), Joseph Drayton (Manhattan), John Mitchell and Sam Freed (Queens) and Courtney Rockett and Patrick Rohan (Westchester).

**Identifying New Committee and Section Leaders.** In addition to enhancing the Section's statewide reach, the Section has also implemented term limits for our Com-

mittee Chairs to offer new leadership opportunities and to help expand Section involvement. In the past year, we welcomed to committee leadership the following outstanding commercial litigators: Mary Kay Vyskocil (Appellate Practice), former Appellate Division Justice James McGuire (Appellate Practice), Sandra Rampersaud (Electronic Discovery), and Dawn Kirby (Federal Judiciary).

**Enhanced Communications with Members.** With the help of Editor Mark Davies, we substantially expanded the content of our Section *Newsletter* this year to include Committee Reports and updates, both to let our members know more about developments in the many substantive areas of the law that the Section's members practice and to seek to engage more members to participate in Committee meetings, CLEs, and reports.

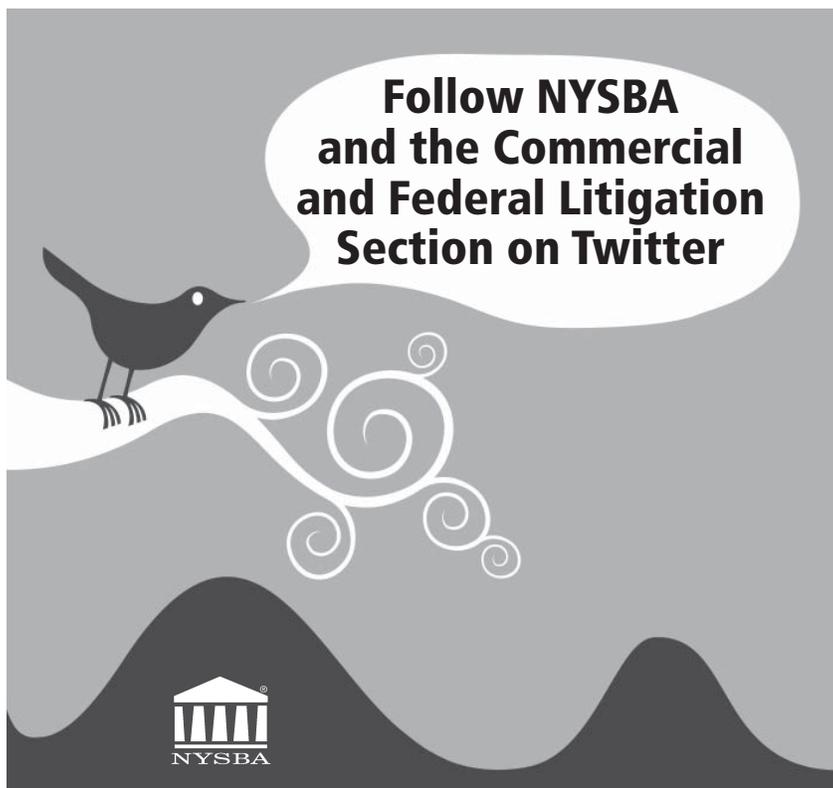
**Outstanding Programs and Reports.** Under the leadership of Jay Himes and Aidan Synnott, our Antitrust Committee issued two reports—one on deferred/non-prosecution agreements and a second on antitrust whistleblower protections. Our Federal Procedure Committee, under Jim Parver and Michael Rakower and with the hard work of Steve Roberts and the input of Employment and Labor Relations Committee co-chair Robert Holtzman, prepared a report proposing changes to and identifying current issues in Rule 68 Offers of Judgments. Our CPLR Committee, under Jim Bergin and Tom Bivona, drafted a report concerning CPLR 3122-a certification of business records. We presented our two-day Commercial Litigation Academy to a full house of lawyers, thanks to

Kevin Smith; and Mark Berman, Ignatius Grande, and Scott Malouf organized and presented Social Media Ethics programs at various locations throughout the state. Tony Harwood presented a report from our Ethics and Professionalism Committee on recent proposed changes to the NY Rules of Professional Responsibility, and Anne Sekel presented a report on rules governing a lawyer's supervision of investigations.

## Conclusion

It has been an honor to lead the Section over the past year. I have found that Section participation offers a unique opportunity to develop bonds with outside counsel, inside counsel, and judges that transcend our day-to-day adversarial and business practices. Section membership yields friendships, a strong community of well-respected colleagues and mentors, and opportunities to help improve the practice of commercial litigation. If you are receiving this *Newsletter*, you have taken the first step of joining the Section. I encourage you to deepen your involvement. Join a committee. Write a report. Come to the Spring Meeting. Section involvement will change the way you view your profession, will make you a better lawyer, and will simply make the practice of law more fun and engaging. I wish all the best to Jim Wicks as he takes the helm. He will be a great Chair. Join him in making the Section the best it can be.

Paul Sarkozi



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# Message from the Incoming Chair

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(Continued from page 1)

As Vincent Van Gogh remarked, “*great things are not done by impulse, but by a series of small things brought together.*” Toward that end, we have three small steps that we plan to do, recognizing that each of these steps or initiatives involves, at its core, communication.

## Initiatives for the Upcoming Year

First, we are planning a task force to begin looking into developing an App to assist the bar practicing in the Commercial Divisions of this State. Today, one can readily access the FRCP, FRE, CPLR, other state consolidated laws, and even PACER through a mobile device. We hope to begin development of an App that gives the commercial litigator the basic tools used in the Commercial Division: directories, rules, statutory resources, and perhaps even over time, access to decisions, all in one place or tool box, accessible through a mobile device. Scott Malouf, an already dedicated member of this Section and our Social Media Committee, will be heading up this task force.

Second, in light of the many recent rule changes in the Commercial Division (of which members of this Section have had an active role in providing guidance and comment), it is now incumbent on our Section to assist in the education process. Lawyers appearing in the Commercial Division need to understand the rules and practices. Business clients should want to come to the Commercial Division to resolve disputes. Accordingly, we will be exploring ways to create a business leaders forum, where we might, for example, develop a program or convocation among lawyers, business leaders, and the judiciary to discuss and explore business and commercial litigation issues from all of the participants’ perspectives. The goal is to better educate the lawyers and business community about how and why litigating commercial cases in New York is different, namely, efficient and better.

Third, we will continue our efforts to try to increase and diversify our membership. A diverse and robust membership is key to a successful Section. We will continue to hold meetings throughout the State to connect better in all judicial districts. We will continue with our Bench Bar programs, the first of which was a huge success on June 8 in Melville, Long Island. (Our District Leader for Nassau and Suffolk, Laurel Kretzing, did a great job.) We will continue to do similar Bench Bar programs throughout the State this year and hope to report at our next Spring meeting in May how successful they were!

We also need more junior lawyers involved, actively, in our Section. These are the future leaders of our bar. We need to take affirmative steps to engage new lawyers interested in commercial and business litigation. We need to reach out to law schools and coordinate more with the Young Lawyers Section to see how we can do more together.

We have 29 active committees—some substantive, some procedural, other forum, or court-focused. We welcome new lawyers to get actively involved in our Section through Committee work. It is a great opportunity for a junior lawyer to get engaged with fellow practitioners and the bench on cutting issues in the field. We also love fresh ideas.

## Conclusion

The Section will continue in its efforts to maintain New York as a pre-eminent forum for the resolution of business disputes. We are mindful that judges and the business community look to our Section for ideas and action in the area of business litigation. We hope that each of you will join us in working to increase the awareness and relevance of this Section. The better informed the lawyers are who litigate business and commercial disputes, the better served the clients are and the more efficient the proceedings will be for the courts. We hope you spread the word among your colleagues to help us increase and diversify our membership.

Since its inception, this Section has gained a reputation of working hard—its officers and Executive Committee members continue to look to explore issues affecting commercial and federal litigation practice and we aim to respond as thought leaders. Ask us how we can better serve you—both the bench and the bar. The Section has a historically great work ethic. We want more ideas from you for us to explore, study, report, and recommend on.

It is going to be a busy year. We are committed to working with all of you to make this Section more responsive to those in need of our services, more engaged with our next generation of lawyers and judges, and more beneficial to our members.

**James M. Wicks**

# The Spring Meeting

The 2015 Spring Meeting of the Commercial and Federal Litigation Section was held at the picturesque Sagamore Resort in Bolton Landing, New York, from May 15-17. The Meeting was well attended with over 150 people participating and featured an impressive array of both state and federal judges, speakers, and panelists. The Meeting celebrated the Northern District of New York's 200th Anniversary, as well as the Section's ongoing and steadfast commitment to public service. Incoming Section Chair James Wicks organized the Meeting and served as its Program Chair and emcee for the three-day event.



## The Celebration of the Northern District of New York's 200th Anniversary

The Meeting began on Friday night, with a cocktail reception to welcome Section members and the Meeting's other esteemed guests. Over lawyerly libations, the Meeting's attendees waited in anticipation of the night's main event, the Dinner Celebration of the Northern District of New York's 200th Anniversary, featuring keynote speaker the Hon. Mae D'Agostino, United States District Judge, Northern District of New York. Following the cocktail reception, the Meeting's attendees were ushered into the Sagamore's Bellevue ballroom for the commencement of the evening's primary festivities.

After thanking the Meeting's key sponsors NAM, AppealTech, Aquipt, and DOAR, Mr. Wicks introduced the Meeting's first speaker, Lance Miner, partner in the Hudson, New York-based-law firm Miner & Miner, and brother of President Reagan's appointee, the late Hon. Roger J. Miner, former United States District Judge of the Northern District of New York, and former judge for the United States Court of Appeals for the Second Circuit. As the Meeting's guests



enjoyed the culinary offerings of the Sagamore, Mr. Miner spoke passionately about his late brother's dedication to the federal bench and the Northern District. Mr. Miner provided tremendous insight into the life and legacy of the Hon. Roger J. Miner, noting that his late brother was incredibly proud to serve the legal community of the Northern District and the great State of New York. Mr. Miner then acknowledged

that he was honored to introduce the evening's keynote speaker, the Hon. Mae D'Agostino, who would provide the Section with a memorable presentation on the history of the Northern District.

Judge D'Agostino's address began by thanking Mr. Miner and admiring what the Miner family meant to the Northern District's legal community, particularly the judicial work of Judge Miner. Judge D'Agostino's keynote address was the perfect combination of levity and historical background as she playfully quipped that with all due respect to her colleague the Hon. Lorretta A. Preska, Chief Judge of the United States District Court, Southern District of New York, the real "Mother Court" of the federal district courts in New York is not the Southern District, but rather the Northern District. Judge D'Agostino explained that the Northern District is a successor to the original District of New York, which was split into Northern and Southern Districts in 1814, and that the United States District Court for the District of New York was the first District Court ever convened under the sovereignty of the United States, with Judge James Duane presiding in



1789. Judge D'Agostino's presentation also explored some of the landmark cases and decisions that came out of the Northern District during its two centuries in existence, which included the criminal case against women's suffrage leader Susan B. Anthony following her decision to vote in the 1872 presidential election, despite women not yet having obtained the

constitutional right to do so. Judge D'Agostino concluded the Meeting's opening night by receiving a well-deserved standing ovation from the Meeting's attendees.



**CLEs and Social Activities**

The weekend’s activities featured four outstanding CLE programs, titled (i) *The Use of Technology in Court*; (ii) *Exploring Attorney Client Privilege Among General Counsel*; (iii) *Attorney Fee Disputes*; and (iv) *The Ethics of Outsourcing Legal Services* (discussed in other articles in this *Newsletter*). Given the natural beauty that Lake George, New York, has to offer, the weekend also featured a wide range of leisure and outdoor activities, including a Saturday morning 5K fun run, hiking, golfing, swimming, and boating. Many of the Meeting’s attendees also gathered to watch the weekend’s big sporting events, including the New York Rangers Eastern Conference Final playoff game against the Tampa Bay Lightning and the 140th running of the Preakness Stakes.

**The Saturday Night Gala Dinner**

The weekend’s highlight was the Saturday Night Gala Dinner. Well attended by state and federal judges and lawyers



who practice throughout New York, the dinner featured several award presentations. Section Chair Paul Sarkozi presented the Hon. Melissa A. Crane with the Chair’s Public Service Award

for her indefatigable support and service to the Section and her involvement in co-chairing, together with the



Hon. Andrea Masley, the Section’s Committee on Commercial Jury Charges. Judge Masley also received the Chair’s Public Service Award at the Section’s Executive Committee Meeting on June 9, 2015. In addition to presenting the Chair’s Public Service Award, Mr. Sarkozi highlighted some of the accomplishments of his term (*see*

“Message from the Outgoing Chair”) and Mr. Wicks discussed his goals for the 2015-2016 term (*see* “Message from the Incoming Chair”). Mr. Wicks also thanked the Gala Dinner’s sponsors, Kelley Drye & Warren LLP and Kaplan Fox & Kilsheimer LLP.

**Presentation of the Robert L. Haig Award for Distinguished Public Service**

The Section’s prestigious Robert L. Haig Award for Distinguished Public Service was presented by Sharon M. Porcellio, partner at the law firm Bond Schoeneck & King PLLC. Ms. Porcellio explained that she was flattered and humbled to present the Section’s award to her mentor and friend, the Hon. William M. Skretny, United States



District Judge (former Chief Judge) for the United States District Court, Western District of New York, a man who has dedicated the vast majority of his professional life to public service. She noted Judge Skretny’s importance to the federal bench and the greater Western District legal community. After the touching remarks, Judge Skretny commenced his attention-grabbing address by thanking Ms. Porcellio. He noted that it was an honor to be presented with this award by someone who is so highly regarded in the New York State Bar Association, Second Circuit, and Western District. He also noted many of Ms. Porcellio’s accolades, including being the recent recipient of the prestigious American Inns of Court Professionalism Award from the Second Circuit, which recognizes “a lawyer whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and rule of law.”

## Judge Skretny's Remarks

Judge Skretny then accepted the Section's Haig Award. He confessed that it was an honor to be named the recipient of this year's Haig Award and to join the list of other past recipients who have all distinguished themselves in their commitment to public service throughout their careers. He also expressed his gratitude to the Section, the Section's Chair Mr. Sarkozi, Chair-Elect Mr. Wicks, the Section's other officers, and the nominations committee and staff. Judge Skretny explained that this award is "so much larger than one person" and that he accepts it "in recognition of the important work that our Second Circuit, New York State, and local judges do every day in maintaining respect for the rule of law." He also thanked the many outstanding judges and lawyers of the Western District and his family for their support over the years.

In his remarks, Judge Skretny noted the crucial role the judiciary plays in maintaining the rule of law in the United States. He explained "[i]t is sometimes said that the judiciary is the *weakest* of the three co-equal branches of the government, since it has neither purse nor sword." He noted, however, that this "is a misperception overshadowed by the critical importance of maintaining both the rule of law, and judicial independence." Judge Skretny pointed out that this was something President George H.W. Bush stressed to him during his nomination to the federal bench in 1990 and that they are words he has tried to never lose sight of during the last 25 years.

Judge Skretny underscored the importance the rule of law has also played in our country's history. He stated that "respect for the rule of law is the foundation upon which our free society is built. It can only be sustained if it is nobly earned. The fair and thoughtful decisions of our judges and the zealous advocacy of each [attorney] in the bar help accomplish that." Judge Skretny then went on to quote the Hon. Felix Frankfurter, former justice of the Supreme Court of the United States, who said "[w]e must have law and lawyers that are sensitive to the feelings and needs of the various ingredients that make the sum total of the American Nation. Lawyers that are hard-headed without being hard, lawyers that are wise rather than smart. In the last analysis, the law is what the lawyers are."

Judge Skretny also acknowledged that the Section's Meeting coincided, almost to the day, with the 115th anniversary of the establishment of the Western District of New York, as May 12, 2015, marked the Court's 115th anniversary. With that, Judge Skretny delved into a fascinating review of the Western District's history. He explained that John R. Hazel was appointed to be the Western



District's first judge in 1900 by President William McKinley, and was paid a whopping salary of approximately \$5,000 per year. Just months into his appointment, Judge Hazel played a pivotal role in American history. After President McKinley was assassinated in Buffalo, New York, Judge Hazel swore in Vice President Theodore Roosevelt—one of only six U.S. presidents to take the oath of office away from Washington, D.C.

Judge Skretny used the remainder of his keynote address to drum up continued support for the judiciary's budget efforts for the next fiscal budget year. Judge Skretny lamented "[a]s I speak, there are ongoing efforts to eliminate or limit senior judges, recall magistrate judges, and career law clerks. Those efforts are focused on the bottom budgetary line without due consideration of the efficiencies that are forever lost when a court loses its most experienced judicial officers and attorneys." Judge Skretny gave "one draconian example" as being recall magistrate judges, which he described as "the equivalent of our senior district judges and a lifeline for us in the Western District."

To further illustrate his point, Judge Skretny referred to one recent case litigated in the Western District, *Paul D. Ceglia v. Mark Elliot Zuckerberg and Facebook, Inc.*, "a case handled superbly by Recalled Magistrate Judge Leslie G. Foschio, of the Western District of New York, on referral from Senior District Judge Richard J. Arcara," he noted. Judge Skretny explained that "[t]he case was rife with procedural complexities, troubling conduct and significant financial claims. And, not surprisingly, the case involved unique case management and lawyering skills." He indicated that although Judge Foschio adhered to a narrow discovery approach in this case, it still resulted in voluminous discovery. Specifically, "over the 21 months that followed, Judge Foschio considered 4,500 pages of expert reports, exhibits, and affidavits; deposition transcripts from 13 experts; he issued 78 Orders, 27 Decisions and Orders, and a 151-page Report and Recommendation."

Judge Skretny emphasized that as a result of this case, some very useful case management insights were promulgated, including "(1) the adoption of a flexible case management approach to meet the needs of the particular case; (2) direct and continuous case supervision; (3) rapid and well-prepared motion practice to enforce agreed-upon discovery protocols and requirements; and (4) the speedy resolution of those motions, including appeals to the senior district judge." He also recognized that "a critical element to moving this case forward was the attorneys' command of the technical issues and their flex-

ibility and expertise." Judge Skretny ultimately remarked that "the progression of this case at the district court level speaks volumes for what can be accomplished by the court's senior judges, or recall magistrate judges. Without adequate funding to maintain and retain them, the full and fair administration of justice in future cases is certain to be delayed or perhaps denied."

Judge Skretny concluded his impactful speech by quoting Martin Luther King, III, human rights advocate and son of slain civil rights leader, Martin Luther King, Jr. He stated "[t]he arc of the moral universe is long...but it bends toward justice." Judge Skretny explained that as lawyers and judges "we are privileged to be in positions to apply pressure to that arc...to bend it toward justice as far as it will go. That is our purpose and that has been our goal since Judge Hazel opened the Western District's doors 115 years ago!"



### Conclusion of the 2015 Commercial and Federal Litigation Section Spring Meeting

Following the conclusion of two terrific CLE programs, the weekend came to a close on Sunday morning with a beautiful afternoon left to explore Lake George, New York. The Section's officers and members thank all of those who attended this year's Meeting and are already gearing up for next year's Spring Meeting which will take place on May 13-15, at the historic Otesaga Resort Hotel, in Cooperstown, New York.



\* \* \*

## Panel: The Use of Technology in Court

By Mark A. Berman



The first CLE at the Spring Meeting, entitled "The Use of Technology in Court," opened up the weekend's programming with a bang. The panel, moderated by Section Chair-Elect Mark A. Berman, consisted of New York Supreme Court Justice Timothy S. Driscoll (Commercial Division, Nassau County), United States District Judge William H.

Pauley, III (Southern District of New York), and New York Supreme Court Justice Saliann Scarpulla (Commercial Division, New York County). Tracee E. Davis, Esq. of Zeichner Ellman & Krause LLP participated as counsel, and Gene Klimov of DOAR and Bob Rivas of Aquipt were the panel's technologists.

All litigators appreciate that technology really should be incorporated, where appropriate, into one's court presentation on a motion to dismiss or for summary judgment or at trial. However, the key is knowing your audience, and then how to use technology effectively. All the panelists emphasized that counsel needs to be fluent in the technology used and to be able to respond to technological issues and problems that arise during proceedings. The panelists noted that the inability to quickly address such issues could otherwise doom the success of a well-prepared electronic presentation.

The panel then highlighted electronically three dynamic graphical presentations designed by DOAR which sought to emphasize and make clear for the intended audience, whether the judge or the jury, the importance of certain facts to a legal or factual argument. Each of the judges on the panel commented on what "worked" for them and what did not "work" in each graphic. It was fascinating to observe each judge's reaction to what counsel otherwise believed to be a successful electronic presentation, but which graphic "fell flat" for different reasons and did not achieve its intended effect.

Each of the judges had different views as to whether including graphics on a motion to dismiss as a matter of law would be helpful to the court in understanding the issues, and the issue, not unsurprisingly, then came up whether a court, in the first instance, would even entertain such a digital presentation. Concern was raised whether, for instance, a graphical presentation of a dispute concerning contractual interpretation would actually assist the court. However, the judicial panelists

were intrigued by the idea of being able to click on a link that would highlight key provisions as opposed to flipping back and forth through multiple “paper” exhibits. The key, the panelists emphasized, is to learn in advance as much as possible concerning your judge’s view on technology in his or her courtroom.



When addressing motions for summary judgment, the judges raised the issue of whether the entirety of a dynamic graphical presentation would actually become part of the formal record and thus afford the court, if it desired, the opportunity to review the dynamic graphic at a later date when drafting its decision. Also raised was the issue whether, if the graphic happened to be dynamic, each “moving” part of graphic, as it is modified, would be part of the record. The judges made clear that they also want a “paper” copy of whatever is shown to them electronically.

Indeed, to make this CLE program interactive, the audience was able to watch from their mobile devices each graph dynamically transform from one slide to the next. Aquipt, a company that works behind the scenes in installing technology in courtrooms, set up this platform for the program. Aquipt also explained how simple and inexpensive it would be to install a device that, with the court’s permission, could capture in native format a party’s electronic document that was shown to the court, which then could be transmitted electronically to the other side in order to provide that party with the opportunity to analyze and annotate it for impeachment purposes. Also discussed was the need for counsel to be able to revise electronic documents “on the fly” in response to a ruling by the court expressing concerns about it. Without counsel being versant with the technology, it was noted that a critical digital document that might have “brought home” an argument might be excluded by the court for a reason that could have been easily corrected.

The issue of hyperlinks in briefs was addressed both at the trial and appellate division levels. The judges on the panel each indicated that they would like the opportunity to be able to, with the click of a link, read the case relied upon or review the actual exhibit quoted or cited. The panelists noted, however, that hyperlinked documents were rare, at best, but they hoped to see more of

them in the future. Practitioners and judges from the audience also raised the use of hyperlinks in appellate briefs.

In addition, the audience learned that videotaped deposition testimony, at least from the perspective of certain judges, sometimes is viewed by jurors as more credible than a “live” witness. This observation appears to be counter-intuitive,

but it should be heeded by attorneys when deciding during discovery whether to videotape a deposition.

DOAR also addressed the importance of being able to monitor “live” prospective and sitting jurors’ social media communications during trial and deliberations as well as post-trial. The audience was advised that inexpensive software exists that would allow counsel from the comforts of his or her own office to be able to review public tweets from a particular geographic area by, for instance, triangulating around a courthouse location.

However, DOAR and the panelists emphasized that such monitoring needed to be done without leaving any “digital footprint” so that a juror would not be able to learn the identity of the monitoring attorney or his agent. New York ethics opinions indicate that an ethical violation would occur if a juror was able to learn the identity of counsel from such monitoring as that would constitute an improper *ex parte* communication. It was noted that LinkedIn sends an automatic communication to the holder of an account when such account is viewed that would identify the name of the person monitoring if that person was at the same time logged into LinkedIn. Judge Pauley also raised the issue of an attorney’s duty of candor as it relates to reporting juror misconduct learned as a result of monitoring jurors’ social media communications.

Finally, it was discussed whether jurors should have electronic exhibits in the jury room during deliberations, and the panelists’ views were not consistent. The concern was raised that juror access to a computer was generally problematic as were issues concerning one juror arguably controlling what exhibits other jurors could see and how such digital exhibits would be presented to them.

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## Panel: Attorneys' Fees Disputes

Michael Cardello III

On May 17, 2015, a panel discussion was held during the Spring Meeting of the Commercial and Federal Litigation Section of the New York State Bar Association highlighting attorneys' fees disputes. The panel consisted of the Moderator, Jeremy Feinberg, Esq., Special Referee, New York County Supreme Court, Commercial Division; the Honorable Frank Maas, United States Magistrate for the Southern District of New York; the Honorable Vito M. DeStefano, Justice of the State Supreme Court, County of Nassau, Commercial Division; Richard P. Byrne, Esq., Partner at L'Abbate Balkin Colavita and Contini, LLP and Mediator at NAM; and Michael Cardello III, Esq., Partner at Moritt Hock & Hamroff LLP.

Attorneys' fees disputes have been increasingly litigated in New York State and United States Federal Courts as a result of various contractual and statutory provisions. The relevance of this topic was driven by the fact that attorneys' fees disputes are rapidly becoming a larger part of Courts' dockets due to the increased number of: (1) contractual agreements that contain fee shifting provisions; and (2) statutory provisions, both Federal and State, that provide for fee shifting. Attorneys' fees disputes are no longer the "tail" of the case, as there is real money in dispute with regard to fee shifting, at times dwarfing the amount of damages or other relief sought in the case. The various viewpoints from the Federal bench, State bench, practitioners, and a mediator's point of view shed light on an increasing area of dispute that courts have had to address.

The Panel discussed the origin of attorneys' fees disputes that arise from various Federal statutes, from sanctions for inappropriate lawyering/client conduct during discovery, from contractual relationships, and, less often, from State statutes. The Panel provided insight into the do's and don'ts with respect to litigating attorneys' fees disputes. However, it was noted by the Panel that parties and their counsel must address threshold questions: "Is it even worth pursuing these fees?" "Does collecting a smaller judgment sooner and waiving the attorneys' fee claim benefit the client more than waiting for a decision on an attorneys' fees application?"

One of the key points made during the discussion was that even if there is not a significant amount of money involved in the attorneys' fees dispute, it is not appropriate to file insufficient papers or send an attorney who knows nothing about the facts of the case to the hearing. However, it may be appropriate to send a junior attorney to an Inquest for attorneys' fees to foster professional development, with a more senior attorney as witness, to shadow or to assist the junior attorney in the attorneys' fees dispute process.

One area of focus of the Panel was evidentiary failures arising during an attorneys' fee dispute—whether during an Inquest or in the papers submitted to the Court. Often, particularly in Federal Court, the issue of attorneys' fees is decided on papers only and it is important to provide sufficient arguments and evidence to the Court to allow for a proper ruling. Moreover, it is important to include educational and vocational experience of the attorneys who worked on the matter. Otherwise, courts may disallow time for an attorney whose credentials cannot be properly evaluated.

Additionally, best practice tips were discussed by the Panel, specifically, whether or not it was appropriate to rely on a summary of invoices rather than the invoices themselves. During the discussion, the Panel referenced a recent First Department decision that reversed a JHO in New York County when he mistakenly relied upon a summary of bills prepared for the hearing instead of the bills themselves. See *135 East 57th Street, LLC v. 57th Street Day Spa, LLC*, 2015 N.Y.S. Op. 01895 (1st Dep't). However, the Panel highlighted that relying on full, unredacted bills may raise privilege issues that must also be considered by counsel, particularly if the underlying matter is still pending.

Another topic of discussion during the presentation was a party's burden in proving the reasonableness of fees and whether or not an expert is necessary or could the Court make this determination on its own. The Panel articulated that, in most instances, the Court was well-qualified to make these determinations on its own and did not necessarily need an expert to tell it what is reasonable. With regard to a review for reasonableness of fees, the judicial participants noted that they weigh the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate (otherwise known as the Lodestar method) and further consider the following: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitation imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Additionally, the Court also looks for duplication of effort, partners doing associate work or associates doing paralegal work, and watches for relationship counsel doing more than a nominal amount of work, particularly if it is outside of his or her normal practice area. The judicial participants of the Panel were clear that this type of review is essential for the Court to be able to make an assessment on reasonableness of fees and that the Court was duly qualified to make such a determination.

Another topic that was discussed by the Panel was the concept of recoupment of “fees on fees,” specifically, whether a party can seek attorneys’ fees for its pursuit of its claim for attorneys’ fees in an action. The Panel members agreed that, although rarely granted, getting “fees on fees” is not impossible and any claim for “fees on fees” must be supported by either a contractual provision or a statute that authorizes such a claim.

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## Panel: Ethically Outsourcing Legal Work

By Anthony Harwood

On a beautiful Sunday morning on the shores of Lake George, the Section’s Committee on Ethics and Professionalism presented a panel discussion on the ethics of outsourcing legal and legal support services. Professor Patrick Connors of Albany Law School moderated the panel, consisting of Beverly Braun, from the Jaeckle law firm in Buffalo, Tony Harwood from the Rakower Lupkin firm in Manhattan, Dennis McCoy from the Barclay Damon firm in Buffalo, and Seth Robert of the Brown Robert firm in Fort Lauderdale, Florida.

There is a general consensus, as the ABA has explained, that “[t]here is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided that outsourcing lawyer renders legal services to the client with the ‘legal knowledge skill, thoroughness and preparation reasonably necessary for the representation,’ as required by Rule 1.1.”<sup>1</sup> With this in mind, the panel discussed how to make use of outsourcing to provide competent representation consistent with the lawyer’s obligations under the Rules of Professional Conduct. The discussion focused on seven interrelated topics: (1) disclosure; (2) client consent; (3) conflicts; (4) confidentiality; (5) supervision; (6) billing; and (7) liability. The panel emphasized that, while there are many opinions from bar associations on how the rules of ethics apply, there is little guidance from the courts, so whether the courts will follow the bar associations is an open question on many issues.

Whether it is mandatory to disclose to the client that the attorney will be outsourcing legal or legal support services and to obtain the clients’ informed consent depends on the type of work that the retaining lawyer delegates, whether there will be disclosure of confidential client information, and the extent to which the retaining lawyer supervises the retained lawyer or support staffer. The consensus among bar associations is that consent is necessary when the outsourcing will involve substantive or strategic work in which the outside service provider exercises independent judgment without close supervision.<sup>2</sup> Consent also is necessary when the outside service provider will have access to client confidences.<sup>3</sup> In most cases, because



of New York’s broad definition of client confidences (Rule 1.6(a)(3)), outsourcing will require client consent and the retaining lawyer would be wise to obtain that consent in the engagement letter. Moreover, a lawyer should obtain an enforceable agreement binding the retained lawyer or staffer to protect client confidences.

To comply with the rules concerning conflicts of interest (1.7 to 1.13), the retaining lawyer has a duty to investigate whether the retained lawyer or staffer has worked for adverse parties or for the firms representing adverse parties, and if so whether those representations constitute a conflict of interest. The retained lawyer or staffer’s conflicts ordinarily will be imputed to the retaining lawyer (Rule 1.10).

A vexing issue involving billing is whether the retaining lawyer may add a profit component to the fees of the retained lawyer or staffer. There is little authority in New York on this. A consensus seems to be developing in other states that it is permissible, without disclosure to the client or client consent, provided that the lawyer bills for the services as fees rather than an expense and accepts responsibility for the work of the retained lawyer or staffer.<sup>4</sup> If the lawyer bills for the services of the retained lawyer or staffer as an expense, then the billing must be at cost. However, there are opinions that take the other view, requiring disclosure and consent, and in some states the bar associations have said that adding a profit element implicates the rules on fee sharing.<sup>5</sup> None of the New York authorities has addressed whether this would involve fee sharing, but if it does, then New York’s rules on fee sharing require detailed disclosure and informed written consent (1.5(g)).

Rules and statutes governing the unauthorized practice of law may apply if a lawyer outsources legal work to an attorney who is not admitted to practice law in New York or to a staffer. (Rule 5.5 and New York Judiciary Laws §§and 484.) However, under comment 2 to Rule 5.5, a lawyer who adequately supervises the work and retains responsibility for it does not engage in or aid the unauthorized practice of law.

Supervision is also the key to minimizing liability arising from outsourcing. Many of the lawyers' duties to the client are non-delegable, so the retaining lawyer must closely supervise the activities of the retained lawyer or staff, and can be liable for negligent supervision of the outsourcing providers.<sup>6</sup>

## Endnotes

1. American Bar Association Formal Opinion 08-451 (August 2008) at 2, quoting Rule 1.1.
2. See, e.g., New York State Bar Association's Proposed Amendments to the New York Rules of Professional Conduct (2015), Rule 1.1

comments 6, 6[A] and 7; American Bar Association's Model Rules of Professional Conduct (2015), Rule 1.1 comments 6 and 7.

3. New York City Bar Formal Opinion 2006-3 at 4; American Bar Association Formal Opinion 08-451 at 5.
4. See American Bar Association Formal Opinion 00-420 (citing state opinions).
5. Texas State Bar Professional Ethics Committee Opinion 577 (2007); Los Angeles Ethics Opinion 518 (2006); Hawaii Ethics Opinion 47 (2004).
6. See *Whalen v. DeGraff*, 53 A.D.3d 912 (3d Dep't 2008); Restatement 3d of the Law Governing Lawyers, § 58 cmt. e (2006).

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# What Lawyers Need to Know to Practice Law in the Social Media Age

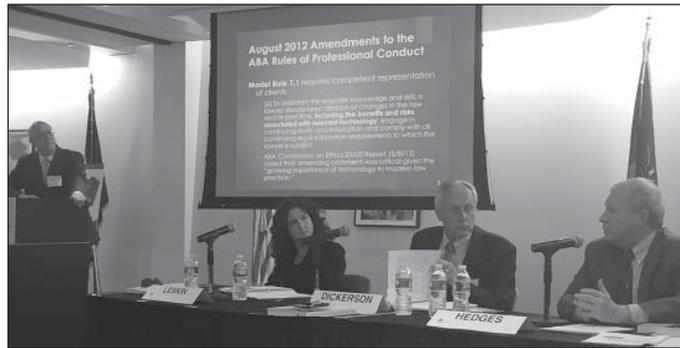
By Yitzy Nissenbaum

The Social Media Committee of the Commercial and Federal Litigation Section, along with the Committee on Continuing Education, on May 20th, held a CLE entitled “What Lawyers Need to Know to Practice Law in the Social Media Age.” The CLE, hosted by Kramer Levin Naftalis & Frankel LLP and sponsored by Kroll Ontrack, addressed cutting-edge social media issues that lawyers face every day. The first panel, “Social Media Ethics Guidelines for Attorneys,” focused on the Section’s well-received Social Media Ethics Guidelines and the second panel drilled down on “Privacy and Security Issues in New Technologies.” Both panels addressed the evolving legal concerns that arise with the burgeoning digital age.

The first presentation, moderated by Committee Co-Chair and Section Chair-Elect Mark A. Berman, included Second Department Appellate Division Justice Thomas A. Dickerson, retired United States Magistrate Judge Ronald J. Hedges, and Lori B. Leskin of Kaye Scholer LLP. The speakers discussed the ethical dilemmas raised in the Section’s 2014 Social Media Ethics Guidelines as well as such issues as “Attorney Competence” and “Using Social Media to Communicate with a Judicial Officer,” which are new guidelines contained in the Updated Guidelines released in June 2015.

In addition to discussing ethical issues raised by communicating with clients over social media and the researching of jurors, the panelists discussed such new topics as “Lawyer’s Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer’s Social Media Page,” “Attorney Endorsements,” “Retention of Social Media Communications with Clients,” and “Maintaining Client Confidences and Confidential Information.” This year’s program added a new dimension by including an Appellate Division Justice who spoke about disciplinary complaints as they related to e-discovery and social media issues. Justice Dickerson’s comments sought to educate the audience about how electronic “miscues” that violate attorney ethics could result in the issuance of disciplinary sanctions.

The second panel targeted legal questions raised by the new and evolving technologies that are changing our



**Mark A. Berman moderating panel on *Social Media Ethics Guidelines for Attorneys*, from left to right: Lori B. Leskin, Justice Thomas A. Dickerson, Ronald J. Hedges (M.J. ret.)**

world. As society has become more and more interconnected through the “Internet of Things” (IoT), serious questions have arisen concerning privacy and security issues. This cutting-edge panel was moderated by Committee Co-Chair Ignatius Grande of Hughes Hubbard & Reed LLP. Ignatius put together an outstanding panel consisting of Tracy Pulito, Vice President, Deputy Chief Privacy Officer at Starwood Hotels &

Resorts Worldwide, Inc.; Sofia Rahman, Associate General Counsel, Social Media, Privacy and Data Protection at Citigroup, Inc.; Brendan Schulman, Senior Counsel at Kramer Levin Naftalis & Frankel LLP; and Adam Thierer, Senior Research Fellow at Mercatus Center, George Mason University.

This panel addressed the problem of the ever-increasing amount of personal data that is now being collected and stored by third parties and what consent, if any, is required to collect data about a given individual. The panel well-understood that these are thorny issues that concern our citizenry, and the panel addressed such implications. Given the data breaches that are occurring each day, the panel then moved on to discuss the serious issue of protecting such data.

In addition, Mr. Schulman addressed the use of drones and their present-day applications as well as concomitant privacy and security concerns. The panel speakers spoke about the various regulatory bodies tasked with privacy and security issues. Panelists also noted that legislation is being proposed seeking to address the disparate concerns of industry and individuals as they relate to such collected personal information and such legislation needs, in order to appropriately balance such issues as life-safety, quality of life, and privacy concerning the benefits and detriments of such collected information. One key takeaway from the

panel relating to the importance of privacy policies was that “one size does not fit all” privacy concerns and that company policies and legislation need to be well-thought out before implementing them so as not to stifle technological advancement.

Following the second panel was a reception sponsored by Kroll Ontrack.



**Ignatius Grande moderating panel on *Privacy and Security Issues in New Technologies*, from left to right: Brendan M. Schulman, Adam Thierer, Sofia Rahman, Tracy Pulito**

# Section Presents Ninth Annual “Smooth Moves” CLE Program for Attorneys of Color and Bestows the Honorable George Bundy Smith Pioneer Award on the Honorable Denny Chin

By Sara Chang

On April 1, 2015, the Commercial and Federal Litigation Section presented its Ninth Annual “Smooth Moves” program—the Section’s premiere diversity event organized to attract attorneys of color to more active participation within the Section. Since its inception in 2007, Smooth Moves has included both a CLE program and a networking reception, culminating in the presentation of the Section’s Honorable George Bundy Smith Pioneer Award. The Pioneer Award is given each year to an attorney of color whose career accomplishments exemplify those of the retired Court of Appeals jurist for whom the award is named: legal excellence, community involvement, and mentoring.

The CLE program this year was entitled “The Business of Lawyering: Understanding Your Client’s Language and Managing Your Practice Ethically and Efficiently.” The program, which was moderated by a former recipient of the Pioneer Award, Kenneth Standard, featured the following outstanding panel of leading law firm, in-house, and government practitioners: Vincent Chang, Partner at Wollmuth Maher & Deutsch LLP; Jorge Dopico, Chief Counsel to the New York State Supreme Court, Appellate Division, First Department Disciplinary Committee (and former Counsel to the New York State Commission on Judicial Conduct); Taa Grays, Assistant General Counsel and Chief of Staff to the General Counsel at MetLife, Inc.; and Kaylin Whittingham, Founder of the Law Offices of Kaylin L. Whittingham (former Disciplinary Counsel at the New York State Supreme Court, Appellate Division, First Department Disciplinary Committee). The panelists discussed the ethical issues and considerations for practicing attorneys, focusing in particular on the importance of maintaining accurate financial records and escrow accounts.

The George Bundy Smith Pioneer Award was established by the Section in recognition of Judge Smith’s work in the civil rights movement and his 30 years of public service in the New York judiciary, including 14 years as an associate judge of the Court of Appeals. Former Section Chair, and Assistant United States Attorney, Carrie Cohen offered a personal and heartfelt introduction for this year’s Pioneer Award recipient, the Honorable Denny Chin, Circuit Judge of the United States Court of Appeals for the Second Circuit. Judge Smith then presented the award himself. Judge Chin gave an engaging speech on his family history and some of the high profile matters he has presided over, most notably *U.S. v. Madoff*.

Born in Hong Kong, Judge Chin immigrated to the United States at a young age through the help of his grandfather. His grandfather, wanting to make a better life for his

family, arrived in the United States and worked to make enough money to bring his son (Judge Chin’s father) and family over. Judge Chin went on to graduate from Stuyvesant High School, followed by Princeton University where he graduated magna cum laude, and then Fordham University School of Law to earn his juris doctorate.

Upon graduation, Judge Chin clerked for the Honorable Henry Werker, United States District Judge for the Southern District of New York, then worked for the law firm Davis Polk & Wardwell. Judge Chin’s private practice experiences also include Vladeck, Waldman, Elias & Engelhard, P.C., and Campbell, Patrick & Chin. While in private practice, Judge Chin provided extensive pro bono representation to the Asian American Legal Defense and Education Fund. He also served as President of the Asian American Bar Association of New York from January 1992 through January 1994 and served on various nonprofit boards, including Hartley House, Care for the Homeless, the Clinton Housing Association, and the Prospect Park Environmental Center. Judge Chin served as an Assistant United States Attorney in the Southern District of New York and as a United States District Judge for the Southern District of New York, making him the first Asian American appointed as a U.S. District Court Judge outside of the Ninth Circuit. In 2009, President Obama nominated Judge Chin to the United States Court of Appeals for the Second Circuit.

Past recipients of the Section’s Pioneer Award include Hon. George Bundy Smith himself (JAMS–New York); Cesar A. Perales (New York Secretary of State, and Co-Founder and past President and General Counsel, LatinoJustice); Elaine R. Jones (Director-Counsel Emeritus, NAACP Legal Defense and Educational Fund); the Honorable Carmen Beauchamp Ciparick (former Senior Associate Judge, New York Court of Appeals); the pioneering, father-son law practice of Kee & Lau-Kee; the Honorable Samuel Green (retired Court of Appeals Associate Justice); Kenneth Standard (General Counsel Emeritus, Epstein Becker & Green, P.C.); and Kay Crawford Murray (retired General Counsel, New York City Department of Juvenile Justice).

Finally, at the event the Section awarded the Commercial Division’s Minority Law Student Fellowship to Geoffrey Williams, a first year law student from Fordham University School of Law, who will spend the summer working in the Chambers of the Honorable Saliann Scarpulla, Justice of the New York State Supreme Court, Commercial Division. The New York Bar Foundation provides a \$5,000 stipend for the fellowship recipient.

## The Section's District Leaders

| County (District)     | District Leader                   | Firm                              |
|-----------------------|-----------------------------------|-----------------------------------|
| Albany (3rd)          | Jim Potter                        | Hinman Straub P.C.                |
| Erie (8th)            | Sheldon Smith                     | Nixon Peabody LLP                 |
| Kings (2nd)           | Richard Klass                     | Richard Klass, Esq.               |
| Nassau/Suffolk (10th) | Laurel Kretzing                   | Jaspan Schlesinger, LLP           |
| Onondaga (5th)        | Jonathan Fellows                  | Bond Schoeneck & King PLLC        |
| Monroe (7th)          | Jeff Harradine                    | Ward Greenberg Heller & Reidy LLP |
| New York (1st)        | Joseph Drayton                    | Cooley LLP                        |
| Queens (11th)         | John Mitchell                     | Mitchell & Incantalupo            |
| Queens (11th)         | Samuel Freed                      | Farrell Fritz, P.C.               |
| Westchester (9th)     | Courtney Rockett<br>Patrick Rohan | Boies, Schiller & Flexner LLP     |

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# Judge Elizabeth Wolford (WDNY) Speaks to Section Executive Committee Meeting in Rochester

By Brian J. Jacek

Then Section Chair Paul Sarkzoi traveled to Rochester to hold an open meeting of the Section's Executive Committee, with U.S. District Court Judge Elizabeth A. Wolford, our guest speaker. The meeting took place on April 14 at the offices of Nixon Peabody LLP. Judge Wolford provided an interesting perspective on what she wished she had known as a practicing attorney. Prior to joining the bench in 2013, Elizabeth Wolford practiced business and commercial litigation for twenty years in both state and federal court.

Her thoughts and suggestions are summarized below.

- **Pay attention to body language and facial expressions:** Judge Wolford observed that criminal defense lawyers and prosecutors are professionally cordial in their interactions and before the court. She remarked, however, that too frequently, civil practitioners exhibit animosity towards one another, and that animosity is visible to the judge. Such behavior can be distracting and take the focus off of the legal issues at hand.
- **Remember that you are there to persuade the judge:** Judge Wolford noted that she was surprised how frequently attorneys argue with each other and with the judge. She explained that oral argument should be termed "oral persuasion." Arguing with opposing counsel or the judge will not advance your argument, and will instead be viewed as combative. If a judge asks a question, it is because she wants to know the answer, not because she is trying to pick a fight. Counsel should respond accordingly.
- **Focus on the tenor of your argument:** The Judge stated that she looks for clear arguments, not snarky or snide comments. Theatrics do not win the day.
- **Always keep in mind the standard of review:** Attorneys too often fail to draft their arguments with an eye toward the standard of review that the judge will apply in deciding the motion. Referencing that standard and threading it throughout the argument can help persuade the judge that your position is the correct one.
- **Jurors often think that attorneys are not cognizant of their time and are most impressed by an attorney's organization:** Again, forget the platitudes and theatrics. Jurors appreciate when attorneys present facts and arguments clearly; they do not care as much about how great a performer the attorney is. They are impressed when attorneys do not use notes because it gives the impression that they know what they're talking about. Jurors like to feel as though attorneys are cognizant of their time and grateful for their service. To that extent, jurors do not want attorneys to

waste their time. They are especially frustrated with excessive sidebars as they see them as unnecessary and secretive.

- **Come to settlement prepared and with authority:** Judge Wolford feels that while alternative dispute resolution and mediation are oftentimes helpful, she acknowledged that sometimes judges are best situated to settle cases. As a result, attorneys should come to a settlement conference prepared and with authority to settle.
- **Technology can be helpful if you know how to use it:** Judge Wolford explained that technology is often helpful to the judge and to the jury, but only if the attorney knows how to use it. If not, technology can become distracting and sometimes embarrassing. When using technology it is important to first ensure that there is no objection and, next, to be sure it will work.
- **Brief writing requires focus and clarity:** Organization and clarity are the most important elements of a well-developed brief. Use of flowery or verbose language may seem like a good idea, but it takes away from the point. The words used are not so important, so long as they clearly convey the message. And attorneys should be sure to make it clear what they want from the court. Judge Wolford also noted that submitting "undisputed facts" is oftentimes not helpful because the facts are in fact disputed.
- **Beware of motions to dismiss and discovery disputes:** Judge Wolford is surprised by the number of motions to dismiss submitted to the court. She noted that motions to dismiss are often filed even when a complaint clearly states a claim. A client's money may be best used elsewhere. To that end, Judge Wolford recommended that attorneys advise their clients of the ramifications (financial and otherwise) of getting into a protracted discovery dispute.
- **The Basics:** Judge Wolford noted that she was surprised by attorneys who ignore federal procedure and local rules and deadlines. Before making a motion, check the federal, local, and judge's rules. Also, be sure to Shepardize cases. It is embarrassing for everyone if the case an attorney cites has been overturned.

Judge Wolford concluded by noting that the view from the bench has provided her with a different perspective into the practice of law. Now that she is on the receiving end of the arguments she once made, she picks up easily on what is most effective and what is least effective. Take heed.

# Meet the Commercial Division Judges of Nassau and Suffolk Counties

By Kevin Schlosser and Harvey B. Besunder

On June 8, 2015, the New York State Bar Association's Commercial and Federal Litigation Section presented "An Evening with the Commercial Division Judges of the Tenth Judicial District." The CLE event was jointly organized by the Commercial Division Committee of the Suffolk County Bar Association and the Commercial Litigation Committee of the Nassau County Bar Association.



Present at the event were all six Commercial Division Justices of Nassau and Suffolk Counties—Justices Stephen A. Bucaria, Vito M. DeStefano, Timothy S. Driscoll, Elizabeth H. Emerson, Jerry Garguilo, and Emily Pines. The discussion was moderated by Harvey Besunder, a partner at Bracken Margolin Besunder LLP and Co-Chair of the Commercial Division Committee of the Suffolk County Bar Association, and Kevin Schlosser, a partner at Meyer, Suozzi, English & Klein, P.C. and Chair of the Commercial Litigation Committee of the Nassau County Bar Association. Robert L. Haig, partner at Kelley Drye & Warren LLP and Chair of the Commercial Division Advisory Council, was a special guest speaker.

In 2014 the Executive Committee of the Suffolk County Bar Association formed a new committee specifically for the purpose of working with the Commercial Division Justices and litigators. Since Nassau and Suffolk Counties have been aligned over the years in the practice of law, it was decided that the committee should be comprised of lawyers from both counties. The impetus for this initiative was the fact that Chief Judge Jonathan Lippman had created the Commercial Division Advisory Council in 2013, charged with the task of implementing the recommendations made by the task force chaired by former Chief Judge Judith Kaye. That Council has made a series of recommendations (many of which have already been adopted) to enhance the efficiency of the Commercial Division and to make it appealing for businesses to bring their litigation in the State Courts of New York. The Suffolk Bar group was to monitor the changes, discuss the workability with the judges, and inform the practicing lawyers.

Since Justice Elizabeth Emerson was on the original task force and Harvey Besunder is a member of the Council, they were appointed as co-chairs of the committee.

In furtherance of the charge of Suffolk's group, James Wicks, partner at Farrell Fritz, P.C., a member of the Suffolk Committee and incoming Chair of the New York State Bar Association Federal and Commercial Litigation Section, arranged

for a joint meeting with the respective committees of the New York State, Nassau, and Suffolk Bar Associations. This event was an outgrowth of that meeting.

Laurel R. Kretzing, a partner at Jaspan Schlesinger LLP and also a member of the Committee, spearheaded the event, along with Schlosser on behalf of the Nassau County Bar and Besunder on behalf of the Suffolk County Bar. Through the joint efforts of the three Bar Associations, all six Long Island Commercial Divisions Justices appeared and gave the lawyers who attended the chance to talk to the judges during the hour-long "cocktail" party and to listen to the insights that each judge discussed during the program that followed.

The program was "sold out"—there were 180 Long Island lawyers who attended and hopefully became more knowledgeable as to the new rules and how each judge views them and would implement them in his or her own part. Based on the popularity of the program, it is the intention of the Bar Associations to offer similar seminars in



the future so that the Bar can be apprised of the changes and the judges' outlook and help make the Commercial Division more efficient and appealing to litigants and attorneys.

At the event, Mr. Haig provided an explanation of the process by which the Commercial Division Advisory Council develops new proposed rules for the Commercial Division. He explained that the Advisory Council has met with corporate in-house counsel to hear their concerns and that the recent rule changes were designed to better meet the needs of the business community to create an efficient and cost-effective forum for the resolution of business disputes. Mr. Haig further explained that in drafting the proposed rules, the Advisory Committee has carefully considered both the letter and spirit of the CPLR to ensure that the new rules are fully consistent with applicable law, and that the proposed rules are presented for public comment before ultimately being adopted by the Chief Administrative Judge of the State of New York. He emphasized that the rules allow for modification in many instances, through opting out by parties and through the discretion afforded to Commercial Division judges.

Messrs. Besunder and Schlosser then moderated a lively panel discussion among the Commercial Division Justices. The discussion started by addressing ways in which the Commercial Division Justices and their respective law secretaries and chambers could best become familiar with the ongoing rules and how to implement them. Suggestions were made for bench and bar confer-



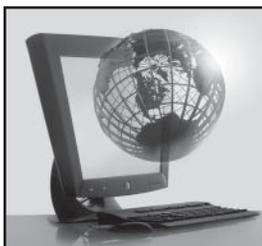
ences in which the Commercial Division Rules would be reviewed and discussed with Commercial Division Justices and their law secretaries.

Other topics of discussion included the new rules on expert witness discovery and resolving discovery disputes through letters and court conferences. Each of the judges who commented was in favor of more liberal expert witness discovery modelled on the federal rules and

believed that broader discovery of experts would enhance resolution of cases. There was also consensus that resolving discovery disputes through informal means, such as in person and telephone conferences, rather than through formal motion practice, was the preferred practice.

The panel then addressed the determination of dispositive motions, namely, motions to dismiss and motions for summary judgment. It was the general consensus that superfluous, redundant, and/or non-essential causes of action should generally be avoided or consensually disposed of without formal motion practice. Motions for summary judgment should not be made prematurely, and generally should await the completion of relevant discovery. It was recognized that a high percentage of motions for summary judgment in commercial cases are denied.

Each of the judges was supportive of continuing coordinated efforts between the bench and the bar to foster the timely and cost-efficient resolution of business disputes and to enhance the Commercial Division as a preferred forum for the business community.



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# CPLR Amendments: 2015 Legislative Session

(2015 N.Y. Laws ch. 1-99)

| CPLR §  | Chapter (Part) (Subpart, §) | Change   | Eff. Date |
|---------|-----------------------------|--|-----------|
| 1101(f) | 55(B)(16)                   | Extends expiration of CPLR 1101(f) until Sept. 1, 2017   | 4/13/15   |
| 3016(i) | 76(2)                       | Adds provision on privacy of names in certain legal challenges to college/university disciplinary findings | 10/5/15   |

## 2015 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's N.Y. Orders 1-18 of 2015)

| 22 NYCRR §              | Court    | Subject (Change)  |
|-------------------------|----------|---|
| 202.6(b)                | Sup.     | Deletes application for default judgment in consumer credit matter pursuant to 202.27-a   |
| 202.70(g)               | Sup.     | Adds preamble on dilatory practices   |
| 202.70(g), Rule 8(b)    | Sup.     | Adds need to vary presumptive number and duration of depositions set forth in Rule 11-d as matter to be considered by counsel in regard to e-discovery issues prior to preliminary conference |
| 202.70(g), Rule 11(c)   | Sup.     | Adds consideration by court of appropriateness of altering presumptive limitations on depositions set forth in Rule 11-d  |
| 202.70(g), Rule 11-d    | Sup.     | Adopts new rule governing limitations on depositions  |
| 202.70(g), Rule 11-e    | Sup.     | Adds rule on response and objections to document requests   |
| 202.70(g), Rule 14      | Sup.     | Amends rule on resolution of discovery disputes   |
| 202.71                  | Sup.     | Establishes procedure for recognition of tribal court judgments, decrees, and orders  |
| 520.2(a)                | Ct. App. | Adds cross reference to 520.17  |
| 520.3(b), (c), (d), (e) | Ct. App. | Amends definition of approved law school, instructional requirements, course of study, and credit for law study in foreign country  |
| 520.6(b)                | Ct. App. | Amends educational requirements for legal education in study of law in foreign country  |

Notes: The court rules published on the Office of Court Administration's website include up-to-date amendments to those rules: <http://www.nycourts.gov/rules/trialcourts/index.shtml>.

# Notes of the Section's Executive Committee Meetings

## February 10, 2015

Guest speaker Judge Mae D'Agostino, United States District Court Judge, Northern District of New York, offered her insights into some of the causes of the perceived delay in civil cases as well as her advice about civil practice.

The Executive Committee discussed the Annual Meeting, the upcoming 200th anniversary celebration of the NDNYS, the upcoming Social Media CLE, and Commercial Division Bench Bar Programs.

## March 11, 2015

Guest speaker Judge Sheila Abdus-Salaam, New York State Court of Appeals, discussed her experiences with appeals in commercial cases, certified questions from the Second Circuit to the Court of Appeals, and applications for leave to appeal.

The Executive Committee discussed the draft report of the Federal Procedure Committee recommending amendments to Fed. R. Civ. P. 68. The Executive Committee also discussed the Ethics and Professionalism Committee's report on COSAC's proposed amendments to the Rules of Professional Conduct and voted in favor of COSAC's proposals in regard to Rules 1.1, 1.6, and 7.2, with certain modifications. The Executive Committee discussed and voted to approve the resubmission of the Social Media Committee's Memorandum in Opposition to New York State legislation amending certain labor and education laws concerning the protection of individual social media passwords.



## April 14, 2015

Guest speaker Elizabeth Wolford, United States District Court Judge, Western District of New York, discussed practice in her court (*see* article in this *Newsletter*). The Executive Committee discussed the WDNYS and Rochester Section initiatives and the Commercial Division Bench-Bar Programs.

## May 6, 2015

Guest speaker Justice Carolyn Demarest of the Kings County Commercial Division discussed the case load in her Commercial Division, use of ADR services, phone conferences, the new rules on interrogatories and depositions, and ESI protocol.

The Executive Committee discussed and approved the Federal Procedure Committee's updated report recommending amendments to Fed. R. Civ. P. 68. The Executive Committee also discussed and approved Commercial Division Committee reports on a proposed Commercial Division rule regarding entity depositions and on the proposed amendment to the Preamble of the Rules of the Commercial Division concerning proportionality in discovery and discussed and recommended changes to a Commercial Division Committee report on the Advisory Council's proposed changes to the rule on eligibility of assignment to the Commercial Division. The Executive Committee discussed and approved, with modifications, an Ethics and Professionalism Committee report on a proposed amendment to New York Rule of Professional Conduct 8.4. The Executive Committee approved a report of the Committee on Antitrust on whistleblower protection in the antitrust context.

## Upcoming Executive Committee Meetings

|                        |            |         |
|------------------------|------------|---------|
| September 9            | January 13 | April 5 |
| October 13             | February 9 | May 4   |
| November 10 (Syracuse) | March 9    | June 7  |
| December 8             |            |         |

Note: All meetings, except in November, will be held at the offices of Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York City.

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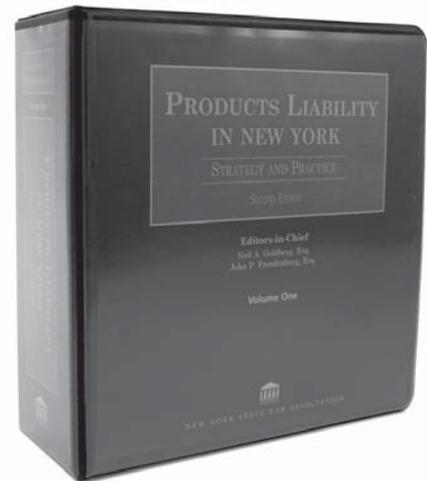
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