

APPROVED MINUTES

THE NEW YORK STATE BAR ASSOCIATION COMMERCIAL & FEDERAL LITIGATION SECTION EXECUTIVE COMMITTEE

Minutes of the Meeting of the Executive Committee of the Commercial & Federal Litigation Section held in accordance with the rules of the New York State Bar Association on Tuesday, February 9, 2016.

MEMBERS PRESENT

**James M. Wicks, Chair
Mark Berman, Chair Elect
Deborah Edelman, Treasurer
Jeremy Corapi, Secretary
Gregory Arenson
James Bergin
Thomas Bivona
Charles Dorkey, III
Hon. Helen Freedman
Richard Friedman
Ignatius Grande
Helene Hechtkopf
Anthony Harwood
Robert Holtzman
Jay Himes
Bernice Leber
Carla Miller
Benjamin Nagin
David Rosenberg
Hon. Alan D. Scheinkman**
Jamie Sinclair
Isaac Zaur**

MEMBERS PARTICIPATING BY PHONE

**Teresa Bennett
Benjamin Blum
Richard Dircks
Laurel Kretzing
Beth Gould*
Mitch Katz, Vice Chair
John Mitchell
James Potter
Stephen Roberts**

Courtney Rockett*
Patrick Rohan**

** indicates non-executive committee member guest*

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

****indicates attendance by proxy. Ms. Rockett's attendance shall not count towards the meeting's quorum requirement.*

The meeting came to order at 6:07 p.m.

Section Chair Jim Wicks' Welcome Remarks

Mr. Wicks welcomed the Executive Committee Members to the meeting. Mr. Wicks welcomed the meeting's guest speaker, the Hon. Alan D. Scheinkman to the meeting. Mr. Wicks noted that the Executive Committee was honored to have Judge Scheinkman as the guest speaker for the meeting. He asked all Executive Committee Members attending the meeting by telephone to send Section Secretary Jeremy Corapi an email so that he could record their attendance for the meeting's minutes.

Guest Speaker: Hon. Alan D. Scheinkman, J.S.C.

Presiding Judge, Commercial Division of Westchester County and Administrative Judge, Ninth Judicial District

Section Chair Mr. Wicks introduced Judge Scheinkman to the Executive Committee and went over Judge Scheinkman's illustrious background. Judge Scheinkman opened by noting that he enjoys speaking with bar association groups and thanked the Executive Committee for having him.

Judge Scheinkman discussed things that he recommends lawyers do when they are appearing before him. He also discussed things that lawyers should not do when they are appearing before him. Judge Scheinkman noted that his longtime law clerk is stepping down soon following her election to the bench of the New York Supreme Court. Judge Scheinkman noted that this will challenge his chambers' operations in the coming year. Judge Scheinkman explained that he was excited about his new law clerk and thought he would do an excellent job.

Judge Scheinkman noted that he thought there was more commercial litigation lately than in recent years. He observed that there was less litigation during the heart of the financial crisis presumably because plaintiffs did not want to put defendants into bankruptcy.

Judge Scheinkman remarked that the Westchester County Commercial Division is very different than the Manhattan County Commercial Division in terms of case volume, with the former having far fewer cases each year. Judge Scheinkman stated that this allows him to act efficiently as both a Commercial Division judge and an administrative judge. Judge Scheinkman explained that at the outset of a case he will ask the parties for copies of their pleadings, a joint description of the case's facts, and a proposed discovery schedule. This

allows Judge Scheinkman to understand what the case is truly about. He also said it fosters a sense of collaboration between the parties in that they have to work on something together early on in the case. Judge Scheinkman explained that if the parties fail to submit a joint statement of facts it bothers him.

Judge Scheinkman explained that he does all preliminary conferences on the record with the attorneys appearing before him. If the parties want something off the record he will listen to the respective party's request and make a determination. Typically, he will grant the request. Judge Scheinkman noted that he likes to meet with the parties before any dispositive motion practice commences so that he can obtain an understanding of whether motion practice is necessary or whether the case can be resolved without motion practice. Judge Scheinkman stated that his default practice is that he will proceed with directing the parties to commence discovery even if motion practice has been commenced. If he thinks the motion might make a big difference in the case or has merit, he might stay discovery or direct the parties to do limited discovery. Judge Scheinkman also noted that he rarely, if ever, grants or permits ex parte TRO applications. Judge Scheinkman also noted that parties should be more selective with motion exhibits rather than submitting voluminous motion papers with superfluous materials that detract from the main issues before the court on a given motion. He pointed out that if a party is using a deposition transcript as an exhibit, he prefers that the party only use the portion of the transcript that the party is citing to as an exhibit rather than include the whole transcript in the motion papers.

Judge Scheinkman noted that he thought the Annual Meeting was very well done this year. He thanked the Section for providing the judges from around the state with a forum to meet and socialize with one another after the Annual Meeting Luncheon concludes. Judge Scheinkman noted that each state courthouse is different and that each judge's behaviors and styles on the bench are a byproduct of the courthouse that he or she sits in.

Last, Judge Scheinkman stated that he had the opportunity to go to new Chief Judge Janet DiFiore's investiture ceremony on Monday, February 8, 2016. Judge Scheinkman commented that if members of the Executive Committee have not yet had an opportunity to hear the speech that Judge DiFiore gave during the ceremony, they should take the time to watch it on the internet. Judge Scheinkman noted that the speech was incredibly inspiring.

Judge Scheinkman concluded his remarks by thanking the Executive Committee Members for their time and for allowing him to speak at the Executive Committee Meeting. Mr. Wicks thanked Judge Scheinkman for taking the time to speak to the Executive Committee and offered the Section's future support to the Commercial Division.

Commercial Division Committee Reports: Proposed Commercial Division Rule Changes (Votes Held and All Reports Approved)

Commercial Division Committee Co-Chairs Teresa Bennett and Isaac Zaur presented the Commercial Division Committee's three (3) reports.

I. First Report

The first report presented was a comment on the proposed amendment of Commercial Division Rules (22 NYCRR 202.70(g)) regarding memorialization of rulings in disclosure conferences.

The following changes were made to the Report at the suggestion of the Executive Committee Members:

The Report heading was changed so that it would be addressed to the Office of Court Administration and presented as a Section Report as opposed to an Executive Committee Report. A corresponding change to Paragraph 1 of the Report was made so that instead of it reading "The Commercial Division Committee (*"Committee"*) is pleased to submit . . ." It reads "The Commercial and Federal Litigation Section (*"Section"*) is pleased to submit . . ."

The Executive Summary of the Report was changed from:

The Committee agrees with the Subcommittee of the Advisory Council on Procedural Rules to Promote Efficient Case Resolution that a rule requiring, at the request of a party, memorialization in the form of an Order all resolutions reached at a disclosure conference will further the resolution of discovery disputes through informal conferences and avoid protracted and costly discovery motions. The Committee also believes that telephonic conferences form an integral part of discovery management in the Commercial Division. The Committee therefore recommends that the proposed new Rule regarding memorialization of rulings in disclosure conferences be adopted with the modification that sub-section (b) be stricken.

So that it now reads:

The Section agrees with the Subcommittee of the Advisory Council on Procedural Rules to Promote Efficient Case Resolution that a rule requiring, at the request of a party, memorialization in the form of an Order all resolutions reached at a disclosure conference will further the resolution of discovery disputes through informal conferences and avoid protracted and costly discovery motions. The Section also believes that telephonic conferences form an integral part of discovery management in the Commercial Division. The Section therefore recommends that the proposed new Rule regarding memorialization of rulings in disclosure conferences be adopted with the modification that sub-section (b) be revised to state "The foregoing procedures shall not apply to telephone conferences unless otherwise ordered by the Court."

The paragraph of the Report entitled "RESPONSE AND SUGGESTS TO FURTHER THE GOALS OF THE PROPOSAL" was changed so that it now reads "RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL." Corresponding changes were made to this paragraph to reflect that the Report was coming from the Section rather than from the Commercial Division Committee.

This paragraph was further revised so that instead of it reading:

The Committee is concerned, however, by the exclusion of telephonic conferences from the ambit of the Proposal. Telephonic discovery conferences are a routine and integral part of discovery management for many cases, and the Committee feels that the same logic motivating the Proposal with respect to in-person conferences should also govern conferences held by phone.

It now reads:

The Section has given consideration to the exclusion of telephonic conferences from the ambit of the Proposal. Telephonic discovery conferences are a routine and integral part of discovery management for many cases, and the Section feels that it may often be advantageous to memorialize rulings issued in the course of such conferences for much the same reasons that motivate the Proposal. That being said, the Section also recognizes that such a procedure may at times impose an additional administrative burden upon court personnel. The Committee's proposed amended language represents an effort to balance those considerations.

It was also noted by the Executive Committee Members that going forward a copy of the proposed rule that is being commented on should accompany all Reports so that the Reports are easier to follow for Executive Committee Members and so that the Executive Committee Members can better assess the quality and content of the draft Report.

Subject to the changes identified by the Executive Committee Members, all Executive Committee Members present voted in favor of adopting the Report. Executive Committee Members Deborah Edelman and Charles "Trip" Dorkey, III abstained.

II. Second Report

The second report presented was a comment on the proposed amendment to Commercial Division Rules (22 NYCRR 202.70(g)) regarding settlement conferences before a Justice other than the Justice assigned to hear the case.

The following changes were made to the Report at the suggestion of the Executive Committee Members:

The Report heading was changed so that it would be addressed to the Office of Court Administration and presented as a Section Report as opposed to an Executive Committee Report. A corresponding change to Paragraph 1 of the Report was made so that instead of it reading "The Commercial Division Committee ("*Committee*") is pleased to submit . . ." It reads "The Commercial and Federal Litigation Section ("*Section*") is pleased to submit . . ."

Corresponding changes were made to the Executive Summary paragraph to reflect that the Report was coming from the Section rather than from the Commercial Division Committee.

The paragraph of the Report entitled “RESPONSE AND SUGGESTS TO FURTHER THE GOALS OF THE PROPOSAL” was changed so that it now reads “RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL.” Corresponding changes were made to this paragraph to reflect that the Report was coming from the Section rather than from the Commercial Division Committee. At Executive Committee Member Gregory Arenson’s suggestion, this paragraph was also modified so that instead of the paragraph including the phrase “faster, cheaper smarter”, a comma was added in between the words “cheaper” and “smarter” so that it now reads “faster, cheaper, smarter.”

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

III. Third Report

The third report presented was a comment on the proposed revised Model Preliminary Conference Form for use in the Commercial Division.

The following changes were made to the Report at the suggestion of the Executive Committee Members:

The Report heading was changed so that it would be addressed to the Office of Court Administration and presented as a Section Report as opposed to an Executive Committee Report. A corresponding change to Paragraph 1 of the Report was made so that instead of it reading “The Commercial Division Committee (*“Committee”*) is pleased to submit . . .” It reads “The Commercial and Federal Litigation Section (*“Section”*) is pleased to submit . . .”

Corresponding changes were made to the Executive Summary paragraph to reflect that the Report was coming from the Section rather than from the Commercial Division Committee. The following sentence was also removed from the Report’s Executive Summary paragraph: “However, because the proposed Revised Preliminary Conference form is not mandatory but suggestive, the Committee takes no position on whether it should be adopted.” The Executive Committee Members felt that this sentence was unnecessary because it would be appropriate for the Section to take a position on the proposed model form if it chose to do so. Ultimately, no position was taken by the Section in this Report.

The paragraph of the Report entitled “RESPONSE AND SUGGESTS TO FURTHER THE GOALS OF THE PROPOSAL” was changed so that it now reads “RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL.” Corresponding changes were made to this paragraph to reflect that the Report was coming from the Section rather than from the Commercial Division Committee. At the suggestion of Executive Committee Member Robert Holtzman, the phrase “without taking further position on whether it should be adopted” was also removed from this paragraph of the Report in keeping with the Executive Committee’s view that it would be appropriate for the Section to take a position on the proposed model form if it chose to do so.

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

CPLR Committee Report: Use of Expert Affidavits in Summary Judgment Motions (Vote Held and Report Approved)

CPLR Committee Co-Chair Helene Hechtkopf presented the CPLR Committee's Report on the recent statutory amendment to CPLR 3212(b) to allow an expert's affidavit in support of, or in opposition to, summary judgment motions, regardless of whether or not the expert was disclosed prior to the submission of the affidavit.

The following changes were made to the Report at the suggestion of the Executive Committee Members:

The Report heading was changed so that it would be presented as a Section Report as opposed to a CPLR Report. A corresponding footnote was added to denote that the Report was prepared by CPLR Committee Co-Chairs Thomas Bivona and Helene Hechtkopf.

In keeping with the Executive Committee Members' view that going forward a copy of the rule or law that is being commented on should accompany all Reports, the following language and block quote was added to the end of the first paragraph of the Report:

The amendment reads:

Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of Section 3101 was not furnished prior to the submission of the affidavit.

Additionally, the first sentence of the second paragraph of the Report was modified so that the word "decision" was changed to "discretion."

After debate between Executive Committee Members Gregory Arenson and Charles "Trip" Dorkey, III, it was also agreed that the following sentence should be removed from the penultimate paragraph of the Report since it arguably incorrectly overstated the consequences of the rule being commented on in the Report: "Additionally, there is potential for this new rule to upset a judge's ability to effectively manage cases, because it divests the trial judge of the discretion to exclude consideration of an affidavit submitted on summary judgment."

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

Approval of January 2016 Executive Committee Meeting Minutes

The Minutes for the January 2016 Executive Committee Meeting were unanimously approved by all Executive Committee Members present subject to the Hon. Helen Freedman's proposed change that her name be added to the list of "Members Present" on page 1 of the Minutes, and subject to the proposed change on page 7 of the Minutes that the spelling of the word "Liason" be changed to "Liaison."

Annual Meeting Recap

Section Vice Chair Mitch Katz provided a recap on the Annual Meeting held on January 27, 2016 at the Hilton in Midtown Manhattan. Mr. Katz reported that the Annual Meeting received very positive feedback. He thanked the Executive Committee Members for their support and suggestions during the planning of the Annual Meeting.

Spring Meeting Update

Section Chair-Elect Mark Berman provided the Executive Committee Members with an update on the Section's Spring Meeting. Mr. Berman noted that the meeting will take place on May 13-15, 2016 in Cooperstown, New York. Mr. Berman noted that there will definitely be four (4) CLE programs. He also explained that no award recipients or speakers have been named yet. Mr. Berman noted that there would be a CLE program on (1) the antitrust exemption in Major League Baseball which is being coordinated with Executive Committee Member and Section Antitrust Committee Co-Chair Jay Himes; (2) Cost effective e-discovery; (3) the CPLR; and (4) Social Media and Juries. Mr. Berman noted that the meeting's Friday night dinner will take place at the Major League Baseball Hall of Fame. He also noted that the Section is about three to four weeks away from having a flyer ready for the official promotion of the Spring Meeting.

House of Delegates Report

Section Chair Mr. Wicks reported on the House of Delegates Meeting which occurred during the NYSBA Annual Meeting Week. He noted that during the House of Delegates Meeting Executive Committee Member Mark Alcott mentioned that the American Bar Association is focusing on the issue of non-lawyers or non-law firm entities being a part of law firms. Mr. Wicks noted that the Section may also focus on this issue in the future and produce a report on this topic. Mr. Wicks also noted that the House of Delegates plans to put together a best practices committee. Executive Committee Member and Section Delegate Gregory Arenson noted that membership is also a very serious and important issue for the NYSBA. He noted that membership is down 7 to 8 percent at the state bar level. Mr. Arenson pointed out that membership in the state bar's various sections is what helps keep the NYSBA funded and functioning. He also pointed out that the end of March is when each section's membership count starts over for purposes of calculating how many members each section has.

Annual Meeting Presidential Summit Report

Section Chair-Elect Mr. Berman provided the Executive Committee Members with an update on the Presidential Summit Meeting which occurred during the NYSBA Annual Meeting Week. Mr. Berman discussed the programs that were featured during the Presidential Summit, which included one on social media issues and heavily featured the Section's work in this area. Executive Committee Member Gregory Arenson thanked Mr. Berman and Executive Committee Member Ignatius Grande for all of the outstanding work they have produced in spearheading the Section's Social Media Committee. Mr. Berman noted that Section Social Media Committee member Ronald Hedges will be taking over as Co-Chair of the Social Media Committee when Mr. Berman steps down as Social Media Committee Co-Chair in May 2016 to assume the Section Chair position.

10th Anniversary Smooth Moves Program Reminder

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

Other Business

Section Chair-Elect Mr. Berman reminded the Executive Committee Members that the Section's Federal Procedure Committee will be putting on a free non-CLE webinar on February 10, 2016, about the recent federal rule changes regarding discovery proportionality. He encouraged Executive Committee Members to register and tune in for the program.

Section Chair Mr. Wicks reminded the Executive Committee Members that the due date for newsletter submissions is February 19, 2016.

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

The meeting adjourned at 8:06 p.m.