

## **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, October 13, 2015.

#### **MEMBERS PRESENT**

**James M. Wicks, Chair  
Jeremy Corapi, Secretary  
Deborah Edelman, Treasurer  
Mark Berman, Chair Elect**

**Thomas C. Bivona  
Hon. Helen Freedman  
Jaclyn Grodin  
Hon. Jerry Garguilo\*  
Helene Hechtkopf  
Robert Holtzman  
Dan Levitt  
Jonathan Lupkin  
James McGuire  
Stephen Roberts  
Paul Sarkozi  
Anne Sekel  
Mary Kay Vyskocil  
Daniel Wiig**

#### **MEMBERS PARTICIPATING BY PHONE**

**Teresa Bennett  
Steven Bennett  
Beth Gould\*\*  
Richard Dircks  
Jonathan Fellows  
Mitch Katz, Vice Chair  
James Potter  
Courtney Rockett  
David Rosenberg  
Sheldon Smith  
Douglas T. Tabachnik**

*\*indicates guest speaker for the meeting*

*\*\* indicates non-member guest*

The Meeting came to order at 6:06 pm.

### **Section Chair Jim Wicks' Welcome Remarks**

Mr. Wicks welcomed the Executive Committee Members to 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. Mr. Wicks then introduced the meeting's guest speaker, the Hon. Jerry Garguilo.

### **Guest Speaker: Hon. Jerry Garguilo Justice, Appellate Term, Second Judicial Department Justice, Suffolk County Supreme Court, Commercial Division**

Justice Garguilo thanked the Executive Committee for asking him to come speak at the meeting. Justice Garguilo began his remarks by telling a comical anecdote involving his grandmother taking her grandchildren to the beach. Justice Garguilo explained that the point of his story is that one of the best services a judge can render to lawyers and clients is to create a pathway for resolution.

Justice Garguilo explained that he enjoys being on the Commercial Division bench. When he starts a case, he asks each side what their optimal outcome of the case would be if they obtained a decision entirely in their favor. Justice Garguilo explained that this gives him an idea of what each side's best and worst outcome in the litigation is. Justice Garguilo stated that after he makes this initial inquiry he prefers to get into the technical aspects of the case and will ask each side whether they have an exit strategy for the litigation.

Justice Garguilo further stated that in his view, there is a certain reality about practicing law and being a judge and that is that in any case, there is going to be a time where you will be candid with the judge. Justice Garguilo explained that often, if a resolution to a case is negotiated fairly, then both sides will criticize the deal after the case has been settled.

Justice Garguilo explained that he approaches his job seriously and wants to convey to those that appear before him that there is a human being sitting in chambers that is willing to work with the public. Justice Garguilo noted that his mission statement since he first became a judge has been to keep lawyers out of case captions.

Justice Garguilo then handed out a hardcopy of a decision from a prior case that was before him in which the parties engaged in "litigation warfare" involving voluminous motion practice. Justice Garguilo used this case as an example of a case in which he was able to swiftly resolve the parties' complex discovery disputes. Justice Garguilo explained that he has yet to come across a discovery dispute that he could not resolve by talking with the

parties. He also explained that he welcomes phone conferences on any case if the parties think that it will be helpful to resolving a discovery dispute. Justice Garguilo advised that he will always try to work with the parties in a case, however, he noted that anyone who appears before him needs to be able to answer basic questions about the case and that parties and attorneys should not aggravate the judge.

Justice Garguilo then fielded questions from the Executive Committee Members. During the Q&A, he inquired as to why a commercial part has not yet been established in Central Islip. Justice Garguilo suggested that the Section and its Executive Committee Members should try to lobby for the establishment of a commercial part in Central Islip.

Justice Garguilo also explained that he is a big supporter of mediation and if he has to get a special master involved in a case, his chambers does extensive research on who should be appointed to the position. He also noted that in any case, it is a problem when the lawyers are contentious with each other. He explained that in his view, this breeds contempt between the parties. Justice Garguilo noted that he enjoys being a judge. He noted that it is important for lawyers to bring their imaginations to any case they work on and that creativity is crucial in making legal arguments.

Justice Garguilo thanked the Executive Committee for having him and said that he appreciated being invited to speak at the meeting.

### **Approval of September 2015 Executive Committee Meeting Minutes**

The Minutes for the September 2015 Executive Committee Meeting were unanimously approved by all Executive Committee Members present without any changes.

### **Ethics and Professionalism Committee Report: Threatening Disciplinary Action Against Attorneys in New York (Vote Held and Conditionally Approved At Meeting – Final Vote to Be Held at November 2015 Executive Committee Meeting in Light of Post-Meeting Revisions)**

Section Chair Jim Wicks thanked Ethics and Professionalism Committee Co-Chair Anne B. Sekel for presenting the report.

Ms. Sekel presented the Ethics and Professionalism Committee's Report on Threatening Disciplinary Action Against Attorneys in New York. Ms. Sekel explained that the report analyzes the propriety of threatening disciplinary action against an attorney in a litigation. Ms. Sekel explained that the tone of the report is neutral and discusses the varying views on this topic. Ms. Sekel noted that there are cases on both sides of the issue with some saying the threat of disciplinary action against an attorney is permissible in the context of a litigation and others saying it is not. She also noted that there is no New York Rule of Professional Conduct that directly addresses this issue.

Mr. Wicks asked the Executive Committee Members whether they thought the report should take a particular stance on this issue or whether the report should only discuss the varying positions and provide best practices in light of the varying viewpoints.

Section Chair Elect Mark Berman suggested that based on the varying views on this issue, the Section is not likely in a position to advocate for a particular stance on this issue at this time. He suggested that the report take a “best practices” tone.

Mr. Wicks suggested that the report should be revised to add a sentence to temper the guidance portion of the report and make it clear that the Section was not taking a particular position on the issue, but rather discussing the various positions on this topic.

Executive Committee Member Robert Holtzman suggested that the quote at the opening of the report be removed in light of the fact that the Section decided not to take a position on this issue.

All Executive Committee members present voted in favor of adopting the report, subject to the aforementioned changes suggested by Mr. Wicks and Mr. Holtzman. Executive Committee Member Deborah Edelman abstained.

Following the meeting, material revisions were made to the report that were not discussed or suggested during the meeting. Accordingly, an additional vote on the report shall be held at the Section’s November 2015 Executive Committee Meeting in Syracuse, New York.

### **Commercial Division Bench-Bar Programs**

Section Vice Chair Mitch Katz reported on the Section’s past and upcoming Bench-Bar Programs. Mr. Katz reported that the Section’s Syracuse Bench-Bar Program was held on October 6, 2015. He noted that the program had a great turnout and was attended by approximately 60 people. Mr. Katz informed the Executive Committee Members that the Rochester Bench-Bar Program would be held on November 4, 2015, and the Albany Bench-Bar Program would be held on December 7, 2015.

### **Buffalo Program - Bench-Bar/Executive Committee Meeting/CLE/Cocktail Reception/Presentation of Award to Anne Rutland**

Section Chair Elect Mark Berman reported on the Section’s upcoming Buffalo Program. Mr. Berman reported that the Buffalo Program is tentatively scheduled for December 8, 2015, at Nixon Peabody LLP’s office in Buffalo, New York. He advised that the program is being organized with the help of Section Members Sharon Porcellio and Sheldon Smith. Mr. Berman explained that this program would be formatted differently from other Section Bench-Bar Programs. He explained that the Buffalo Program is going to feature a Bench-Bar Program component but also will serve as the Section’s Executive Committee Meeting for the month of December. The Section will also use the program to present retiring Court Attorney Anne Rutland with an award for her service to the Court. All three Buffalo Commercial Division judges are expected to attend and the Section is expecting a large turnout for the event.

## **Annual Meeting Update**

Section Vice Chair Mitch Katz reported on the planning status of the Annual Meeting. He noted that in addition to the two (2) panels that were previously discussed during the September 2015 Executive Committee Meeting, there is going to be a third panel focused on advancing the opportunities of female attorneys in litigation and the courtroom. Mr. Katz advised that the panel is going to be composed of past female Section chairs. Mr. Katz noted that in order to fit all three (3) panels into the meeting, the Section will be starting its program 15 minutes earlier than usual. Mr. Katz noted that the other two (2) panels are progressing nicely and are on schedule to produce quality CLE panels at the Annual Meeting.

## **Section Membership Update**

Section Chair Jim Wicks reported on the Section's membership numbers. Mr. Wicks noted that the Section has added a significant number of members over the past month due largely to following up with non-section member Bench-Bar Program attendees. Beth Gould reported that as of September 1, 2015, the Section had 2,421 members. As of October 13, 2015, the Section had added an additional 40 members.

## **Publications**

Section Chair Jim Wicks reported that the second Section Newsletter of the year is about to go to print. He then introduced Daniel Wiig, Editor-In-Chief of the *NY Litigator*, to discuss the status of the *NY Litigator*. Mr. Wiig explained that he is in the process of compiling content for the next issue of the *NY Litigator* and is openly accepting submissions. He encouraged the Section's committees to submit content and reported that he is hopeful the Spring issue will have robust content. He also noted that several young law firm associates have contacted him asking if they could submit articles for review. Mr. Wicks pointed out that if people inquire about submitting content for the *NY Litigator*, the Section should check to make sure they are Section members. If not, the Section should reach out to them regarding membership. Mr. Wicks also noted that Dave Horowitz and Judge Driscoll will be regular contributors to the *NY Litigator*.

## **Other Business**

Section Chair Elect Mark Berman reminded the Executive Committee Members that the Section's Spring Meeting will be held in Cooperstown, New York in Mid-May.

Former Justice and Executive Committee Member Helen Freedman mentioned that all members of the Commercial and Federal Litigation Section are invited to attend a free reception which the New York County Lawyers' Association and Thomson Reuters are hosting on Monday, October 26, 2015 from 5:30 to 7:30 p.m. The reception will honor the 182 principal authors of the new Fourth Edition of *Commercial Litigation in New York State Courts*. Many of the authors of this treatise are members of the Section.

Former Justice and Executive Committee Member Helen Freedman also mentioned that the New York County Lawyers' Association Committee on the Federal Courts is hosting a Luncheon Honoring the Federal Courts at New York Law School on November 3, 2015. During the luncheon the Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice will be presented to Judge John G. Koeltl, United States District Court Judge for the Southern District of New York. Section Members are invited and encouraged to attend.

The Meeting adjourned at 7:24 P.M.