

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 Wednesday, May 6, 2015.

MEMBERS PRESENT

**Paul D. Sarkozi, Chair
Mark Berman, Vice-Chair
Jaclyn H. Grodin, Secretary
Deborah Edelman, Treasurer
James Wicks, Chair Elect**

**Thomas Bivona
Richard Dircks
George DuPont*
Mary Flynn
Timothy Greensfelder
Anthony Harwood
Jay Himes
Richard Klass
Laurel Kretzing
Dan Levitt
Hon. Frank Maas
Michael Rakower
Sandra Rampersaud
Stephen Roberts
Anne Sekel
Maryann Stallone*
Vincent Syracuse
Richard Trotter***

MEMBERS PARTICIPATING BY PHONE

**James Bergin
Benjamin Blum
Beth Gould
Robert Holtzman
Mitchell Katz**

**indicates guest of Executive Committee Member*

**Guest Speaker: Justice Carolyn Demarest
Kings County Commercial Division**

Section Chair Paul Sarkozi introduced the guest speaker, Justice Carolyn Demarest of the Kings County Commercial Division. Justice Demarest has been on the bench in the Commercial Division since it was implemented in Kings County 13 years ago.

Justice Demarest explained that her case load has never been more extreme than it is now, as the Kings County Commercial Division lost a judge last year, and there is no current plan to fill the vacancy. She relies heavily on the ADR services available to litigants through the courts, including using Judicial Hearing Officers such as Judge Starkey, and finds mediation very helpful for family cases, which are common in her Part.

The judge uses phone conferences often, and finds them helpful; while the parties always have an obligation to meet and confer regarding issues before bringing something to the court's attention, in the event a resolution cannot be reached a party can write a letter to the court requesting a phone conference. She also believes that the new rules limiting interrogatories and depositions, as well as the rule changes to expert disclosures and depositions, are important and effective tools for trying to manage cases. Justice Demarest encourages the parties to strictly adhere to the ESI protocol agreed upon during preliminary conferences, so that no issues arise later in the case, and to be realistic about the necessary scope of ESI. Finally, she noted that she has seen many issues with the introduction of e-filing to Kings County because parties and their counsel are intimidated by the process.

Justice Demarest noted that she has seen more applications for sanctions recently, but that she finds it difficult to impose sanctions given that each side generally has a reasonable version of the applicable facts, and further finds that sanctions applications add another layer to the already overburdened courts. While she does grant sanctions' requests where appropriate, she is not generally inclined to impose dispositive sanctions awards.

Mr. Sarkozi asked what the Section could do to help Justice Demarest and the Commercial Division in Kings County. The judge explained that more than anything, the courts are low on resources and need more support in every area. Because of the impact the lack of resources continues to have on litigants and practitioners, she believes it is in the interest of the Section and the NYSBA to work with the courts to develop solutions where possible.

Approval of March and April Executive Committee Meeting Minutes

The minutes for the March and April Executive Committee meeting were unanimously approved by all Executive Committee members present, except that James Wicks and Dan Levitt's attendance needed to be included in the March minutes.

Federal Practice Committee Updated Report: FRCP 68

Federal Practice Committee Co-Chair and Committee member Stephen Roberts presented a revised version of the Report of possible amendments to FRCP 68, which revisions were the result of discussion at the March Executive Committee meeting. Specifically, after discussion between Mr. Rakower, Mr. Roberts and Robert Holtzman, Co-Chair of the Committee on Labor Relations, the Report was modified to recommend that no change be made to the distinction between collective and class actions under Rule 68. The Report continued to recommend that Rule 68 be amended to permit an entry of judgment where in plaintiff's favor where a plaintiff has rejected a defendant's Rule 68 offer for all of the relief the plaintiff could legally recover.

The Executive Committee unanimously voted to approve the revised Report, except that Deborah Edelman abstained. Mr. Rakower thanked all of the Executive Committee and Federal Practice Committee members who participated in the drafting of the Report.

Commercial Division Committee Report: Comment on Proposed Rule Changes involving Entity Depositions, Proportionality and Eligibility for Commercial Division

Commercial Division Committee member Mary Flynn presented three Reports from the Committee.

a. Report on Proposed Rule Change Regarding Entity Depositions

Ms. Flynn explained that the proposed adoption of a new Commercial Division Rule relating to depositions of entity representatives intended to mirror FRCP 30(b)(6). The proposed rule provides that a producing party must designate the witness 10 days in advance of the deposition, and set forth the subject matter for which the witness will testify. Moreover, the new rule will limit the length of the examination of the entity witness, regardless of how number of designated witnesses, unless the parties agree otherwise or the court enlarges the duration upon request. The Committee recommended that the Section endorse the proposed new rule, subject to the modifications set forth in the Report.

All Executive Committee members present voted in favor of adopting the Report, except that Deborah Edelman abstained.

b. Report on Proposed Changes to Rule on Eligibility for Assignment to Commercial Division

Ms. Flynn then presented a Report concerning the Advisory Council's proposed changes to the rule on eligibility to assignment to the Commercial Division, including arbitrated matters, *Yellowstone* matters and home improvement matters.

The Report approved of the Advisory Council's position that no new rule to differentiate *Yellowstone* injunction cases appropriate and inappropriate for the Commercial Division should be implemented. The Executive Committee agreed with the Report's position.

The Report also approved the Advisory Council's proposal that disputes concerning home improvement for single family residences (or individual residential units) should not be heard in the Commercial Division even if they meet the monetary threshold. However, the Committee believed that the proposed amendment should clarify that in the case of condominium or cooperative units, the exemption should only apply when the subject home improvement contract applied solely to an individual unit. The Executive Committee agreed with the Report's position.

Finally, the Report addressed the Advisory Council's proposed changes to the rule on eligibility of arbitrated cases to the Commercial Division. Specifically, the Advisory Council's proposal would eliminate the current exemption of arbitrated matters to meet the monetary thresholds applicable to other cases, except that it would not eliminate the exemption for arbitrations outside of the United States. The Committee agreed that the monetary threshold should apply to both arbitrated and non-arbitrated matters, but disagreed with the proposal to the extent it allowed the exemption to still apply to arbitrations which occurred outside of the United States.

The Executive Committee members then engaged in significant discussion concerning the Advisory Council's proposal, and debated the intent behind the proposal. Mr. Sarkozy noted that he believed the proposal was poorly drafted, and was meant to include all international arbitrations, including those heard in New York, as a way to incentivize parties to arbitrate international matters in New York. Ms. Flynn explained that the Committee did not feel that international arbitrations held abroad should receive different treatment from arbitrations heard in New York or other parts of the United States. After continued discussion, Ms. Flynn agreed to revise the Report to address the various issues the Executive Committee raised. Mr. Sarkozy then moved for the revised Report to be resubmitted for discussion and approval at the June Executive Committee meeting.

c. Report on Proportionality in Discovery in Preamble

The Report recommends that the proposed amendment to the Preamble of the Rules of the Commercial Division concerning proportionality in discovery be adopted. Specifically, the proposal would include the words "encourage proportionality in discovery" among the items listed following "The Commercial Division is mindful of the need to . . ."

All Executive Committee members present voted in favor of adopting the Report, except that Deborah Edelman abstained.

Ethics Committee Report: Rule 8.4 on Supervising Investigations

Ethics Committee Co-Chair and Committee member Anne Sekel presented the Ethics Committee's Report on a proposed amendment to New York Rule of Professional Conduct 8.4, which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation". The Report recommended one change to the comment to the proposed amendment – but not the proposed amendment itself – which the Committee

believed clarified the obligations of an attorney in representing a client engaged in an otherwise lawful and ethical undercover investigation.

The Executive Committee discussed various issues concerning the proposed modification to the comment, and considered edits to the Report's proposed language. The Report, as modified by the discussion of the Executive Committee, was approved in concept by all Executive Committee members present, except for Deborah Edelman, who abstained, and the revised Report would be submitted for final approval at the next Executive Committee meeting.

Antitrust Committee Report

Jay Himes, Co-Chair of the Committee on Antitrust Litigation, presented the Committee's Report on Whistleblower Protection in the antitrust context. The Report noted that there has never been a whistleblower statute in the antitrust context, and described the current debate regarding the possible introduction of such a statute, as well as the issues associated with whistleblower protection in antitrust cases.

The Executive Committee voted unanimously in favor to approve the report, and Mr. Sarkozi asked that Mr. Himes include the names of all of the Report's authors on the final version.

Other Business

Vice-Chair Mark Berman reminded attendees about the May 20 Social Media Committee Event, and the May 14 event in White Plains for the 225th Anniversary of the Southern District of New York. He also noted that an event to celebrate the 200th Anniversary of the Eastern District of New York would be held on June 4 in Islip.

Mr. Sarkozi noted that the meetings between Chair-Elect James Wicks and Section Committee Chairs to go over the upcoming term would be held on July 20, 27 and 28, and that Committee Chairs should email Mr. Wicks to confirm a date.

Mr. Sarkozi noted that the Section's Bench-Bar program for Nassau County would be held on June 8.

Finally, the Executive Committee members expressed their profound thanks to Jaclyn Grodin for her invaluable service and dedication to the Section during her two terms as Section Secretary.

At which point the meeting was adjourned.