

MINUTES

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

Minutes of the Special 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, December 6, 2016.

Members Present By Telephone:

Mark Berman, Chair
Mitch Katz, Chair Elect
Robert Holtzman, Vice Chair
Jamie Sinclair, Secretary
Gregory Arenson
Marc V. Ayala (o/b/o Courtney Rockett)*
Teresa M. Bennett
Robert Haig
Jay Himes
Jonathan Lupkin
Hon. Frank Maas
Carla Miller
Stephen Roberts
Paul Sarkozi
David Tennant
Isaac Zaur

**indicates non-executive committee member*

The meeting came to order at 6:32 pm.

Welcoming Remarks

Section Chair Mark Berman welcomed attendees to the meeting and thanked them for their participation. He asked all members participating by phone to send Section Secretary Jamie Sinclair an email confirming their attendance. He advised members that the purpose of this Special Executive Meeting was to follow up on the Section's November 16th Executive Committee Meeting wherein the Commercial Division Committee presented five reports, two of which were adopted and three of which were the subject of discussion leading to revised reports being drafted. The reports related to time limits for trial, expert witness testimony consultation prior to trial, and the sealing documents in the Commercial Division. The purpose of the special telephonic meeting also was to vote on the Diversity Committee Working Group's report regarding the NYSBA Committee on Continuing Legal Education's proposed

Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys.

Report of the Diversity Committee Working Group of the C&FLS of the NYSBA

Executive Committee member Carla Miller provided an overview of the NYSBA Diversity Committee Working Group’s Report (“Diversity Group Report”) in support of the Report of the NYSBA Committee on Continuing Legal Education’s proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys (“NYSBA CLE Memo”). She informed members on the call that the NYSBA CLE Memo originated from an ABA delegates resolution, which encouraged attorney accreditation providers and CLE organizations to include separate programs targeting bias and diversity. Two states already have a diversity requirement: California includes one credit hour in its attorney requirements, and Minnesota requires two credits.

The Diversity Group Report recommended adoption of the NYSBA CLE Memo with two clarifications: a clearer definition of what the credit hour requirement would be (either one hour or two hours), and what types of programming would qualify for the diversity requirement, so that CLE providers can be clear when planning and marketing programs. The inclusion of the diversity requirement would not add to attorneys’ overall CLE hour requirement, and many existing programs would likely already qualify for diversity credit, including the Section’s own “Smooth Moves” program and the Shira Scheindlin Award for Excellence in the Courtroom program. A motion to adopt the Diversity Group Report was made and seconded. All members participating unanimously approved the Diversity Group Report.

CDC Revised Report Re: Proposed Commercial Division Rule Defining the Protection of Commercially Sensitive Information to be Good Cause for Sealing of Court Records

Section Member Robert Haig provided a brief overview of the Commercial Division Advisory Committee’s (“AC”) position and frame of reference, specifically noting that the proposed rule only applied to the Commercial Division. However, as Mark Zauderer, who authored the AC memorandum in support of adoption of the proposed rule and was the point person to speak on this issue, was unable to attend the meeting due to a conflict, the Executive Committee voted to table any further discussion of this report: (i) pending Mr. Zauderer’s presence at the Executive Committee’s December 15th Meeting, and (2) due to spirited discussion among members regarding this report at its November 16th Executive Committee Meeting. All members voted in favor, and none abstained, as to tabling further discussion of the report.

CDC Revised Report Re: Proposed Amendment to Rule 26 of the Rules of the Commercial Division Addressing the Limitation of Total Hours of Trial

Section Member Robert Haig provided a background of the AC and its mandate. He noted that part of the AC's mission is to market New York as the commercial litigation forum of choice. The AC is comprised of general counsels from many large companies, and he indicated that there is sometimes a reluctance to litigate in New York due to the concern about the length of trials in New York State courts. He indicated that, while it is acknowledged that trial courts already possess inherent authority to limit the length of trials, being able to point to a clear court rule allowing them to do so would serve as a powerful tool for the Commercial Division.

A discussion among members on the call ensued, and a general comment was made that the group participating in this call did not have much overlap with those who expressed such strong sentiments against the proposed rule at the November 16th Executive Committee Meeting. Gregory Arenson proposed a compromise which involved adding a sentence to the end of the draft report to the general effect of: "This new rule may not be necessary to further define the court's discretion and authority, but the Section believes it is important to make clear to corporate representatives that New York Courts have the ability to limit time allocated to the parties at trial. For this reason, the Section recommends adoption of this rule."

Due to the lack of overlap in members participating on the call and those at the previous Executive Committee Meeting, as well as the importance of the issues and desire to have a full and thorough discussion on these matters, members decided to defer voting on the report until the next Executive Committee Meeting to be held on December 15th, wherein members would vote to: (1) adopt the original report (endorsing the new rule); (2) adopt the revised report (opposing the new rule); or (3) adopt a compromise report, which would include language consistent with the above. A straw poll was taken of the members participating on the call, and it became apparent that there was no consensus at that time as to which report to adopt.

CDC Revised Report Re: Proposed Commercial Division Rule Addressing Consultation on Expert Testimony in Advance of Trial

Section Member Robert Haig advised that the AC's motivations for proposing this rule were largely the same as detailed above regarding the proposed rule setting time limits at trial – *to wit*, that general counsels, corporate representatives, and others believe that juries and fact finders often find expert witness testimony, which is increasingly common in commercial litigation, confusing and overly time consuming. Mr. Haig noted that the new rule would encourage litigators, not normally inclined to find common ground, to sit down with their experts and find commonalities in order to limit the amount of time spent at trial on expert testimony and streamline the issues for the fact finders. It was acknowledged that the proposed rule is not truly necessary in terms of a court's authority to require

attorneys to consult with their experts prior to trial, but it is believed that the new rule would encourage judges to propose this in a more effective and meaningful way, which would help ease concerns held by corporate representatives on the issue.

A discussion ensued among members participating, with some questioning the efficacy of this concept, as parties now seek to use stipulations to agree on uncontested issues, which are not generally known to be particularly effective. Section member Jonathan Lupkin, who played an important role in the AC's recommendation of this proposed rule, explained that this rule's utility lies in part in the fact that rather than leaving judges and litigants to create parameters, it provides specific and concrete suggestions for how to think about effectuating it. Mr. Arenson again proposed compromise language between the revised draft report which opposed adoption of the rule and the previous draft report which recommended adoption, wherein a sentence would be added to the general effect of: "This new rule may not be necessary to further define the court's discretion and authority, but the Section believes it is important to make it clear to corporate representatives that New York Courts have the authority to direct counsel to consult with their experts prior to trial in order to find areas of common ground. For this reason, the Section recommends adoption of this rule."

Again, due to the lack of overlap in members participating on the call and those at the previous Executive Committee Meeting, as well as the importance of the issues and desire to have a full and thorough discussion on these matters, members decided to defer voting on the report until the next Executive Committee Meeting to be held on December 15th, wherein members would vote to (1) adopt the original report (endorsing the new rule); (2) adopt the revised report (opposing the new rule; or (3) adopt a compromise report, which would include language consistent with the above. A straw poll was taken of the members participating on the call, and it became apparent that there was no consensus at that time as to which report to adopt.

The meeting adjourned at approximately 7:40 p.m.