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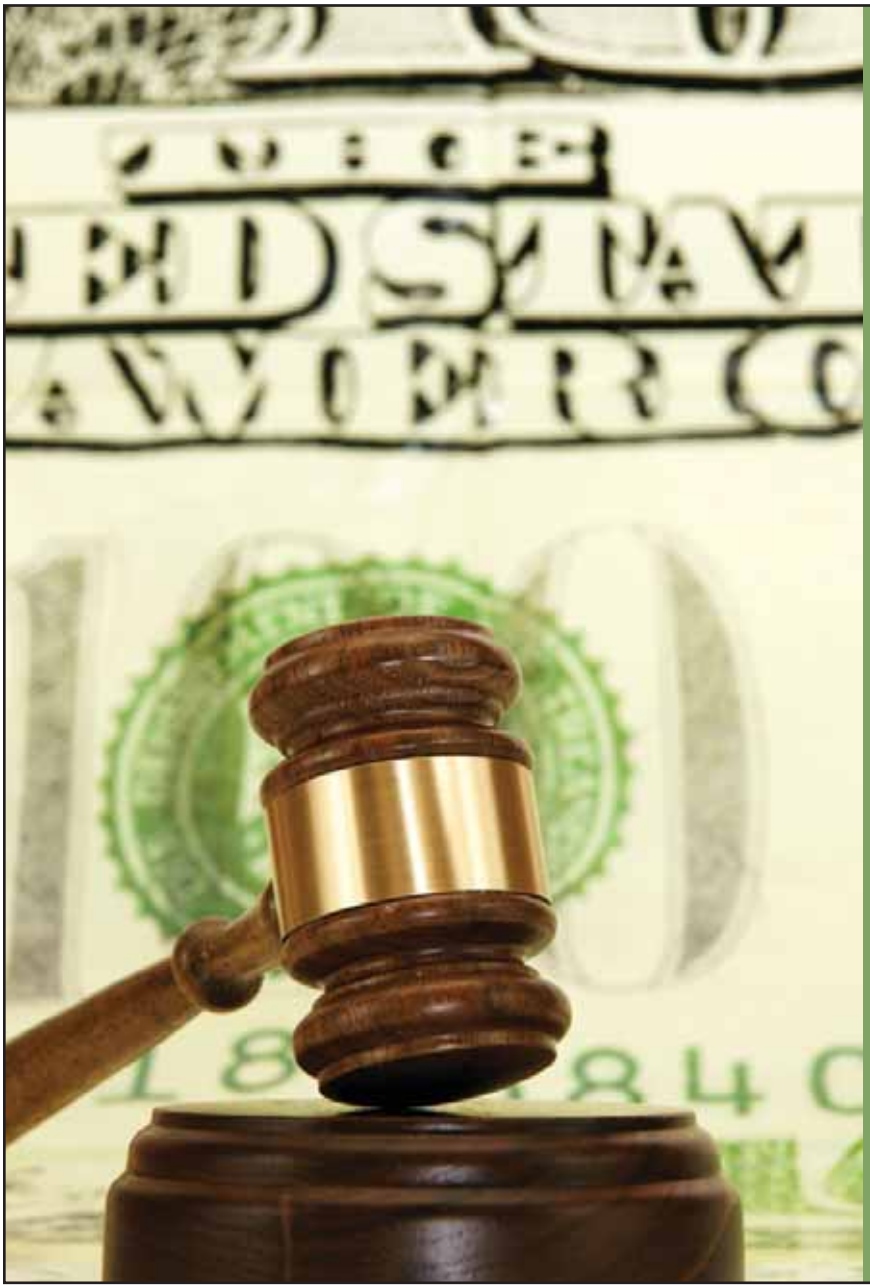
of the New York State Bar Association



Commercial and Federal Litigation Section Annual Meeting

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NYSBA

Commercial and Federal Litigation Section

OFFICERS

Chair:
Jonathan D. Lupkin
Flemming Zulack Williamson Zauderer LLP
One Liberty Plaza, 35th Floor
New York, NY 10006
jlupkin@fzwz.com

Chair-Elect:
David H. Tennant, Esq.
Nixon Peabody LLP
1100 Clinton Square
Rochester, NY 14604-1792
dtennant@nixonpeabody.com

Vice-Chair:
Tracee E. Davis, Esq.
Zeichner Ellman & Krause LLP
575 Lexington Avenue
New York, NY 10022
tdavis@zeklaw.com

Secretary:
Erica Fabrikant, Esq.
Flemming Zulack Williamson Zauderer LLP
One Liberty Plaza, 35th Floor
New York, NY 10006-1404
efabrikant@fzwz.com

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Paul D. Sarkozi
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
sarkozi@thshlaw.com

Delegates to the House of Delegates:
Vincent J. Syracuse
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
syracuse@thshlaw.com

Jonathan D. Lupkin
Flemming Zulack Williamson Zauderer LLP
One Liberty Plaza, 35th Floor
New York, NY 10006
jlupkin@fzwz.com

Joseph V. DeMarco
DeVore & DeMarco, LLP
99 Park Avenue, 16th Floor
New York, NY 10016
jvd@devoredemarco.com

Alternate Delegate to the House of Delegates:
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Marcus Rosenberg & Diamond LLP
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New York, NY 10022-5702
dr@realtylaw.org

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The *NYLitigator*

Editor
David J. Fioccola
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104
dfioccola@mofo.com

Student Editorial Board
St. John's University School of Law

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A Message from the Outgoing Chair

It has been often said that the strength of our Section is the direct result of the work of our committees. I am happy to say that this year has been no exception. Two of our committees produced reports that have been well received and are excellent examples of how our Section repeatedly takes the lead on important commercial and federal litigation issues.

The first report was prepared by the Section's Immigration Litigation Committee, chaired by Clarence Smith, Jr. and Michael D. Patrick. The report was approved in January by both the NYSBA's Executive Committee and House of Delegates. It is now the official position of the NYSBA. Special thanks are owed to Charlotte Smith, Kamaka Martin and Sophia Goring-Piard, who presented the report to the House of Delegates. The report reviews the continuing impact of immigration cases in the Second Circuit Court of Appeals and the efforts taken by the Second Circuit to reduce the backlog of cases, including the use of a Non-Argument Calendar for asylum appeals. It makes several recommendations that were adopted by the House of Delegates, including:

- Expansion of the size of the Board of Immigration Appeals from 15 to at least 23 members;
- Increasing the number of immigration judges nationwide by at least 75 judges, with commensurate increases in staff and law clerk support;
- Creation of a training and mentoring program for poorly performing immigration attorneys and the expansion of pro bono representation; and
- Increasing the sanctioning power of members of the Board of Immigration Appeals and immigration judges.

In an example of inter-bar association cooperation, our Section and the House of Delegates endorsed a report by the Committee on the Federal Courts of New York County Lawyers' Association and NYCLA's additional recommendations to promote the efficient and just resolution of immigration appeals in the Second Circuit:

- The Second Circuit's adoption of a liberal remand policy for decisions that lack sufficient clarity and reasoning to enable the Second Circuit to provide effective and meaningful review;
- Discouragement of government opposition to motions to stay;
- Amendment of the Second Circuit's *Pro Bono* Panel Plan to provide a larger pool of attorneys the opportunity to engage in *pro bono* representation;
- A requirement that the Board of Immigration Appeals make all of its decisions available to the public;
- Encouragement of The Department of Homeland Security to exercise its prosecutorial discretion and allow eligible aliens to apply for relief from removal, despite possible procedural bars; and
- Elimination of the BIA's practice of issuing affirmances without opinion and the creation of a requirement that the BIA issue fully reasoned decisions in all cases.

Another important and timely report addresses the importance of the sealing of documents in business litigations. It was prepared by Bob Schrager, Howard Fischer, Steve Madra and Megan McHugh from our Section's Commercial Division Committee. The report, which was adopted by our Section's Executive Committee in December and approved by the NYSBA's Executive Committee in January, reviews New York, Federal and Delaware Law and recommends that in business cases in New York, justices should be given greater discretion in weighing the competing policy concerns with respect to the sealing of documents. The report emphasizes the need to provide greater confidence to both counsel and litigants that information will be kept confidential and, in turn, continue to make the New York State courts, specifically the Commercial Division, the forum of choice for the resolution of commercial disputes.

Our Annual Meeting, ably chaired by Section Vice-Chair David H. Tennant, was a huge success and we are publishing transcripts of the two outstanding CLE programs that we presented. Former Chief Judge Judith S. Kaye moderated "Behind the Veil: A Frank Discussion About Our Appellate Courts," in which she "interviewed" Chief Judge Jonathan Lippman and U.S. Circuit Judge Richard Wesley about the workings of our appellate courts. Responding to the needs of lawyers in challenging economic times, we offered a second program, entitled "The Future Ain't What It Used to Be: Finding Opportunity in a Changing Economy," that was led by Prof. Gary Munneke of Pace Law School and tackled a tough question: How can lawyers not just survive, but thrive in a changing economy? The panel consisted of Harry P. Trueheart, Chairman, Nixon Peabody LLP; Teresa Wynn Roseborough, Senior Litigation Counsel, MetLife; Michael Rakower, Law Office of Michael C. Rakower, P.C.; and Jim Hassett, LegalBizDev.

Of course, the highlight of the day was our Section's annual luncheon. We were honored by the presence of

over 60 justices and judges from all levels of the New York State and Federal courts, NYSBA President Michael Getnick, NYSBA President-Elect and former Section Chair Steve Younger, several former NYSBA presidents, including Mark Alcott and Bernice Leber, and many former Section Chairs who gathered with us to express their support of the Section and its many activities.

It was a privilege for the Section to present the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation for 2010 to Chief Judge Jonathan Lippman. Former Chief Judge Kaye (who received the award in 1997) made the presentation of the award to Chief Judge Lippman. The creation of the Commercial Division was the direct result of a report that was prepared by our Section. We are a Section that produces results and helped create the Commercial Division after the bench and the bar identified the need for a business court in New York. We have been a part of the Commercial Division's expansion and growth during the past fifteen years. Chief Judge Lippman's initiatives, particularly his support for the development of the Commercial Division, his forward-thinking ideas and his unique ability to build consensus at all levels of the judiciary have made and continue to make New York a premier forum for the resolution of business disputes. We are grateful for his enduring support in elevating the standards of commercial law.

Our Annual Meeting is just one example of the many unique and innovative programs sponsored by our Section. Our Section's Fourth Annual Smooth Moves Program at Lincoln Center on April 27th was another success. The CLE program reviewed the administration's judicial appointments and priorities to date, and discussed legislative initiatives and priorities that could give rise to opportunities for private practitioners to develop expertise, and highlight public sector opportunities and the call to government service. Smooth Moves 4 also featured the presentation of the Honorable George Bundy Smith Pioneer Award 2010 to father and son, Norman Kee and Glenn Lau-Kee, two fine lawyers who exemplify the traditions and tenets embodying the George Bundy Smith Pioneer Award.

The year ended with our very successful spring meeting at the Sagamore in Lake George. Incoming Chair Jonathan D. Lupkin did a fantastic job organizing the weekend, which featured several outstanding CLE programs and many opportunities for socializing and camaraderie. Of course, the highlight of the weekend was the presentation of the Section's Robert L. Haig Award for Distinguished Public Service by Judge Edward R. Korman to Circuit Judge Reena Raggi.

It has been my privilege to have been able to serve the Section as its Chair during the past year and I want to thank all of you who helped contribute to what I believe has been one of the most successful years in our Section's long and distinguished history, especially our outstanding leadership team, Jonathan Lupkin, David Tennant, Paul Sarkozi, our Treasurer, and Deborah Kaplan, our Section Secretary for the past two years. I wish Jon Lupkin the best of luck as the Section's new Chair as well as David Tennant who will serve as Chair-Elect, our new Vice-Chair Tracee Davis, Treasurer Paul Sarkozi, and our new Secretary Erica Fabrikant. Finally, I want to express the Section's thanks to our editor David J. Fioccola for his hard work and dedication in the preparation of *NYLitigator*. I hope to see you at future Section events.

Vincent J. Syracuse

Presentation of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation to the Honorable Jonathan Lippman at the Commercial and Federal Litigation Section Annual Meeting, January 27, 2010

By the Honorable Judith S. Kaye of Skadden, Arps, Slate, Meagher & Flom, LLP
(formerly Chief Judge, NYS Court of Appeals)

MR. SYRACUSE: There are actually few of us left that can say we worked for Stanley Fuld and I worked for him in a variety of different capacities in the Court of Appeals and I know he is smiling at us today.

I just have to tell one Stanley Fuld story and I will make it quick. This is an example of what Stanley Fuld was all about. I was working with him at chambers and Stanley would call our chambers and wouldn't hesitate to ask who was working on a particular case. Which one of you is working on so and so versus so and so and I said it's me. You can get my vote if you change this paragraph and change that paragraph and do that and all of a sudden it dawned on me, I was 24 years old and I was negotiating this with Stanley H. Fuld. Remarkable guy.

My pleasure to introduce Chief Judge of the State of New York, retired Judith Kaye, who will come up here and present the 2010 Stanley H. Fuld Award.

JUDGE KAYE: Thank you all so very much. And I want to say special thanks to the section for allowing me today at this luncheon a new benefit of my post-court after-life, and that is that I was officially seated at Table Three today with my family, my bar family. My new family, the great family of Skadden Arps, is over there at Table One, and I discovered I could sit at both places and actually have two desserts. I had the first one at Table One and I headed back to Table Three when I found that Steve Younger, the president elect, had taken my place at Table Three.

I also discovered a fact of the afterlife—that spaces are filled very, very quickly. So, Steve, don't touch that dessert. Spaces are filled very quickly and very wonderfully in the case of our new Chief Judge Jonathan Lippman. And what a joy, what a delight, it is for me today to present the Stanley H. Fuld Award to Chief Judge Jonathan Lippman.

Now I have to tell you, I did a lot of independent research. I barely know the man. I have done research for days and weeks and months and years. And based on my independent research, ultimately I have concluded that Chief Judge Lippman is eminently qualified and eminently deserving of this great award given by this great section in the name of one of his great predecessors, Chief Judge Stanley Fuld.

I should disclose at the outset that I am drawing very heavily on the views—no, the accolades—of Jonathan's colleagues throughout the judiciary, most especially his Court of Appeals colleagues, several of them here today, Judges Ciparick and Smith and Jones, his fellow PJs; I know Presiding Justice Gonzalez is here, Presiding Justice Cardona and his many, many friends from the court are in the audience today.

Now I have seen and I have read and I have to tell you, I have personally delivered many tributes to Chief Judge Lippman, but to this day, I find no words that better describe him than a *Law Journal* tribute a few years ago when he was celebrated as the longest serving New York State Chief Administrative Judge in the history of the entire universe. He has a great successor in Judge Pfau, who is here today, too.

As the *Law Journal* wrote, and this is a quote, "He manages to retain his first day on the job enthusiasm, rooted in the conviction that he can make a difference and the optimism that tomorrow will be even brighter than today." Quite a feat, don't you think so?

We know, because we know Chief Judge Lippman so well, that those words perfectly encapsulate his manifold administrative abilities. And we know that through all of his phenomenal decades with the New York State court system, chief of this and chief of that, he has been a tireless contributor and problem solver with a boundless work ethic, earning the admiration of every single one person who works with him, including everyone in all three branches of government.

And what a feat, what an essential skill in yesterday's economy and surely in today's economy, to deal so skillfully with a vast array of problems and difficulties that beset one of the largest, most complicated court systems in the nation. No one is more fortunate today then to have Judge Lippman as our court system's CEO. And no one was more fortunate than I to have enjoyed a long partnership and friendship with this insightful and innovative, forward-looking, energetic, resourceful, truly endlessly optimistic Chief Administrative Judge.

But those *Law Journal* words are not limited to Judge Lippman's administrative genius. As those of you who follow the Court of Appeals—to say nothing of the Court of Claims, Supreme Court and First Department, where he previously served with great distinction—as all of you know so well, that same first day on the job optimism and enthusiasm he has consistently brought to his judicial role as well.

Though clearly his love of the law, in all its applications, has also been evident for decades in the various courts he has served, during the past year we have seen those essential traits in full flower in his jurisprudence as well. His opinions are a joy to read—whether you agree with him or you don't agree with him. They are clear. They are well reasoned and straightforward, demonstrating a sound approach to the issues and the practical implications of the Court of Appeals decisions. And this is so whether he is writing on any of the myriad subjects that make up the amazing docket of the Court of Appeals, including the Governor's appointment of a Lieutenant Governor, the secret installation of a GPS device to monitor the whereabouts of a defendant, urban blight and eminent domain or any number of difficult important subjects. I know his writings and his leadership would have had the great respect and approval of the very ultimate perfectionist, Judge Stanley H. Fuld. And yes, I agree with you completely, Vince, Stanley, a friend of mine too, is smiling. Stanley really totally seconds this award today. No question about it.

On the subject of comparisons, now that we reached the subject of comparisons with Stanley Fuld, a few other points of similarity struck me. Like Judge Fuld, at oral argument (and I watched many of them) Chief Judge Lippman is an informed, lively, fully engaged questioner. His inquiries invariably are designed to help the Court better understand the issues needing resolution. And like Judge Fuld, as a human being, he is deferential, calm, gentle, quiet, courteous, always with a kind word and manner that puts people completely at ease.

So long as I am on the human elements, I would like to linger for just a moment on what tops the list for Chief Judge Lippman—his court family, of course, but also his biological family. His devotion to his family is just wonderful, admirable, legendary and I am so pleased, Jonathan, that today your son Russell Lippman and soon to be daughter-in-law Jennifer are in the audience. Congratulations to you both. So glad to see you here today.

When Judge Fuld left the bench, he spoke of the New York State courts' urgent responsibility both to keep the law abreast of the times and to see the judicial system itself continually is strengthened and streamlined. We have no better successor to these challenges and responsibilities than Chief Judge Jonathan Lippman, who I am proud and pleased now to call up to the stage to receive the award. Jonathan.

Recipient of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation to the Honorable Jonathan Lippman at the Commercial and Federal Litigation Section Annual Meeting, January 27, 2010

Acceptance Remarks by the Honorable Jonathan Lippman

JUDGE LIPPMAN: First of all, I want to thank my friend, partner, lifetime soulmate, former Chief Judge Kaye for that beautiful introduction.

She does me great honor. Coming from her, it certainly moves me and nothing gives me more pleasure than to receive this award from this section and from my predecessor Judith Kaye and I want to thank her for not only giving me this award but for also giving me the opportunity to do what I love to do in life, which is to work with my colleagues on the Court of Appeals to oversee a court system which is so terrific.

I know about courts around the country and the New York State court system I say without hesitation in the slightest is by far the outstanding state judiciary in the country and I say that with total sincerity.

I think as my chief judge said it right, that these are tough times to oversee the court system and we have this incredible budget situation in this country and this state and in the city. The salary travails that we have gone through in New York State and despite it all, every day, as you all know, practitioners in the New York State judiciary, does its job, meets its constitutional responsibilities

without any hesitation, despite what I think is a shabby treatment we have received from the other branches of government.

Before I get into my comments about all of you and the commercial division and the commercial law in this state, I want to say to you that we need your support to continue to fight this good fight, putting aside the legal case which is pending, this situation in the state judiciary, where we cannot attract, retain, have people aspire to be on the New York State bench has got to end. It must end. It has to end quickly and we have to return to doing the business that we are responsible for under the state constitution and not to live with this just illogical crazy situation and, you know, I pledge to all of you, to my colleagues on the bench, to all of you in the bar, to my predecessor, that we will not rest for a moment until this situation is remedied in a fair and just manner and I tell you another thing, that this business with the judiciary budget that we are going through right now is also just a travesty in terms of their recognition.

We have on this panel this morning so ably led by Judge Kaye, where I tried to make the point that we are different from the other branches of government and they have to understand that. We take every case that you bring to us, that litigants bring to us. We have no choice. That is our constitutional mission.

We don't turn away cases. We can't cancel programs. The judiciary is really the judges and the nonjudicial personnel of the unified court system. They deserve our respect, honor and God willing the other two branches of government will do their job and do what they are supposed to do and we will be able to carry out our constitutional responsibilities in this great court system with all of you.

Seeing you every day is what gives us pleasure and let me talk about all of you. You know, I have been so privileged to work with all of you for so many years on the issues that face us in the field of commercial litigation, and Chief Judge Kaye, a former litigator, had an idea and we kind of threw it out to you as a—just in the most light kind of way—and asked you to report back to us on what we could do to improve the treatment of commercial litigation in this state. I think it was no secret and our friends and colleagues in the federal courts that are here today that really people did not want to come to the state courts to present their commercial cases. The Federal Court was, by our own admission, a better venue and we came to all of you and said how can we do it better and you answered the call and presented to us this idea of a new commercial division of the Supreme Court that Stanley Fuld and every chief judge before Judge Kaye would have been proud of and we all wish that we had thought of it, but you, with Judge Kaye, with all of us court administration had this great idea and the trick was to make it into reality, to make it into something that was meaningful.

I'm so proud that really things have changed in so many grievances between business folks in this state and internationally. They agreed to have their disputes resolved in the courts of the State of New York and, in particular, in the commercial division and that is why I am so proud to receive this particular award, Stanley Fuld, and by this particular section which, by any standards, really has risen to the occasion of all of us in the state courts and I can't think of a better group of attorneys, a more skilled, expert dedicated committed group of attorneys than all of you in this section.

For over 20 years now this section has partnered with the court system on some of the most important reforms and initiatives that we have taken to improve the administration of justice.

It's not just being the driving force on the establishment of the commercial division. It's following it up, whether it's making the commercial division law report, the commercial division clerkship program, staying abreast of legal and other developments, I really look forward to working together with you in the years ahead to continue this evolution in the development of the commercial law in New York and I have seen it from so many different prospectives as an administrative, chief administrative judge working with Judge Kaye and all of you to establish the division, of being particularly the presiding justice in the First Department, which I must say we discussed at the panel this morning, has the best commercial litigation in the world that we see, that I saw at a bird's eye view being the presiding justice of the Appellate Division, First Department.

I have seen the great lawyering that you all are so responsible for and now seeing it in the Court of Appeals, as we agreed this morning, we would like to see more of it. We would like to find ways to make sure again in an effort to further the development of commercial law that we have so many good and interesting and complex commercial cases come up to the Court of Appeals.

I know that my colleagues Judge Kaye introduced all feel the same way. It's a delight to see you and I did want to talk to you about—two particular areas that, talking about the future and all of us working together, that are really coming to the fore and the first is e-Filing, I hope, and know many of you share my excitement about e-Filing in New York which really—we worked so hard under the voluntary pilot program that existed since 1999 to make e-Filing a success with over 13,000 attorneys registered to e-File over 200,000 cases and 500,000 documents e-Filed in the New York courts and e-Filed authorized for commercial cases in 17 counties statewide.

But as long as e-Filing remained voluntary and as long as it remained a pilot subject to legislative sunset,

I firmly believe we would never achieve the kind of progress necessary to move the New York courts into the 21st century.

That is why I am so delighted, thanks to Judge Pfau and so many people who have worked so hard on this issue, that we have finally made a historic breakthrough with the enactment of Chapter 416 of the laws of 2009. What does it mean for New York? It means that e-Filing is now permanent in New York. No more sunset provision.

It means from now on we don't need legislative approval to expand voluntary e-Filing to additional counties and case types and finally we can now mandate e-Filing in three locations around the state. I am so pleased to tell you that mandatory e-Filing will commence in New York County Supreme Court in commercial cases involving $100,000 or more beginning on May 1, 2010. From that day on, no more paper filings will be accepted. I believe in this program and I believe it will be a showcase for the rest of the state and will demonstrate, beyond any reasonable doubt, that e-Filing is the wave of the future in the New York courts and you all will play such an important part in that effort.

I might note that the second mandatory e-Filing program will involve tort cases in Westchester County with a target start date over the summer.

The third program will take place in the counties outside of New York City. The finalists are Rockland, Monroe, Tompkins and Livingston Counties where we are in the process of interviewing the county clerks and local bars to ascertain their interest and readiness.

For anyone here who is worried about adjusting to mandatory e-Filing, please note that we are committed to making it as convenient as possible. Our statewide resource center, based in New York County, provides free e-Filing training session for the bar every week and they also do a traveling program for upstate practitioners.

Also you may have seen our e-Filing booth here in the Hilton this week providing information, answering questions and registering new users.

New York is home to the most sophisticated business community and commercial bar in the world. We must be a national leader on this issue. With your support and cooperation, it will be only a matter of time before e-Filing becomes a permanent accepted part of the legal landscape and very much the norm in the courts of the State of New York and I look forward to that day.

Another area, one other area where I think the New York courts, especially our commercial courts, and we come to you again and again and again, can and must do better and that area is electronic discovery.

Now that our society is almost totally reliant on creating, transmitting and retaining information by electronic means, we are seeing an exponential increase in the number of electronic records that could be relevant to any legal dispute.

As commercial practitioners, you are well aware of the consequences of the litigation process and your clients. Electronic discovery is much more complex and expensive than ordinary paper discovery and not just in commercial matters, but increasingly in the full range of civil and criminal cases.

Next month the court system will issue a report that addresses what the courts can do without the need for legislative action to improve the management and resolution of e-Discovery issues.

The report focuses on providing judges and court staff with the enhanced training, tools and procedures they need to take an earlier and more active role in e-Discovery.

Early court involvement is key to getting the parties to communicate and resolve most e-Discovery issues to preventing avoidable disputes that increase costs, to narrowing the scope of discovery and ultimately can ensure that the cost of e-Discovery remains proportionate to the amount in controversy.

It is critical for the state courts to stay ahead of the curve on this emerging issue so that we are managing and deciding e-Discovery matters as expertly, efficiently and cost effective as possible.

We must work together, and I know we will, on e-Discovery because what is at stake once again is the very status of the New York State Courts as a leading forum for commercial litigation.

Before I close, I must acknowledge again the spectacular work of our dedicated Commercial Division justices past and present and our nonjudicial staff, so many of whom are here today.

All the advances we have made wouldn't have been possible without their dedication and commitment and I would ask them, the judges and nonjudicial personnel of the Commercial Division, to stand and receive the great applause that they deserve. They are great and we know it.

I want to thank them from the bottom of my heart and all of you for the incredible support the Commercial Division has received from the bar and especially from this great Section.

So thank you again for this wonderful award. I will treasure it. I feel energized and optimistic about the journey and the challenges ahead. Nothing gives me greater pleasure than to continue to work with all of you to ensure that the New York courts continue to flourish as a national and international center of commercial litigation. Thank you so much.

Presentation at the Commercial and Federal Litigation Section Annual Meeting on January 27, 2010:

Behind the Veil: A Frank Discussion About Our Appellate Courts

Panel Chair: HONORABLE JUDITH S. KAYE
Skadden, Arps, Slate, Meagher & Flom, LLP, New York City
(formerly Chief Judge, NYS Court of Appeals)

Panelists:
HONORABLE JONATHAN LIPPMAN, Chief Judge, New York State Court of Appeals
HONORABLE RICHARD C. WESLEY, United States Circuit Court Judge, Geneseo

MR. SYRACUSE: Good morning, everybody. Welcome to the Commercial and Federal Litigation Section Annual Meeting. I am the Chair of the Section. It's my pleasure to welcome you.

For those of you who are members, I thank you for being with us. For those of you who are not members of the Section, I promise you can't leave the room unless you sign up.

Our Section has been at the forefront of commercial and federal litigation for 21 years. I am the 21st Chair of the Section. We have over 30 committees that cover every conceivable litigation topic that you can imagine and there is something here for everyone.

Before I turn over this morning program to David Tennant, I just want to remind everyone there is a yellow binder at the front desk. This is something that is hot off the presses. This is the work product of the Section's Commercial Division Committee. It's a review of the individual practices of each commercial judge from Erie County to Suffolk County across the state. It's something totally new. It's similar to what we did a few years ago with respect to the federal individual practices and now we have done it for the state system. It will be posted on the web with plenty of copies available.

Without anything further from me, I turn it over to David Tennant, the Vice-Chair of our Section and the program Chair of today's program.

David.

MR. TENNANT: Thank you, Vince. Let me extend my welcome to everyone here. Thank you for coming. You might have guessed from the way the room is set up, we are trying something a little bit different. If you can envision yourself as a studio audience, hopefully a live one, where you are sitting watching the taping of a couple of really interesting shows, and what we are hoping to accomplish by that is to make this a little bit more interesting than the normal setup.

The first program that you will be watching is the Judge Kaye show. Judge Kaye will be interviewing Judge Lippman and Judge Wesley about all things appellate. It is an opportunity to lift the veil and hear from judges about how the courts operate and what matters are of pressing concern to the judiciary today.

The second program we have for you is something very different. We have a distinguished group led by moderator Professor Gary Munneke, who will be talking about very serious matters in terms of where the legal industry is today, where it might be going and how lawyers can take the changing economy as an opportunity to really expand their business and to basically find some silver lining in the clouds that exist.

We will have a mid-morning break. The break is scheduled to be at 10:30. It will be a ten-minute break. It is listed as fifteen in your program, but if you could be back in your seats by 10:40, please, Bob Haig will be making an announcement regarding the Bar Foundation.

The program will end at noon and I certainly hope that you will, at the end of the program, feel like it's worth your time to come here and that will reflect your views, good, bad or indifferent, in your evaluation forms.

The materials that are available here, you have a course book that includes materials that are relevant to both the appellate practice program and the law practice management program and at this point we should thank Veritext Litigation and Deposition Services for extending their services here today. This is being videotaped and transcribed and we are hoping that the evidence from today's shows will actually perhaps open up some new doors for Judge Kaye that she might enjoy a career that matches James Lipton. And without anything further, I would turn the show over to Judge Kaye.

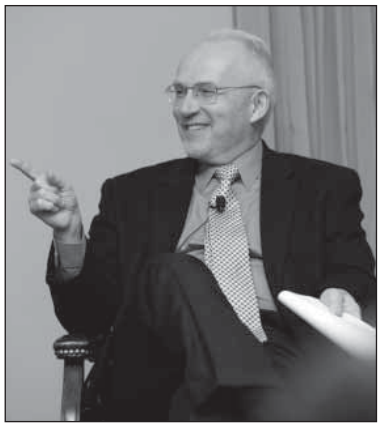
JUDGE KAYE: Thank you so much, David. Thank you all early risers and I want to start by saying I love the career I have. I see one of my colleagues, Mr. Garfinkel, is in the front row. And I sure did love the career I did have. But as many of you know, for me today is a dream come true because I fantasized all my growing up years and surely after college graduation that I would be one of the great makers and shapers of world opinion through a career in the media. That is what I aspired to. Unfortunately, the media never saw it that way, but I did fantasize interviewing great, great pigeons—I mean subjects—such as I have today. This just couldn't be a more wonderful opportunity for me and peripherally I hope all of you enjoy it too.

There is a second reason that we have this format and that is I have become a great fan of James Lipton. You heard David refer to him. So I think of this as not inside the Actors Studio, but inside the judge's chambers and I have gotten the ten questions. I don't know how many of you are familiar with that wonderful interview program, but I have gotten the ten questions that James Lipton asks of his pigeons.

For example, number seven: What is your favorite curse word? I will be putting questions of that caliber to our wonderful guests today and you know I have dressed to the occasion from head to toe purple prose, that is the title. So I'm thrilled that the Section not only conceived of this format and invited these two great people, but also found in the court system probably two of the shiest and most retiring judges in the state and federal systems. I know we are going to have a great time.

You know a message went out and we did receive a number of questions, but just so you know, I think we will reserve a few minutes at the end for questions or if you are just bursting at the seams and you want to ask something in the middle, do it. But I think we will reserve a few minutes at the end for questions, otherwise we'll just go at it.

I'll begin by asking, Judge Wesley you can start, but define yourself. Not just your title, we know your title. And you know what, you haven't stayed anywhere in your career long enough to really lift the veil anywhere. Why don't you give us—define yourself is what I really want.



JUDGE WESLEY: Well, I'm a lawyer who realized early on in his legal career when he was serving publicly that there was a great value to staying close to the law and still finding an opportunity for public service, so after I left the state legislature, a judicial opportunity opened up and I was mentioning this to Bob Katzman last night—I had dinner with Bob, one of my dear colleagues at the court. I said you never know for certain that you are going to like what you do until you start to do it.

We all have a sense of ourselves and where we are going.

Then we take ourselves into that job or that position with a firm and it really either fits or doesn't.

I knew from day one when I became a judge that was the thing that seemed like a best fit for me ever. I'm from a small town. I continue to find my small town roots supported and a base for my beliefs, who enjoys learning about the law and who can't hold a job for more than seven years.

My wife says I'm an abject failure, I've never been in one place more than seven years. I hate to say this, but come June 13th it will be my seventh year on the federal bench. So theoretically if you're looking for an "Of Counsel"…but I am kind of expensive.

I'd say—a fellow who stayed close to home, but who has come to see his life intertwined with the law in a way that gives me great satisfaction.

JUDGE KAYE: And maybe just to fill out the context, how does this gig that you are now in differ from where you were before?

JUDGE WESLEY: Well, federal judges are decidedly different in ways that one doesn't really appreciate until one moves over.

Federal judges always ask themselves: "Do I have jurisdiction to do this?" because they get no more power than what Congress gives them, with a few very minor limitations under the All Writs Act and other matters like that. So judges always ask themselves that.

I don't ever recall myself, as a State Court judge, except in very limited instances, thinking about whether I had jurisdiction. I was a Supreme Court judge. So federal judges see themselves a little different in their relationship to a legislative body that they deal with. There is a thing about Article 3 and life tenure that changes your attitude.

JUDGE KAYE: Tell me.

JUDGE WESLEY: It's like oil on troubled waters. And the law is decidedly different. I mentioned this to you earlier. I started out in the state legislature, was a small town practitioner, then was a trial judge for a number of years, Appellate Division and then the New York Court of Appeals. The New York law was like an old pair of blue jeans, it was something that was very comfortable. I understood and I participated in it for a long period of time. I had a compass with it.

So when I moved to the federal side I had not been a federal practitioner, so I had to learn the federal rules of civil procedure by analogy back to the CPLR and it was very, very painful, very painful, the first couple of years for both me and my law clerks, so it's different. And the other thing that you notice is that the subject matter is considerably different in some areas.

JUDGE KAYE: A tiny follow-up to round out this definitional section. At the Court of Appeals conference table you often reported your conclusions in terms of how this is going to sell at the Livonia post office. Is that still the test at the Second Circuit for you?

JUDGE WESLEY: Judge Cabranes found the Livonia post office test somewhat quizzical. The Livonia post office test is as follows: I was born and raised in a suburb of Livonia, in a place called Hemlock. That's what Judith referred to it as when I was sworn in to the Court of Appeals in 1997. I go and get the mail every morning and the people I meet at the Livonia post office, many of whom I went to high school with and have known me for a long time, I'm never referred to as judge, always referred to by my first name.

We had this case in the Court of Appeals and when I first used it, I was protesting where we might go with the case and I said to Judith and my colleagues, I said, you know, I'm going to walk into the Livonia post office on Monday and one of my friends is going to walk up to me and say to me, "Dick, what the hell were you people thinking?" in that decision.

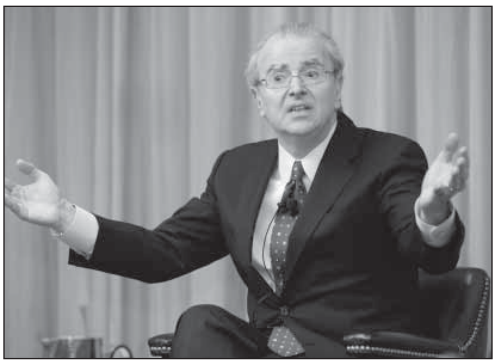
And the point of it is that Holmes said the law is common sense, that law shouldn't be too divorced from common sense. And I think he was right. That doesn't mean that we are subject to the whims of misinformation or misperception of what we do as judges, but it does mean we have to kind of keep ourselves grounded in the real world and how our decisions impact people.

JUDGE KAYE: We will now turn to you, Judge Lippman, and you haven't exactly had job seniority in any of your recent positions either, have you? So how do you define yourself?

JUDGE LIPPMAN: I'm a kid from the streets of New York, grew up on the lower east side of Manhattan, and became a lifer in the court system. As opposed to what Dick was saying, I have been essentially in the same place for all of these years, starting out as an entry level legal person, what we used to call a law assistant, in the Supreme Court of New York County and the greatest honor in those years too was to be called a "law person."

(Laughter)

JUDGE LIPPMAN: I sort of sequel into this area of court administration, where I think I was greatly identified, for a large portion of my career, with Chief Judge Kaye. We embarked on a great adventure together for many, many years, really a dozen years, and then apropos of what Judge Kaye was saying, in the last number of years I have changed course from the administrative part of the court system to being the presiding justice of the Appellate Division in the First Department, which is a fabulous court, which I am sure we will talk about a little bit. I sat in the fantastic courtroom on Madison Avenue and 25th Street, one of the most beautiful courtrooms in the world, for two years, and then a year ago came to this other majestic, just as grand place where I get to sit with Justice Ciparick and my wonderful colleagues on the highest court in the state. There could be no greater moment in my life, and I guess I will quote, as I did at last night's event, Chief Judge Kaye's words: In terms of having the opportunity to be the Chief Judge and doing the adjudicative work at the court being a lawyer's heaven. I would also describe it on the administrative side, as she's described it: As the CEO job of a lifetime.



JUDGE KAYE: I'll pick up with you, Jonathan. In this day and age, is it still the CEO job of a lifetime, meaning it's kind of pluses rather than minuses?

JUDGE LIPPMAN: I think it's something, given our association and years together, that is very much second nature to me and I do feel so comfortable with it.

JUDGE KAYE: You mean with crisis and catastrophe?

JUDGE LIPPMAN: I think you know the complex governmental world we live in today, and the judiciary is very much a part of it. And the crazy things we see happening in state government have a great impact on the judiciary, but I think the flip side of that is that the judiciary very much informs state government in various ways. It's that dynamic that I think is the fun; being the chief executive in the world that we live in, in the judiciary that hasn't had a raise in 11 years, with the executive branch that is seeking to cut everyone's budget, including our own, and a legislative branch that has had its own ups and downs, it's a challenge, but the answer—the short answer is yes, I still love it.

JUDGE KAYE: I asked you about crisis and catastrophe and you used the word fun. What is the funnest thing right now for you, and I'm talking about the adjudicative side as well as the administrative side. And Richard, I'll then ask you the same question.

JUDGE LIPPMAN: I think for me the most fun is—

JUDGE KAYE: No, I meant in the terms of challenges and crises.

JUDGE LIPPMAN: Oh, that kind of fun. Let me say on the adjudicative side, I think we have obvious influence in modern technology and I think we are all coming into the world of e-Filing.

JUDGE KAYE: Even in the state court?

JUDGE LIPPMAN: Oh, definitely.

JUDGE KAYE: When do you see that happening?

JUDGE LIPPMAN: Soon. You know that we together fought for so many years to get the ability to do it in the trial courts in a more direct and forceful way. In the trial courts, in the commercial division, I think you are all aware, most of you should be, we are going to a mandatory e-Filing system. And even for the Appellate Division and Court of Appeals, I think it's coming soon. I think on the adjudicative side, one other issue that is paramount to me, particularly from my years in the Appellate Division, the battle between work product and productivity in the Appellate Division.

We have such tremendous volume. Those of you who come to practice before the Appellate Division from our state, we have 23, 24 arguments a day, as opposed to the Court of Appeals, where maybe we have four, or three or five cases on a particular day.

Certainly we have the challenge of making sure that the development of the law in New York State is what we want it to be, that the decisions are ones that resonate with the bar and the public, and we are caught between that and this tremendous volume that we have and I just give one issue—I would say two because they are related—on the administrative side as the challenges.

One is the ongoing challenge that I alluded to of the judicial salary situation in New York State, which is outrageous by any standards and must be resolved and I think it's complicated by the budgetary situation in this country, state and city and all of that plays together. It certainly is a tremendous challenge.

JUDGE KAYE: I'm going to turn to product and productivity because I think that is a subject that concerns us all in the audience. But Richard, I want to put the same question to you about challenges and crises and in your case, I'm going to ask you to advance the solution as well as the problem.

JUDGE WESLEY: Certainly our docket changed dramatically with the Real ID Act in 2005 which put the Second Circuit into the position of reviewing immigration petitions for asylum review of appellate determination by the Board of Immigration Appeals and we have been struggling with that.

We were overwhelmed with cases and we found that the immigration cases began to crowd out the calendar. Our immigration filings rose 720 percent from 2001 to 2009 and they rose 32 percent just in one year between 2007 and 2008.

At the BIA, pursuant to the Bush administration's desire to move a lot of cases, there were over at one time half a million cases or 350,000 cases jamming up the appeals process and pushing them through, and our court then had engaged in a long period of time where we had to fill in the blanks on a number of jurisprudential issues in the court.

We finally came to a conclusion that there were a group of cases where the factual and legal issues started to be well defined and we created in the Second Circuit, for the first time, a nonargument calendar.

That was the idea of John Newman, who is considered to be the lion of the Second Circuit and he has quite a roar.

JUDGE KAYE: What other animals would define him?

JUDGE WESLEY: There are a couple that I won't express since this is being videotaped and recorded. But that's been a real challenge for us.

We, in the period of time from 2006 to now, our court has done 13,000 immigration appeals—13,000. We use this nonargument calendar, which is a sequential way of looking at cases and any one judge can push the case over to the argument calendar. And we do it and it is additional work, so every Monday in about 36 or how many weeks a year—35 times, 36 times a year, regardless of my other work, paperwork shows up and I'm responsible from two to four cases and sending it on to the next judge by the end of the week. So every week I'm working four cases and I'm receiving four cases from judge number two.

JUDGE KAYE: You say regardless of your other work. How does it affect your other work?

JUDGE WESLEY: It has affected our other work in terms of calendar. Because until we decided to do the nonargument calendar, the immigration cases began to age and we were filling our calendars with the oldest cases and so naturally the immigration cases began to crowd out all of the other civil and criminal matters, so we then began—and I speak the truth—I suspect you wait very long periods of time to wait to get your appeals heard, so there was a great deal of pressure on us to do that.

We have now, and in addition to that, we increased our caseload by 23 percent. We took additional cases. We went from 40 sitting days a year to 45 sitting days a year. We always think our current job is a hard job, but I have done them all and this is the singularly hardest job I have ever done in my life. My clerks—they may be smiling.

JUDGE KAYE: They are not smiling, Richard.

JUDGE WESLEY: They work very hard and some of us felt we were going to break under it, but the good news is if you filed your appellate brief now by September 15, you will be heard this week.

So your opening brief, if your blue brief was filed on September 15, you are before me this afternoon, so we have really caught ourselves up and really reduced it. Right now I think we have 21 cases that are fully briefed and ready to go on the criminal side and 22 on the civil side.

We have a huge number of immigration cases, but those are continued to be funneled in—we are really beginning to move along. So this is good news for us, but not without, I might add, significant cost to the judges.

The other thing I will mention, the one distinct difference you see between the federal and the state, if we lose a judge or the judge goes senior for us, we have three vacancies and they have been vacant for almost a year. And they will be vacant for approximately another six to nine months, depending on who is nominated. Denny Chin passed up to the Senate and judiciary unanimously and now he tells me it may be six months before he gets a vote in the Senate. That's absurd, that's just ridiculous. And I am a lifelong Republican. I think that ridiculous, totally ridiculous. To see the political intervention on the federal side that you don't see on the state side.

JUDGE KAYE: No, you don't see any political intervention.

(Laughter)

JUDGE WESLEY: That's true. That's definitely on your side. I might add, let me make one other point that I think is important and it goes to our caseload. A good deal of our caseload is substantial commercial litigation. You do not fully appreciate the significance of New York law until you become a federal judge dealing with diversity cases—

I had a case six months ago involving a power plant in Thailand, in contract, breach of contract case, a power plant in Thailand. Guess whose law was written into the contract to decide the issue? New York law. New York law is the gold standard around the world for the resolution of commercial disputes. Why is it? Because New York law is well reasoned, predictable and understandable and yet New York judges are 46th in the nation in what they're paid—

JUDGE LIPPMAN: Fiftieth.

JUDGE KAYE: I think we should just pause for a special round of applause for the Commercial Division judges.

JUDGE WESLEY: Absolutely.

(Applause)

JUDGE KAYE: They really have led the revolution in the way New York law is regarded throughout the world.

JUDGE WESLEY: Some of us have a theory: perhaps people are going to 60 Centre Street and seeking their relief there.

JUDGE KAYE: I'm sure my former colleagues would join me, whether or not you do it by way of certification, bring them all over to the State Court.

JUDGE WESLEY: I would like to hang on to a few of them.

JUDGE KAYE: You mentioned nonargument several times.

JUDGE WESLEY: Yes.

JUDGE KAYE: I want to move to a subject—we hear about summary calendars. We know about the SSM sua sponte motions without oral argument at the New York Court of Appeals. Has oral argument become diminished and devalued and is it on its way out? Do you care any more about oral argument?

JUDGE LIPPMAN: Just the opposite. I think oral argument is still in many ways the key to the kingdom. I think these are really broad based in my mind.

JUDGE KAYE: Is that theoretical? Do you see a diminution in oral argument?

JUDGE LIPPMAN: No. What I see, particularly at the intermediate court in New York is that we have a tremendous amount of volume.

As Dick said, you have to find ways, whether they are nonargument calendars or some other means, to move cases more speedily through the system so you can spend the time and have extensive oral argument, meaningful oral argument, on cases that merit it and I still think that a significant portion of the calendar, both at the Court of Appeals and certainly the Appellate Division, I say up to 25 percent, certainly 10 to 20 percent are dispositive or disposed of directly by the oral argument. I think it's still essential.

You have to find ways to give cases the attention they deserve and that means making value judgments on different kinds of cases and their complexity and the amount of time that needs to be allotted, and determining whether there are certain kinds of cases where oral is not significant or necessary, but I still see oral argument as in so many ways dispositive of so many cases.

I can tell you in terms of the judiciary, we do not devalue oral argument in any way.

JUDGE KAYE: The issue for you, Jonathan, more for you than for Dick, goes to product and productivity, and we are really talking about the enormous burden on the intermediate appellate courts. But I want to hear from you, Richard, on the subject of oral argument, not just that you think it's a great thing. Is it diminishing in its value? Is it losing value?

JUDGE WESLEY: I think part of the problem with its value, for example, we have five cases for argument this afternoon, six cases for argument. Of those cases they present a wide array of issues. Yet I have got to assign them, as the presiding judge, so I assign them various argument times.

I won't characterize the cases because some of you may end up in front of me and I don't want you to feel cheated in any way.

Yesterday we had three cases that were submitted and I actually suggested submission on one of them and suggested submission on a couple of other cases on Friday. All of the cases on Friday will be submitted, makes it a little cleaner for us in our work.

By doing that, by taking a look at the red and the blue brief and sitting down with my clerk and identifying whether there is established law that settles this case and take it on submission and letting my other two colleagues decide whether they agree under the federal rule, only one judge needs to object and it goes to oral argument automatically.

We had two very substantial habeas cases two days ago and because we had cleared the calendar, with submitted cases, instead of giving them ten minutes, I gave one argument a full hour of oral argument.

I said to the lawyer, just keep talking, I'll tell you when to stop. And we had a full exploration of a number of very serious habeas issues, and habeas jurisprudence is one of the most difficult areas of law for federal judges. And so I think by screening cases and eliminating cases because Jonathan is right, we don't pick our customers, our customers pick us as long as they've got a final order or an order that meets the collateral order doctrine. Everyone comes to us. What we try to do is sort through those cases in a meaningful way.

We have to categorically, with immigration cases, and we left room in the rule as you pointed out yesterday, we left wiggle room to find additional cases to do that and I do do that myself, personally, as do a number of my other colleagues. Not all of them do that and the reason for that is to allow others who have these difficult cases, it's hard to get a handle on them, to have them not be combined into eight minutes or ten minutes. I think eight minutes is ridiculous, but by the same token, if you have seven cases, you don't want to be there for three-and-a-half hours.

There was a case that was argued *Majewski v. First Central School District*. The question was the retroactivity with regard to the Workers' Compensation Law that was passed in the Pataki administration. There was a split in the Appellate Division and there was a terrific argument. Mike Hutter argued for one side. Leslie Neustadt argued the other side and I use this oral argument at Cornell when I guest lecture on appellate advocacy. It's a terrific oral argument because when you watch the questioning from a judge, Judge Kaye leads off with serious questions because they are counter balancing statutory interpretation rules with regard to deciding whether this is or is not retroactive and Levine and I get into a battle questioning back and forth and Levine gets the better of me and then Joe Bellacosa. Finally Mike Hutter says, he draws kind of a line in the sand and Lesley stands up and steps across the line and says take that and this is why I win.

What is amazing is she talked about insurance reserves and if you look at the bench—and I like to give Leslie credit—it would be my opinion it was one of the most stunning oral arguments I have ever seen and I was so proud of that practitioner and that court that day. You look at Judith and all of a sudden a light goes on and you see everybody's hand start to write. I was totally at sea about that case and the result was obvious to me when we walked off the bench.

So I'm telling you that there are occasions, not every case, when oral argument turns this thing.

Lastly, I remember Judith walking off the bench in a case involving whether a municipality assumes a special obligation with regard to protecting a woman who was murdered by her husband, Persio versus Suffolk County or something like that.

JUDGE KAYE: Do you remember the cite?

(Laughter)

JUDGE WESLEY: But I remember Judith walking off the bench and taking a deep breath and saying wasn't that an unbelievable oral argument. It was argued by a fellow who never argued a case in his life. He said I represent this family. I've represented this family my whole life. I'm not a litigator, but I'm a lawyer for the family.

JUDGE KAYE: I want to—before I leave you, Richard, since there may be lawyers in the audience who are arguing this afternoon. What are the best tips you have for them and for everybody else as well?

JUDGE WESLEY: I think that lawyers who fail to concede obvious weaknesses in their case diminish their argument. I don't understand the theory where you fight and resist obvious impediment to your case. I would think that you would immediately concede it if you're convinced that the judge is right and then immediately distinguish it.

The very best oral advocate that I have ever seen, Kathleen Sullivan, is terrific, former Dean of Stanford Law School now with Quinn Emanuel; Seth Waxman, a former solicitor general, a number of Solicitor Generals. Those people are like butter. They come in and you ask them a hard question and it becomes a conversation.

JUDGE KAYE: Butter is not so good for you.

(Laughter)

JUDGE WESLEY: So I think A, conceding the obvious defects you have in your case, B, don't be disingenuous with the facts. If you lose your credibility with the court, you lose your argument. C, don't try to be something that you are not. That's a generalized statement and D, reduce the confusion. What do I mean by that? If you have not argued at the Second Circuit before, go watch the Second Circuit the day before. I'm sure it's true.

JUDGE KAYE: That's really important.

JUDGE WESLEY: When I was at the Court of Appeals, the really good lawyers were there the day before watching what we were up to. If you get up there and you are not familiar with where you are supposed to sit, what you are expected to say, how the Court carries themselves, each chief judge has their own style.

Judith was a very gracious host. I can't speak for Jonathan. I presume he is. The Court wears the personality of the chief. You have to zero in on how the Court handles itself so that you are ready for it. So that's the single best advice, reduce the confusion, familiarize yourself so you have that opportunity.

JUDGE KAYE: What is the Court of Appeals like these days?

JUDGE LIPPMAN: I think the same gentility as when you were there. It's a very gracious place and I think that apropos of what Dick is saying, at the Court of Appeals, we have now put our arguments in the archives.

You cannot only see them that day, you can go back and get prior arguments.

Before you come and argue before the Court of Appeals, I would watch them. You can see arguments for a period of time, including the day before, and so I would do that. And I think Dick's recitation on some of the arguments that he was a part of and Judith was—and I think an added tip—and not just in the Court of Appeals, is to answer the judge's question.

You are presenting your argument, but the judge may have a particular thing that she wants to know about, and to me that's the most important thing. Listen. In the Court of Appeals it often happens that within two words of your starting to get out your argument, the court has questions that they want to ask, so you don't get a chance to present your argument. But you need to answer the question that the Court is interested in. Because this is a very, very hot bench.

We prepare every case. This isn't a case where certain judges are preparing certain cases and others looking at different cases. We prepare every case. Every judge is hot on it. Again the second you start, so to me the most important thing is to listen and when you have to shift gears in the middle because what we do—and you are both experienced at this—judges want to jump in and get their questions. One judge is going in a particular direction and all of a sudden another one comes with

something from a different part of the case. Listen and answer what you are asked.

What I did want to get back to, Judith, apropos of Dick's comments, is what I said earlier about the Court of Appeals having three, four, five, even six cases. It is so different when you are sitting in the intermediate Appellate Court and there are 25 cases. Yes, the person is presiding and, as Dick says, the court takes on the tone of the justice presiding.

At the Court of Appeals we have the luxury of having a more genteel atmosphere.

When you have 25 cases in the intermediate Appellate Court, including some of these complex commercial cases that all of you are involved in, yes, there comes a time when the presiding judge, and believe me I tried to the maximum extent that I could to have a genteel, lovely atmosphere in the Appellate Division, First Department, but there are times when I am on case four and I know I have to get to 23 and we are going into the early evening, that I do have to say: "Counselor, I understand your argument. Do you have anything else to say?" Because there is really a problem and I'm not sure what the answer is, whether it is more judges or different ways of doing our calendars, but they are two different places, the high court and the intermediate Appellate Court.

JUDGE KAYE: Okay, I have my little list here; I was kind of reserving a whole pool of questions around product and productivity and here I have a former Fourth Department Appellate Division Justice, a former First Department presiding justice, let's get to product versus productivity.

This is the problem. We have the First and Fourth Department. We know about the Second Department, so what's the solution? I can't let you get away with saying you don't know what the solution is. You have to know what the solution is.

There are a lot of cases that are dead once they reach the Appellate Division, because of the huge volume they never make it to the Court of Appeals.

JUDGE WESLEY: From our standpoint, the way we dealt with our backlog, because we had a quantum of cases that were of a particular nature, immigration cases, we are able to develop a mechanism where—and we were fortunate because these were cases that were administrative in nature, so there was a highly deferential review standard so they weren't as record critical in the context of deciding the matter and once the law got that fleshed out, we were able to identify those cases and move them. And what I am now going to say is not the view of the Second Circuit, but solely mine. We have to examine other areas, in my view, in the Second Circuit to identify a group of cases that might be resolved.

One area of cases is criminal cases where the only claim is that the sentence is not reasonable. We have this—it boggles your mind when you were brought up in State Court where judges have this broad discretion with regard to sentencing and all they had to do was sentence within the minimum, maximum. The minimum, maximum being and the crime being defined by the elements of the crime.

The Federal Courts are different. You have to have a different and more complex approach so they have sentencing guidelines—but there is a finite set of cases where the jurisprudence has been developed and they are not record difficult. They are small and easy to assemble, so sentencing cases—and lastly, the third rail of the Second Circuit is pro se cases. If you eliminate the immigration cases from our docket, 1,580 current pending immigration cases, and if you look at solely the civil matters on our docket, pro se dockets are 43 percent of our docket and the view of my court is not universal in allowing the longstanding tradition of allowing oral arguments in the Second Circuit of all pro se (and we are the only circuit in the United States that allows it), so, therefore, there are one or two pro se cases on my calendar every day. There may well be, as those numbers become more critical and our numbers of judges remain lower, we may have to decide we have to identify some cases in that category.

I'm not going to suggest that the Appellate Division do that, but I certainly remember we have a whole slew of discovery motions—see the Appellate Division does not even have a final order rule—you get a bad ruling on production of documents, whereas we don't have that and it may well be that the Appellate Division, Jonathan, I'm not suggesting how the state court system does its business—I would strongly suspect they will be forced to identify categories of cases where the issues can be resolved through a quick mediation, referee or a master.

JUDGE KAYE: Okay, Jonathan.

JUDGE LIPPMAN: I think that is the answer. We have to track cases the same way we did in the trial courts and this audience knows putting commercial cases on a different track and with different judges—

JUDGE KAYE: Would you put commercial appeals on their own track?

JUDGE LIPPMAN: I think it's a tough issue. Expertise is important.

JUDGE KAYE: What about encouraging more leaves to the Court of Appeals? There are a lot of very serious commercial cases that stop at the Appellate Division and do not reach the Court of Appeals.

JUDGE LIPPMAN: Commercial cases are different in nature. Most of these cases settle at some point. It's very difficult—

JUDGE KAYE: Sometimes they settle because they can't go up.

JUDGE LIPPMAN: I agree with that. There is a whole issue in State Court, I think, as part of this discussion about interlocutory appeals in general. Shouldn't we be limiting it to more substantive interlocutory appeals?

I think there has got to be a way in a system with as much volume as we have—and we don't say to find different ways to process cases that go to the appellate courts as well as the trial courts—and I do think that trying new things is important and I don't think anything should be out of bounds because it is not productive to have the kinds of calendars that I discussed before when we have a very complex commercial case sandwiched between—apropos to your suggestion of a special commercial division—other cases, some of them significant, some of them insignificant, and every variation in between.

But I do think, I go back to Dick's point, which I think is looking at your caseload, analyzing it and figuring out how those cases could go through the system. This is no less relevant in the Appellate Court than we all did in the trial courts—when you were the supervising judge—remember the special parts?

JUDGE WESLEY: Shall I tell them how I first met you?

JUDGE KAYE: Tell them.

JUDGE WESLEY: I was in the Monroe County Supreme Court. I was supervising judge of the criminal courts and in 1992 we had this monstrous backlog of 720 indictments. It was bad for the D.A. They were losing witnesses. It was bad for the victims waiting too long for their cases to be resolved. It was bad for the defendants who were waiting in jail for two years and then they were acquitted. So I brought together the D.A. who was very forward looking, Howard Relin, and the public defender, Ed Nowak, and we sat down with some additional defense bar people and we worked out this thing, Part Nine, which is a screening part. We screened all felonies and it was going along and so I'm sitting screening these cases and it's going on very well and all of a sudden, it's 1993—you were appointed chief judge in March 23, 1993, am I right?

So I'm in Rochester City Court doing these arraignments and it's in April or May of 1993 and in walks this very tall, well dressed, very stately looking person, the chief judge of the New York Court of Appeals and needless to say, everything stopped and I was flabbergasted that she was in the building and she would come and visit and, you know, Judith, oh, hello everyone, just go ahead. I'm going to sit here for a few minutes.

Now my palms are sweaty. I don't know if I'm violating someone's rights, careful to do what we were doing. After we finished, Judith came by. She had a million questions like she does today and she really encouraged me to think outside the box and solve the problem.

We reduced the waiting time by twelve months in four months and we were current by the end of the year. It was stunning and Judith, that's the way that Judith and Jonathan—where I just want to step outside the box. No court in the country ever had a more valuable duo team than these two, with Judith and Jonathan together, and it's interesting when you go around the country on federal matters and they will say how is Judge Kaye doing? All the federal judges will ask me and I think Jonathan and Judith have really changed the landscape.

JUDGE KAYE: You talked about—you talked about playing off Judge Wesley's more careful attention to kind of segregating the docket and seeing how some parts could move.

Before we leave the subject, we know certainly on the state side this is a really serious problem, tremendously overburdened dockets in the Appellate Division.

Do you see any systemic hope? Any Fifth Department? Anything on the horizon because the problem, since it's been identified as critical decades ago, has gotten worse?

JUDGE LIPPMAN: I think the Fifth Department makes sense from a caseload perspective, but I'm not sure it's doable politically. We tried and we had some of our court restructuring bills, include proposals for a Fifth Department, in there.

I think politically it is very difficult—it is not rational to have half the state's population and half the state's caseload in the Second Department. So I think that's a difficult—I think that would be the best systemic fix, putting aside all of this caseload tinkering that we are going to do. I think there is another issue that really goes toward addressing this. I think it's the issue of court culture. We both have been in the Appellate Division and Court of Appeals and I use the Court of Appeals as an example and then I come back to the First Department in all due deference—but in the Court of Appeals, it is unacceptable if any case sits at the Court for more than a six-week period.

You come in. You argue. You get your decision. Period. I don't care if it's the most important case in the world or the least important case in the world. It goes out. Why? Culture.

In the Appellate Division, sometimes we have to look within is, I guess, what I am saying to you. Certainly when I came in as the presiding justice of the Appellate Division, First Department, three years ago, we had cases a year to three years old. We had 300 matters pending in the court and that's unacceptable from a cultural perspective and the court has done a spectacular job of reducing, eliminating that backlog. It's incumbent upon us, and Justice Gonzalez is doing a terrific job, and all the judges in the Appellate Division, and Justice Prudenti in the Second Department, but we are dealing with the issue of product versus productivity.

I don't care what the product looks like. If it comes out six, nine months, a year later, it may no longer matter so much what a great product it is. That's a culture that we have to continue to instill throughout the system, that says we serve the public and timely justice is essential.

So part of the answer is not just the systemic changes, but the cultural changes that I know in the First Department we all accepted, and accept today, and throughout all the Appellate Divisions. So there are a number of things that have to be done. Court culture is important and I gave you the Court of Appeals as the archetypical example.

JUDGE KAYE: Before we leave this, since we are commercial at heart here today, I have to be frank and tell you that one of my hopes with the commercial division was that there would be more commercial cases in the New York State Court of Appeals, more commercial cases would find their way to the Court of Appeals and, in fact, that hasn't happened that much.

I think the certification has helped, certification from the Second Circuit. I have a friend that had a billion dollar case at the Appellate Division disappointed not to get to the Court of Appeals. He wound up buying the company, and not everybody can do that. How do we get more commercial cases in the Court of Appeals? That must be an interest of yours as a commercial leader.

JUDGE LIPPMAN: You and I tried to do a study.

JUDGE KAYE: I get to ask you the question and you have to answer it.

(Laughter)

JUDGE WESLEY: Now you know why I'm over here.

JUDGE LIPPMAN: I will answer, but I will verify the fact there is a striking difference between sitting on the Court of Appeals, and the percentage of our caseload there that involves heavy commercial cases, versus the Appellate Division, certainly in the First Department, where every day that you sit you get complex, serious commercial cases.

I think we know the reasons: the non-finality issue at the Court of Appeals, the fact that a lot of them settle.

I think the commercial division helps to define the law and to get cases that are more fleshed out coming through the Appellate Division up to the Court of Appeals.

Would it be different in terms of how you would do it if you had a separate Appellate Court for commercial cases? Not a separate court—a separate division within the court. Maybe.

JUDGE KAYE: Do you think it would be a good idea for this Section to study that question and give recommendations?

JUDGE LIPPMAN: I think it would be a great idea. Look what they brought upon us by their earlier studies: The great commercial division was all a product of this Section. Yes, I think it is.

JUDGE KAYE: Richard, you raised an interesting point.

Before when you talked about preparation for the Court of Appeals and, Jonathan, you talked about watching the videos and all that, why on earth can't we watch videos of the Second Circuit?

JUDGE WESLEY: Again, what I'm about to say is not the view of the majority of the members of the Second Circuit—

JUDGE KAYE: Just a private conversation.

JUDGE LIPPMAN: That's because you're a product of the New York State Court System, that's why you have more progressive views—

JUDGE WESLEY: I am also a judge who tried three murder trials on live TV back when they had cameras in the courtroom. I thought that was a great thing. I didn't think it diminished what was going on. I thought it opened up the courtroom to people—obviously there's going to be sensationalism within it, Greta Van Susteren and all those other people, it's meat for the mill for them, but I do think there's a need for the courts to be opened. The reason I use the video from *Majewski v. Broad School District* is because I can't get video of a Second Circuit argument. I can't have Seth Waxman on video arguing.

What's interesting, Catherine O'Hagan Wolfe, our clerk of the court, I want to give kudos to Catherine, part

of the reason why we reduced our caseload was because of Catherine. Every time I find a really good State Court employee who is ready to retire, I convince them of the wonders of coming into federal service and two incomes.

JUDGE KAYE: And even some of those who are not yet ready to retire—

JUDGE WESLEY: Even those—any of you working in the State courts looking for jobs, give me a call.

JUDGE KAYE: I wasn't advertising that....

JUDGE WESLEY: I've been the beneficiary of two incomes myself. So there are a number of circuits now that do live streaming audio. None of them do live streaming video, yet I can sit in my chambers in Geneseo and watch the Second Circuit. We have that capability to watch it. We don't make it public. The judges are—it's interesting to see the wide array of views. For some reason they think it would diminish the majesty of the Second Circuit. I beg to differ. And if it does diminish it, then what the hell are we doing in the Second Circuit? How are we behaving if that's what it does?

I agree with Jonathan and with you that we—I have no problem with judicial accountability. We're doing the people's work. We're kind of like the ligaments that keep society strung together. We're the one institution that the public truly trusts.

Occasionally some of our colleagues violate that trust and they run astray. But in New York, you are accountable, held accountable, publicly accountable. This is a very significant cultural difference between our State Court system in New York, and not without its battles, if you recall in the late '70s, there were huge fights about this.

JUDGE KAYE: So is there any opportunity?

JUDGE WESLEY: I think there is opportunity from an audio standpoint. You can certainly get the audio of our oral argument. You will pay for it, but you can get the audio of your oral argument. I think it may be helpful to some of you. Without the video, I think you are only getting half a loaf. And you don't really understand it.

If you will recall, Judith, there was an en banc oral argument involving excluding the public from the courtroom and the New York Court of Appeals and Second Circuit heard the cases simultaneously and you and I listened to the audio tape. You could not make any sense of the audio tape of the oral argument in the Second Circuit because you didn't know who was asking the questions and the judges were talking over themselves and it was a Tower of Babel. And I don't mean that in diminishment of my colleagues. My colleagues are terrific people. I just don't understand why the audio and video is not available. It's been available at the New York Court of Appeals for eons—

JUDGE LIPPMAN: We're only disappointed it hasn't become a best seller.

JUDGE WESLEY: We would have liked to see more public interest. Once in awhile, I think, the quality, some of the early death cases were very high profile. I just don't understand that and there is another side that it says it interferes with the court somehow, but I don't think the factual record reflects that, so I would strongly support it and I'm hopeful—technologically we are capable of doing it, so I'm hopeful that some day we will do it.

JUDGE KAYE: Sadly our time is passing. I could go on for days with these wonderful people, but now I want to put them ten questions from Inside the Actors' Studio.

Then we will have the last few minutes to hear from you, so get your questions ready.

I'll start with you, Judge Wesley. What is your favorite word?

JUDGE WESLEY: My favorite word is please.

JUDGE LIPPMAN: Absolutely.

JUDGE KAYE: Jonathan, what is your least favorite word?

JUDGE LIPPMAN: No.

JUDGE KAYE: Richard, your least favorite word?

JUDGE WESLEY: With all due respect.

JUDGE KAYE: It means no.

JUDGE WESLEY: I was told this at a federal/state conference on habeas and what the federal practitioner said is you are really full of shit. I remember him saying that to me.

JUDGE KAYE: What turns you on creatively, spiritually or emotionally, Richard?

JUDGE WESLEY: Creatively and spiritually to watch young minds coming from the finest law schools in this country walk into Geneseo, New York and engage in the dialogue on the law and watch them grow as lawyers and as people and to hold them close to me as if they were my own children long after they left.

JUDGE KAYE: Jonathan, what about you?

JUDGE LIPPMAN: The judiciary of the State of New York.

JUDGE KAYE: Good grief. What turns you off creatively, spiritually and emotionally?

JUDGE LIPPMAN: The other two branches of government.

(Laughter)

JUDGE KAYE: What turns you off?

JUDGE WESLEY: Having served in one of them, I've seen the sausage made and I won't eat it.

(Laughter)

JUDGE KAYE: Is that what turns you off?

JUDGE WESLEY: Politically I think the nation is at a critical stage and I am saddened by 24/7 news and talking heads driving the level of discourse to one of hatred as opposed to understanding who we are and why we are different.

JUDGE KAYE: What sound or noise, Richard, do you love?

JUDGE WESLEY: My son and daughters' voices.

JUDGE KAYE: Jonathan, you too?

JUDGE LIPPMAN: The Yankees win.

JUDGE KAYE: What noise do you hate?

JUDGE LIPPMAN: Well, I'm not fond of the sound of the phone ringing on each and every precious weekend constantly.

JUDGE KAYE: That's when I used to call you.

(Laughter)

JUDGE LIPPMAN: Then I loved it.

JUDGE WESLEY: Be truthful now, you called him at 6:00 a.m. every morning.

JUDGE LIPPMAN: And I loved it.

JUDGE WESLEY: I was there.

JUDGE KAYE: Richard, what sound or noise do you hate?

JUDGE WESLEY: The subway, the 6 train, when I'm waiting at Grand Central. I had a lawsuit a year ago involving whether those are patentable or not and I stuck it right to the plaintiff.

JUDGE KAYE: The famous number seven. What is your favorite curse word? I was going to eliminate it, but with the two of you, no way. What is your favorite curse word? Rat's ass?

JUDGE WESLEY: How did you know? There is a phrase I got from my grandfather that taught me how to curse. It's confining to me to only use one curse word because my repertoire is so wide. Some of you who really know me, as my clerks know, and Judith would sit at the conference table one day and we were arguing about a case and I can't believe I said I don't give a rat's ass about that argument. Why would you care?

So what do I get from Judith when I leave the New York Court of Appeals? I got a book from all the people, all the wonderful people, cleaning staff, maintenance staff. What is on the front? It's a beautifully hand drawn picture of a rat's ass.

(Laughter)

JUDGE KAYE: What you may never have heard and I will tell you now is one of my former law clerks, he is now Judge Robert Mandelbaum, he reports publicly when he entered my chambers the first day, the first thing I asked him to do was get me a picture of a rat's ass and you've got it.

Jonathan, what's your favorite curse word?

JUDGE LIPPMAN: The usual. I'm—

JUDGE WESLEY: You are talking about the F bomb, Johnny? (Laughter)

JUDGE LIPPMAN: I say frigging. I'm fond of Yiddish. Oy vey is okay. Mamzer, you can translate that.

JUDGE KAYE: I could.

JUDGE LIPPMAN: And worse.

JUDGE WESLEY: She used to say those words to me knowing I have no idea.

(Laughter)

JUDGE KAYE: What profession, other than your own, would you like to attempt, Jonathan?

JUDGE LIPPMAN: That's a good question.

JUDGE KAYE: These are all good questions.

JUDGE LIPPMAN: Yes, they are. Right now I want to be the Comptroller of the State of New York.

JUDGE KAYE: Richard?

JUDGE WESLEY: I would like to teach American history and I thought I would become a history teacher and somehow ran into the law midstream.

JUDGE KAYE: Sort of like me and journalism.

What profession would you not like to do?

JUDGE WESLEY: I would never want to be a mortician.

JUDGE LIPPMAN: I do not want to be the coach of the New Jersey Nets basketball team.

JUDGE KAYE: The final question for those of you who are harboring questions, get ready.

If heaven exists, Jonathan, what would you like to hear God say when you arrive at the pearly gates?

JUDGE LIPPMAN: That he or she would say so you were the chief judge when the judges of the State of New York finally got a pay raise and then another and another and another and another. That would give me pleasure.

JUDGE KAYE: Richard—it would give us all pleasure.

JUDGE WESLEY: I guess I would like him to say you're early. Go on back.

(Laughter)

JUDGE KAYE: Any questions from the audience?

SPEAKER: The subject is teleconferencing. Some of you may recall 15 years ago there was a seminar in which the first oral argument was teleconferenced in the Second Circuit and since then—initially there was some interest in the Second Circuit, but I would like—this may have some relevance, the teleconference industry was about to take off. Then I understood it stopped.

My question is, are there arguments in the Second Circuit held by teleconferencing or not, and if not, why not?

JUDGE KAYE: Thank you.

JUDGE WESLEY: The reason why it stopped, when we moved from 40 Foley to 500 Pearl, the Moynihan Courthouse, believe it or not, doesn't have the technical capabilities to do the arguments in the both locations, so therefore, we suspended it until we return to 40 Foley—we are scheduled to go in in November 2011. We think we will be in more likely in the spring of 2012 and our intention is that when we return, we will resume that.

It's very helpful to the federal public defenders from upstate and from Vermont because of the commuting difficulties.

I appreciate the members of the Buffalo bar and the Rochester bar, so I know that commuting in to do an oral argument—it's not that we don't want to do it. It's that we are unable to do it, but once again, we will do it.

I found no problems. We did it quite a lot and I had no problems with it at all.

SPEAKER: Can I ask the chief judge, [if] there might be an interest in doing that?

JUDGE LIPPMAN: I am interested in anything to do with modern technology.

MR. STEPHEN YOUNGER: So much of what you talked about costs money. For those of you who don't know, our Governor is not necessarily supportive of our court budget.

Since our chief judge stood up to cross-examination, I would like to buy him a lifeline from someone who served on the legislature.

What advice do you give somebody who wants to get the legislature to do something this year?

JUDGE WESLEY: These are really strange political waters and it is made worse by the uncertainty.

Speaking of someone who spent a lot of time in Albany and still has a lot of friends there who I speak to on a regular basis, the uncertainty in the Senate is a very disquieting thing and the fragileness of the leadership in the Senate will make it very difficult.

The majority of the conservative upstate Democrats will be at counter purposes with some of the things that the New York City delegation will want, so this is the worst possible environment.

I'm very concerned about the state's credit rating. I'm very concerned about—we have never had this negative balance at the end of the year waiting for the infusion of cash revenues—when I came to the legislature in 1982 Mario Cuomo's budget was about $12 billion.

We had a huge budget gap and if you remember, Governor Cuomo was closing state institutions. Remember you couldn't get a vehicle title because they laid off half the people at the Department of Motor Vehicles and I think we have forgotten about the difficulties of that.

I have the utmost respect for the leadership that Judith provided while chief judge and the leadership that Jonathan is providing now and they are working closely in the political process. They get it. The problem is that it presumes the people you are talking to are rational and I don't mean that in terms of the individuals, I mean the process itself. It's not rational right now.

It's not capable of being rational.

I had lunch with Mayor Bloomberg as part of federal judges week. I love New York City. But what did he do? All he did was rail about the state government cutting the city budget. The question is where do you want to cut, Mayor? Where do you propose to cut it? Do you propose to cut it in Buffalo where unemployment is 10.5%, where the city is gutted? Do you propose to cut it in Rochester which is a shell of its former self? Where do you propose to cut it? In Elmira, where my good friend John O'Mara is from, which is struggling? Where do you propose to cut it?

We will all face extraordinarily difficult times in the state over the next few years and the terrible thing about the judiciary is that they had a pay raise once, they had it done and somebody backed away from it. Eliot Spitzer backed away. He lied to Judith Kaye. She won't say it. But he did. He lied to Judith Kaye. You had it. Unfortunately, that's a tragedy. I can say it because Article III lets me say it. It's a public record.

My pay started at $166,000. It is now $184,900 because of cost of living. Congress doesn't always give it to us. They didn't give it to us last year. They were afraid—that's okay, just the cost of living alone helps. We have fallen behind, but not the way these people have.

JUDGE LIPPMAN: Can I add to that? I think what's important with the legislature, putting aside the issue, I think there are many, as Richard said, so many missed opportunities along the way in terms of this pay thing. We did, Chief Judge Kaye and I, we did everything we could do to get this done. It was within our grasp as Dick says, on more than one occasion, but I think with the legislature and the governor, the key thing to understand in this latest battle is that we are different than the other branches of government.

We have to take every case that comes to the court. We can't cut out programs. There is no such animal. I mean our budget is basically people, the judges and the personnel of the unified court system is what our budget is all about and that's what we are trying to get across to all of the other branches of government, that the judiciary is not only an independent branch of government, but by design different than the other branches, and we will have support within the legislature and ultimately from the governor on that issue.

Without talking about the salary issue, on the merits, obviously there is a court case pending in the Court of Appeals; this issue must be resolved because it affects the viability of our branch of government. Our ability to attract and retain the kinds of judges that are going to decide all of your cases, these difficult cases, that need skill and expertise and cannot be done by just any people in the world who can afford to go serve in the judiciary. You should apply. That's got to change and change now, but to be continued.

JUDGE KAYE: Yes.

MR. MICHAEL GETNICK: First, if I may, I want to thank the Commercial and Federal Litigation Section for putting on this wonderful program. This is a loaded question.

As lawyers and judges, if you were to pick the chief priority for the New York State Bar Association, what would that priority be?

JUDGE WESLEY: Give me some time to think.

JUDGE KAYE: Just one?

SPEAKER: If you have to pick one.

JUDGE LIPPMAN: I know what I would pick, a parochial view from my vantage point, there is nothing more important to the legal profession in this state than to have a strong and vibrant judiciary and I don't think we can do that without giving our judges a real profession that lawyers, like all of you, the best in the state, can aspire to become members of.

Again from my parochial perspective, we must have the resources to run the kind of court system that meets our constitutional mandate. So that's from my unique perspective, that's the answer that I give you.

JUDGE WESLEY: From a legislative standpoint, I would say that the judge bill probably that I know that the House of Delegates is going to consider—and Steve Younger and I have talked about the federal judge bill—will help us because there is some relief for the Second Circuit in that judge bill. I might add the Second Circuit's difficulties are self-imposed because they resisted having additional judges because we have a concern about collegiality, but the workload now has gotten to the point where I think some additional judges are coming.

From an internal standpoint, my top priority is the electronic case management case filing which we

launched and seems to be working well. I think it will bring us out of the dark ages.

One thing I think Catherine found when she came over to us is how starkly poor our information gathering capabilities were and cases getting kind of lost and other things that are kind of strange, so electronic filing and electronic case management will help us enormously.

JUDGE KAYE: I was going to say thank you, but please ask your question.

SPEAKER: You touched on the subject of interlocutory appeals. I would love to hear what you think about the CPLRs of interlocutory appeals in general. More specifically, what its impact is on commercial litigation.

JUDGE WESLEY: From a federal standpoint, you know what's interesting to me, when we get final orders, I can't recall, I think I have had one discovery issue in seven years at the federal circuit. It would seem to me on the state side, if you put in a certificate of appealability which allowed the local judge to decide to certify the Appellate Division and reciprocally can ascertain the interlocutory appeal, that might be a mechanism which you can screen out a whole slew of cases. I don't know.

I'm speaking from total ignorance to what extent they have thought about that. We found certificates of appealability are used by District Court judges on issues that they might be nervous about. They grant it or we get the applications, so certificates of appealability may be one way, if you are going to get docket control while still leaving for uses that can be visited upon—

JUDGE KAYE: This will be part of the session.

JUDGE LIPPMAN: It is the main difference between the federal and state. When we adopted the commercial division, we recognized that is a fundamental difference and conceptually one could argue it would create problems. Management of the case, I think, we would be open to other approaches, but look, that's not to say that sometimes interlocutory appeals don't go a long way to resolving a case. It really does. I think it's an interesting concept.

JUDGE KAYE: Last question

SPEAKER: Another significant difference between federal and state system, you have lifetime tenure, with most of the state system—and being up for election, I would be interested in hearing your assessment of the differences and I know they are significant. This state started to approach—I'm not sure whether there is the political approach again, but I would be interested in your assessment, particularly the variation on the election system of should there be a different approach for incumbent judges, those that are running for the first time?

JUDGE LIPPMAN: I've been and Richard has been an elected and an appointed judge and I think what's interesting, I think the elective process, which is so subject to criticism, is really very interesting and in so many ways you do get closer to the people rather than going into a room with 12 white-shoe lawyers.

The processes are very different. I think there are things to be said for both. I don't think there is a monopoly on excellent judges that comes out of either system.

I know my soulmate agrees that in New York the mixed system works well if you have elected and appointed judges having different routes to the judiciary.

My view is that a mixed system is good, but I think there are virtues to the appointive the system. They both have to be meaningful and they both have to be transparent.

What we tried to do with the elective system—what Judith Kaye and I did—was make the elective system more transparent and more meaningful. The appointive system is only as good as the appointive authority and the mechanisms they put into place.

So I think if we can improve both systems, to be more meaningful, I think New York at the state level is served well by a mixed system.

JUDGE WESLEY: I think it's foolish—the problem with bad judges is that in many places in New York the nomination becomes akin to being elected. It doesn't mean good judges don't come out of both processes. So the processes themselves have equal capability. I do think election of judges beyond the trial level is a huge mistake because it politicizes the process and wreaks havoc in other states.

JUDGE LIPPMAN: High costs.

JUDGE WESLEY: High costs and has been a bunch of 60-second destructive ads. Once you get above a trial level, there is a decided preference from my standpoint recognizing any process in which humans are involved is by its nature political in some way, shape or form.

JUDGE KAYE: If I had time how the new Supreme Court free speech decision will affect the judiciary, but I do not have time.

JUDGE WESLEY: Having been appointed by a Democrat and Republican, I think our current appointive process, both at the Appellate Division and Court of Appeals, is an extraordinary process and particularly with its balance I think is a system that works as well.

JUDGE KAYE: Judge Ira begged me for a last word.

SPEAKER: There is a major difference between discovery with expert witnesses on the federal and state level. The people in this room, especially, in my opinion, suffer from the New York State expert witness rules. You and Judge Wesley have seen both.

Do you see any possibility of somehow changing that so that there might be an expert discovery that is not controlled by the negligence plaintiffs bar in New York State? Whatever the goodness of that is, it causes havoc—I will use a word—and screws up royally what could be early settlement of cases where there could be depositions of expert witnesses on state level.

Do any of you want to comment on that?

JUDGE WESLEY: From my perspective, that's a nonissue in federal appellate litigation. I can't think of any—I can't think of having that litigated in front of me at all.

JUDGE LIPPMAN: I don't think it's viable, the question, to get it done. The question is to what's the rights and the wrongs of it. I understand where you're coming from, particularly, sitting where you sat. I think it's something we should give real attention to, but do I think it's going to happen? Very, very difficult.

JUDGE KAYE: Please reflect for the court reporter Debbie that the hour is now 10:30. We are precisely on time!

(Whereupon a discussion was held off the record.)

Presentation at the Commercial and Federal Litigation Section Annual Meeting on January 27, 2010:

The Future Ain't What It Used to Be: Finding Opportunity in a Changing Economy

Panel Chair: PROFESSOR GARY A. MUNNEKE, Pace University School of Law, White Plains

Panelists:
JIM HASSETT, LegalBizDev
TERESA WYNN ROSEBOROUGH, ESQ., Senior Litigation Counsel, MetLife
MICHAEL C. RAKOWER, ESQ., Law Office of Michael C. Rakower
HARRY P. TRUEHEART, III, ESQ., Chairman, Nixon Peabody LLP

MR. TENNANT: Professor Gary Munneke from Pace Law School is the Moderator.

MR. MUNNEKE: I'm a Professor at the Pace Law School, White Plains, New York. I chair the Law Practice Management and we are pleased to be here this morning to talk to you.

Some of the issues that have been bouncing around not only this bar but the American bar generally and we thought we would do this as an informal conversation among a group of people who dealt with these issues in different ways, and I'm going to give you a little bit about each of the speakers but I am not going to go into a long description because I note from the biographies that it would take most of our time to read the biographies if I tried to do that.

Briefly, the people on the panel. Teresa Roseborough is a senior chief counsel of litigation in compliance at MetLife. She was in litigation practice before doing that and has been involved in a number of things like the Gore campaign and other things like that. She brings to us the experience of corporate counsel not only as an organization that delivers legal services to a corporation, but also as a client of law firms.

Harry Trueheart is with Nixon Peabody. You are the managing partner?

MR. TRUEHEART: Not anymore. The chairman.

MR. MUNNEKE: That's a much better title.

MR. TRUEHEART: Absolutely.

MR. MUNNEKE: You have overseen a lot of the changes.

MR. TRUEHEART: I was the managing partner for 15 years. I have been with the firm 40. I could not get a honest job.

MR. MUNNEKE: Jim Hassett is consultant and he works with marketing for lawyers and his position with Legal Business Dev helps lawyers in staying on top of things, building a client base and all about the attendant issues that float from that.

MR. HASSETT: It's a good deal of that.

MR. MUNNEKE: Michael Rakower is a sole practitioner. He does high end criminal defense work and things attendant with that.

MR. RAKOWER: Commercial litigation.

MR. MUNNEKE: Which brings you to commercial litigation.

All of us had some experience with this. I have written a little bit about the future of the legal profession. There is an excellent article in here that deals with the problem and Harry, I guess I should just ask you first, you did an article for Law Practice Management where you postulated where we are going and what the bar should do about it and what practicing lawyers should do about it. Any thoughts?

MR. TRUEHEART: Let me start with a story about being at a conference with my eight-year-old son many years ago. I don't how long ago that was and listening to people like this pontificating on the subject I thought an eight-year-old would be interested in and after listening for a while and finally squeezing up his face, he taps me on the shoulder and he says, "Dad, I think they are only guessing." So I need to put that as a premise to everything.

The second thing I would say about this, I am a litigator by background. I come to this with some honesty, and my interest has always been in litigation, but at the front, more generally what is going on, but the third way—we are overwhelmed by the current state of the economy and the impact of the economy, but in my view, there are a number of underlying forces that are going on during this period, before this period and after this period that have an impact on the profession.

I will take a couple of minutes, I can go on for a long time and then we can pick up on some of the discussion.

One is just a change in the pattern in economics. One is the globalization of the economy. Its good and bad for New York. We need to get out of the thinking that the U.S. is the center of economic universe and business flows in the U.S. and through the U.S.

It has a big effect on us and a subset of that is what is going on in New York and I need say no more. Where we started in this state is not—the second area is technology, which in my view is affecting us in profound ways at every level of what we do.

One, it affects competition because the amount of information that's created and is available makes a more perfect marketplace. It affects our performance because our clients are measuring what we do, but sharing it is a profoundly good thing.

Another effect of technology is communication, which does a number of things, including taking some of the labor content out of our practice. If you have been around 40 years, you know what I've been saying. There was a time we got paid to stand around the court and listen to lawyers tell lies when cases are to be tried. None of us do that anymore.

The third is information technology and the access to it. I'm old enough to know what cut and paste really means. I am old enough to know when LexisNexis and Westlaw came along. What many of us in the room and what you need to understand is that what is out there now—very valuable, but very free information—and see free solutions and the time cycle in which you are going to invent rocket science, but it is also changing, among other things, what the clients think about what we do.

MR. MUNNEKE: Let me ask you one other question. This perplexed me. A lot of change was taking place in the legal profession going back for a number of years and really through the early 2000s there was a lot of discussion how the profession is changing and globalization, and then the recession came along and an entirely new set of problems sort of overlapped that other discussion about how the profession and the marketplace are changing and I wondered if you had any thoughts on what issues are more temporary related to the economic downturn and which of those will begin to think about again as the economy turns the other way.

MR. TRUEHEART: I think an economic downturn will accelerate as it relates to the client's view of cost efficiencies. They are not going to change a lot of them, but the fourth major change I would have mentioned in terms of the long-term change is a profound change in the way our clients are thinking about where litigation, if it is in their world, the way they think about how they decide whether they are going to take it, how they going to pay for it, all of those things and the short-term economic problems are accelerating of all these changes, particularly in the area of process and efficiency, price and cost and utilization because all general counsel I know are under extreme budgetary pressure and they know, as well as we do, the more expensive thing is litigation.

They are constantly getting questions from the people who pay them and pay our bills how can we cut costs. So that's what the short term is about.

MR. MUNNEKE: The other question I wanted to ask you, we have different practice settings represented here. Are there particular problems associated with larger firms that you have to address or there are advantages or disadvantages in adapting to change that are particularly unique to your kind of practice?

MR. TRUEHEART: If you are small enough, you don't have a managing partner, but more seriously, I think the firm, small firm labeling is used to cover up a lot of different things. It can cover up on price. It can cover up some of the correct criticisms of how some large firms do things, which is inefficiently, but underlying it all, I think if any firm is going to survive, large or small, is facing the same marketplace, the pressure to perform in an efficient way.

We have the pressure to change. You have the pressure to incorporate the benefits if you will or the inability of technology and you have the pressure to specialize. Been there. Done that. It's what people buy. That's not what they bought so much when many of us started in the practice. I think we are all in the same boat.

We can decide whether you would like to be in a large organization or not. Counsel can decide if they want to spend the money on a sole practitioner because you are the one that owns it and that can integrate you with 400 other legal relationships, or if you want to find a firm or can find you and have relationships.

There are differences and the dialogue small in and of itself doesn't address all issues.

MR. MUNNEKE: Michael, I was going to ask you this question. Anecdotally, we were hearing during the recession solos and small were not affected to as great a degree as larger firms. They were smaller and leaner and they would tighten their belts and deal with the fact clients were paying more slowly. Is that an accurate perception or is it out of touch with your experience?

MR. RAKOWER: It kind of depends where you stand within the large firm. People ask me—we like to call our self a boutique firm, a small firm. People ask me how things are going. The fact is that my firm, we experience peaks and valleys much more seriously than I think a larger firm does.

The consequence of that, when there is a recession like there is now, if you are a highly valued partner at a large firm and they are looking to trim the fat, you are not the guy they are going to cut.

They are going to cut the excess associates or the lesser performing partners, but your place in that firm more or less remains solid.

If you're in a smaller firm and experiencing economic decline, there is no one to cut. You immediately experience a shortfall.

Having said that, we have taken the view in these times that there is tremendous opportunity for us and we have it at every turn, try to capitalize on it.

We look at the market situation now as a situation that I think we, as New Yorkers, and all fellow pizza lovers can understand, if you call up a pizza place and you say I want an extra large pie, how many slices come in that, you may get an answer more likely the pizza guy will say I will slice it however many pieces you want it. It's typically eight pieces and medium is 14 inches, but you can slice it any way.

In this recession the pizza pie has shrunk a little bit, from the 16 inch in diameter to a 14-inch in diameter pie. We might have been in an extra large pie world before where you had a small sliver. Although the economy has retracted to the medium size pie, we are hoping to get a larger slice by taking advantage of the opportunities that exist.

Can a small firm take advantage of opportunities that a large firm can? I go through my workday every day hoping so.

MR. MUNNEKE: You mentioned opportunities. You might comment a little bit how a law firm, generally small or large, can look at the opportunities to grow in a recovering economy.

MR. RAKOWER: I believe it's true. I tried to write down some opportunities that we had tried to exploit or look into strategic ways to try to improve and I also tried to consider some of the thematic issues of those practical solutions.

I thought of three thematic issues. I think they are fairly common sense. They boil down to build and strengthen relationships. There is no better time than in times of need to build and strengthen relationships. When times are good, what favors you do for people are forgotten quickly, but in times of need, when you go the extra mile for a client or you assist a colleague in a unique way by showing your expertise, those things are remembered.

So we have taken that to heart. We have worked with our clients who experienced trouble during these times and extended ourselves in ways to prospective clients that in times past we wouldn't do.

We are hoping that will pay dividends into the future. Building and strengthening relationships is a core in how to deal with today's economic situation.

A second theme is to be receptive to opportunity. We look more to it every day. In today's changing economy, what that means is there are changed circumstances and in changed circumstances, there are new opportunities. If you can find a way to not necessarily go with the flow, but exploit those opportunities, you might be able to do so to find increased profits. Clients ask for alternative billing solutions and in doing so, build an upside for us that we wouldn't have seen before.

We would typically charge clients on a hourly fee basis. Bill where a portion is on an hourly and a portion is on a contingency. If we are successful, if we are good at what we do, there is a nice sweetener at the end that will yield a higher total compensation than we would have obtained if we went strictly on an hourly rate.

So what we have tried to do in these times, build important relationships, make deals not just with your client, whether it's with vendors who are offering deals to buy more product at lesser prices, throwing in deals like, you know, free customer support for an extended period of time.

Commercial realtors, we know that the commercial real estate market is in the doldrums and there is an opportunity to extend your lease at a cheaper price, if you had a new lease or renegotiate your lease. Those are the three thematic issues that we think about in capitalizing on today's market.

MR. MUNNEKE: Let me turn to you Teresa. We have heard Harry and Michael and law firms talking about clients and in a sense you're a client.

What are your thoughts on what's happening in this market and things—how things are changing.

MS. ROSEBOROUGH: Let me tell you a little bit about the MetLife legal department, 400 lawyers strong not counting lawyers making up compliance functions.

This makes us either a medium or large law firm inside a corporate environment and we both provide legal services to our business clients at MetLife and we are external legal services at MetLife, and in the world as legal services from external sources, we are clients of those external firms or sources and across both of those perspectives, both as internal providers to the corporations.

The main thing that happened within the current economic environment, severe resource restrictions, both resources that we have available to us and the resources available to us for legal services, that resource restriction has come without any reduction of expectation in terms of the quality and nature and extent of the legal services provided, so at the end of the game, the challenge for us has been able to do more with less and to ask of our external business partners and legal vendors also more for less and I know that's created a lot of challenges in terms of the way law firms were structured.

We have talked a long time about wanting external law firms to work with us who can be both excellent external providers of legal services but also excellent business partners. And being a business partner means not just understanding our business and our role in the financial industry, but also means that you do it to provide services that we can rely on and that you have the ability to control your own resources in a way when you say you can deliver X service for X price you can.

And Michael and Gary both talked about the role of budgets and tying people to budgets and our ability to rely on these budgets and one of the challenges is the hourly fee, the most traditional way of paying for legal services.

It's been the most traditional way. It has extreme value in terms of the ability of a firm to know that it's recovering an amount to resources that's devoted to particular representations and also for us as consumers to have some sense of what choices we are making in terms of what firms we select, what resources we devote.

There's great value to the hourly fee. That's why it persists. It's very difficult for the law firms, as they are currently structured, particularly the large law firms, to actually control how much of that resource they devote to a particular matter.

When you send an associate out to do the first draft of a summary judgment, for the most part, the partner has no idea whether that associate is going to spend 30 hours or 60 hours or more working on that and has no way of calibrating at intervals and might be too late as to being able to control an investment in a particular matter or project.

And that's what gives value to some alternative arrangements that we seek and rely on in terms of cap fees, flat fees, for different types of work and really how can we, in a fair way, calibrate or gauge the amount of work to be provided for a particular matter or a task and come up with a way to make sure that our expectations in terms of cost to calibrate it.

That same resource restriction has led to other behaviors put pressure on you and on us. For example, MetLife procures a lot of services internationally and the pressure on us is to figure out where can we get the same quality of service externally through an international resource that we can otherwise get domestic with and what processes and procedures can you basically export to a national environment and do it more cheaply and I think in terms of how large corporations provide legal services that you are going to see more and more of that and the competitors are not going to be other firms or people who do your work domestically, but also these external services, international services and particularly with litigation support, document review and some of the more intense, extensive acts, I think there will be more and more pressure on us to figure out how those services can be done outside of the United States at a lower rate or lower cost rather than inside the United States.

MR. MUNNEKE: The model has changed. Law firms can't send somebody out and whatever it billed the client pays. They are scrutinizing business. They are looking at other methods, thinking about changing that firm, if they are not getting what they want, to reduce costs. Is this an economic downturn outcome?

MS. ROSEBOROUGH: I think it's permanent. I think it's difficult to retrace your steps. Once you find different things, it's hard to go back, even though we are not resource constricted as we are now.

So I think that the model change demands, in terms of changing the way legal services are delivered, are permanent, just as our internal changes, how we deliver service to our internal clients are undergoing rather permanent changes.

Three years ago MetLife paid over 400 law firms for our services to, this year we are going to pay a little over a hundred and next year 75 or 80, so convergence is another factor so, and we were talking about where do you invest? Or do you have a smaller number of providers? Do you do the work of doing the sole practitioners to provide extensive services? There is a lot of work and effort in order to discover those people and have to stay off Michael's radar screening, meet Michael on criminal services, but it's a real challenge to find the negative goal. The small firms that can provide—when you find those boutiques, you build long-term relationships, but that gives advantages to the large law firm.

Large firms can provide more resources for free, in terms of newsletters, CLE, all kinds of communication that are relationship-building activities that aren't directly, but which are enormously valuable to us in terms of our ability—how the benefit of an external perspective of how those changes impact us, so those are things that the large law firms offer and difficult for the small firms to offer.

MR. MUNNEKE: The question that everybody is sitting on the edge of their seat with this thought in mind. How can I make sure that my firm is one of the 75 on the list and not the 325 out in the cold? What do people have to do to get your business?

MS. ROSEBOROUGH: Request for proposals. We send those out and we can get specific tasks or matters being as creative as you can when you get those proposals how to manage a particular matter, how you control expenses, how you deliver quality service is really important, and it's interesting, looking at the range of responses, some people send back the following three people will be assigned and here is their background, and to people who draft full-blown memos with legal memoranda or responses to complaints or initial drafts of motions to dis-

miss. The firms that do more work at the front end both reveal more about their scales and capabilities and show that they are going to invest in a meaningful relationship and—

MR. MUNNEKE: How do you get Teresa's business? What do you do in your practice structure to make sure that you are one of the 75?

MR. TRUEHEART: You would like to have been one of the 400 and if you were one of the 400, you would like to think you have been enough in touch not only with what the client thought you needed, what you think they are going to need going forward, so you are always going to try to be at least a step ahead, but trying to put yourself in a position of a client and anticipate where they may be going or trying to do the free things that Teresa talks about, trying to build relationships in all levels of the organization where you have contact, including with secretaries and the people who handle the bills.

You try to take the static that you can take out of the relationship in the sense that you don't want problems with bills, that sort of thing. You want to match their calendars. You want to do all of those things.

If they don't recognize the first time or second time, by the third time it's going to be very apparent. It's always them, that sort of thing and then—and this is a challenge. You try to figure out if you really have what the client is going to need and it is, in fact, appropriate for you to pitch for it.

I would look at a law firm website. You couldn't tell whether there were three lawyers or 3,000. Everyone has a broad range of legal services and it's still true about that. The problem: the clients are much more sophisticated. While they will look at the website, they will talk to their friends and other companies and it goes on and on and on.

So you really do have to understand what level of expertise you need to bring and whether you've got it. The mix I assume is a mixture of trust, expertise, costs and many other factors, your reputation, your assets and also try to figure out the proposals is something you have to think about.

MR. MUNNEKE: You work with people-client development, you tell me how to be one of the 75. What is your reaction to everything you heard?

MR. HASSETT: When Judge Lippman was talking about a job that he had, he described lawyers heaven and I think what I do working with law firms and focusing them on the business side, is like taking you to lawyer's hell.

It is the notion that you have to find some compromise, a tradeoff between what the legal profession has traditionally been and business and people not having enough money to buy the things that they would prefer to buy.

That's a very difficult tradeoff to make and it's one I don't think everybody will successfully make. When I give speeches—I did a survey on alternative fees over the summer and I guess it was for a panel that Harry Trueheart, and I quoted Harry.

MR. TRUEHEART: What did I say?

MR. HASSETT: You said in this transition there will be winners and losers. This is a difficult transition that the profession is going through and some people are going to figure it out and, in fact, they may be better off than they were before.

Some people are not and so it's really in the interest of everyone in this room obviously to be on the winning side. I think how do you get on the winning side? I think it comes back to another comment that Judge Lippman made in passing, how do you do an effective oral argument? Listen. Listen to what the judges are asking and give them what they ask for.

I often, in my presentation, quote Stephen Covey, the seven habits of successful people. He says listening is the single most important ingredient in successful relationships, not just in business development, in dealing with your spouse and with your kids and I don't think, that resonates with me because I'm a terrible listener. I would rather talk and I think I have that in common with a lot of lawyers. That's why they call them pitch leaders instead of catching leaders. What you should do, you shouldn't tell them how great you are. You should be understanding what they need and what they need is exactly what we hear on this panel. There is less money, smaller budgets, so firms, large and small, have to figure out how do you deal with that? How do you provide a service that maybe isn't identical to the service that you used to give, but is equally satisfactory and equally meets the needs for less money? It's really as simple as that. Everything that this panel is talking about is coming down to how you provide value.

MR. MUNNEKE: I'm gathering a sense that it's not just that the economy has shrunken the pie from 16 inches to 14 inches, but the model has changed so that clients are asking the lawyers to deliver services more efficiently. They want a better price not because the economy is bad but because technology and global competition and new ways of doing business allow them to ask for law firms to be more efficient.

MR. HASSETT: It's both. It's the economy and everything else. My company specialized in custom training for sales organizations 20 years before we started working with lawyers and then I went to a conference about legal marketing and what I heard there five years ago was that the trend is what I had been seeing for 20 years in banks,

insurance companies, in telecommunications companies, in any kind of company that you can think of, these same things have happened. Their clients are saying there are fewer resources. Do more with less.

What I heard in that session five years ago was what exactly got that message five years ago. Things were great. They didn't have to do more for less. They could do more for more.

There was a hint that it was in the air or else. I ended up changing my entire company focus because I saw this as something that had to happen. I thought it was going to happen in less than five years. It took the economy falling apart to really happen. I don't think it's ever going back.

MR. TRUEHEART: If you want a nightmare, and hopefully this hasn't happened to you, talk to a general counsel from corporate procurement, people have gotten involved in the process which the in-house legal department procures services.

Bear in mind, in my view, colleagues in-house still want to do the very best job with the same standard professionals as we do, and they are not doing it either and they would like to maintain satisfactory and professional relationships with firms so that it's a total win.

The firm survives and can afford good people. Now bring in the guys that are buying steel, fuel, oil, plastic and pencils and have to deal with that and this is also going on in corporate America, which is another reason some client will go backwards. I don't know if you are dealing with that.

MS. ROSEBOROUGH: We face pressure from your client. Legal services are not a commodity. We live in an environment where all kinds of professional services are a commodity with health care, medical profession. We, in terms, I'm saying this as a lawyer not as an in-house lawyer, we, as a profession, have to continue to deliver services that emphasize our professionalism and we cannot become commoditized. You can't treat certain kinds of legal services as widgets that can be procured by the hour, and replicate it in the same way, and dealing with issues where we need 12 of them or 20 of them, and that's going to require that we continue to deliver advice and consultation and a joinder of expectations in a way that keeps us from being commoditized as a profession.

MR. MUNNEKE: The whole idea of legal services of commodity seems scary to me. How do you communicate either as general counsel or as the person in the law firm that there may be commodity legal services, but what we are doing is more unique that it requires special skill, knowledge, experience?

MS. ROSEBOROUGH: Part of it is the replicative—what their business objectives are, the specialized nature of the projects and engagements that are going on and reflecting that expertise and partnership, everything that you do in every independent case that you have.

Part of that is very well and easily delivered at the partnership level in those firms or at the petit provider level. It's very difficult to deliver that with associates. So one challenge that law firms have, how do we keep our younger talents, the people who do document reviews, doing first draft agreements, from being considered the commodity even if we ourselves at the higher level are considered the professionals in that, and part of that is that I think firms' and one of our challenges is making sure that young people are developed fast enough. Fast enough that they very quickly become part of the expert arrangements and very much engaged and providing advice and consultation to the firm in the way that is not going to make them feel like a widget in the process or part of a document development, and so one of the law firms that leveraged a lot, they made a lot of money. I think there is going to have to be less than that, let that work go, document review, privilege. Let that be exported to other places and continue to emphasize the professional parts of the services that we provide.

MR. MUNNEKE: Let's talk about this exporting service and it can apply to any number of contexts. It can mean going to a boutique firm right here in New York. It could mean going to a firm in San Francisco because with technology and the Internet, geography really means very little and if somebody can provide what you want somewhere else, you will go there.

It could mean going to a large law firm in the UK that provides the same kind of services as the firms in the U.S.

It could mean outsourcing some of the commodity work to India where lawyers there can do it at a fraction of the cost. What are the prospects or the future of exported legal services and what does that mean for all of us? And I think I would like to get everybody's reaction to that. I would like to start with you.

MS. ROSEBOROUGH: I think for us we are asked why do you have office space in New York and so we have to justify our existence in that way all the time. The legal services, why are you using the New York market instead of the Houston, instead of Kansas, and we have to justify that we are after particular professionals and their experience that exists in different markets. Increasingly the value of large law firms that can tap into different economic markets, I think that will be a consistent advantage of technology and a challenge of technology making sure that expertise and service quality is delivered in the right economic environment for both of us and the same is true in terms of exploring legal services requiring outside of the domestic forces that there is a constant cost benefit analysis—where in the world is the best source for this particular service and are we tapping into the appropriate place for that service to get the best return for our company?

MR. MUNNEKE: You, yourself, can be exported?

MS. ROSEBOROUGH: Yes.

MR. MUNNEKE: Have you used legal services overseas?

MS. ROSEBOROUGH: We have so far not tapped into India or some of the other sources, but with the constant pressure to justify, making the decision not to do that and more and more on document production, litigation technology, there is going to be increasing pressure to tap into those where they can be evaluated to provide the same quality of service at a cheaper price.

MR. MUNNEKE: If we are going to pay more, are we going to get more by keeping it here?

MR. TRUEHEART: We are in many major metro areas and we have a significant number of lawyers and we have been using those resources for all the reasons we can get space in certain markets and less than what New York space is today, which is a lot less than it cost a year ago. I want to make a point. It wasn't too long ago when most of us as lawyers said that will never happen because it's a profession. And I started thinking about where it might have happened on the profession—we have a very substantial health care practice, you should start looking at the international implication of health care practice because that's going to happen, international trade in health care, and they said never, never in my lifetime.

As of today there are world class surgical centers and treatment centers, among others, in Thailand, and here and there, and worse yet from the standpoint of the medical profession, there are insurance companies today who, with qualified facilities, will pay you to go there, have a vacation and have whatever needs to be lifted, and other things are going with dentistry.

MR. MUNNEKE: Managed legal care.

MR. TRUEHEART: It is happening to us. Whether you call it export or disaggregation, saying what Teresa said before, it's getting narrower.

We need to realize that if you are in consumer mode as opposed to at the level we are talking about, which nobody is in this room because you are commercial and federal litigation, think about all the do-it-yourself, do-it-yourself divorces, all the stuff on the web. It's going on all through the profession and as annoying as it is, you have to step up and move faster.

In the case of our firm, the thing that we have done in that respect is billed around the concept of geographic diversity and building expertise on a firmwide basis and deliver the best people for the client. I will say candidly some clients will not take a service provider that is not next door, particularly New York City attitude because nobody outside of the city knows everything.

I can say that because I have worked in the city a long time and I've worked outside the city. But more and more clients and for 20 years clients see the advantage of mix-and-match routine.

So I started doing the work of a firm that had one office in Rochester; I found myself doing international dispute work. It was cheaper and they were delusional to think I knew what I was doing. It's here.

MR. MUNNEKE: Doesn't that mean that you can send work within your firm to Des Moines?

MR. TRUEHEART: But we are not there.

MR. MUNNEKE: It's cheaper to run the office. You send the work over there. They do it. It comes back to you and you are still next door to your client. Don't you have advantage over the firm that has to do work here because they are here?

MR. TRUEHEART: I sure would like to think so. The client could just be happy to get it right from Des Moines once they find the right person.

MR. MUNNEKE: What about overseas; have you outsourced work?

MR. TRUEHEART: Yes.

MR. MUNNEKE: Have you thought about that and it just doesn't make sense now or ever?

MR. TRUEHEART: Nothing is forever and it will make sense at some point. Some of them have done this. Some friends in counterparts, and it's—we are in a stage, it's a series of things which will be worked out. Selling corporate America has done it, GE, some big—and many of the English firms have outsourced back office and are now beginning to outsource more substantive stuff at some level.

Many firms have outsourced document review. There is an intermediary between them and the people, let's say India, and a couple of global firms have a global center in the Philippines. We also see time share advantages.

If you live in the U.S. because it may be in business here, but not in business somewhere else and people do the work—

MR. MUNNEKE: In the end, if you can deliver the service more efficiently, then Teresa is going to be happy, assuming that the quality—

MR. TRUEHEART: She would be a very unusual client if she weren't.

MR. MUNNEKE: Michael, I think you may have a fairly unique practice area and for someone who needs a lawyer, who needs a lawyer like you, they need you. I don't know that all small firm lawyers are in the same boat.

They may be much more easily squeezed out by larger firms and corporations making the choice to go overseas or go outside of the State of New York. Do you have any thoughts how the smaller organizations can stay in the game?

MR. RAKOWER: Yes, definitely. I do need to apologize. I think we did something wrong with our firm. We are primarily commercial litigating. We do some civil rights, white collar defense.

MR. MUNNEKE: We really want somebody who is here who knows the courts who can represent you. If you are talking about commercial litigation, you are competing head to head with Harry. They are just different problems.

MR. RAKOWER: That's what we see as our competition and that's who we go against. There are benefits in using us and benefits in using Harry. Those clients want to find out why we might be able to better serve them for their particular needs.

We did examine ourselves whether or not to outsource some of our work would be beneficial. We relentlessly pursued value for the client whether technologically or in terms of people power. For us it turned out not to be a value proposition and we realized it wouldn't be for our client. We are different than larger firms—I spent a few hours with a gentleman from India who was very, very compelling about the kinds of work they could do for us and we thought this was great opportunity for the client. Every e-mail was rife with grammatical mistakes. We did a test run. The quality wasn't there for us.

In today's legal market, it makes less sense for the smaller firms at least to make use of overseas talent. There is a glut of lawyers out there looking for opportunities. What we decided to do instead is have a stable relationship with firms that provide temp lawyers. When we have a case that requires labor intensive, we have the ability to skill up. We have hardware in our office and we bring in contract lawyers who we closely supervise and train with whatever material it is that we are working with and we provide value to the client that way, so we got American-trained highly skilled lawyers who are looking for long-term opportunities who want to work hard, who we can supervise, who we think whose quality we can ensure and provide great value to the client because the price for those document reviewers on a contract basis is reasonable.

So, in that sense maybe we have a leg up in that we can provide a high quality product at a reasonable price that the larger firms can only do if they outsource that work and risk the quality in a way that we do not.

MR. MUNNEKE: I have heard some people speculating the future of the practice of law, suggesting that law firms, as we know them, will not exist in 20 or 30 years. You will have a small number of people in an organization that deals with the client like Teresa and Teresa will put out a RFP and then the lawyers with these contacts will put together sort of an ad hoc group to solve the particular problem and they have permanent employees like associates or even lower level partners that they will go to—Facebook, LinkedIn—have ongoing relationships who are available to work on a contract basis.

Instead of having big permanent firms, you will have ad hoc firms and do the work as needed. You will have rainmakers who will be the firms and everybody else will be practicing as a contract solo. Is that realistic?

MS. ROSEBOROUGH: I don't think so. I think not in the environment as it is now. Law is a collaborative endeavor and different perspectives add great value to law firm's in-house counsel, working on a particular matter, thought process together, and it's one of the reasons we see—different cultures have all the different kinds of law firms because they—because it commends them or doesn't, so part of our professionalism is communicated to our clients. The value proposition we bring as a collaborative enterprise and I think that's going to help the law firm model not exactly as it's replicated, but the law firm model is going to be a valuable one for different services.

MR. TRUEHEART: I think we are in the process of evolving. It's hard to tell what the exact, how much of it can be found in an analogy that the engineering profession, large scale engineering companies who do large scale international projects, nuclear power plants, what that analogy is, is they have a core of highly expert people and an infrastructure that supports them and they're substantial at the end of the day in and of themselves, but as the work scales, they can scale the total organization through contract people, itinerary engineer, whatever you want to call them, been there, done that in other types of projects but move from company to company, project to project and we are developing an infrastructure of that capability—using it to some extent already in some major cases and it's possible that model will be better developed and better implemented over time with the combination market force and technology—lacking the experienced people who could work at our level ten years ago, now for a variety of reasons American forces will suffer.

MR. MUNNEKE: Relate the issues to law firm pyramid model where there are a lot of people down at the bottom that the firm has to support in order to be available to provide services and if you are exporting more services or outsourcing the work, then it seems to me that the bottom of the pyramid can at least shrink and allow the firm to be a little bit more nimble; is that a fair statement?

MR. TRUEHEART: I don't know what you mean by nimble.

MR. MUNNEKE: Nimble in that if you assume there are fluctuations in the amount of business you have, it's not a flat line.

MR. TRUEHEART: Your resources to your work—if you have to put a hundred people somewhere tomorrow, nimble may not be spending a week trying to find them. It—

MR. MUNNEKE: As we draw toward the end of this, I thought I would ask what other issues would affect the way our profession and the practice of law, particularly in commercial litigation, can we expect that we haven't talked about and what other things are on the horizon that you see as may be big influences that we should all think about? Jim, I'll start with you.

MR. HASSETT: I can't see that far. The value thing is changing the way the profession does business and we have to get past that before I can worry about the next step.

MR. MUNNEKE: Mike?

MR. RAKOWER: I would keep in mind the types of disputes that arise during recessionary periods are different than those that arise during growth periods. This is all about going to see the opportunities. It's helpful to consider what kinds of practice areas you are going to grow now and are growing now to take advantage of that.

I think it's the theme of today's discussion. Listening is important, so we all talk to prospective clients and we all talk to actual clients. Prospective clients don't always get converted to be actual clients. You can learn from all of those people what practice areas are growing, what your clients needs are and how those disputes, the kinds of disputes you are handling in the past are different from what you are going to handle in the future position yourself.

MS. ROSEBOROUGH: Technology is going to allow increasing transparency in how we do our work and what work we provide and it's going to be important for law firms and internal legal departments to stay cutting edge, how we use technology and also in terms of how social network and other types of technology impact how we recruit lawyers and how clients expect services to be provided.

The same with our customers. The customers are the segue to the comment about diversity; as we become more global, you are going to see more globalization. Our customer base will become more global and our expectation and diversity being able to match up to the diversity of our customer base is going to increase and we will expect our vendors to increase as well.

MR. MUNNEKE: When we talk about a global economy and a global marketplace, we are, by definition, talking about a diverse marketplace to a certain degree needing for our workforce to look like the workforce of the customers and clients we deal with.

MR. TRUEHEART: From a provider point of view, you have probably been involved, but the cost in the federal setting is a major deterrent that any client who has the choice as to whether they will be involved—there are other kinds of transactional costs but mostly just the market—just wish that you were local lawyer in the local Houston, Texas when the market finds a court that works for them, they will go there. If you are in a court system that isn't working, it's going to impact your market.

So the whole transactional part is to reduce the amount of disputes or change, whether they are settled or go to arbitration, I'm not prepared—transactional costs in this environment are a strain of dispute resolution.

The second thing the labor content in the legal work is going on even if the market grows the variety of technology take out of practice and just way outsource providers like document companies and that is going—

MR. MUNNEKE: We are at the end of this program. I hope that our conversation will provide a catalyst for you to begin thinking about some of these issues that could have been talked about for hours that were mentioned in passing.

I encourage you to take a look at those. I think one of the problems we have as lawyers, we tend to be like Huck Finn floating down the Mississippi just encountering whatever happens to us as we go along on the raft and responding and reacting to whatever it is, rather than looking forward to try to identify the factors that will affect us and Harry said we can't always be right, but I think we err when we don't try to think about those things.

A lot of people are doing this. There is a lot written. I should tell you that I had a number of conversations with Steve Younger, President-elect of the bar, and he's very interested in continuing this discussion into next year. It's my hope this panel will have served as at least an introduction to what we ought to be talking about as a Bar Association.

I thank the Commercial Litigation Section for giving us the opportunity to raise these issues to help you all to be ready and to take on the next 20 years of the practice of law.

MR. TENNANT: I want to thank Professor Munneke, Ms. Roseborough, Mr. Rakower, Mr. Hassett and Mr. Trueheart for their comments. Very thought provoking. That concludes our CLE for today.

(Luncheon recess.)

Mandatory E-Filing in New York County Supreme Court—May 2010

By Hon. Sherry Klein Heitler and Jeffrey Carucci

Mandatory electronic filing has been introduced in the Supreme Court, Civil Branch, New York County, in certain kinds of commercial cases ("mandatory commercial cases"). This project represents a significant step forward for the state court system. In order to assist the commercial Bar practicing in New York County Supreme Court to make an easy transition to this new era, we set forth this brief summary of the relevant procedures.

Pursuant to Chapter 416 of the Laws of 2009, the Chief Administrative Judge was authorized by the Legislature to introduce mandatory electronic filing in three counties in defined types of cases in Supreme Court—certain commercial cases in New York County, tort cases in Westchester County, and cases in an upstate county. Chief Administrative Judge Ann Pfau wrote to Bar groups in December 2009 and informed them of her intention to institute mandatory e-filing in New York County and Westchester County and sought comments from the Bar. As readers may know, in January 2010, at the Fuld Award ceremony of the Commercial and Federal Litigation Section at the Annual Meeting of the New York State Bar Association, Chief Judge Jonathan Lippman announced that mandatory e-filing would begin in New York County in May of this year. A Uniform Rule for the mandatory program, as well as an amended Uniform Rule for consensual e-filing, have been approved.

The court wishes to do whatever it can to ensure that commercial practitioners are aware of the coming of mandatory e-filing to New York County Supreme Court in commercial cases and to inform the Bar of key facts about this project so that attorneys will be in a position to prepare themselves accordingly. We hope that the introduction of mandatory e-filing will be smooth, orderly, and efficient for all concerned, particularly attorneys and their clients. And so, we have written to Bar groups, posted notices on our websites and in the *Law Journal*, and written articles such as this one.

The following are the key aspects of mandatory e-filing that the Court will implement pursuant to the Uniform Rules.

All mandatory commercial cases that are commenced on May 24, 2010 and thereafter must be commenced electronically through our e-filing system, the New York State Courts Electronic Filing System ("NYSCEF"), and subsequent filings made in those cases must be made electronically.

The legislation defines the kinds of cases that are subject to mandatory e-filing as follows: commercial matters of the types set forth in Uniform Rule 202.70 (b) (and excluding those listed in 202.70 (c)), irrespective of whether the cases have been or will be designated as Commercial Division actions, provided that the amount in controversy is over $100,000 (exclusive of interest, costs, disbursements, counsel fees, and punitive damages). However, two categories of covered cases are not subject to a monetary threshold: corporate and other business dissolution proceedings and commercial arbitration matters (see Uniform Rule 202.70 (b) (11) and (12)). A mandatory commercial case that could be, but is not, brought in the Commercial Division, or that is transferred out of the Division, will be subject to mandatory e-filing. In addition, the monetary threshold of the Commercial Division as we write is $150,000, but the threshold for mandatory e-filing is lower. As a result, we will have e-filed Commercial Division cases and some e-filed commercial cases outside the Division.

Since e-filing is mandatory under the legislation, it follows that, except as otherwise provided in the Uniform Rule, from May 24 onward, documents in mandatory commercial cases that are submitted in hard copy format to the County Clerk to commence a case or that are presented in that format to the County Clerk or court clerks at any later stage will not be accepted—they must be e-filed. To facilitate identification of cases subject to mandatory e-filing, the County Clerk may require the filing of a special cover sheet upon the commencement of new actions; a supplement to the RJI may be required as well. Generally, working copies of motion papers and other documents intended to be reviewed by a Justice must be delivered to the court. The Uniform Rule requires that a copy of the confirmation notice, which is issued immediately by the NYSCEF system when a document is e-filed, be firmly bound as the cover page of every working copy presented; working copies not so configured will not be accepted until corrected. The confirmation notice is necessary for efficient processing of submitted working copies—from it, the court clerks will be able to recognize that the document in question concerns an e-filed case, that it is a working copy, and that the "original" has been e-filed. Specific procedures governing submission of working copies and other matters are to be found in our Protocol on Electronic Filing, which is posted on the "E-Filing" page of the court's website at www.nycourts.gov/supctmanh. In view of its importance, attorneys are urged to familiarize themselves with the current Protocol and with any subsequent revisions. Should modifications to other procedures be necessary to conform to the Uniform

Rule or as this mandatory program proceeds, amendments will be made to the Protocol.

The NYSCEF system offers many benefits to attorneys and their clients: convenience, the ability to file at any hour of any day, simplified service of interlocutory documents (the e-filing system is also an e-service system (except for service for the acquisition of jurisdiction, which must be effected in hard copy form in the normal manner)), the ability to pay court fees on-line by credit or debit card (Mastercard or Visa), immediate access to the entire file at any time from anywhere, savings in storage / file space and trips to the courthouse, instantaneous notification of filings by the court, including postings of decisions and orders, among other things. Normal court fees must be paid, but there is no charge to use the NYSCEF system—that is, there is no charge to file a document, serve a document, consult the NYSCEF case file, or print documents from the system.

In many respects, the NYSCEF system resembles the Federal Electronic Case Filing system. Thus, it is our expectation that those familiar with the latter will be able to use the former with no formal training. Because the system is simple and easy to learn, many will find sufficient a brief review of the *User's Manual* and *FAQ's* that are available on the NYSCEF site (www.nycourts.gov / efile), or some practice using the NYSCEF "Practice System," which is an exact replica of the NYSCEF system that can be used by attorneys to practice with fictitious cases. Those who feel the need of training can obtain it easily. Anyone interested in training is urged to contact the NYSCEF Resource Center at efile@courts.state.ny.us or 646-386-3033. A two-credit CLE course is offered weekly, or more frequently if needed, at the courthouse of the New York County Supreme Court at 60 Centre Street, Manhattan. There is no charge for this course. The staff of the Resource Center can answer any other questions attorneys may have and are eager to be of help.

The rules governing e-filing allow attorney service companies to become authorized e-filing agents. Attorneys who do not wish to involve themselves or their office staff in e-filing are free to e-file through such an agent.

We urge commercial practitioners to follow our court's website for additional information on this important new initiative as it moves forward. And we thank the Commercial and Federal Litigation Section (Vincent Syracuse, Chair) for allowing us to present this information to interested practitioners.

Judge Heitler is the Administrative Judge for Civil Matters of the First Judicial District. Mr. Carucci is the Statewide Coordinator for Electronic Filing of the New York State Unified Court System.

SECTION REPORT

Sealing Documents in Business Litigation: A Comparison of Various Rules and Methods Applied in Federal, New York State and Delaware Courts

Prepared by the Commercial Division Committee[1]

New York courts frequently wrestle with the issue of whether, and how, a court should "seal" documents that arise during business litigation. The courts must not only consider the applicable legal standard, but also balance competing policy concerns: the public's right to unfettered access to the judicial decision-making process versus the potential harm to litigants or the public should the information be made available. To assist in this analysis, we have examined the various approaches taken by the New York State courts, the federal courts in New York and the Delaware Chancery Court in business disputes.

Based on this review, we recommend the following in business cases: 1) New York State justices should be given greater discretion in weighing these competing policy concerns; 2) the good cause standard that the courts apply should include an inquiry into *the role that the information in question plays in the judicial proceeding*; and 3) the New York courts should consider incorporating some additional electronic filing features that would help protect against inadvertent disclosure of sealed materials.

I. Determining "Good Cause": Whether to Consider the Role of the Information in the Judicial Proceeding

While a "good cause" standard is used by both the federal and New York State courts, those courts have adopted different approaches to the "good cause" analysis. *See, e.g., L.K. Station Group, LLC v. Quantek Media, LLC*, 20 Misc.3d 1142(A), 2008 N.Y. Slip Op. 51827 (U), 2008 WL 4172655 at *2 (Sup. Ct., N.Y. Co. 2008) ("The manner in which "good cause" is construed, however, seems to be broader in the federal courts than in New York courts.")

Although both New York State and federal courts apply a general presumption in favor of public access to judicial records, differences in application of the "good cause" standard seems to stem from the following factors: 1) "good cause" in the federal courts is initially examined against the backdrop of a discovery rule while New York examines it against a statute specifically intended to scrutinize sealing; 2) New York treats all judicial documents equally while the federal courts recognize differing types of judicial documents; and 3) federal courts apply a calculated presumption of public access based on the type of judicial document and its role in the adjudication.

In federal court, a party must move for a protective order to seal documents. Protective orders in federal court practice are governed by Rule 26(c) of the Federal Rules of Civil Procedure, "…the court may, **for good cause**, issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense…" Fed. R. Civ. P. 26(c) (emphasis added). Balanced against a party's "good cause" is the common law right of public access to judicial documents. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006). Where the document is "judicial"[2] in nature, the federal courts apply a more demanding standard of "good cause."[3] *Id. See also In re Terrorist Attacks on September 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006). Judicial documents are given a presumption of public access, but the strength of the presumption is based on the document's role in the adjudicatory process.[4] *See Cumberland Packing Corp. v. Monsanto*, 184 F.R.D. 504, 505 (E.D.N.Y. 1999). The approach is based on the belief that many of the documents "…generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power" and, as a result, the court must identify the documents "…directly affect[ing] an adjudication to matters that come within a court's purview solely to insure their irrelevance." *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).

Evidence introduced at trial or documents submitted as the principal basis for a summary judgment motion are given an "especially strong" presumption of access due to their central role in a court's exercise of its Article III function and the "resultant value of such information to those monitoring the federal courts." *Id. See also The Diversified Group v. Daugerdas*, 217 F.R.D. 152, 158 (S.D.N.Y. 2003). If the judicial document plays only a minor role in the judicial process, the presumption of access "amounts to little more than a prediction of public access absent a countervailing reason." *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). Filed settlement documents are given a very weak or even non-existent presumption of access as "… they play a 'negligible role' in the trial judge's exercise of Article III judicial power until they are merged into a tentative final agreement for court action, thereby becoming public."[5] *See The Diversified Group v. Daugerdas*, 217 F.R.D. 152, 15 (S.D.N.Y. 2003) (quoting *United States v. Amodeo* at 1050). Materials that are exchanged during discovery are not given a presumption of public access as they play no role in the performance of Article III functions and the "movant need only make a baseline showing of good cause in order to justify the imposition of a protective order." *Ello v. Singh*, 531 F. Supp. 2d 552, 583 (S.D.N.Y. 2007). *See also Cumberland* at 505. Once the court has determined the type of presumption to be afforded the document, it balances

that against any competing interest.[6] *See United States v. Tangorra*, 542 F. Supp. 2d 233, 236 (E.D.N.Y. 2008).

In sum, the federal court applies the following steps in determining good cause when sealing judicial documents: 1) a motion for a protective order is brought before the court sealing particular documents based on Rule 26 (or a stipulation submitted for the court's approval), 2) the court reviews how the judicial document impacts its Article III function (does it help it come to a decision or is it merely a document that has a negligible impact at that stage of litigation), 3) a measured presumption of public access based on the document's role in adjudication and 4) a balancing of the public versus private interests.

New York follows a similar approach under N.Y.C.R.R. § 216.1.[7] Court records can only be sealed upon a written finding of good cause, while, documents obtained through disclosure and not filed with the clerk remain subject to the protective order standard under CPLR 3103. *See* Uniform Rules for Trial Courts, 22 N.Y.C.R.R. § 216.1. Noticeably, good cause is not initially evaluated against a discovery rule (like Rule 26), but, rather in the light of a statute whose purpose is to limit sealing. *See* George F. Carpinello, *Public Access to Court Records in Civil Proceedings: The New York Approach*, 54 Albany Law Review 93, 108-110 (2003).[8] *See also In re Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 601 N.Y.S.2d 267 (1st Dept. 1993). "[216.1] was enacted largely in response to a concern that …courts were not sufficiently taking into account the public interest…in particular, …the practice of sealing records of settlements in product liability and other tort actions where the information might alert other consumers to potential defects." *In re Twentieth Century Fox Film Corp.* at 485-486. Confidentiality is to be treated as an "exception, not the rule" and "[w]hatever makes its way into the [court] file is presumptively open for public review." *See In re Will of Hoffman*, 284 A.D.2d 92, 727 N.Y.S.2d 84, 85 (1st Dept. 2001). Compared to the federal court, New York's approach is more streamlined: 1) a party must move pursuant to § 216.1 (or submit a stipulation for the court's approval), 2) any document filed with the court is treated with a single presumption of public access rather than a spectrum of possible presumptions, 3) the court balances the public versus private interests.

The chair of the committee that helped draft N.Y.C.R.R. § 216.1 argues that New York courts should consider a judicial document's role as part of the court's exercise of its judicial discretion in determining good cause. *See Carpinello, supra* at 1095-1100. He states, "The movant's burden should be significantly less where the document was not part of the judicial decision-making process and where the document does not inherently raise legitimate issues of public interest." *Id.* The belief is that this analysis would occur organically as part of the court's "…balancing process [in] weighing the potential for harm and embarrassment to the litigants and public alike." *See Carpinello, supra, quoting, Coopersmith v. Gold*, 156 Misc.2d 594, 606, 594 N.Y.S.2d 521, 530 (Sup. Ct., Rockland Co., 1992).

In practice, however, New York courts do not generally evaluate the role of the judicial document in its decision making process. For instance, a recent decision denied petitioners the right to seal property valuation reports in an estate accounting proceeding, despite two prior orders (issued in 1992 and 1994) granting sealing. *See In re Goldman*, 21 Misc.3d 1138(A), 875 N.Y.S.2d 820, 2008 WL 5076469 at *2 (Sur. Ct., N.Y. Co. 2008). Without delving into its merits, the decision is silent as to what role the evaluations serve in the court's judicial function (the accounting). Arguably, these evaluations are not central to or significantly impact upon the court's role in the accounting proceeding. Additionally, the court made no mention of any public interest served in allowing access to the documents. Rather, the court focused on the idea that once a record is filed it is presumptively open to public access: "There must be a showing of compelling circumstances to justify departure from the strong preference for allowing public access to court records." *Id.* at *1.

Similarly, the First Department denied defendant's motion to seal a complaint, which alleged unethical and criminal conduct, as there was a clear public interest in such allegations. *See Liapakis v. Sullivan*, 290 A.D.2d 393, 736 N.Y.S.2d 675 (1st Dept. 2002). While this result may seem appropriate, the court offered no discussion as to what role the summons and complaint occupied at that stage of the court's function. In contrast, as discussed earlier, the federal courts explicitly conduct this analysis in considering whether a summons and complaint should be sealed. *See Ello v. Singh*, 531 F. Supp. 2d 552 (S.D.N.Y. 2007), *See also Standard Investment Chartered Inc. v. NASD*, 2007 WL 2790387 at *6.

In another example, the Second Department granted the sealing of certain documents submitted in conjunction with a summary judgment motion (which one would expect to have a greater presumption of public access than an estate valuation in an accounting procedure) as the documents contained proprietary financial information that could harm a party's competitive standing. *See Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 835 N.Y.S.2d 595 (2nd Dept. 2007). Again, there was no explicit discussion of what role these documents have in the exercise of the court's judicial decision making process. These decisions point to an evolving line of New York case law that implicitly hold that merely filing a court document imposes a strong presumption of public access, regardless of the document's role in the judicial function.

In fairness, had the role of the judicial documents been examined and a variable weight of presumption been applied in the cases mentioned above, the courts could have rendered the same decision. Explicitly asking the question, however, forces the New York courts to consider the im-

port and role of the judicial document as part of the court's judicial function in balancing against the private interests in sealing that document.

Such a context-based approach has at least tacit approval in New York case law that was developed shortly after the enactment of Part 216 of the Uniform Rules in 1991. For example, in 1993, the First Department recognized that the context in which the judicial documents have been filed is a consideration: "…the type of proceeding, in and of itself, is an important factor which the court should take into account in determining whether the parties have established sufficient good cause to seal the records to overcome any public interest in their disclosure." *In re Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 486-487, 601 N.Y.S.2d 267, 269 (1st Dept. 1993). Failing to consider context, the court opined, would unreasonably tip toward the public's interest predominating and "… make disclosure virtually automatic in any proceeding." *Id.* at 269.

Yet, more recent decisions appear to give lesser consideration to the contextual role of a judicial document. As a result, eminent New York jurists have recognized that without the discretion to maintain a proper balance between competing policy interests, not only may the Commercial Division be adversely affected, but the administration of justice could be compromised:

> While the public has an interest in having court files open and available, there are other interests which must be balanced. The State has an interest in having its courts, and especially the Commercial Division, be "user friendly." Litigants have an interest in having documents containing confidential information, i.e. information which might put the litigant at a competitive disadvantage if made available to competitors by means of a public filing, kept confidential. It could be argued that trial courts should be given more discretion in arriving at a proper balance.

L.K. Station Group, LLC v. Quantek Media, LLC, 20 Misc.3d 1142(A), 2008 N.Y. Slip Op. 51827 (U), 2008 WL 4172655 at *2 (Sup. Ct., N.Y. Co. 2008).

II. The Mechanics of Sealing: Manually Sealing versus Electronic Sealing

Generally, there are five means of protection for confidential documents which are to be filed with the court. 1) Sealing of the Entire File; 2) Partial Sealing of Individual Documents; 3) Sealing via Electronic Filing; 4) Redacting Confidential Documents; and 5) Impounding of Documents.

As discussed earlier, if a party wants to seal the entire file, he/she will have to make an application pursuant to Section 216.1 of the Uniform Rules. The court will then hold a hearing to determine whether there is good cause to seal the entire file. If the application is granted, then an order will be entered. The order should contain certain exceptions as to who may review the file. Generally, the order should allow the file to always remain accessible to the court, court employees, attorneys of record, or their designees who would be determined in writing and would present the proper identification to the Clerk of Court when retrieving the file.

A common dilemma is when one has a new case which he/she believes should be filed under seal. If the party purchases an index number and files the papers, they will become immediately open to inspection. Prior to purchasing an index number, the party should go to the County Clerk's office. There, the party will be instructed to file an order to show cause seeking to seal the file. The confidential documents (i.e., summons and complaint) will be attached, yet segregated in an envelope. The order to show cause will contain a temporary restraining order (TRO) provision requesting a temporary sealing of the file until the assigned justice schedules the "good cause" hearing required pursuant to Rule 216.1. If the TRO is granted, the movant will go back to the County Clerk's office and the papers will be put in a temporary sealing file. If the TRO is denied, then the papers will go into a file open to the public. The court will thereafter hold the required hearing to determine whether the file will be sealed.

At times, it is not necessary to seal an entire file, but rather individual documents which are filed with the court. If the court allows for partial sealing of the file, then, in New York County, a separate folder is created by the clerk's office which contains the subject documents. This file is placed alongside the unsealed portion of the file on the shelf in the County Clerk's office. While a file may be partially sealed, clerks in New York County find this to be problematic. The clerks become responsible for ensuring that only particular documents are turned over when the file is requested. It can be difficult for a clerk to guarantee that no sealed document will be turned over because at times they may be part of an extremely large file. Furthermore, in theory, it can become a burden on the court if the parties have to come in for a "good cause" hearing each time they want a particular document to be sealed. Overall, it is not that partial sealing cannot be done, but parties should be advised that it may cause difficulties.

In Nassau County, a sticker indicating that portions of the file are under seal is placed on the front of the file and a separate redweld, with the sealing order attached to the front, is created to hold all the sealed documents. The redweld is kept with the rest of the court file.

The problems associated with partial sealing are alleviated to a certain extent if the parties choose to e-file their case. When a case is e-filed, either party may file a particular document and mark it secure so that access is not allowed to the public over the internet. Rather, only the

parties who hold an e-file identification number and members of the court system may access the document.

E-filing, however, cannot be used as a way around making the appropriate Section 216.1 application. In New York County, even when a matter is e-filed, the parties are responsible for filing hard copies of all electronically filed documents. This would include any documents which a party has marked "secure." Despite designating the document as "secure," the party is still responsible for filing a hard copy of the document which will be available to members of the public who come to the County Clerk's office and request the file. Therefore, a word of caution to a party that "secure" does not mean "sealed" in New York County.

A party may also consider filing redacted documents when bringing a motion or an order to show cause. Under this method, a party would file redacted copies of any alleged confidential documents and separately hand to the assigned justice unredacted copies which he/she will review. Of concern, however, is if a redacted copy is filed and the originals are returned to the parties after the judge renders a decision, issues may arise with respect to the record on appeal. Somehow the court has to connect the unredacted version of the documents to the court file because it is only what is in that file which constitutes the "record" for appeal purposes. The court must be specific in its decision as to what unredacted documents it has relied upon—meaning it must affirmatively state it for the record. The parties can then later subpoena the document(s) for appeal purposes. Before choosing this manner of protecting confidential documents, a party should be aware of the assigned justice's preferences and whether this would be an acceptable means of protecting the confidential documents.

Lastly, a more extreme method of protecting confidential documents would be to seek an order from the court impounding them. This is very different from sealing. Generally, if one impounds something, it is one particular item. For example, a piece of jewelry, bearer bond, or other unique item. It is generally understood that the item will be returned to someone at the end of the case. If something is impounded, it is placed in a locked safe. Only two individuals hold the combination allowing access to the safe. This appears to be a less likely means for protecting a document and is one really intended to protect an item as unique and irreplaceable, rather than confidential.

In the course of our review of sealing mechanics, we looked to how another business court, the Delaware Chancery Court, helps ensure that sealed materials are not inadvertently disclosed. All documents filed with Delaware Chancery Court are filed electronically through Lexis, and can be viewed publicly through that mechanism. But Delaware has programmed the system as follows:

- Documents are deemed confidential, either through Order or through the filing of a normal confidentiality stipulation that has been "so ordered."
- When counsel electronically file a document there is apparently a mechanism to select the type of security one would like applied to that document.
- If it is a sealed document, only counsel to the action subject to the confidentiality order and the court can view the document.
- Clerks can review the document, but have no mechanism to print it if it is sealed.
- No hard copies are stored in the court anymore.
- While normally the public has access to all documents filed electronically on the Lexis system, if the document is sealed, nothing happens when one tries to click on the link to that document. [9]

Such an approach appears to offer some advantages that the New York Courts might want to consider. First, hard copies are not subsequently filed in e-filed matters. Therefore, members of the public will not have access to secure documents by going to the clerk's office and requesting the file. Second, in Delaware Chancery Court, despite being able to view secure documents, clerks cannot print any document bearing that designation. In New York County, clerks may both view secure documents and generate hard copies by printing them. While this latter approach may provide certain administrative benefits to the courts, it significantly increases the risk that sealed materials might be inadvertently disclosed to parties not entitled to them and imposes an additional administrative burden on the clerks to ensure that no such inadvertent disclosure occurs.

III. Conclusion

Judges should have greater discretion in deciding whether to seal a document. It is clear that the courts take seriously their obligation to make sure that the public has access to judicial decision-making process so that the public will have confidence that the judicial system is operating openly, honestly and fairly. At the same time, private litigants need to be protected against third parties who might seek to misuse their access to court records to expose trade secrets, valuation information, and proprietary information, when that information is not germane in determining the merits of the suit and when the information does not affect public health and safety.

New York's current sealing scheme can cause seeming incongruities where an estate accounting can at one point be sealed, then unsealed, all during the same litigation, while documents submitted in support of a summary judgment motion are sealed, even where they are dispositive to the issue at hand. New York courts should be allowed the discretion of applying a measured presumption of public access that best fits the role that a filed document plays in the proceeding, before analyzing the competing public versus private interests. In fact, it appears to be a step that was envisioned as part of the court's analysis under 216.1, but, has been recently ignored by newer case law. *See Carpinello,*

supra; *see also In re Twentieth Century Fox* at 269. Allowing New York courts this small measure of discretion should allow for a more equitable result in the balance between public and private interests.

In terms of the physical mechanics of sealing, we would recommend that the New York Courts consider adopting some of the protections currently used by the Delaware Chancery Court. The New York Courts have already taken substantial steps to enhance document security by implementing electronic filing, and by limiting hard copy duplication of "sealed" documents, the courts could further help reduce inadvertent disclosure and the administrative headache posed by sealing, and thus help effect the decisions made by the justices who have determined that such "sealed" materials should not be disclosed.

Any movement toward this approach would provide greater confidence to both counsel and litigants that information will be kept confidential, and, in turn, continue to make the New York State courts, and specifically, the Commercial Division, a welcome forum for the resolution of commercial disputes.

Endnotes

1. This report was prepared by Howard Fischer, Steve Madra, Megan McHugh, and Robert Schrager of the Commercial Division Committee of the Commercial and Federal Litigation Section of the New York State Bar Association ("NYSBA"), co-chaired by Paul D. Sarkozi and Mitchell Katz. On December 8, 2009, the Executive Committee of the Section adopted the report by a unanimous vote. The report was subsequently adopted by a unanimous vote of the Executive Committee of the NYSBA on January 28, 2010.
2. A judicial document is defined as an "item filed…relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (*quoting United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir.1995)). It is not immediately clear as to what documents are to be classified as "judicial" as the district courts have openly acknowledged that the definition of "judicial" documents is still evolving.
3. "[A] party seeking a protective order sealing trial, other court hearings, or motions and accompanying exhibits filed with the court must satisfy a more demanding standard of good cause." *In re Terrorist Attacks on September 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006).
4. The Western District of New York has a Local Rule restating this principle: "there is a presumption that Court documents are accessible to the public and that a substantial showing is necessary to restrict access." *Livecchi v. Rochester Police Department*, 2004 WL 1737379 (W.D.N.Y. 2004), *quoting* Local Rule Civ. P. 5.4.
5. Additionally, there is a strong public policy encouraging the settlement of cases through a negotiated compromise and if sealing helps to create that outcome, it would outweigh a public access interest. *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856-858 (2d Cir. 1998).
6. Some competing interests mitigating against disclosure have been defined, as where business information might harm a litigant's competitive standing, or where there exists a law enforcement interest or based on the privacy interests of individuals. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006); *Fischer v. Smithkline Beecham Corp*., 2008 WL 4501860 (W.D.N.Y. 2008) (denying request to seal records as movant failed to meet its burden in establishing records as trade secrets).
7. The text of the statute is as follows:

   § 216.1. Sealing of Court Records

   (a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

   (b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR § 3103.
8. This law review note was written by the Chair of the New York State Advisory Committee on Civil Practice, which originally drafted the New York Rule on Sealing of Court Records. While this note is an excellent reference tool, its findings may need to be updated as six years has passed since the article was published. Another law review article, *Public Availability or Practical Obscurity: The Debate Over Public Access to Court Records on the Internet*, by Arminda Bradford Bapko, is worth mentioning, as it discusses the merits of a time lag in electronic filing. New York Law School Law Review, 49 N.Y.L. Sch. L. Rev. 967 (2004-2005).
9. Delaware Chancery Rule 5(g) is the operative statute controlling sealing. The full text of that statute appears below.

   Delaware Chancery Rule 5(g)

   (g) Sealing of Court Records.

   (1) Except as otherwise provided in this Rule 5(g), all pleadings and other papers, including deposition transcripts and exhibits, answers to interrogatories and requests for admissions, and affidavits or certificates and exhibits thereto ("documents") filed with the Register in Chancery shall become a part of the public record of the proceedings before this Court.

   (2) Documents shall not be filed under seal unless and except to the extent that the person seeking such filing under seal shall have first obtained, for good cause shown, an order of this Court specifying those documents or categories of documents which should be filed under seal; provided, however, the Court may, in its discretion, receive and review any document in camera without public disclosure thereof and in connection with any such review, may determine whether good cause exists for the filing of such document under seal.

   (3) The provisions of paragraph (2) of this Rule 5(g) notwithstanding, the Court may, in its discretion, by appropriate order, authorize the parties or other persons to designate documents to be filed under seal pending a judicial determination of the specific documents or categories of documents to which such restriction on public access shall continue to apply. In all such cases the Court shall require submission of the matter within ten days of such initial order and shall make such a determination as soon as practicable.

   (4) Whenever any brief or letter subject to Rule 171 [which is the chancery rule regarding the filing of briefs/legal memoranda] is filed under seal with the Court because it would disclose information from a document which is otherwise required to be filed under seal pursuant to this Rule 5(g), the following procedures shall be followed:

(A) if the restricted documents had been designated by the party filing the brief or letter, the party shall also file a copy of the brief or letter for public inspection omitting only such restricted information which the party believes should continue to be sealed for good cause; or

(B) if the restricted document had been designated by another person, the party filing the brief or letter under seal shall give written notice to such person that a copy of the entire brief or letter will be filed for public inspection unless such person files, within 3 days of the filing of the brief or letter under seal, a copy of the brief or letter for public inspection omitting only such restricted information which such person believes should continue to be sealed for good cause; or

(C) if the brief or letter discloses information from a restricted document which had been designated by the party filing the brief or letter and also discloses information from a restricted document which had been designated by another person, the party filing the brief or letter under seal and such other person shall jointly prepare and file, within 3 days of the filing of the brief or letter under seal, a copy of the brief or letter for public inspection omitting only such restricted information as each of them believes should continue to be sealed for good cause.

(5) Any person who seeks the continued sealing of any portion of a brief or letter pursuant to paragraph 4 of this Rule 5(g) shall also file a certification signed by such person's attorney of record (or, in the event such person is not represented by an attorney, signed by such person) that said attorney has personally reviewed the brief or letter filed under seal and that said attorney believes to the best of the attorney's knowledge, information and belief that the restricted information should continue to be sealed for good cause. Said certificate shall briefly set forth the reasons why said attorney believes that good cause exists for continued filing of the brief or letter under seal.

(6) Any party who objects to the continued restriction on public access to any document filed under seal pursuant to paragraphs (2) or (3) of this Rule 5(g) or to any portion of a brief or letter filed under seal pursuant to paragraph (4) of this Rule 5(g) shall give written notice of such party's objection to the person who designated the document for filing under seal. To the extent that such person seeks to continue the restriction on public access to such document, said person shall serve and file an application within 7 days after receipt of such written notice setting forth the grounds for such continued restriction and requesting a judicial determination whether good cause exists therefor. In such circumstances, the Court shall promptly make such a determination.

(7) The Register in Chancery shall promptly unseal any document or brief or letter in the absence of timely compliance with the provisions of this Rule 5(g). In addition, 30 days after final judgment has been entered without any appeal having been taken therefrom, the Register in Chancery shall send a notice to any person who designated a document to be filed under seal that such document shall be released from confidential treatment, unless that person makes application to the Court within 30 days for further confidential treatment for good cause shown.

(8) Notwithstanding any provision of this Rule 5(g), any order permitting or requiring a document, brief or letter to be filed or remain filed under seal (the "Sealing Order") shall expire three years after the final disposition of the action in which the Sealing Order was entered, and any document, brief, or letter filed under seal pursuant to the Sealing Order shall become a part of the public record. Notwithstanding anything to the contrary in this Rule 5(g)(8), the time within which the Sealing Order shall expire may be extended by the Court for good cause shown.

SECTION REPORT

The Continuing Surge in Immigration Appeals in the Second Circuit: The Past, the Present and the Future

Prepared by the Committee on Immigration Litigation

Executive Summary

The growth in immigration appeals in the Second Circuit is well documented, with a noticeable surge commencing in 2002 that quickly grew to represent more than 38% of all filings in 2004.[1] As we report below, these immigration appeals continue to be filed at elevated levels and continue to dominate the Second Circuit's docket. There is no apparent decline. Without changes in immigration law and policy, or structural changes in how immigration appeals are adjudicated, there is every indication that a sizable immigration docket will persist in the Second Circuit.

This report looks at the current state of affairs in the Second Circuit, identifying the measures taken by the court to handle the enormous volume of immigration appeals and how these measures are working. We also examine measures recently instituted or proposed that may improve the quality of legal representation and administrative case records in immigration appeals. The report offers several recommendations for the future that should permit greater case review at the administrative levels including expanding the size of the Board of Immigration Appeals and the number of immigration judges and support staff, creating a training and mentoring program for poorly performing immigration attorneys, increasing the sanctioning power of members of the Board of Immigration Appeals and immigration judges, and encouraging either greater *pro bono* representation or providing indigent immigrants with government-funded attorneys. We believe greater administrative review will both discourage further appeals and ensure that cases that are appealed to the circuit courts contain more detailed case records whose merits may be more readily evaluated.

I. Background: The Problem of Immigration Appeals

Millions of foreign nationals currently reside in the United States without authorization or in violation of their status, some having entered without authorization, some having overstayed their admission period, and some having violated their status with, for example, a criminal conviction. Those detected are ordered to appear in deportation proceedings before immigration courts nationwide. Many of these foreign nationals resist removal by seeking asylum—a humanitarian ground of relief for immigrants who were persecuted, or fear persecution, in their home countries[2]—while asylum applicants whose cases are not granted administratively are also referred to immigration court. Immigration judges undoubtedly have a grave responsibility in adjudicating claims of asylum—where an incorrect denial returns an individual to his or her country of persecution. The fact that the immigration court system as a whole (including the Board of Immigration Appeals which oversees the immigration courts) lacks sufficient resources to handle the large case volume undermines the accuracy, legitimacy, and efficiency of decision-making in immigration cases.[3] Further complicating the task of identifying meritorious claims is the lack of financial resources of asylum applicants who often appear without counsel.[4]

By the late 1990s, the lack of judicial resources to handle the large number of immigration cases resulted in enormous administrative backlogs within the immigration courts and the Board of Immigration Appeals.[5] Seeking to reduce the growing backlog, Attorney General John Ashcroft instituted streamlining reforms in 1999 and 2002.[6] As a direct result of those reforms, the United States Courts of Appeals, particularly the Second and Ninth Circuits, witnessed an unprecedented surge in immigration appeals.[7] In a 2004 article, the Association of the Bar of the City of New York reported on the Second Circuit's efforts to address the burgeoning immigration caseload through special case management measures and by coordinating with the Board of Immigration Appeals.[8]

Now, five years later, our review of the immigration appeal docket in the Second Circuit reveals that the volume of immigration appeals has not declined.[9] Furthermore, despite the measures instituted within the Second Circuit and the Board of Immigration Appeals, there continues to be concern regarding the competency of counsel appearing before the court on immigration matters[10] and the thoroughness of the record provided by the Board of Immigration Appeals.[11]

II. Overview of Immigration Appeals Processes and the 1999 and 2002 Streamlining Reforms

Under the authority of the Attorney General, the Executive Office for Immigration Review (EOIR) is charged with interpreting and administering U.S. immigration law on behalf of the U.S. Department of Justice (DOJ).[12] EOIR consists of more than 230 immigration judges who are responsible for issuing deportation orders in instances where there is no form of relief.[13] The Board of Immigration Appeals (BIA or the Board) hears appeals from immigration court decisions.[14] Its precedent decisions are binding on immigration courts nationwide, subject to the

Attorney General's review. Respondents may also appeal to the U.S. Court of Appeals with jurisdiction; however, these decisions are only binding on immigration courts within that circuit.[15] Accordingly, uniformity of law nationwide is best achieved through BIA precedent.[16]

The Attorney General has authority to change the BIA's structure and internal processes. In both 1999 and 2002, he introduced streamlining procedures designed to reduce the enormous backlog in BIA cases—56,000 in March 2002.[17] The 1999 revisions permitted single board members to affirm immigration court decisions in one-line decisions without any legal analysis.[18] The use of Affirmances Without Opinion ("AWOs") subsequently increased due to the 2002 reforms and were mandated in certain instances.[19] In addition, the 2002 reforms reduced the BIA from 23 to 11 members, expanded single-member as opposed to three-member panel review, and established time limits for adjudicating cases.[20] The 1999 and 2002 reforms have been roundly criticized by federal circuit courts.[21] Nevertheless, the federal courts have consistently affirmed the authority of the Attorney General to amend and adopt rules to streamline the administrative process,[22] and some have praised the BIA for its efforts to reduce the administrative case backlog.[23]

III. Pre-2004 Surge in Immigration Appeals and 2004 City Bar Study

The Attorney General's efforts to reduce the administrative backlog of immigration cases by streamlining procedures had a direct and immediate impact on the dockets of the federal circuit courts.[24] While only 6% of BIA cases were appealed prior to the reform measures, 20% were being appealed by the end of 2003.[25] Nationwide federal circuit courts experienced an increase of 294% in immigration appeals from 2001 to 2002, with an additional increase of 35% in 2003.[26] By 2003, immigration appeals represented 14.4% of all appeals filed in the federal circuit courts.[27] The growth was even more appreciable in the Second Circuit where administrative agency appeals constituted 4% of total appeals filed in 2001.[28] Just two years later, 34% of all appeals filed in the Second Circuit were administrative agency appeals, most of which were BIA appeals.[29]

The Committee on Federal Courts, Association of the Bar of the City of New York, undertook a study of the burgeoning immigration docket in the Second Circuit, publishing its findings in August 2004.[30] As noted in that report, the Second Circuit met the challenge of the massive influx of immigration appeals by instructing the DOJ to dedicate sufficient attorneys to the cases and urging the BIA to designate sufficient staff to expedite preparation of the records.[31] The Second Circuit added part-time attorneys to process the cases, and Second Circuit staff attorneys bundled cases together for conferencing where the petitioners were represented by the same attorney.[32] Status conferences with staff attorneys were ordered in an effort to resolve cases at the staff attorney level.[33] Despite these measures, however, the surge of appeals has continued.

IV. The Continued Surge in BIA Appeals to the Second Circuit: 2004 to Present

The rate at which BIA determinations are appealed has actually increased from 2004, producing even a larger impact on the Second Circuit's docket. While 29% of BIA cases within the Second Circuit were appealed in 2004, this percentage increased to 41% (2005), 43% (2006), 38% (2007) and 42% (2008).[34] This contrasts to the 3% appeal rate in BIA cases within the Second Circuit in 2001.[35]

These elevated BIA appeal rates produced a 1470% increase in the number of BIA appeals in the Second Circuit from 2001 to 2008.[36] Immigration appeals have represented between 37% and 39% percent of all appeals filed within the Second Circuit between 2004 and 2008.[37] By contrast, only 4% of the Second Circuit's docket consisted of BIA cases in 2001.[38] The increase in BIA appeals is part of an overall increase in appeals to the Second Circuit, which now receives 2,000 more appeals each year than in 2001.[39]

The volume of BIA appeals shows few signs of abating.[40] Immigration and Customs Enforcement (ICE), the component of the Department of Homeland Security (DHS) responsible for enforcing immigration laws nationwide, has steadily increased enforcement action in recent years,[41] and appeals from the BIA continue to fall overwhelmingly within the jurisdiction of the Second and Ninth Circuits.[42]

It is not merely the volume of appeals and resulting stress on court resources that are of concern; rather, there is also apprehension regarding the quality of representation afforded immigrants appealing BIA decisions and the thoroughness of fact-finding and legal review conducted at the lower administrative levels. While there is no excuse for poor quality legal representation, it may be partially attributable to the meager financial resources of many immigrants in proceedings, as they have no right to government-appointed counsel.[43] Noting wide disparity in the quality of representation in immigration appeals, the Honorable Judge Robert A. Katzmann wrote "…too many of the briefs that I see are barely competent, often boilerplate submissions."[44] In fact, a study conducted of cases pending before the court on April 21, 2005, concluded that over one-third of the appeals were handled by the same ten law firms, most of which were run by solo practitioners.[45]

There is also concern regarding the quality of records received on appeal from the BIA. Speaking to the Senate Committee on the Judiciary, the Honorable Judge Jon O. Newman of the Second Circuit summarized the problem:

> When overburdened [immigration judges] decide their high volume of cases

> hurriedly with oral findings dictated into the record and then their decisions are affirmed in a one-word ruling, the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process.[46]

Also speaking before the committee, the Honorable Chief Judge John M. Walker, Jr. of the Second Circuit noted "a severe lack of resources and manpower" within EOIR and reported that "one of [his] court's problems with the BIA is that it rarely seems to adjudicate the outstanding legal issues in a case, no doubt because the judges lack the time to do so."[47] Accordingly, further reform measures within the Second Circuit and the BIA appear necessary.[48]

V. The Second Circuit's Post-2004 Response to Chronic Elevation in Immigration Appeals: The NAC System

In response to the unabated surge in BIA appeals, the Second Circuit has instituted additional measures to reduce the case backlog. In 2005, the Second Circuit created a Backlog Reduction Committee (BRC) to assess how the court could modify its screening process to efficiently handle the influx of immigration cases.[49] Recognizing that the vast majority are asylum cases, the BRC implemented a Non-Argument Calendar (NAC) specifically for asylum appeals.[50] Because these cases share a common issue—whether the BIA's finding was supported by substantial evidence—the BRC determined that the judges and staff attorneys would refine their case-law expertise and be able to expedite their decision-making without sacrificing the fairness or quality of court opinions.[51] All asylum cases are initially sent to the NAC, which consists of panels of three judges.[52]

Materials submitted to the NAC include counsels' briefs, the BIA record, and a memorandum, draft summary order, and recommended disposition prepared by a law clerk within the Staff Attorney's Office.[53] Utilizing sequential voting, the panel of judges may vote to send to the Regular Argument Calendar (RAC) grant, deny, remand or other.[54] Any one of the judges can remove a case from the NAC, and counsel can request that a case be sent to the RAC upon a showing of good cause.[55] Typically voting is completed within three weeks of case submission.[56]

Judge Newman, a member of the Second Circuit's BRC, reports that the NAC system has reduced significantly the court's backlog of pending cases.[57] When the NAC program commenced on September 30, 2005, there were 5,299 pending agency cases within the Second Circuit.[58] Most were BIA asylum denials.[59] By September 30, 2007, there were only 1,465 pending agency cases.[60] Judge Newman attributes the reverse in this trend in FY 2008 to the increase in new BIA appeals in 2008 and the purposeful reduction in the number of cases sent to the NAC each week.[61] During the first three months of FY 2009, the number of pending agency cases decreased, and the court has again increased the weekly assignment of NAC cases.[62]

The NAC program has undoubtedly been successful in reducing the backlog of cases pending within the Second Circuit.[63] It remains open to debate whether the NAC system offers the same level of fairness and quality of decision-making as the RAC calendar.[64] In Judge Newman's view, had BIA asylum appeals remained within the RAC docket and been reviewed for oral argument, as a matter of course, the decisions reached by the judges would have remained the same.[65] Noting the inferior quality of many of the petitioners' briefs in NAC cases, in his view oral arguments would not have benefited the cases significantly.[66]

While Judge Newman's insight into the NAC system is assuring, practitioners appearing before the Second Circuit on non-BIA cases remain concerned about the potential impact of the surge on non-BIA cases.[67] While it is difficult to assess to what extent, if any, there has been an impact on non-BIA cases, it is worth noting that the Second Circuit adopted Interim Rule 34 in August 2007 requiring parties in all cases to assess whether oral arguments are warranted and affirmatively request the opportunity.[68] In certain instances, including where the appeal is determined to be frivolous, the rule also permits the court to dispense with oral arguments even where both parties desire to be heard.[69] The adoption of this interim rule is particularly significant considering the Second Circuit's historic practice to afford litigants the opportunity for oral argument in appeals.[70] The adoption of this rule is fairly strong evidence that the surge has impacted, at least procedurally, non-BIA cases pending before the court.

VI. New Measures That May Improve the Quality of Legal Representation in BIA Appeals Before the Second Circuit

The Second Circuit recently promulgated new rules governing its Committee on Admissions and Grievances ("the Grievance Committee") and created a *pro bono* counsel program. In May 2007, the Grievance Committee issued new rules governing its proceedings, including the scope of matters that can be referred to it.[71] Attorneys may be referred to the committee for misconduct or for failing to meet a professional obligation to the court.[72] In December 2004, the Second Circuit also began receiving applications for its newly created Pro Bono Panel.[73] Panelists are appointed to represent *pro se* litigants in "meritorious or complex appeals."[74] They serve for up to three-year terms and must make themselves available to accept court assignments.[75] While there is no indication that these measures were instituted specifically to address BIA appeals, they should be useful tools in improving the quality of legal representation provided in them.

Judge Katzmann is also involved in his personal capacity with a study group, created in the aftermath of his 2007 Marden lecture at the Association of the Bar of the City of New York,[76] to examine barriers to effective representation of immigrants.[77] The study group hosted a working colloquium at Fordham Law School in March 2009 where key participants in the field discussed ways to: (1) encourage private bar participation; (2) address institutional barriers to high quality legal representation; and, (3) address inadequate legal representation, and attorney and notario fraud.[78] The group has published articles on these subjects in the *Fordham Law Review*[79] and will be continuing its efforts to promote reform.

It also should be noted that the DOJ has proposed measures that may improve the quality of legal representation in immigration appeals.[80] In 2006, Attorney General Alberto R. Gonzales directed EOIR to develop regulations equipping immigration judges with the authority to sanction individuals for filing false or frivolous cases or engaging in other gross misconduct.[81] He also directed the development of similar regulations for the BIA.[82] EOIR has not issued proposed regulations to date, although it has increased the grounds for disciplining attorneys who appear before immigration courts and the BIA.[83] Increasing the sanctioning power of immigration judges and the BIA may also discourage the filing of frivolous appeals with the circuit courts, but, of course, should not be used to sanction competent counsel who are providing zealous advocacy for their clients within the rules of professional conduct.

VII. Strategies to Improve the Quality of the Legal and Factual Record

Recognizing that only reform measures within EOIR will improve the quality of the legal and factual records received, the Second Circuit has continued to meet with BIA leadership to discuss how to remedy the surge in immigration appeals.[84] The DOJ has also recognized the necessity of further reform within EOIR. In August 2006, Attorney General Gonzales instructed immigration courts and the BIA to implement 22 new measures designed to improve the administration of justice in immigration matters.[85] The 2006 directive mandates technological and support improvements, as well as the implementation of performance evaluations and required passage of an immigration law exam by immigration judges and BIA members.[86] Additional measures proposed included drafting a new code of conduct for immigration judges and BIA members and an improved procedure for reporting complaints about adjudicators.[87] In June 2009, EOIR issued a status report detailing the implementation of the 22 measures and indicated that many had been completed including exam testing of new immigration judges, a training plan for immigration judges, BIA members, and their staff, improved complaint procedures, and enhanced transcription services and interpreter selection processes.[88] While critics argue that EOIR has not fully implemented the 22 measures, [89] a detailed discussion of these measures and the extent to which they have been implemented is beyond the scope of this report. Instead, we focus below on EOIR's progress in implementing two measures believed most likely to improve the quality of appellate records: (i) increasing the number of immigration judges, BIA members and support staff; and, (ii) reducing the number of AWOs and increasing the number of precedent decisions.

a. Increasing the Number of Judges and Staff

The Attorney General's August 2006 memorandum proposed increasing the BIA from 11 to 15 permanent members.[90] The DOJ published final regulations authorizing this expansion in June 2008, and Attorney General Michael B. Mukasey appointed new members to the Board the same year.[91] Prior to the 2002 reforms, however, there were 23 BIA members.[92] The 2006 memorandum also instructed EOIR to seek budgetary increases to hire more immigration judges, law clerks, and BIA staff attorneys.[93] There were 238 immigration judges as of May 15, 2009, an increase of only 8 judges since 2006, and the DOJ has been criticized for failing to consistently request budgetary increases to support this initiative and failing to quickly fill open positions.[94] Nevertheless, EOIR continues to express its commitment to increasing the number of immigration judges and staff.[95] For FY 2010, EOIR has requested funding for an additional 28 immigration judges and 28 law clerk positions, as well as support staff.[96] EOIR acknowledges the slow pace of hiring, attributing it to the amount of time involved in scrutinizing candidates carefully.[97] One of the chief reform proposals at present is to further increase the size of the BIA, the number of immigration judges, and their support staff.[98]

b. Reducing AWOs and Increasing the Number of Precedent Decisions

Following the Attorney General's 2006 memorandum, EOIR issued proposed regulations in 2008 that would make AWOs discretionary under all circumstances and encourage the increased publication of precedent decisions.[99] The regulations are currently awaiting final approval.[100] Pursuant to the 2002 reforms, AWOs are mandatory in certain instances, whereas the 2008 proposed regulations would give the BIA more flexibility and single board members more discretion to choose between issuing an AWO or a single-member written opinion.[101] The rule seeks to improve the quality of decision-making for "complex or problematic" cases and better equip the BIA to address the poor quality of some immigration judge decisions, as well as instances of "intemperate or abusive" judicial behavior.[102] Although these regulations await final approval, the BIA's utilization of AWOs has already declined substantially. AWOs accounted for 36% of BIA decisions in 2003, but only 10% in 2007.[103] EOIR had decreased AWOs to less than 4% by the beginning of 2009.[104] While single-member opinions have risen correspondingly, critics contend that these decisions can be

equally lacking in substantive legal analysis.[105] To the extent that the BIA increases its issuance of thorough written opinions, the Second Circuit may see a reduction in BIA appeals, as respondents may conclude with greater frequency that their cases do not warrant further review. In instances where immigrants are appealing BIA denials merely to delay their removal from the United States, the Second Circuit would at least have a more thorough record to review on appeal and have appropriate tools to address frivolous appeals.[106]

The 2008 proposed regulations also seek to increase the issuance of BIA precedent decisions. Currently, single-member opinions are not considered for publication as precedent, and only certain types of cases may be referred to three-member panels.[107] The proposed regulations would permit BIA members greater discretion in referring cases to three-member panels when "the case presents a complex, novel or unusual legal or factual issue."[108] Furthermore, under the proposed regulations, a majority of the permanent Board members on the presiding three-member panel could authorize the publication of precedent, in contrast to current regulations that only permit the publication of precedent upon approval of a majority of permanent Board members.[109] The Second Circuit has recognized the important role that BIA legal precedent plays in promoting nationwide uniformity in the adjudication of immigration cases and offering guidance to immigration courts.[110] Proponents of these proposed regulations argue that additional BIA precedent will clarify the law and reduce the grounds of appeal to the circuit courts.[111]

VIII. Conclusion and Recommendations

We commend the Second Circuit for its successful measures to address the surge in immigration appeals. Through implementation of the NAC system, the court appears to have successfully reduced the backlog in pending cases. The continued high volume of BIA appeals to the Second Circuit, however, is alarming. Furthermore, it appears that a number of immigration practitioners are filing immigration appeals merely to extend the stay of their clients. Their appeals are poorly briefed, and we encourage the court to implement any additional measures that will discourage this practice. Measures also must be taken to improve the quality of legal representation at the administrative levels and the thoroughness of administrative review conducted by immigration judges and the BIA.

Our principal recommendation is to increase the size of the BIA, as well as the number of immigration judges and support staff.[112] Immigration judges and Board members are clearly overburdened.[113] By increasing their ranks, immigration judges would have more time to devote to each case on their docket. Similarly, BIA members would be able to issue more detailed written opinions and precedent decisions, thereby reducing the incentive to appeal further. It would also be easier for the circuit courts to evaluate decisions upon appeal and more quickly identify meritless and frivolous filings.

Our remaining recommendations seek to improve the quality of legal representation of immigrants. First, we commend the private firms that have *pro bono* programs encouraging participation in immigration cases including appeals before the Second Circuit and hope they continue even in this difficult economic climate. Second, to improve the quality of representation before the Second Circuit, we support the establishment of a training and mentorship program for poorly performing attorneys. Greater training (and even mentorship) should be available at the administrative levels as well. These programs may assist attorneys who lack familiarity with the court system, but want to provide their clients with high quality legal representation. We concede, however, that a number of the most poorly performing attorneys simply may not care about the quality of representation they provide and may not participate in these programs unless forced. For this reason, the Second Circuit should continue to use its Grievance Committee where appropriate, as well as other tools, and EOIR should develop corresponding regulations to increase the sanctioning power of immigration judges and the BIA. We also endorse increased sanctioning by state attorney discipline committees.

Lastly, aggressive measures need to be undertaken to provide poor immigrants with greater access to high quality legal representation at the administrative levels. This could be accomplished either through increased *pro bono* representation or funding for government-appointed attorneys for the indigent.[114] Only by offering immigrants better quality legal representation from the outset can we ensure that the merits of their cases will be adequately presented and advocated.

IX. Addendum

This report relies on data available from the Second Circuit, which was taken from the Office of Planning, Analysis and Technology, Executive Office of Immigration Review and the Administrative Office of U.S. Courts. Research for this report also includes newspaper articles, recent reports on the volume of BIA appeals nationwide, law review articles, regulations, and press releases. We obtained feedback from various stakeholders including immigration practitioners and federal practitioners who appear before the Second Circuit.

APPENDIX

Report on the New York State Bar Association Commercial and Federal Litigation Section Report: The Continuing Surge in Immigration Appeals in the Second Circuit: The Past, the Present and the Future

A Report of the Committee on the Federal Courts
of the New York County Lawyers' Association
January 27, 2010

The Committee on the Federal Courts endorses the report entitled *The Continuing Surge in Immigration Appeals in the Second Circuit: The Past, the Present and the Future* (the "Report"). While the Committee agrees with the proposals in the Report, we believe that these proposals do not go far enough and should include the following additional recommendations for managing and reducing the Second Circuit's immigration docket while ensuring that the interests of justice, fairness and due process are not adversely affected:

1) The Second Circuit should adopt a liberal remand policy for decisions that lack sufficient clarity and reasoning to enable the Second Circuit to provide effective and meaningful review;

2) The Second Circuit should discourage government opposition to motions to stay;

3) The Second Circuit should amend its *Pro Bono* Panel Plan to provide opportunity to a larger pool of attorneys to engage in *pro bono* representation before it;

4) The Board of Immigration Appeals ("BIA") should be required to make all of its decisions available to the public;

5) The Department of Homeland Security ("DHS") should be encouraged to exercise its prosecutorial discretion and allow eligible aliens to apply for relief from removal despite possible procedural bars;

6) The BIA's practice of issuing affirmances without opinion ("AWO") should be entirely eliminated, and the BIA should be required to issue fully reasoned decisions in all cases.

Background

The Report details the dramatic surge in the Second Circuit's immigration case docket between 2002 and the present. Immigration cases, including primarily petitions for review of decisions of the BIA,[115] currently make up an astounding 30-40 percent of the Second Circuit's docket each year.[116] These cases involve challenges by aliens to final orders of removal[117] issued by the BIA and to the BIA's denial of motions to reopen removal proceedings.

Removal proceedings begin when DHS serves an alien with a charging document (currently a Notice to Appear) and then files that charging document with the Immigration Court. The Immigration Courts and the BIA are part of the Department of Justice's Executive Office for Immigration Review ("EOIR"). Once the charging document is filed, an alien appears before an Immigration Judge (IJ) for a series of hearings to determine that alien's removability and whether or not that alien is entitled to any form of relief from removal.

It is important to note the Immigration Court is an administrative tribunal not subject to many statutory and constitutional provisions. The Federal Rules of Evidence do not apply and the application of the Fourth, Fifth and Sixth Amendments is severely limited.[118] According to the BIA, Department of Justice and DHS, there is only a privilege and not a right of an alien to representation by counsel at no expense to the alien.[119] The protections of the Fourth Amendment have little application in removal proceedings, and the exclusionary rule does not apply.[120] The Sixth Amendment is completely inapplicable to removal proceedings, and the Fifth Amendment only has limited applicability. An IJ is permitted to draw a negative inference where an alien refuses to testify on the basis of the Fifth Amendment's protection against self incrimination, an especially problematic situation where an alien may be facing both removal proceedings and criminal prosecution at the same time.

If the IJ finds an alien removable and determines that he or she is ineligible for relief, the IJ will enter an order of removal against the alien. The alien has 30 days from the decision to file an appeal with the BIA. If the IJ finds an alien is not removable or he or she is eligible for relief from removal, the attorney for the government can appeal the IJ's decision to the BIA. Once the BIA decides the case, the alien has a statutory right to petition for review to the United States Court of Appeals with jurisdiction over the case.[121] Similarly, an alien with a final order of removal may move either the IJ or the BIA to reopen the proceedings. If the motion is denied, the same chain of appeals follows.

The Report describes the Second Circuit's immigration caseload as "The Problem of Immigration Appeals."[122] Despite this characterization, it is important to note the substantial nature of the interests at stake in removal proceedings and the essentiality of judicial review. An alien seeking asylum, withholding of removal or protection under the Convention Against Torture is claiming a fear of torture or persecution in his or her homeland if returned. Persecution is defined as threats to an alien's life or freedom. Thus, an erroneous determination of an alien's claims (which can be caused by overwhelming dockets, limited staffing and decisions with limited reasoning) will likely send the alien back and place him or her directly in the hands of the alleged persecutor or torturer.[123]

In non-asylum cases, removal proceedings usually involve the question of whether an alien may remain in the United States with his or her family. When an alien is removed, the alien and his or her family face two choices: separation from the family or relocation of the entire family, which frequently includes United States citizens and permanent residents, to another country. Once an alien is removed, he or she is ineligible to return to the United States for a minimum of ten years. He or she simply cannot come to the United States to visit family. Further, the cost of air travel for a family may be so prohibitive the alien will be unable to see his or her family unless they leave together.[124] Thus, practically, removal often results in either the destruction of the family unit or the *de facto* deportation of United States family members with the alien. This penalty is perhaps significantly more severe than the penalties in many criminal cases.

The stakes in immigration cases are high, yet the agency involved in adjudicating these cases has a demonstrated track record of inconsistency in the quality of its decision making. According to statistics compiled by the Office of Immigration Litigation ("OIL")[125] with respect to the BIA's determinations of an alien's credibility, the Second Circuit, despite review under the highly deferential substantial evidence test, overturned the BIA's credibility determinations in 46 percent of cases it reviewed in 2007; 86 percent of cases reviewed in 2006; and 37 percent of cases reviewed in 2005. Thus, over a three year period, with regard to credibility determinations,[126] the BIA had an accuracy rate of 63 percent at best and 14 percent at worst.

A study by Syracuse University found that the single best predictor of the outcome of an asylum case was not the alien's country of origin or the nature of the claim itself, but the identity of the particular IJ to whom the case was assigned.[127] Another recent study that included anonymous reporting by IJs indicated the IJs feel so pressured to comply with case-completion goals that they lack confidence in the accuracy of their decisions.[128]

As the Report indicates, the Immigration Courts and the BIA are consistently overburdened, understaffed and underfunded,[129] but DHS continues to increase the number of aliens it places in removal proceedings each year. It is against this background that the Second Circuit's immigration docket must be evaluated. If the entire system of adjudication of removal cases is to resemble the kind of justice we expect from our system of government, judicial oversight of the agencies involved is absolutely essential. Without it, the system and the quality of its adjudications are likely to deteriorate further. While the Report addresses some of these issues, it does not fully articulate the state of the current system.

Recommendations of the Report

The Report notes the contribution of several factors toward the surge in immigration appeals before the Second Circuit, including the BIA's previous streamlining procedures, a continuing lack of resources for the BIA and the Immigration Courts, the BIA's AWO procedure, and problems with access to quality legal representation before the agency and the Second Circuit.[130] In response, the Report makes several recommendations, most of which are targeted at reforming practices of and before the agency.

The Report's primary suggestion, with which we concur, is that the resources of the Immigration Courts and the BIA should be increased, and the number of Board Members, IJs and support staff should be substantially increased from current levels. This would allow both the IJs and the BIA to issue more reasoned decisions, which, according to the Report, would aid in the identification and disposal of non-meritorious claims. We note also that reasoned decisions that cite to the record and are supported by legal authority also increase the perception of fairness in the process, a lack of which may be a contributing factor in the increase in the Second Circuit's immigration docket. The quality and consistency of the agency's decisions need improvement, which is only possible if Board Members and IJs have the time and resources they need to devote to hearing cases and issuing decisions. Without more IJs and Board Members, the only way to increase the time and resources devoted to each case would be to significantly reduce the pace of adjudications, which would lead to a substantial increase in the backlog of pending cases.[131]

In a related recommendation, the Report suggests the BIA designate more of its decisions as precedential decisions to provide a uniform interpretation of the immigration laws. We concur with this recommendation. More precedential decisions result in more clarity in the legal standards, which allows the IJs to apply the immigration laws in a more consistent

manner and also provides aliens, their attorneys and the courts with meaningful standards against which to assess a given case. Increased clarity makes it easier to detect frivolous appeals and serves as a disincentive for filing such appeals.

The Report also recommends that law firms with *pro bono* programs take additional immigration cases at the agency and federal court level. We concur with this commendable goal. The Report, however, does not suggest how to implement this suggestion (something we address below).

The Report suggests attorney mentoring programs for poorly performing attorneys, but notes that some attorneys may not be interested in using such a program. We concur with this suggestion but would like to see a more detailed proposal.

The Report recommends further use of agency, state and Circuit disciplinary procedures against attorneys providing substandard representation or those who file fraudulent or frivolous applications. We concur, with caution. Poor performing attorneys do a disservice to their clients, and often may end up putting their clients in a worse position than the clients were in at the beginning of the representation. More problematic are *notarios*, service centers, travel agents and other non-attorney service providers, who often file fraudulent, frivolous or poorly prepared applications on behalf of alien clients. While we recommend vigilant prosecution of individuals and entities engaged in the unauthorized practice of law, and we support the use of disciplinary measures against poor performing attorneys, we caution that attorney discipline measures should comport with the applicable due process standards applied by state disciplinary committees and the federal courts. Such procedural safeguards are not typical of the abbreviated format of the administrative proceedings held before the IJs and the BIA, and the fairness of the system must be maintained. The sanctions power of the BIA and the Immigration Courts should apply to both private attorneys and government attorneys.

Finally, the Report suggests that access to quality legal representation for individuals appearing before the IJs and the BIA should be improved, either through increased *pro bono* representation or by government-funded attorneys. We concur with this recommendation. Quality representation is often most essential before the Immigration Courts, where the alien will contest removability and/or apply for relief from removal. It is at this stage that the alien is able to submit evidence, present witnesses and testify regarding his or her claim. It is also the stage of the proceedings where the rules and procedures are often the most complex, and where an alien is most able to benefit from representation by an attorney familiar with the procedures and applicable legal standards. Without competent representation, an alien may not have any idea what kind of evidence he or she needs to submit, or even where and how to file or pay for an application. Unfortunately, providing government-funded attorneys in immigration proceedings would require an act of Congress, which is unlikely to occur. On the other hand, we would welcome a proposal on how to increase *pro bono* representation before the agency, as this may be an obtainable goal if the Second Circuit, the EOIR and local bar associations coordinate.[132]

Additional Proposals

While the Report makes several worthwhile proposals, we note that most of the proposals appear to be outside the scope of the Second Circuit's ability to manage its own docket. Our first three proposals concern the Second Circuit's inherent power to control its docket. Our next three proposals expand on a few of the Report's proposals relating to EOIR reform.

1) Adopt a liberal remand policy

A significant problem in the adjudication of BIA appeals by the Second Circuit is that many BIA decisions (or IJ decisions where the BIA has issued an AWO) lack clear reasoning that allows the Second Circuit to reasonably evaluate the basis of the decisions. Many of these decisions are easily identifiable prior to the briefing and consideration of the case on the merits. Such decisions could be summarily remanded for clarification upon inclusion in the Petition for Review of such decisions.[133]

Additionally, notwithstanding the numerous and complex standards of review that apply to various components of a BIA decision, the Second Circuit maintains the inherent power to remand cases to the BIA where the BIA's decision is not sufficiently clear to allow for meaningful review. We propose that, as a matter of policy, the Second Circuit remand these cases. A liberal remand policy would help to preserve the Second Circuit's resources while protecting the important due process rights of the individual aliens whose cases are before it. It will also send a strong message to the BIA that its decisions must be clear and sufficiently well reasoned to allow the Second Circuit the opportunity for meaningful review. While this will increase the expenditure of resources by the BIA, this additional expenditure is likely to motivate the BIA to issue better decisions initially so that it does not have to revisit cases upon remand. The increased administrative burden on the BIA is also preferable to either an increased burden on the Second Circuit, or the problems with fundamental fairness and due process that would occur if the Second Circuit adopted an approach targeted at either discouraging or dismissing alien appeals.

2) Discourage motion practice and other abusive tactics by the government

OIL has recently begun opposing motions for a stay of removal filed by aliens and has also increased its use of motions for summary affirmance and motions to dismiss. Previously, the Second Circuit and DHS arranged a forbearance policy where DHS would agree not to deport an alien while his or her appeal was pending if a motion for stay was filed. This was done to prevent the Second Circuit from expending its resources adjudicating stay motions. OIL has begun opposing motions to stay. As a result, notwithstanding the DHS and Second Circuit forbearance policy, the Second Circuit is now faced with the prospect of having to adjudicate motions it had arranged not to adjudicate.

Additionally, OIL has been filing motions to dismiss and motions for summary affirmance with increasing frequency. The result is many immigration appeals now involve significant motion practice, whereas six months to a year ago such motions were exceedingly rare. The standard for surviving a motion for summary affirmance is very low. An alien need only show that his or her appeal is not frivolous.[134] However, responding to the motion is time consuming and requires a recitation of the facts and issues of the case similar to that required in a brief on the merits, as well as substantial research and drafting of issues that will not be explored in the merits brief. The result is that many hours of additional time are required to represent an alien in a BIA appeal before the Second Circuit, a fact that is ultimately likely to affect the legal fees involved.

Additionally, if such a motion is denied and the case is heard on the merits, it essentially requires twice the amount of effort from the Second Circuit as hearing the case on the merits alone. Such motions place an additional burden on the Second Circuit and on the aliens before it (who, as the Report notes, are often faced with difficulty in obtaining affordable legal representation). While the government claims that its motion practice is intended to preserve the resources of the Second Circuit, members of the bar have speculated that the real intent is to increase the cost and difficulty of seeking review of BIA decisions in light of indications of the Second Circuit's growing frustration with its immigration docket.

The government may save many arguments for its merits brief without risk of waiver. For example, frivolousness is an issue that can be raised in a principal brief, as well as the fugitive disentitlement doctrine. Eliminating or restricting motion practice in immigration cases would substantially benefit the efficient disposition of immigration cases by reducing the amount of the Second Circuit's resources consumed by each case.

3) Expand the Second Circuit's *Pro Bono* Panel

The Second Circuit maintains a list of attorneys it has determined meet necessary levels of immigration and appellate experience to represent a petitioner on appeal: the *Pro Bono* Panel (hereinafter "the Second Circuit Plan").[135] Eligibility is open to private attorneys with at least three years of appellate experience.[136] The application process requires completion of a four-page application, submission of three writing samples, preferably appellate briefs in which the applicant was the prime author, admission to the bar of the Second Circuit and application within a particular time period.[137] The goal of the Second Circuit Plan is to "provide *pro bono* counsel to *pro se* parties in civil appeals in which briefing and argument by counsel would benefit the Court's review."[138] The Second Circuit acknowledges the program depends both upon the volunteer efforts of the private bar and the Second Circuit's commitment to providing service opportunities to attorneys.[139]

The Second Circuit is not the only United States Circuit Court of Appeals with such a panel, but from a review of the other federal circuit courts' web sites, only two conspicuously advertise their panels: the Seventh Circuit[140] and the Ninth Circuit.[141] The Ninth Circuit's immigration docket is the largest of the federal circuit courts of appeals; the Second Circuit occupies second place, while the remaining Circuits' dockets are much smaller. The Ninth Circuit *Pro Bono* Program (hereinafter "the Ninth Circuit Plan") has been in existence since 1993, and participants praise it.[142] Thus, it may be an acceptable model for handling extremely large dockets.

The Ninth Circuit Plan differs from the Second Circuit Plan in a few aspects. One is purpose: the Ninth Circuit Plan was born of the idea to give young lawyers and law students early experience,[143] while the Second Circuit Plan's chief goal is to provide *pro se* parties with counsel and assist the Court with reducing its *pro se* docket.[144] Second, the Ninth Circuit Plan reimburses attorneys for travel within the Circuit, accommodation in a hotel and meals. It also reimburses attorneys for other expenses related to representation, such as:

- Photocopying and/or necessary printing costs for briefs and excerpts of record, motions and a petition for rehearing. (*See* 9th Cir. R. 39-1.2 and 39-1.3.)
- Computer-assisted legal research costs, not to exceed $1000.
- PACER fees incurred for accessing the District Court record of the case on appeal, not to exceed $1000.
- Documented long-distance telephone toll calls to the client.
- Postage and delivery up to $1000 for reasonable fees.[145]

Third, the eligibility requirements for the Ninth Circuit Plan differ. The Ninth Circuit Plan is open to any attorney in good standing who is a member of the Ninth Circuit bar and advises a District Coordinator (attorneys who volunteer to locate interested counsel within their respective lists) that the attorney wishes to accept Ninth Circuit appeals *pro bono*.[146] The District Coordinator distributes the cases to attorneys on the panel.[147]

By using the Ninth Circuit Plan as a model on reimbursement and eligibility, the Second Circuit may reduce the backlog in its immigration docket and receive better briefed cases. Specifically, adopting the Ninth Circuit Plan will allow an influx of attorneys willing to take cases *pro bono*, less-experienced but eager and competent attorneys will be able to participate, and all participating attorneys will be able to recoup some costs.

The objection that reducing the eligibility barrier as described will add to the number of poorly written briefs is understandable. However, the Ninth Circuit does not report an increase in poorly written briefs and, in fact, reports about a 50 percent rate of relief (at least partial reversal or other termination favorable to *pro bono* client) for those petitioners whose cases are part of the Ninth Circuit Plan.[148] Other courts do not require several years' experience in the particular field for inclusion on their *Pro Bono* Panels. For example, the Southern District of New York appears to allow on its *Pro Bono Panel* any attorney who is a member of the bar of that court in good standing and willing to accept cases, including newly admitted attorneys subject to the Court's approval.[149] In addition, some states appear to allow less-experienced criminal attorneys to receive appointments for criminal trials, appeals and post-conviction petitions, cases for which the attorneys may bill the respective court or public defender office.[150] Thus, allowing less-experienced attorneys to be eligible to receive cases *pro bono* is not new and any fear of the Second Circuit encouraging incompetent briefs may be unfounded.

An alternative to reducing the barrier completely to the level of the Ninth Circuit Plan is to allow eligibility upon completion of a training program between an aspiring applicant with less experience and one or more approved experienced immigration appellate attorneys. Such an idea is not new. Several United States District Courts maintain Criminal Justice Act ("CJA") Panel lists of attorneys willing and qualified by the respective District Courts to accept paid appointments of criminal defendants. Several of those District Courts allow for aspiring applicants to obtain the needed experience by 1) operating as second-chair attorneys to members of the CJA Panel on a limited number of cases and 2) completion of CLE courses on criminal defense and the Federal Sentencing Guidelines. For instance, the Southern District of New York and the District of New Jersey have such a training program.[151] The Southern District of New York even allows the trainee attorney to bill for his or her time (at a reduced rate).[152]

The training requirement can vary for attorneys of different experience levels. This model of training is similar to that in some states allowing attorneys to receive state criminal appointments. For example, for the newest or least experienced attorneys in criminal law, a state may require several CLE hours and limit appointments to misdemeanors.[153] Those with substantial criminal experience may receive homicide or capital appointments.

The aspiring applicant would bear the burden of beginning and completing the training process. At application, the aspiring applicant would certify, along with the mentor(s), that he or she completed the training program. Specifically, the Circuit could require an aspiring applicant to find a Second Circuit Plan attorney who is willing to mentor / supervise through a certain number of immigration appeals and to attend a CLE specifically focused on Second Circuit immigration practice. To aid aspiring applicants in locating Plan attorneys willing to mentor / supervise, the Second Circuit could publish the contact information of the Second Circuit Plan members on its website and indicate those willing to mentor / supervise,[154] allowing aspiring applicants the opportunity to contact those Plan attorneys on their own. In addition, the mentoring / supervising attorney may also, upon prior approval by the Circuit, be an experienced practitioner who is not a member of the Plan. After completion of the training, the Second Circuit should allow the aspiring attorney to immediately apply for inclusion on the Plan list and should accept rolling admissions.

The Second Circuit's Plan explicitly acknowledges expenses are not generally reimbursable, though some might be upon an application to the Office of Legal Affairs showing undue hardship on the attorney.[155] By reimbursing attorneys to a limited extent, the Second Circuit should be able to attract additional attorneys to its *Pro Bono* Plan. Also, the Ninth Circuit's Program actively encourages prevailing attorneys to seek statutory attorneys' fees and then offset the Court's reimbursement against them. The Second Circuit should similarly encourage prevailing attorneys to seek statutory attorneys' fees, because Plan members may be unaware they are allowed to seek such fees.

4) Require the BIA to make all of its decisions available to the public

While the Report stresses the importance of having the BIA issue precedential decisions, it does not mention the BIA's numerous other decisions. Some of the BIA's non-precedential decisions are available from electronic databases like Lexis and Westlaw; however, the number is substantially limited and the process by which such decisions are chosen for public release is unclear. As noted above, the BIA's decisions suffer from a marked lack of consistency. This is due, in part, to the lack of guidance in the form of precedential decisions.

However, the lack of consistency is also due to the fact the vast majority of BIA decisions are not subject to public scrutiny because they are unavailable to the public to review and compare. Thus, it is difficult to determine how (and often *if*) the BIA is applying its own precedents. This makes it difficult for aliens and their attorneys to evaluate a claim to predict the likely outcome, and it also makes it difficult to spot when the BIA is diverging from its established standards. To rectify this situation, the BIA should be required to publish all of its decisions, even if they are not designated as precedential decisions. The agency, the Second Circuit, the bar and the aliens involved will all benefit from the additional transparency in the system, the consistency in adjudications and the applications of the legal standards developed by the BIA that would be promoted by this proposal.

5) Persuade DHS to review its policies regarding reopening cases in which an alien is eligible for relief but precluded from applying due to the procedural posture of the case

The statute and regulations allow an alien to file one motion to reopen his or her removal proceedings within 90 days of the BIA's final decision in the case.[156] However, there are exceptions. The most notable exception is where an alien is seeking to reopen proceedings in order to apply for asylum-based on changed-country conditions. The time and number limits may also be tolled where the alien has been adversely affected by ineffective assistance of counsel.

However, it is not uncommon for an alien to become eligible to apply for lawful permanent residency status after proceedings have concluded and after the expiration of the 90-day period. The BIA may reopen an alien's removal proceedings in such a circumstance if an exception applies or the parties file a joint motion—that is, if the ICE Assistant Chief Counsel[157] in the case consents to joining in a motion to reopen. To this end, ICE previously had a policy to join in motions to reopen where an alien became eligible to adjust status, was not eligible at the time of the prior hearing and merited a favorable exercise of discretion. However, it appears that ICE policy, at least at the local level, strongly disfavors joining in motions to reopen. The result is that aliens who are eligible to adjust status are left without a forum for doing so because more than 90 days have passed since the BIA's decision, ICE refuses to join in a motion to reopen and no exceptions apply. It is not difficult to imagine that this creates an incentive to file motions to reopen based on asylum claims that are either weak or lacking in merit. Many of these motions to reopen are denied by the BIA and then appealed to the Second Circuit.[158]

Compounding the problem is OIL's apparent policy of limiting settlement. Only cases that would clearly be the subject of an adverse decision by the Second Circuit and would result in criticism by the Second Circuit or in bad publicity seem to qualify for settlement consideration. Decisions that could result in bad publicity might be those in which an IJ has acted in a biased, hostile or inappropriate manner, or the BIA has clearly and obviously applied the wrong legal standard to a case.[159] This apparent policy has limited the effectiveness of the Second Circuit's Civil Appeals Management Plan (CAMP) program in immigration cases.

The result of these two DHS policies is an overburdened immigration docket in the Second Circuit. Cases that could be resolved through the joint motion process often unnecessarily end up before the Second Circuit, and cases before the Second Circuit stay before it rather than being resolved by the parties. This often happens even though the alien is eligible to legalize his or her status. The Second Circuit should attempt to persuade ICE that it is not in the best interests of the Second Circuit or the system as a whole to maintain policies that promote litigation and prevent eligible aliens from legalizing their status.[160]

6) Eliminate entirely the Affirmance Without Opinion procedure and require the BIA to explain its reasoning in all cases

The BIA's AWO procedure is commonly cited as a principal cause of the initial surge in the Second Circuit's immigration docket. However, as noted by the Report, even though the BIA's use of AWOs has declined, the BIA often issues cursory decisions that contain little reasoning and leave the alien with little confidence that the BIA actually considered the facts, arguments and evidence in the case. The entire administrative system involved has been operating in accordance with an emphasis on speed and efficiency since 2002 or earlier. The result is numerous decisions of the federal courts criticizing the decisions of the BIA and IJs, a massive surge in the number of immigration appeals before the Second Circuit, and a lack of faith in the fairness of the system by most of the parties involved. The BIA's decisions show a demonstrated lack of quality and consistency that raises questions about whether or not its adjudications meet basic standards of justice. There appears to be a correlation between the agency's emphasis on speed and the criticism of its decisions. It is time for the agency to slow down and issue reasoned decisions to ensure that the interests of justice, and not just case-completion goals, are served.

Conclusion

The Committee recommends the adoption of the Report and the additional proposals discussed above.

While there are systematic and pervasive problems in the administrative adjudication system that contribute to the Second Circuit's immigration docket, these problems militate in favor of judicial oversight of the BIA's decisions and decision-making process. However, the Second Circuit has the ability to control its docket to minimize the impact of the immigration docket, assure the fair and efficient adjudication of immigration appeals, and encourage the agencies involved to adopt policy and structural changes to improve the fairness and accuracy of the system as a whole. Further, the agencies involved have the ability to initiate changes to begin to fix some of the current flaws in the system that have caused the Second Circuit's large immigration docket. The proposals in the Report, and the additional proposals herein, provide a useful starting point for reform of agency practices and enhancement of the Second Circuit's docket-control measures.

New York County Lawyers' Association
Committee on the Federal Courts
Gregg Kanter, Chair

Subcommittee on Immigration Report Recommendations
Daniel B. Lundy, Co-Chair
Stuart A. White, Co-Chair

Endnotes

1. U.S. Court of Appeals—BIA Appeals as % of Total Appeals Filed During the Twelve-Month Periods Ended December 31, 2001 through 2008 (April 15, 2009).
2. Judge Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 429 (2008).
3. Reflecting on asylum cases, one immigration judge stated, "These are death penalty cases being handled with the resources of traffic court." APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 1 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf.
4. Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 18 (2004).
5. 73 Fed. Reg. 34654 (June 18, 2008).
6. Board of Immigration Appeals; Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999); Board of Procedural Reforms To Improve Case Management Rule, 67 Fed. Reg. 54878 (Aug. 26, 2002).
7. In a 2006 statement before the Senate Committee on the Judiciary, the Honorable Judge Jon O. Newman of the Second Circuit acknowledged that the courts of appeals were "currently overburdened with BIA appeals," particularly within the Second and Ninth Circuits. Jon O. Newman, U.S. Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 3 (Apr. 3, 2006).
8. Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* (2004).
9. U.S. Court of Appeals—Rate of Appeal for BIA Decisions—12-Months Ended December 31, 2001-2008.
10. *See* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 9-10 (2008).
11. *See, e.g.*, APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 32-34 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf; John M. Walker, Jr., U.S. Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 3-4 (Apr. 3, 2006); Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 8 (Apr. 3, 2006).
12. U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet*, Aug. 2009, http://www.usdoj.gov/eoir/fs/biabios.htm.
13. Julia Preston, *Study Finds Immigration Courtrooms Backlogged*, N.Y. TIMES, June 18, 2009, at A20.
14. U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet*, Aug. 2009, http://www.usdoj.gov/eoir/fs/biabios.htm.
15. Government trial attorneys are not permitted to appeal adverse Board decisions; thus all appeals from BIA decisions are filed by immigrants who receive an adverse decision. 73 Fed. Reg. 34656 (June 18, 2008).
16. *See* 73 Fed. Reg. 34659 (June 18, 2008).
17. Board of Immigration Appeals; Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999); Board of Procedural Reforms To Improve Case Management Rule, 67 Fed. Reg. 54878 (Aug. 26, 2002); *see also*, 73 Fed. Reg. 34654 (June 18, 2008) (discussing earlier procedural reforms and their impact.); John R. B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 5 (2005).
18. Board of Immigration Appeals; Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999).
19. 73 Fed. Reg. 34655 (June 18, 2008).
20. *Id.* at 34655-6.
21. *See Albathani v. INS*, 318 F.3d 365, 378-9 (1st Cir. 2003). The Seventh Circuit noted in *Niam v. Ashcroft* that "the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases." 354 F.3d 652, 654 (7th Cir. 2004). Writing for the court in *Benslimane v. Gonzales*, Judge Posner noted that the

    > tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. 430 F.3d 828, 29-30 (7th Cir. 2005).

    Further, some federal circuit courts have held that AWOs contribute an element of confusion in the court record as to the actual basis for the BIA's decision and ultimately whether the

federal court has jurisdiction to review the decision. *See Lanza v. Ashcroft*, 389 F. 3d 917 (9th Cir. 2004).

22. Since the Immigration and Nationality Act is silent on procedures for administrative appeal, the "agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council Inc.*, 435 U.S. 519, 543 (1978)). Legal challenges concerning the BIA's issuance of AWOs on due process grounds have also been repeatedly struck down since immigrants have the "opportunity to be heard" by an immigration judge. *Denko v. INS*, 351 F.3d 717, 730 n. 10 (6th Cir. 2003).

23. In *Guyadin v. Gonzales*, Judge José A. Cabranes of the Second Circuit acknowledged that "IJs and the BIA are to be commended for their efforts, in which the 'streamlining' policy plays an important role." 449 F.3d 465, 470 (2d Cir. 2006).

24. U.S. Court of Appeals—Rate of Appeal for BIA Decisions—12-Months Ended December 31, 2001-2008.

25. Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 4 (2004).

26. *Id.*

27. *Id.* at 5.

28. *Id.*

29. *Id.*

30. Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* (2004).

31. *Id.* at 9-10; *see also*, David H. Tennant, *The Surge in Asylum Appeals: What does it Mean to Civil Appellate Litigation*, CERTWORTHY 4-5 (Defense Research Institute (DRI), March 2008); Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 3 (Apr. 3, 2006).

32. Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 10 (2004).

33. *Id.*

34. In 2004, 2,602 out of 8,863 BIA decisions within the Second Circuit's jurisdiction were appealed. In 2005 and 2006 respectively, 2,710 out of 6,555 and 2,486 out of 5,849 BIA decisions within the Second Circuit's jurisdiction were appealed. In 2007 and 2008, 2,386 out of 6,361 and 2,606 out of 6,204 BIA decisions within the Second Circuit's jurisdiction were appealed. U.S. Court of Appeals—Rate of Appeal for BIA Decisions—12-Months Ended December 31, 2001-2008.

35. *Id.*

36. *Id.*

37. U.S. Court of Appeals—BIA Appeals as % of Total Appeals Filed During the Twelve-Month Periods Ended December 31, 2001 through 2008 (April 15, 2009).

38. *Id.*

39. The Second Circuit received 4,460 appeals in total in 2001, 6,835 in 2004 and 6,708 in 2008. *Id.*

40. *See* John R. B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005). The government initiated approximately 30,000 removal proceedings in 1990 and approximately 185,000 in 2000. Judge Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 430 (2008) (citing DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 6 (2003)); *but see* David H. Tennant, *The Surge in Asylum Appeals: What does it Mean to Civil Appellate Litigation*, CERTWORTHY 3-4 (Defense Research Institute (DRI), March 2008).

41. U.S. Department of Justice, Executive Office for Immigration Review, FY 2004 STATISTICAL YEAR BOOK, B2 (Mar. 2005); U.S. Department of Justice, Executive Office for Immigration Review, FY 2008 STATISTICAL YEAR BOOK, B2 (Mar. 2009).

42. U.S. Court of Appeals—Number of BIA Appeals by Circuit During the Twelve-Month Periods Ending During December 31, 2001 Through 2008. For a discussion of the Ninth Circuit's efforts to manage the surge in immigration appeals, *see* Anna O. Law, Institutional Growth and Innovation—The Ninth Circuit Court of Appeals and Immigration (2008), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/2/6/6/0/6/pages266061/p266061-1.php.

43. Whether there is a constitutional or statutory right to effective assistance of counsel in immigration has also been subject to recent debate. *See Matter of Compean Bangaley & J-E-C*, 24 I&N Dec. 710 (A.G. 2009) (holding that there is no constitutional or statutory right to effective assistance of counsel in immigration including government appointed counsel provided for under the Sixth Amendment of the Constitution). In June 2009, Attorney General Eric Holder withdrew the *Compean* decision, and immigration judges and the BIA were instructed to apply the previously established standard of review for ineffective counsel. *Matter of Enrique Salas Compean*, 25 I&N Dec. 1, 2 (A.G. 2009).

44. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 10 (2008).

45. *Id.* (*citing* John R. B. Palmer, *et al.*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 90 (2005)).

46. Jon O. Newman, U.S. Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 8 (Apr. 3, 2006).

47. John M. Walker, Jr., U.S. Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 3-4 (Apr. 3, 2006).

48. *See* APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 1 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf.

49. Judge Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 433 (2008).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 434.

54. *Id.*

55. *Id.* at 433-4.

56. *Id.* at 434.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 434-5.

61. *Id.* at 435.

62. *Id.*

63. *Id.*

64. *Id.* at 436.

65. *Id.*

66. *Id.*

67. *See, e.g.*, David Tennant, *The Surge in Asylum Appeals: What does it Mean to Civil Appellate Litigation*, CERTWORTHY 8-9 (Defense Research Institute (DRI), March 2008).

68. United States Court of Appeals for the Second Circuit, Local Rule 34 (Aug 27, 2007), *available at* http://www.ca2.uscourts.gov/Docs/News/localrule34final.pdf.

69. *Id.*

70. Judge Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 432-3 (2008).

71. United States Court of Appeals for the Second Circuit, Rules of the Committee on Admissions and Grievances for the United States Court of Appeals for the Second Circuit (May 21, 2007), *available at* http://www.ca2.uscourts.gov/Docs/AttDisc/Rules%20of%20the%20Committee%20on%20Admissions%20and%20Grievances.pdf.

72. *Id.*

73. PRO BONO CONNECTION, AMERICAN BAR ASSOCIATION, PRO BONO POLICY NEWS 3, *available at* http://www.abanet.org/legalservices/probono/publications/pro_bono_connections/pbconsp05.pdf.

74. United States Court of Appeals for the Second Circuit, Plan for Appointment of Pro Bono Counsel (revised April 2006), *available at* http://www.ca2.uscourts.gov/Docs/ProBono/Copy%20of%20Plan%20 and%20Application.pdf.

75. *Id.* This program has been criticized for requiring the Pro Bono Panel member assigned to the case to appear for oral argument. Firm partners appointed by the court cannot assign the presentation of oral argument to an associate attorney. Allowing greater associate involvement could increase participation in the program.

76. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3 (2008).

77. Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES, Mar. 13, 2009. The study group was not commissioned by the Second Circuit. Judge Katzmann is involved exclusively in his personal capacity, not on behalf of the court.

78. *Id.*; Fordham Law Review, Event Details, Overcoming Barriers to Immigrant Representation: Exploring Solutions, *available at* http://law2.fordham.edu/ihtml/page3.ihtml?imac=1168&calID=9840.

79. 78 Fordham L. Rev. 101 (2009).

80. Transactional Records Access Clearinghouse, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/immigration/reports/210/.

81. Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 5-6 (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf. The U.S. Courts of Appeals already have such power. *See Muigai v. INS*, 682 F.2d 334 (2d Cir. 1982).

82. Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 6 (Aug. 9, 2006), *available* at http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

83. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/immigration/reports/210/; Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 4 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf. One stumbling block in this area has been whether this power should extend to sanctioning government attorneys.

84. News Release, Meeting with Second Circuit Judges Latest in Series to Improve understanding of Immigration Court System (June 15, 2006), *available at* http://www.usdoj.gov/eoir/press/06/Meetingwith2ndCircuit.htm.

85. Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

86. *Id.*

87. *Id.*

88. Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

89. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), http://trac.syr.edu/immigration/reports/210/ and APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 1 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf.

90. Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 6 (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

91. Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Progress Overview 6 (Sept. 8, 2008) *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf; Press Release, U.S. Department of Justice, Attorney General Mukasey Appoints Five New Members to the Board of Immigration Appeals (May 30, 2008) *available at* http://www.usdoj.gov/eoir/press/08/AG-BIAAppointments.pdf.

92. Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 3 (2004).

93. Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 6 (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

94. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW (2009), *available at* http://trac.syr.edu/immigration/reports/208/; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/immigration/reports/210/.

95. Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 4 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

96. *Id.*

97. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/immigration/reports/210/.

98. APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 10, 34 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf. The proposal is favorably viewed by Judge Jon O. Newman of the Second Circuit. Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 7-9 (Apr. 3, 2006).

99. *See* 73 Fed. Reg. 34654 (June 18, 2008).

100. Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 4 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

101. 67 Fed. Reg. 54878 (Aug. 26, 2002); 73 Fed. Reg. 34656 (June 18, 2008).

102. 73 Fed. Reg. 34656 (June 18, 2008).

103. *Id.*

104. Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 3 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

105. *See* APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 32-33 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf. This report summarizes findings drawn from structured interview questionnaires of stakeholders. One stakeholder interview noted the issuance of "many one or two-paragraph decisions where it is clear that the [member] has not reviewed the record and there has been no meaningful review." *Id.* at 33.

106. Jonathan Cohn, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Statement before the Senate Committee on the Judiciary 3 (Apr. 3, 2006) (citing *INS v. Doherty*, 502 U.S. 314, 321-325 (1992)).

107. 73 Fed. Reg. 34659 (June 18, 2008).

108. *Id.*

109. *Id.* at 34661.

110. *See Liu v. U.S. Dep't. of Justice*, 455 F.3d 106 (2d Cir. 2006) (remanding the case for the BIA to determine the legal standard).

111. 73 Fed. Reg. 34659 (June 18, 2008).

112. We recommend increasing the BIA from 15 members to at least 23 members, the size of the BIA prior to the 2002 reforms. There are currently over 230 immigration judges nationwide. In order to reduce their caseload, we recommend an increase of at least 75 immigration judges. Appropriate increases in staff and law clerk support are also necessary.

113. Exemplifying this is a recent psychological study of immigration judges conducted by the University of California at San Francisco, which determined that burnout levels among immigration judges were higher than hospital physicians and prison wardens. *Burnout Rate High Among Immigration Judges*, 35 A.B.A. J. 1, 13 (2009) (citing Stuart Lustig, *et al.*, *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L. J. 1 (2009)).

114. The extent to which greater consideration should be given to providing government-appointed counsel to individuals in immigration proceedings is beyond the scope of this article.

115. There are also a number of appeals from decisions of the District Courts in immigration-related matters, but it appears that these appeals make up a small percentage of all immigration cases before the Second Circuit. Appeals of District Court actions typically do not challenge orders of removal issued by the BIA, as jurisdiction to review orders of removals is exclusively within the Courts of Appeals subsequent to the provisions of the REAL ID Act of 2005. *See* Section 106(c) of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, 302 (May 11, 2005) (eliminating District Court jurisdiction over challenges to final orders of removal and transferring existing District Court cases to the Courts of Appeals for adjudication). For the purposes of this article, review of orders of removal are analytically distinct from immigration-related appeals from the District Courts. The issue discussed herein is related to cases involving review of orders of removal, and any proposed actions should not include District Court appeals of immigration matters, which should be treated as traditional civil appeals.

116. Report at 10.

117. Prior to 1996, immigration proceedings were divided into two types—exclusion proceedings for aliens seeking entry to the United States and deportation proceedings for aliens already in the United States whom the government wished to remove. These two types of proceedings have been consolidated into the current proceeding under the general label "removal." However, cases initiated prior to 1996 retain the exclusion and deportation labels and have certain procedural and substantive differences from removal proceedings. For the instant purposes, the distinction is not important, and we will use the general term, removal, to refer to all three types of proceedings.

118. *See Doumbia v. Gonzales*, 472 F.3d 957, 962-63 (7th Cir. 2007).

119. *See* 8 U.S.C. § 1229a(b)(4)(B); *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009) (holding that aliens have no constitutional right to effective assistance of counsel in removal proceedings), *overruled by Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) (overruling *Compean* 1 but declining to reach the constitutional issues).

120. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). However, an IJ may grant a motion to exclude evidence obtained as the result of a constitutional violation where the violation is "egregious." *See Orhorhage v. INS*, 38 F.3d 488 (9th Cir. 1994). The standard is high and motions to suppress are granted infrequently.

121. *See* 8 U.S.C. § 1252.

122. Report at 2.

123. *See Bridges v. Wixon*, 326 U.S. 136, 163-64 (1945) (Murphy, J. concurring) ("It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime.' Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation.").

124. For instance, a round-trip plane ticket to China costs between $1,000 and $1,500 on average. To fly a wife and three children to China to visit their deported husband/father would cost between $4,000 and $6,000 (possibly more). Many immigrant families cannot afford this. Further, on average, the alien deported to China can expect to make the equivalent of $2,000 or less per year in China, depending on region. Such an alien would not be able to meaningfully contribute to the airfare of family members.

125. OIL is the component of the Department of Justice that now litigates immigration cases on behalf of the government in the Second Circuit and other Courts of Appeals.

126. United States Department of Justice, Immigration Litigation Bulletin, Vol. 12, No. 11, pp. 4-5 (November 2008). *Available at* http://www.ilw.com/immigdaily/news/2009,0917-OIL.pdf (last visited 12/16/09). The study related to credibility determinations only, not the final outcome of the case.

127. *See* JUDGES SHOW DISPARITIES IN DENYING ASYLUM, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, Syracuse University (July 31, 2006) (noting that denial rates in randomly assigned asylum cases for the 208 judges compared ranged from a low of 10 percent to a high of 98 percent), *available at* http://trac.syr.edu/immigration/reports/160/.

128. Stuart L. Lustig, *et al.*, *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 Georgetown Immigration Law Journal 57 (Fall 2008). *Available at* www.ilw.com/articles/2009,0811-lustig.pdf.

129. Report at 22; *see also* Lustig, *et al.*, *supra*.

130. Report at 3, 24-25, 26-27.

131. Some IJs in the New York Immigration Court have already begun scheduling hearings in 2012, as earlier dates are not available.

132. We note that some of the local law schools, such as New York Law School, operate immigration law clinics. It may be worth including these schools in any dialogue regarding this proposal.

133. We contemplate a simple screening process, not motion practice, that would defeat the efficiency interest this proposal serves. A decision that is not sufficiently clear on its face to apprise the Court of the basis for the decision is flawed as a matter of law and difficult to review in a meaningful way. We anticipate a small but meaningful number of the BIA's decisions will fit this criteria. Under this proposal, the Court would be able to clear these cases from the docket with minimal effort while at the same time assuring aliens are provided with a fair opportunity to be heard on their cases.

134. Summary affirmance is appropriate only in cases where a petitioner can raise no non-frivolous grounds for appeal. *See Love v. McCray*, 413 F.3d 192, 194 (2d Cir. 2005); *United States v. Monsalve*, 388 F.3d 71, 73 (2d Cir. 2004). The standard for summary affirmance mirrors the standard for advancing an Anders motion. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (superseded by statute on other grounds).

135. United States Court of Appeals for the Second Circuit Plan for the Appointment of *Pro Bono* Counsel (revised 2006), at 2, *available at* http://www.ca2.uscourts.gov/Docs/ProBono/Copy%20of%20Plan%20and%20Application.pdf.

136. *Id.* at 2.

137. *Id.*

138. *Id.*

139. *Id.*

140. United States Court of Appeals for the Seventh Circuit Volunteer Panel Attorney Questionnaire, *available at* http://www.ca7.uscourts.gov/forms/cjaques.htm.

141. United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 4, *available at* http://www.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf.

142. Letter from Leonard J. Feldman, Esq. to Washington State Bar Association, December 2003,, *available at* http://www.wsba.org/media/publications/barnews/2003/dec-03-feldman.htm.

143. United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 1.

144. United States Court of Appeals for the Second Circuit Plan for the Appointment of *Pro Bono* Counsel (revised 2006), at 1.

145. United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 8-9.

146. *Id.* at 4; Letter from Leonard J. Feldman, Esq., to Washington State Bar Association, December 2003.

147. Letter from Leonard J. Feldman, Esq., to Washington State Bar Association, December 2003.

148. United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 3, *available at* the Southern District of New York *Pro Se* Clerk's office.

149. United States District Court for the Southern District of New York Information Guide for the *Pro Bono* Panel (Rev. 2/017) at i, available at the *Pro Se* Office of the Southern District of New York.

150. Virginia Indigent Commission Certification Application for Court Appointed Counsel, *available at* http://www.publicdefender.state.va.us/certapp.htm; Office of the Public Defender, State of New Jersey Pool Attorney Application Process available at: < http://www.state.nj.us/defender/PoolAttorneyApplicationProcess_8-25-08.rtf>.

151. Press Release, Criminal Justice Act Mentoring Program Approved for the Southern District of New York, Oct. 23, 2008, *available at* http://www.nysd.uscourts.gov/cases/show.php?db=notice_cja&id=18.

152. *Id.*

153. Virginia Indigent Commission Certification Application for Court Appointed Counsel, *see* note 31.

154. The District of New Jersey similarly publishes the names and contact information of CJA Panel attorneys in its district and leaves it to aspiring applicants to contact those attorneys willing to mentor.

155. United States Court of Appeals for the Second Circuit Plan for the Appointment of *Pro Bono* Counsel (revised 2006), at 4 (page 4 not numbered, but follows numbered page 3).

156. *See* 8 U.S.C. §§ 1229a(c)(7); 8 C.F.R. § 1003.2(c).

157. ICE (Immigration and Customs Enforcement) is the DHS agency that prosecutes removal proceedings and arrests, detains and ultimately deports aliens. The government is represented by the ICE Office of Chief Counsel in removal proceedings, with an Assistant Chief Counsel serving as the prosecutor.

158. It is important to note that the appeals are usually out of desperation to remain in the United States with the alien's family members, not a desire to game the system or file frivolous paperwork, as the filing of a petition for review does not actually prolong an alien's stay in the United States.

159. It is the authors' experience that OIL will nevertheless not settle a case prior to the filing of the alien's brief in such cases, even where the error is brought to its attention at the beginning of the case.

160. This is especially so since the aliens are often only eligible to legalize their status as a result of having a United States citizen spouse or child that has filed an immigrant petition on their behalf.

This report was prepared by the Immigration Litigation Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, co-chaired by Michael D. Patrick and Clarence Smith, Jr. The Executive Committee of the Section adopted the report by unanimous vote on November 17, 2009. The Immigration Litigation Committee includes Michael P. DiRaimondo, Judge Noel Anne Ferris, Sophia M. Goring-Piard, Kamaka R. Martin, Thomas Moseley, Eva Saltzman, Charlotte W. Smith, and David H. Tennant. The principal author was Charlotte W. Smith with assistance from Kamaka R. Martin. Committee members Judge Noel Anne Ferris and Eva Saltzman recused themselves in the preparation of this report.

On January 28, 2010, the report received the approval of the Executive Committee of the New York State Bar Association. On January 29, 2010, by a unanimous vote in the House of Delegates, the New York State Bar Association approved the report and recommendations of the Section. It also approved the recommendations made in a report issued by of the Committee on the Federal Courts of the New York County Lawyers' Association, a copy of which is appended to this report.

Committee on Immigration Litigation

Founded in 2007, the Committee on Immigration Litigation offers a forum to discuss how to improve substantive law and administrative and judicial procedures in the area of immigration litigation. Its mission is to identify ways to improve the administration of justice in immigration law. The committee recently presented a report concerning the continued high volume of immigration appeals in the Second Circuit at the NYSBA Annual Meeting in January 2010. The Executive Committee and the House of Delegates adopted the report and its accompanying resolutions. The report, *The Continuing Surge in Immigration Appeals in the Second Circuit: The Past, The Present and the Future,* is included in this issue of the *NYLitigator* on pages 44-56.

The report summarizes the current state of affairs in the Second Circuit and identifies measures that should be taken to handle the enormous volume of immigration appeals. Following procedural reforms instituted by the Attorney General in 1999 and 2002, there was a noticeable surge in immigration appeals from the Board of Immigration Appeals (BIA) to the Second Circuit. In 2001, administrative appeals constituted 4% of total appeals filed in the Second Circuit.[1] By 2003, 34% of all appeals filed were administrative agency appeals, most of which were immigration appeals from the BIA.[2] Since 2004, the volume of immigration appeals has represented between 37% and 39% of all appeals filed within the Second Circuit,[3] and it is clear that the volume will continue unabated unless further reforms are instituted at the administrative levels and within the Second Circuit. Moreover, too many immigration appeals are poorly briefed boilerplate submissions.[4]

By way of background, the Executive Office for Immigration Review (EOIR) is responsible for interpreting and administering U.S. immigration law on behalf of the U.S. Department of Justice. EOIR is comprised of immigration courts and the BIA, which hears appeals from immigration court decisions. Millions of foreign nationals currently reside in the United States without authorization or in violation of their status. Those detected are order to appear in deportation proceedings before an immigration judge. Many seek asylum, a humanitarian form of relief for immigrants who were persecuted or fear persecution in their home countries.

In its report, the committee recognizes the successful measures of the Second Circuit to address the high volume of immigration appeals. The Second Circuit instituted a Non-Argument Calendar (NAC) for asylum appeals, which has helped to reduce the backlog in pending appeals.[5] Although not expressly designed to address the volume of immigration appeals, the circuit also recently promulgated new rules for its grievance committee and created a *pro bono* counsel program.[6] Judge Robert A. Katzmann is also involved in his personal capacity in a study group that is examining barriers to effective representation of immigrants. The study group hosted a working colloquium in March 2009 and published articles in the *Fordham Law Review* in December 2009.[7] Despite these measures, however, the extent to which the high volume of immigration appeals may impact non-BIA cases pending before the Second Circuit remains a concern.

The Committee on Immigration Litigation recommends further measures be taken within the Second Circuit to improve the quality of representation in immigration appeals. In addition, the committee believes that increased measures at the administrative levels to improve the quality of legal representation and the thoroughness of administrative review both will discourage the incentive to appeal and make it easier for the Second Circuit to identify meritless and frivolous cases in its immigration docket. Specifically, the committee recommends an increase in the size of the BIA, as well as the number of immigration judges and support staff, which would allow more time to write opinions and issue precedent decisions. The committee further recommends instituting greater measures to improve the quality of legal representation of immigrants including greater participation in the Second Circuit's *pro bono* counsel program, the establishment of a training and mentorship program for poorly performing attorneys within the Second Circuit, and comparable training and mentoring opportunities at the administrative levels. The Second Circuit should also continue to use its grievance committee where appropriate, and greater sanctioning power should be conferred to immigration judges and the BIA. Measures must also be undertaken to provide poor immigrants with greater access to high quality legal representation at the administrative levels whether it be accomplished through increased *pro*

bono representation or funding for government-appointed attorneys for the indigent.

The Committee is co-chaired by Michael D. Patrick and Clarence Smith, Jr. and includes Michael P. DiRaimondo, Judge Noel Anne Ferris, Sophia M. Goring-Piard, Kamaka R. Martin, Thomas Moseley, Eva Saltzman, Charlotte W. Smith, and David H. Tennant. The committee would like to thank the principal author of the report, Charlotte W. Smith, and Kamaka R. Martin for her assistance. Committee members Judge Noel Anne Ferris and Eva Saltzman recused themselves in the preparation of the report.

The committee's work has also been a good example of partnership with local New York bar associations. In 2004, the Association of the Bar of the City of New York published an article on the surge in immigration appeals. Five years later, the Committee on Immigration Litigation reexamined the issue and offered further recommendations to improve the efficiency and quality of review at both the administrative and appellate levels. At this year's annual meeting, the NYSBA also adopted a report of the New York County Lawyers'Association and additional resolutions, which offer further recommendations for reform.

The committee's efforts last year also included collaborating with the NYSBA's Committee on Mass Disaster Response (MDR) in helping the victims of the mass shooting in Binghamton on April 3, 2009. The rampage by a single gunman inside a center set up to help recent immigrants left 13 people dead and wounded four others. Most of the victims were shot inside a classroom where they were taking English as a Second Language. The victims hailed from China, Haiti, Pakistan, Iraq, Vietnam and Brazil. Given the victim population, the uncertain immigration status of the victims and their families, and concerns about family members traveling from outside the United States to attend services and claim their loved ones' remains, the MDR Committee reached out to the Immigration Litigation Committee for assistance. David H. Tennant, past Chair of the MDR Committee and current member of the Immigration Litigation Committee, contacted Committee Co-Chair Michael D. Patrick on Sunday, April 5, for immediate assistance in advising victim families who were gathering at a family assistance center in Binghamton.

Within hours, committee member Sophia M. Goring-Piard was on the telephone providing *pro bono* immigration assistance to one of the Chinese families. Over the course of the next several days, Michael D. Patrick contacted officials at the U.S. Department of State and worked with MDR members located in Binghamton to coordinate and facilitate applications for visas. Co-Chair Clarence Smith, Jr. accepted a *pro bono* immigration case on behalf of an individual from Haiti who was in the building when the shooting occurred, but was not injured. The Chair of the MDR, Robert J. Saltzman, and former NYSBA President, Kate Madigan, greatly appreciated the Immigration Litigation Committee's assistance, especially on short notice when no local immigration lawyers could be reached. The Committee on Immigration Litigation will continue to promote measures to improve the administration of justice in immigration litigation in the upcoming year.

Committee on Immigration Litigation Co-Chair Bios

Michael D. Patrick

Michael D. Patrick, Co-Chair of the Committee on Immigration Litigation, is Partner and General Counsel of Fragomen, Del Rey, Bernsen & Loewy, LLP in the firm's New York office. He graduated from Syracuse University (B.A., *cum laude*, 1975) and Hofstra University (J.D., 1978). Mr. Patrick is admitted to the New York Bar and serves as Co-Chair of the Corporate Compliance Committee for the firm and is a member of the Second Circuit Committee on Admissions and Grievances, International Security Affairs Committee ABCNY, American Bar Association, the International Bar Association, the Federal Bar Council (Trustee), the American Immigration Lawyer's Association, and the American Foreign Lawyers Association (Treasurer, 2004-2009).

Prior to joining Fragomen, Mr. Patrick was a founding Partner of Campbell, Patrick & Chin and served as a Special Assistant United States Attorney, Southern District of New York and Chief of the Immigration Unit, Civil Division, where he represented the Immigration and Naturalization Service, State Department, Department of Labor and other federal agencies in the federal courts. Prior to joining the U.S. Attorney's Office, Mr. Patrick was an Assistant Corporation Counsel for the City of New York.

Mr. Patrick is a frequent faculty member of NITA at Hofstra and ITAP at Cardozo. Mr. Patrick writes a bimonthly immigration column in *The New York Law Journal* and is a frequent speaker on immigration topics before Bar Associations, international trade organizations and human resources groups. Mr. Patrick received the Dean's Award for Distinguished Hofstra Law School Alumni in May 2000 and is listed in the current editions of *Best Lawyers in America*, *Super Lawyers* and *Chambers USA: America's Leading Business Lawyers*.

Clarence Smith, Jr.

Clarence Smith, Jr., Co-Chair of the Committee on Immigration Litigation, maintains a law practice in New York, New York representing both corporate and individual clients in various immigration matters. This includes counseling clients on obtaining employment and

family-based visas, representing individuals in deportation matters, and advising clients on complying with various United States government agencies, such as the United Stated Department of Labor and the United States Department of Homeland Security. Mr. Smith represents various clients in both criminal and civil matters in New York State Supreme and Civil Courts.

Prior to starting his own law practice, Mr. Smith joined the law firm of Connell Foley, LLP, of Roseland, New Jersey and served as a Partner (2005–2008). At Connell Foley, Mr. Smith led the Immigration Law practice, which was an important component of the firm's comprehensive labor and employment law services. There, he counseled employers regarding non-immigrant and immigrant visas, employment-based visas, labor certifications, naturalization, and all aspects of immigration-related benefits. At Connell Foley, Mr. Smith regularly assisted employers in complying with the United States Department of Labor and Department of Homeland Security (USDHS) statutes and regulations pertaining to non-citizen employees.

In addition, Mr. Smith also served as an Assistant Chief Counsel for the United States Department of Homeland Security (1998–2005). There, Mr. Smith represented the United States Government in deportation and removal proceedings in immigration proceedings. Prior to his service at USDHS, Mr. Smith served as a Senior Court Attorney for the Departmental Disciplinary Committee, Supreme Court Appellate Division, First Judicial Department (DDC) (1994–1998). There, Mr. Smith represented the DDC in administrative proceedings concerning attorney misconduct. Prior to his service at the DDC, Mr. Smith served as an Assistant District Attorney for the New York County District Attorney's Office (1988–1994). There, Mr. Smith represented the State of New York in the prosecution of criminal matters committed in the County of New York.

An experienced arbitrator from 1999–present, Mr. Smith has served before the Financial Industry Regulatory Authority (FINRA), formerly the National Association of Securities Dealers. Here, Mr. Smith serves either on arbitration panels or as an individual arbitrator to arbitrate disputes related to the securities industry. Mr. Smith is also an arbitrator for the American Arbitration Association (AAA). Here, Mr. Smith serves on arbitration panels of companies where the parties' contracts contain AAA clauses.

Endnotes

1. Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 5 (2004).
2. *Id.*
3. U.S. Court of Appeals—BIA Appeals as % of Total Appeals Filed During the Twelve-Month Periods Ended December 31, 2001 through 2008 (April 15, 2009).
4. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 10 (2008).
5. Judge Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 Brook. L. Rev. 429, 433 (2008).
6. United States Court of Appeals for the Second Circuit, Rules of the Committee on Admissions and Grievances for the United States Court of Appeals for the Second Circuit (May 21, 2007), *available at* http://www.ca2.uscourts.gov/Docs/AttDisc/Rules%20of%20the%20Committee%20on%20Admissions%20and%20Grievances.pdf; Pro Bono Connection, American Bar Association, Pro Bono Policy News 3, *available at* http://www.abanet.org/legalservices/probono/publications/pro_bono_connections/pbconsp05 .pdf.
7. 78 Fordham L. Rev. 101 (2009).

Section Committees and Chairs

ADR
Carroll E. Neesemann
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
cneesemann@mofo.com

Antitrust
Jay L. Himes
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
jhimes@labaton.com

Hollis L. Salzman
Labaton Sucharow LLP
140 Broadway, 34th Fl.
New York, NY 10005
hsalzman@labaton.com

Appellate Practice
David H. Tennant
Nixon Peabody LLP
1100 Clinton Square
Rochester, NY 14604-1792
dtennant@nixonpeabody.com

Melissa A. Crane
Appellate Division: First Department
27 Madison Avenue, Room 406
New York, NY 10010
macrane@courts.state.ny.us

Bankruptcy Litigation
Douglas T. Tabachnik
Law Offices of Douglas T. Tabachnik, PC
63 West Main Street, Ste. C
Freehold, NJ 07728
dtabachnik@dttlaw.com

Civil Practice Law and Rules
Thomas C. Bivona
Milbank Tweed Hadley McCloy LLP
One Chase Manhattan Plaza, 45th Fl.
New York, NY 10005-1413
tbivona@milbank.com

James Michael Bergin
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
jbergin@mofo.com

Civil Prosecution
Neil V. Getnick
Getnick & Getnick
620 Fifth Avenue
New York, NY 10020
ngetnick@getnicklaw.com

Richard J. Dircks
Getnick & Getnick
620 Fifth Avenue
New York, NY 10020
rdircks@getnicklaw.com

Class Action
Ira A. Schochet
Labaton Sucharow LLP
140 Broadway, 34th Fl.
New York, NY 10005
ischochet@labaton.com

Commercial Division
Mitchell J. Katz
Menter, Rudin & Trivelpiece, P.C.
308 Maltbie Street, Ste. 200
Syracuse, NY 13204-1498
mkatz@menterlaw.com

Paul D. Sarkozi
Tannenbaum Helpern Syracuse &
Hirschtritt LLP
900 Third Avenue
New York, NY 10022
sarkozi@thshlaw.com

Commercial Division Law Report
Paul D. Sarkozi
Tannenbaum Helpern Syracuse &
Hirschtritt LLP
900 Third Avenue
New York, NY 10022
sarkozi@thshlaw.com

Jonathan D. Lupkin
Flemming Zulack Williamson Zauderer LLP
One Liberty Plaza, 35th Fl.
New York, NY 10006
jlupkin@fzwz.com

Complex Civil Litigation
Edward A. White
Hartman & Craven LLP
488 Madison Avenue, 16th Fl.
New York, NY 10022
ewhite@hartmancraven.com

Corporate Litigation Counsel
Jamie E. Stern
ING
230 Park Avenue, 15th Fl.
New York, NY 10169
jamie.stern@us.ing.com

Carla M. Miller
Universal Music Group
1755 Broadway, 4th Fl.
New York, NY 10019
carla.miller@umusic.com

Creditors' Rights and Banking Litigation
S. Robert Schrager
Hodgson Russ LLP
60 East 42nd Street, 37th Fl.
New York, NY 10165
rschrager@hodgsonruss.com

Michael Luskin
Hughes Hubbard & Reed, LLP
1 Battery Park Plaza, 17th Fl.
New York, NY 10004-1482
luskin@hugheshubbard.com

Diversity
Tracee E. Davis
Zeichner Ellman & Krause LLP
575 Lexington Avenue
New York, NY 10022
tdavis@zeklaw.com

Electronic Discovery
Constance M. Boland
Nixon Peabody LLP
437 Madison Avenue, 23rd Fl.
New York, NY 10022
cboland@nixonpeabody.com

Adam I. Cohen
FTI Consulting, Inc.
3 Times Square
New York, NY 10036
adam.cohen@fticonsulting.com

Employment and Labor Relations
Gerald T. Hathaway
Littler Mendelson P.C.
900 3rd Avenue, 8th Fl.
New York, NY 10022-3298
ghathaway@littler.com

Ethics and Professionalism
Anthony J. Harwood
100 Park Avenue, 18th Fl.
New York, NY 10017-5590
tony.harwood@aharwoodlaw.com

James M. Wicks
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
jwicks@farrellfritz.com

Evidence
Lauren J. Wachtler
Mitchell Silberberg & Knupp LLP
12 East 49th Street, 30th Fl.
New York, NY 10017
ljw@msk.com

Michael Gerard
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
mgerard@mofo.com

Federal Judiciary
Jay G. Safer
Locke Lord Bissell & Liddell, LLP
3 World Financial Center, 20th Fl.
New York, NY 10281
jsafer@lockelord.com

John D. Winter
Patterson Belknap Webb & Tyler
1133 Avenue of the Americas, Ste. 3500
New York, NY 10036-6710
jwinter@pbwt.com

Federal Procedure
Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, Ste. 1400
New York, NY 10022-7237
garenson@kaplanfox.com

Immigration Litigation
Michael D. Patrick
Fragomen, Del Rey, Bernsen & Loewy LLP
7 Hanover Square, 10th Fl.
New York, NY 10004-2756
mpatrick@fragomen.com

Clarence Smith Jr.
Law Office of Clarence Smith Jr.
305 Broadway, Ste. 806
New York, NY 10007
smithjr.clarence@gmail.com

International Litigation
Ted G. Semaya
Eaton & Van Winkle LLP
Three Park Avenue, 16th Fl.
New York, NY 10016
tsemaya@evw.com

Internet and Intellectual Property Litigation
Joseph V. DeMarco
DeVore & DeMarco, LLP
99 Park Avenue, 16th Fl.
New York, NY 10016
jvd@devoredemarco.com

Peter J. Pizzi
Connell Foley LLP
85 Livingston Avenue
Roseland, NJ 07068
ppizzi@connellfoley.com

Oren J. Warshavsky
Baker & Hostetler LLP
45 Rockefeller Plaza
New York, NY 10111
owarshavsky@bakerlaw.com

Membership
Peter Andrew Mahler
Farrell Fritz PC
370 Lexington Avenue, Room 500
New York, NY 10017-6593
pmahler@farrellfritz.com

Edwin M. Baum
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
ebaum@proskauer.com

Nominations
Melanie L. Cyganowski
Otterbourg, Steindler, Houston & Rosen
230 Park Avenue
New York, NY 10169-0075
mcyganowski@oshr.com

Pro Bono and Public Interest
Deborah Ann Kaplan
Baker & Hostetler LLP
45 Rockefeller Plaza, 11th Floor
New York, NY 10111-0100
dkaplan@bakerlaw.com

Real Estate and Construction Litigation
David Rosenberg
Marcus Rosenberg & Diamond LLP
488 Madison Avenue, 17th Fl.
New York, NY 10022-5702
dr@realtylaw.org

Robert L. Sweeney
Whiteman Osterman & Hanna LLP
99 Washington Avenue, 19th Fl.
Albany, NY 12210
rsweeney@woh.com

Edward Henderson
Kilpatrick Stockton LLP
31 West 52nd Street
New York, NY 10019
ehenderson@kilpatrickstockton.com

Securities Litigation and Arbitration
James D. Yellen
Yellen Arbitration and Mediation Services
156 East 79th Street, Ste. 1C
New York, NY 10021-0435
jamesyellen@yahoo.com

Jonathan L. Hochman
Schindler Cohen & Hochman LLP
100 Wall Street, 15th Fl.
New York, NY 10005-3701
jhochman@schlaw.com

State Court Counsel
Deborah E. Edelman
30 West 63rd Street
New York, NY 10023
dedelman@courts.state.ny.us

Janel R. Alania
Unified Court System
Chambers of The Hon. Bernard J. Fried
60 Centre St, Room 626
New York, NY 10007
jalania@courts.state.ny.us

State Judiciary
Charles E. Dorkey III
McKenna Long & Aldridge LLP
230 Park Avenue, 17th Fl.
New York, NY 10169
cdorkey@mckennalong.com

White Collar Criminal Litigation
Evan T. Barr
Steptoe & Johnson LLP
750 Seventh Avenue, Ste. 1900
New York, NY 10019-6834
ebarr@steptoe.com

Task Force on the State of our Courthouses
Gregory K. Arenson
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, Ste. 1400
New York, NY 10022-7237
garenson@kaplanfox.com

Melanie L. Cyganowski
Otterbourg, Steindler, Houston & Rosen
230 Park Avenue
New York, NY 10169-0075
mcyganowski@oshr.com

Sharon M. Porcellio
Ward Greenberg Heller & Reidy LLP
300 State Street
Rochester, NY 14614-1020
sporcellio@wardgreenberg.com

NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
One Elk Street, Albany, New York 12207-1002

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