

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on January 15, 2020.

Members Participating in Person

Laurel Kretzing, Chair
Daniel Wiig, Vice-Chair
Mark Berman
Susan DeSantis**
Stephen A. Hochman
Viktoria Liberchuk
Jessica Moller**
James Wicks
Kevin Quaratino
Ignatius Grande
Jay L. Himes
Hon. Frank Maas

Members Participating by Telephone

Catherine Carl
Deborah Edelman
Courtney Rockett
Anne Sekel
Natasha Shishov

**Indicates guest attendees and speakers at the meeting

Section Chair, Laurel Kretzing, called the meeting to order at 6:13 pm.

Guest Speaker

Susan DeSantis, NYSBA Chief Communications Strategist

Ms. DeSantis spoke about her background at the NY Law Journal and how she is able to use her background and contacts to help assist in publicizing events for NYSBA members. She explained that the Communications Division of NYSBA can do a lot for members, and that the NYSBA section that get most prominence in terms of press attention and publication are the ones that give a lot of information to the Communications Division well in advance of their upcoming events. The more detail and more enticing description of events, the better. Ms. DeSantis also explained that it is important to get that information to NYSBA with as much advanced notice as possible so they the Communications Division can publicize the event, try to get coverage of the upcoming event from various media outlets, and disseminate information through her daily email to NYSBA

members and on the NYSBA website. Ms. DeSantis encouraged the Section to communicate with her and her team on a more regular basis to ensure that the Communications Division has the most up-to-date event information that can then be publicized. In addition, Ms. DeSantis encouraged the Section to communicate with NYSBA's Marketing Director, who can assist in publicizing events and other information via social media.

Ms. DeSantis also answered various questions posed by those in attendance, including how to better publicize the Section's upcoming diversity and inclusion event on February 5, 2010, and how to make event descriptions more interesting by doing things such as highlighting the prestige of speakers.

Ms. DeSantis can be contacted at sdesantis@nysba.org, (518) 487-5780 (office) or (201) 575-5756 (cell).

Review of December 4, 2019 Meeting Minutes

The minutes of the December 4, 2019 meeting were amended to include Stephen Hochman as having attended in-person, and to correct the spelling of Kevin Quartino's last name. A motion to approve the minutes as amended was made, seconded and unanimously approved.

Report on Appointment of Members at Large

Laurel Kretzing provided a report on the appointment of members at large to the Executive Committee. Members at large are periodically appointed to serve 2-year terms. There are currently 26 members at large, and all current members at large were contacted to determine their interest in being reappointed. A motion was made and seconded to appoint the following individuals to serve a 2-year commencing June 1, 2020:

Hon. Jeremy Feinberg
Hon. Helen Freedman
Hon. Sharon Grubin
Hon. Frank Maas
Hon. Andrea Masley
Edward Beane
Michael Cryan
J. Scott Greer
John Grubin
Claire Gutekunst
Stephen Hochman
Alan Mansfield
Grant Shehigian
Natasha Shishov

The motion was unanimously approved.

Annual Meeting Update

Daniel Wiig presented an update on the Section's events at the upcoming NYSBA annual meeting. There are currently 5 sponsors, 18 tables purchased, 110 people registered for CLE, and approximately 200 people for luncheon registered. There are currently 45 active judges who will be in attendance. Mr. Wiig encouraged everyone to keep spreading word to maximize sponsorships and attendance.

Evening at Thurgood Marshall Courthouse Update

Anne Sekel presented an update on the upcoming Evening at Thurgood Marshall Courthouse scheduled for evening of January 28, 2020. There will be hors d'oeuvres served while attendees will have an opportunity to network with fellow section members. The Chief Judge will be giving opening remarks, and several District and Circuit Court judges also will be in attendance. NYSBA's Young Lawyers Section recently agreed to promote this event.

Becoming an Ally: Four Trailblazing Jurists Discuss Diversity & Inclusion CLE Program Update

Kevin Quaratino and Viktoria Liberchuk presented an update on the Becoming an Ally: Four Trailblazing Jurists Discuss Diversity & Inclusion CLE Program scheduled for February 5, 2020. The event format is going to be that of a moderated interactive panel discussion, with four prestigious jurists from diverse backgrounds sitting on the panel. The discussion is intended to focus on supporting young lawyers, female lawyers, and lawyers from diverse backgrounds in their career advancement by answering questions posed from a diverse attorney perspective (e.g., "What do I do if the partners in my firm don't see me?"). Flyers for the event have been handed out at various events and are posted in the elevators at 60 Centre Street, and the event is being publicized electronically via email and on the NYSBA homepage. NYSBA's Young Lawyers Section recently posted the event on the Communities page.

Other Business

Mark Berman provided an update on a meet and greet event that will be hosted together with the Monroe County Bar Association as a way for attorneys in the Rochester area to meet a new commercial division judge in Rochester/Monroe County. A similar event is being considered for downstate to welcome a new commercial division judge in Brooklyn.

The Section's next Executive Committee meeting will be held on February 4th at Farrell Fritz in Uniondale.

Meeting adjourned at 7:57 p.m.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on February 4, 2020.

Members Participating in Person

Laurel Kretzing, Chair	Sonia Russo
Viktoria Liberchuk	Peter Mastaglio
Jessica Moller**	Michael Antangiovanni
James Wicks	Gregory LaSpina
Michael Cardello III	Stephen Brodsky
Philip Butler	Katharine Santos
Paige Bartholomew	Hon. James Hudson**
Natalia Gandolfo	Hon. Jerome Murphy**
Jaclyn Rugginello	Hon. Elizabeth Hazlitt Emerson**
Jana Schwartz	

Members Participating by Video Conference

Daniel Wiig, Vice-Chair
Jay Himes
Ann Sekel

Members Participating by Telephone

Alan J. Brody
Richard J. Dircks
Jonathan Fellows, Chair Elect
Claire P. Gutekunst
Catherine Carl
Gregory Arenson
Hon. Helen Freedman
Alan Mansfield
Kevin Quaratino

**Indicates guest attendees and speakers at the meeting

Section Chair, Laurel Kretzing, called the meeting to order at 6:14 p.m.

Guest Speakers

***Hon. James Hudson (Commercial Division, Suffolk County) and
Hon. Jerome Murphy (Commercial Division, Nassau County)***

In a question and answer style discussion, Justices Hudson and Murphy spoke about various issues relating to the way in which the newly implemented presumptive mediation is affecting Nassau and Suffolk County, and other matters, including:

1. *How are you handling the new presumptive mediation rules?* In Nassau County, some judges will not themselves handle a mediation if the case is going to involve a non-jury trial. Generally, the assignment for mediation will occur at the Preliminary Conference and the case may be referred to one of several different mediators (including a JHO), but assignment for mediation will not stay discovery, pending settlement discussions when referring out to a JHO. In Suffolk County, the new presumptive mediation rules implemented in December 2019 will not be applied to a commercial case if the RJI specifies that it is a commercial division case because you cannot be forced into presumptive ADR with a true commercial division case. But if commercial case is not specified on the RJI, the case will get put in with the other cases and may get referred to ADR, then if no settlement at ADR the parties can request a referral to commercial division. The benefit of mediation through presumptive ADR is that the mediator is free.
2. *When the parties say they can self-mediate, how much leeway will the court give the attorneys?* Generally, if all attorneys agree, the court will let attorneys set their own pace, but if even one attorney does not agree to the self-mediation then the court will set time frames and 22 NYCRR § 202.7 will all come back into play.
3. *Do you agree that under presumptive ADR, there is now a requirement in courts that it is up to the judge to impose on the parties as early as possible a pre-discovery effort to engage in settlement discussions?* Every case is different. Sometimes there are very legitimate reasons why the parties do not want to engage in settlement early on (e.g., waiting for an expert report), that the court will entertain in delaying settlement discussions.
4. *What technology is available in the courtroom?* In Suffolk County, some justices have the ability to use Skype in chambers, in addition to courtrooms being set up with standard projectors and Wi-Fi. Generally, although it depends on the particular courtroom, there is very limited technology in the courtrooms in Nassau County. Attorneys can bring certain technology into court, which may be very helpful in a document-intensive case.
5. *What do you like, what can attorneys do better?* Motions for re-argument are generally underutilized. Anything that you think should be appealed, in good faith, should be preceded by a motion for re-argument because it gives the judge an opportunity to re-review everything. If a mistake was made or something was overlooked, a judge would generally rather reverse himself/herself with a motion to

re-argue than get reversed on appeal. But motions to re-argue should only be made in good faith, and generally should only be made when it involves an important issue, otherwise it will just waste the parties' and the court's time.

Review of January 15, 2020 Meeting Minutes

The minutes of the January 15, 2020 meeting were amended to show Hon. Frank Maas attended in-person and to correct the spelling of his name in the listing of members at large. A motion to approve the minutes as amended was made, seconded and unanimously approved.

Report on Annual Meeting

Daniel Wiig reported on the NYSBA Annual Meeting that was held last week. Approximately 170 registered for the Section's CLE presentations, and there was great attendance at luncheon as well. Some attendees thought the CLE portion was not long enough, but the Section is always constrained with timing to ensure the lunch starts on time since there needs to be a hard stop at 2:00 p.m. There was some discussion about possibly starting the welcome remarks slightly earlier next year to give a few more minutes to the CLE portion.

Becoming an Ally: Four Trailblazing Jurists Discuss Diversity & Inclusion CLE Program Update

Kevin Quaratino and Viktoria Liberchuk presented an update on the Becoming an Ally: Four Trailblazing Jurists Discuss Diversity & Inclusion CLE Program scheduled for tomorrow, February 5, 2020 at Foley & Lardner in NYC. Approximately 70 people are currently registered to attend, including several justices and their law clerks. In addition to the substantive presentations, it will provide a nice networking opportunity in light of the anticipated judicial attendance.

Other Business

The Section's next Executive Committee meeting will be held on March 3, 2020 at Foley & Lardner in NYC.

There will be a mock trial program on April 22, 2020 that will give an opportunity for less experienced attorneys to do a trial with guidance from more experience attorneys and with judges who will critique their performance.

Jonathan Fellows reported on the planning of the Section's Spring meeting that is scheduled for May 1-3, 2020 at the Otesaga Hotel in Cooperstown. Four panels are being planned.

Gregory Arenson reported on the House of Delegates and Section Caucus. The caucus adopted best practices on contemplation of reports, including sections working on reports should get other sections who may be interested tuned in with the report as soon as possible in order to avoid conflicts down the road. The best practices guidelines should be available soon. The Association is interested in having sections do more reports. Also, the House of Delegates approved several items: (1) non-attorney affiliates may become section members (includes

paralegals, JDs that are not admitted to practice); (2) adopted a diversity plan that, among other things, says the sections are supposed to appoint liaisons to standing Committee on Diversity and Inclusion, and that sections are supposed to create and submit diversity plans by January 31, 2021; and (3) NYSBA formally came out in favor of adult recreational use of marijuana.

Stephen Brodsky reported that he is going to be discussing a panel with Judge Berman relating to the SDNY mediation program

Meeting adjourned at 7:45 p.m.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on March 3, 2020.

Members Participating in Person

Laurel Kretzing, Chair

Jonathan Fellows, Chari Elect

Daniel Wiig, Vice-Chair

Anne Sekel, Treasurer

Natasha Shishov, Secretary

Hon. Frank Maas

Tony Harwood

Jay Safer

Jeremey Feinberg

Claire P. Gutekunst

Robert Holtzman

Kevin Quaratino

Mark Berman

Stephen Hochman

Stephen Roberts

Michael Rakower

Hon. Helen Freedman

Hon. Andrew Borrock**

Members Participating by Telephone

Rachel Morgenstern

Tony Harwood

James Wicks

Viktoria Liberchuk

Teresa M. Bennett

Alan Mansfield

Paul D. Sarkozi

Deborah Edelman

Ignatius Grande

Matthew Maron

Jay L. Himes

**Indicates guest attendees and speakers at the meeting

Section Chair, Laurel Kretzing, called the meeting to order at 6:10 p.m.

Guest Speakers

Hon. Andrew Borrock (Commercial Division, New York County)

Justice Borrock discussed practices in his part and personal preferences. He prefers to receive information from the Bar as to how the parties want to see their cases progress and dislikes discovery disputes that amount of personal attacks between counsel.

Justice Borrock runs a paperless part and works predominately on-line. He prefers un-redacted documents to be submitted on flash drive, if they are otherwise sealed, and prefers that documents include hyperlinks. Additionally, he uses e-mail to respond and communicate with attorneys and does not permit the submission of letters. Although Justice Borrock is reluctant to tell the Bar not to bring a particular motion, he does prefer that the parties request a conference to discuss discovery disputes prior to bringing discovery motions. If a discovery motion is necessary, they must be brought by Order to Show Cause.

With respect to presumptive ADR, Justice Borrock will not impose himself into settlement negotiations by mandating that a case be sent to mediation, but will assist if the parties agree that ADR would be helpful.

Discussing jury trials, Justice Borrock commented that the Bar does a good job of explaining complex issues to juries and believes that the use of experts is very helpful.

Taking the Lead 2020 Program Update

Laurel Kretzing reported on the upcoming “Taking the Lead” program, which is scheduled for April 22, 2020. This program will feature experienced and new lawyers and will be held in ceremonial courtroom of the Southern District of New York.

Spring Meeting 2020 Update

Jonathan Fellows reported on the Section’s upcoming Spring meeting, scheduled for May 1-3 in Cooperstown. The Robert Haig Award will be awarded to Loretta Lynch, former United States attorney. Four panels will be presented concerning: 1) restrictive covenants; 2) ESI; 3) Title 9 and Sexual Assault; and 4) a class action update. Registration will be open in the next a day or two. Bring a big hat for the cocktail hour on Saturday night for the Kentucky Derby.

Report on Becoming an Ally: Four Trailblazing Jurists Discuss Diversity & Inclusion CLE Program

Kevin Quaratino presented the report on the “Becoming an Ally: Four Trailblazing Jurists Discuss Diversity & Inclusion” CLE Program, which took place on February 5, 2020 at Foley & Lardner in NYC. More than 80 people attended. The Section’s Young Lawyers Committee is planning a follow up social outing with young lawyers to discuss other programing that would be geared towards young lawyers.

Report on Data Protection Event

Ignatious Grande reported on an event that was co-sponsored by the Section, which concerned data protections in arbitration proceedings. There were approximately 40-50 attendees.

Other Business

- Minutes from the February meeting will be approved at the next meeting. The February meeting took place at Farrell Fritz in Nassau County, with live video conferencing at Foley Lardner in NYC. Going forward, the Section should consider holding more EC meeting at locations throughout the State with video conferencing in NYC.
- Mark Berman discussed the recent meet and greet with the new Commercial Division Judge in Rochester and the upcoming Bench/Bar Event in Kings County, scheduled for April 2, 2020. A similar program is being planned in Long Island with Commercial Division Judges from Nassau and Suffolk County.
- Jay Safer reported on a new program concerning ADR being planned by the Federal Judiciary Committee.
- The new NYSBA website will be going live on 3/4/20
- Claire P. Gutekunst reported on an upcoming CLE program: “Legislating Genetic Testing: Is Knowledge Power”, scheduled for March 18, 2020 at the Southern District of New York.

Meeting adjourned at 7:20 p.m.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on March 30, 2020.

Members Participating via Zoom

Laurel Kretzing, Chair
Jonathan Fellows, Chari Elect
Daniel Wiig, Vice-Chair
Ann Sekel, Treasurer
Natasha Shishov, Secretary
Stephen T. Roberts
Viktoriya Liberchuk
James Wicks
Alan J. Brody
Michael S. Cryan
Matthew Maron
Alan Mansfield
Gregory Arenson
Michel Fox
Vincent J. Syracuse
Hon. Helen Freedman
Claire P. Gutekunst

Section Chair, Laurel Kretzing, called the meeting to order at 6:03 p.m.

Report on Proposal to Revise Commercial Division Rule 31

Mark Berman presented the Report on the proposal to revise Commercial Division Rule 31, which concerns, among other things, paperless parts. A change was proposed to the last sentence of the “comments” section, to lowercase the “T” in the word “the” and place a period at the end of the sentence. The Report was unanimously approved with the above changes.

E-Filing Discussion

There has been a request that the EC consider and discuss the potential use of virtual courts in the Commercial Divisions during the COVID pandemic.

6:15 adjourned.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on April 21, 2020.

Members Participating via Zoom

Laurel Kretzing, Chair
Jonathan Fellows, Chari Elect
Daniel Wiig, Vice-Chair
Ann Sekel, Treasurer
Natasha Shishov, Secretary
James Wicks
Stephen T. Roberts
Scott Malouf
Kevin Quaratino
Claire Gutekunst
Michael Fox
Gregory Arenson
Paul D. Sarkozi
Robert N. Holtzman
Deborah Edelman
Jay G. Safer
Hon. Melissa A. Crane
Richard J. Dircks
Ignatius Grande
Hon. Karla Moskowitz
Hon. Stewart D. Aaron*
Hon. Deborah H. Karalunas*

***Guest Speaker**

Section Chair, Laurel Kretzing, called the meeting to order at 6:00 p.m.

Guest Speaker: Honorable Stewart D. Aaron – Southern District of New York

The Honorable Stewart D. Aaron discussed procedures and practices in the Southern District of New York during the pandemic. Generally, the Southern District is open for business. Parties can still file documents in connection with old and new cases. Jury trials however are suspended until further notice and the SDNY has not made a decision as to when they will resume. There will be a phase in process with bench trials taking priority, likely to be held in the summer. Attorney admissions are continuing remotely. The Court will begin experimenting with using remote witnesses for bench trials. The Judge commented that he goes into the courthouse every Monday and that other Judges are regularly in the courthouse as well, but all maintain distance.

With respect to daily procedures, the Judge explained that all filings go directly to Chambers and do not have to go through the Clerk's office. This permits him, as well as other Judges if they choose to, to get all filing in real time. When a new filing comes in, he forwards it to his clerks, who address the matter promptly. In response to a letter filing, the Judge may decide the request immediately, set up a conference for the next day or set a timeframe by which opposing counsel has to respond. This keeps the operations of his Chambers running smoothly during this unique time.

Addressing the practices in the criminal part, the Judge noted that although the pandemic has not generally changed his decisions concerning bail, he does have a thumb of the scale towards release, provided that the individual is not a danger to the community or a flight risk.

Next addressing settlement conferences, the Judge encouraged parties to utilize the Magistrate Judges to facilitate settlement discussions. The Court will provide parties dial-in information and the Judge can move people to different rooms for settlement negotiations.

Approval of February 4, 2020, March 3, 2020 and March 30, 2020 Minutes

The minutes for the past three EC meetings were approved with one abstention.

Virtual Courts in the Commercial Division Around the State

A number of EC members reported on steps taken by the Commercial Divisions across the State to implement virtual court operations during the pandemic. A spreadsheet has been prepared and circulated to the EC outlining the preferred method of contact for each of the CD Judges during the pandemic. Justice Deborah H. Karalunas, the Presiding Justice of the Commercial Division, Onondaga County, joined the EC meeting as a guest speaker and reported that each Administrative Judge has been charged with coming up with a plan to implement virtual courts. She noted that in Onondaga County, judges are not currently able to e-file decisions, that conferences can be handled at the request of the Judge and that attorneys can reach out to judges via e-mail or by other means, as outlined on the circulated contact sheet. In New York County, judges are able to e-file decisions by sending them to the Clerk of the Court, who uploads them to NYSCEF. Officials for the Nassau/Suffolk County Courts speculate that no trials would be held before the Fall and jury trials may not resume until 2021. In Nassau County, attorneys can contact the Chief Clerk of the Court if they have an emergency application, who will contact the appropriate Judge to determine whether the application is in fact an emergency. In Suffolk County, judges that are caught up on motions are conferencing cases.

Diversity and Inclusion Committee: Appointment of Co-Chair and Revision of Policy

The EC unanimously approved the appointment of Ken Nawaday as co-chair of the Section's Diversity and Inclusion Committee and as a member of the Smooth Moves Planning Committee.

Laurel Kretzing and Ken Nawaday reported that the Smooth Moves program would be rescheduled for the Fall. Laurel has reached out to the Commercial Division judges to determine the best approach for moving forward with the annual diversity fellowship. She suggested a Fall part time scholarship in light of the fact that a remote scholarship in the summer would not be as beneficial for the award recipient.

Report on NYSBA House of Delegates and Section Caucus

Greg Arenson reported on the April 2020 NYSBA HOD meeting, which was held virtually due to the pandemic. NYSBA's membership and CLE income is down, which will affect operations. Some of the reports considered at the last HOD meeting included 1) a proposal to amend Rule 7.5 of Rules of Professional Conduct, which would ban the use of trade names in law firms. This proposal was not adopted; 2) a report and recommendation that calls for a new process to test law school graduates to ensure that they are ready to practice law and serve clients effectively in New York was adopted. The report recommends, among other things, to eliminate the NY Law Exam and replace it with a rigorous exam on New York law as a prerequisite to admission to the New York bar, conduct an independent analysis of the grading and scaling of the Uniform Bar Exam, and allow those who do not wish to practice law in New York to take only the UBE and allowing those who only wish to practice in New York to take only the Multi-state Bar Examination section of the UBE and the rigorous New York test; and 3) the report and recommendation of the Task Force on Rural Justice, which includes loan repayment reforms, tuition assistance programs, relaxing residency requirements for public positions and raising hourly rates for assigned counsel, was adopted.

Spring Meeting Update

The Section's Spring Meeting has been cancelled as a result of the pandemic. Although the officers contemplated rescheduling the meeting for the Fall, they decided not to given the uncertainty of a potential second wave of the COVID virus and the lack of venue availability.

Proposal for "Settlement Month" by the Dispute Resolution Section

The Dispute Resolution Section has drafted a proposal that requests the NYSBA President to encourage parties to engage in settlement negotiations amid the pandemic. Laurel made revisions to the proposal and asks the EC to consider how to proceed. Comments should be e-mailed to Laurel and Jonathan.

"How to Seal Documents in the Commercial Division" Webinar Update

Kevin Quaratino provided an update on this webinar, scheduled for April 22, 2020 at 10am, which will address the black letter law concerning sealing motions, how to evaluate whether a sealing motion is necessary and what the motion should include.

Other Business

The Women's Initiative Task Force report will be reviewed and voted on at the next EC meeting in May.

The EC discussed whether the Spring meeting, which has been cancelled due to the COVID pandemic, should be reorganized as a virtual meeting, with a reduced fee.

7:51 adjourned.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on May 21, 2020.

Members Participating via Zoom

Laurel Kretzing, Chair
Jonathan Fellows, Chair Elect
Daniel Wiig, Vice Chair
Natasha Shishov, Secretary
Gregory LaSpina
James Wicks
Robert N. Holtzman
Deborah Edelman
Mark Davies
Stephen L. Brodsky
Jay L. Himes
Scott Malouf
Sharon Porcellio
Michael Fox
Gregory Arenson
Claire Gutekunst
Richard Friedman
Hon. Helen Friedman
Hon. Frank Maas
Paul D. Sarkozi
Bernice Leber
Hon. Karla Moskowitz
Lauren Wachtler
Hon. Shira A. Scheindlin
Jay Safer
Steve Roberts
Ignatius Grande
Ellen Brickman*
Natalie Gordon*
Jessica Moller*

***Guest Attendee**

Section Chair, Laurel Kretzing, called the meeting to order at 6:03 p.m.

Approval of April 21, 2020 Minutes

The minutes from the April 21, 2020 Minutes were unanimously approved.

The Time is Now: 2020 Women's Initiative Task Force Follow-Up Study

Honorable Shira A. Scheindlin presented the report, which focuses on the presence of women in the courtroom. This report was an update of the original report that was adopted three years ago. The data was collected to determine whether there has been a change in the percentage of female attorneys in the courtroom. The questionnaire that was distributed to the judiciary to compile the data was nearly identical to the questionnaire used three years ago. It yielded double the amount of responses that were received three years ago. Data was received from the New York Appellate Divisions, Commercial Divisions, Court of Appeals, the Federal District Courts of New York (except for the Eastern District) and the Second Circuit. Based on the data, the number of female appearances did not significantly increase. Some of the data that was reported included: 1) the total number of female appearances in court went up by 1.5% to 26.7%; 2) 25.3% of lead counsel are women, which was the same that was reported three years ago; 3) second and third counsel roles went up by 9% to 36.4%; 4) women were attending court more often, but were still not speaking as often as their male counterparts; 5) the more complex the case, the less female participation in lead roles; 6) the number of women lead counsel in single party cases increased by 11% to 43% and in complex multi-party cases decreased by 6% to 23%; 7) women represented 26% of attorneys appearing in trial court and 25% in appellate courts; 8) 27.5% of lead attorneys were female in federal court appearances and 23% in state court; 9) women were lead counsel 35% of the time in the public sector and 19% in the private sector; 10) women had lead roles 40% in family and employment law disputes and 17% in contract disputes; 11) women are selected as mediators less frequently than as arbitrators and the more money that was at stake in a particular matter, the less likely that a women would be selected in the alternative dispute resolution setting.

The report recommends, among other things, that law firm management should implement sponsorship programs, provide female and junior attorneys with more speaking and writing opportunities, encourage bar involvement, track metrics so that assignments are equally distributed between men and women and utilize metrics other than billable hours when evaluating compensation. Addressing corporate departments, the report recommends that corporate policy should be implemented that would require outside counsel to track how assignments are distributed, request that diverse teams be used on corporate matters, require associate participation on team calls and meetings and that billing credit should be allocated to those who are doing the work. It also recommends that companies consider using model ADR provisions in their contracts that would require one diverse neutral on arbitration panels.

As a result of the original report, many state and federal judges have adopted individual part rules encouraging the participation of minority and junior attorneys in court. This report also recommends that court appointments should include women and minorities and that judges should recognize when a male lead counsel is deferring to a female or junior attorney person next to him.

This report will be presented to the NYSBA House of Delegates for adoption at the June 2020 meeting.

The report was approved, with one abstention.

NYSBA Bar Foundation

Lauren Wachtler reported that the Bar Foundation will establish a COVID relief fund. The EC unanimously approved to contribute 5K to the relief fund.

Virtual Town Hall with the Appellate Division Update

Daniel Wiig reported that all four Presiding Justices and Chief Clerks will be presenting on this upcoming virtual hall and will report how their courts are handling appeals in the midst of the pandemic.

Report on the Proposed Changes to Rule 4.2 of the New York Rules of Professional Conduct (Tab 3)

Ignatius Grande presented the report on the proposed changes to Rules 4.2, which concerns the communication with persons represented by counsel. The change would exclude alerts received by counsel as communications that are otherwise not permitted pursuant to the rule. The report was approved with one abstention.

Report on the Emergency Procedures in US Courts During the Pandemic

Stephen Roberts presented this report, which recommends that the remote taking of depositions be permitted, that parties can stipulate to remote depositions, that service of subpoena rules be relaxed and that remotely conducting emergency applications be permitted. The report was approved and adopted with one abstention.

Spring Meeting Virtual CLEs

Two of the CLE programs that were scheduled for the Spring meeting will be conducted as webinars. The Class Action webinar will be presented on 6/10 and the program concerning restrictive covenants will be presented on 6/17.

End of Bar Year Comments

Laurel Kretzing thanked the EC for their continued work throughout the pandemic and for the overall support during her tenure as the Section's Chair.

7:21 adjourned.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on July 1, 2020.

Members Participating via Zoom

Jonathan Fellows, Chair
Daniel Wiig, Chair Elect
Ignatius Grande, Vice Chair
Anne Sekel, Treasurer
Jessica Moller, Secretary
Jay Safer
James Wicks
Kan Nawaday
Laurel Kretzing
Sharon Porcellio
Gregory Arenson
Mitchell Katz
Kevin Quaratino
Robert Holtzman
Michael Fox
Peter Pizzi
Stephen Younger
Mark Berman
Stephen Brodsky
Hon. Karla Moskowitz
Michael Fox
Claire Gutekunst
Paul Sarkozi
Jay Himes
Clara Flebus
Viktoriya Liberchuk
Stephen Roberts
Hon. Richard J. Sullivan*
Catherine Carl (NYSBA)*
Simone Smith (NYSBA)*

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:02 p.m.

Guest Speaker

Hon. Richard J. Sullivan, Second Circuit Court of Appeals

Judge Sullivan spoke to about response of the federal courts, particularly the Second Circuit Court of Appeals, to the COVID-19 pandemic. As reported by Judge Sullivan, the Second Circuit has had less disruption than the federal district courts and other courts, and has almost its full staff working remotely with only a skeleton crew of IT personnel and staff in the clerk's office at the courthouse working on-site. The Second Circuit allowed a three week extension of time for filing documents, and has continued to hold oral arguments telephonically. Although telephonic oral arguments are somewhat more formal and it is more difficult for the judges to ask questions, Judge Sullivan thought this approach has allowed advocates more opportunity to develop their arguments without interruption and that he has learned additional information about the cases as a result of the uninterrupted presentations from advocates. Judge Sullivan said he has learned Members of the public are also able to listen in to oral arguments as they are occurring.

In a question and answer style discussion, Judge Sullivan also spoke about various issues relating to the Court's protocols and the experience of practitioners during the COVID-19 pandemic, including:

- *During telephonic oral argument, is there a mechanism to inform the lawyers how much time they have left?* Yes, the courtroom deputy will interrupt advocates with the time marks, but the lawyers should be also keeping him/her own time.
- *Why has the Second Circuit opted for telephonic oral argument as opposed to a video virtual format?* Because of the potential connectivity difficulties that can be experienced with video. Telephone will have fewer connectivity glitches than video, and telephone is less likely to "skip" or get dropped than a Wi-fi video connection. The Court could not risk having a situation where either the judges or advocates lose their video connection for a few minutes during an oral argument, and needed to have a fail-safe method that would ensure nothing gets skipped. But the Second Circuit is discussing if it should transition to video and how that can be done.
- *Has there been any talk about adjusting the courtrooms to be able to do in-person proceedings?* Yes, but in-person activity is still a big concern. Several of the Court's judges are octogenarians and more vulnerable to COVID-19, as are many attorneys. Also getting to the courthouse is an issue because of the need for public transportation in NYC.
- *Is the Court considering doing hybrid situations with some judges and/or lawyers in-person and others remote?* That is a difficult issue because the Court does not want to put anyone in a position of feeling at a disadvantage or having anyone feel like they were putting their health at risk by being there in-person.
- *If things with COVID-19 do not improve, do you think there may be a time when a jury trial would be conducted remotely?* Doing a remote jury trial would be a big challenge. It may not be that bad to do the testimony remotely, but there would be issues with doing jury deliberations remotely.

Approval of May 21, 2020 Minutes

The minutes of the May 21, 2020 meeting were amended to reflect that Jay Safer, Steve Roberts and Ignatius Grande attended. A motion to approve the minutes as amended was made (James Wicks), seconded (Jay Safer) and approved unanimously.

Report on the Section's Webinars

Jonathan Fellows reported that the Section recently conducted two CLE webinars—one on class actions, one on restrictive covenants, with judges presenting on the panels for both. The CLEs had originally been planned as in-person seminars for the Spring Meeting, but were presented instead as webinars as a result of the pandemic. Although the Section got some pushback about the CLE registration fee (\$50 for Section members, \$150 for nonmembers), NYSBA insists that when CLE being issued there needs to be a charge. Both of the programs were excellent.

Report on the Section's Town Hall Meetings

Daniel Wiig reported on Section's four recent Town Hall meetings. The first was a presentation on the Commercial Division, the second was a presentation by all four Presiding Justices of the Appellate Division, the third had a panel with all Chief Judges from the NY federal district courts and the Chief Judge of the Second Circuit, the fourth was a joint presentation with JAMS on virtual mediation, and the fifth was a joint presentation with JAMS on virtual arbitration. The Section will consider doing additional Town Hall meetings depending on how things progress with the pandemic.

House of Delegates Report

Laurel Kretzing reported on the May 27th meeting of the House of Delegates. It was reported that the Bar's finances are down, but the investment funds have bounced back up since March. But most significant financial issue was the uptick of web-based CLEs during the pandemic, which has resulted in lost revenue for the sections. The Section's "Time is Now" report was also presented by Judge Scheindlin, and it was unanimously approved by the NYSBA Executive Committee and adopted by the House of Delegates. The Health Law Section also prepared a comprehensive report with recommendations relating to the COVID-19 crisis, but the report received a lot of pushback because of the complexity of issues addressed, and it was tabled to November meeting of the House of Delegates to give the Sections an opportunity to comment on it – comments are due on September 10th.

Update on "The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR"

Laurel Kretzing reported that "The Time is Now" report was unanimously approved by the NYSBA Executive Committee and adopted by the House of Delegates.

Update from the Committee on Technology and the Legal Profession

Mark Berman spoke in favor of a cybersecurity CLE requirement, which is pending approval by the State's CLE Board. If passed, New York would be the first state in the country to institute this requirement. Chief Judge DiFiore has also created a taskforce to work on technology in the courts, on which Mark Berman and Sharon Porcellio sit as members.

Update on the NYSBA Innovation Tournament – January 2021

Mark Berman spoke about a virtual “hackathon” style event that is being hosted by the Section on January 11-12, 2021, and co-sponsored by Hofstra Law School. They expect 100-200 lawyers and students to participate. The premise of the event is to have individuals design apps that help bridge the justice gap by providing the underserved ways to resolve disputes without counsel. The event is being set up with teams that will compete until there are 2-3 finalists teams, and then those finalists would work with Hofstra's computer scientists to actually build the apps. They are working on additional sponsorship for the event to see if finalists can also get a monetary prize.

Update on the Report on Operations in Federal Courts During the Pandemic

Jay Safer presented on the report prepared on the status of all notices issued by the US Supreme Court, Second Circuit, EDNY, SDNY, NDNY and WDNY for litigators regarding operations during the COVID-19 pandemic. The report going to be posted on the Section's portion of the NYSBA website. If anyone wants a copy, let Jay Safer know.

Other Business

Jonathan Fellows advised that the Section officers are in the process of reviewing the roster of Section committees, and will be reaching out to each committee for an update on committee activities.

Meeting adjourned at 7:55 p.m.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on September 17, 2020.

Members Participating via Zoom

Jonathan Fellows, Chair	Jay Safer	Robert Holtzman
Daniel Wiig, Chair Elect	Jeffrey Harradine	Samantha Ettari
Ignatius Grande, Vice Chair	Hon. Karla Moskowitz	Scott Malouf
Jessica Moller, Secretary	Kathy Kass	Stephen Roberts
Hon. Frank Maas	Andrea Masley	Suzanne Messer
Hon. Helen Freedman	Kevin Quaratino	Hamutal Lieberman
Jay Himes	Mark Berman	Hon. Saliann Scarpulla*
Paul Sarkozi	Mark Davies	Lauren Bernstein*
Claire Gutenkunst	Kan Nawaday	Stephen Ginsberg*
Courtney Rockett	Peter Pizzi	Catherine Carl (NYSBA)*
Jeffrey Zaino	Ralph Carter	Simone Smith (NYSBA)*
Gregory Arenson	Richard Dircks	

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:03 p.m.

Guest Speaker

Hon. Saliann Scarpulla, Appellate Division First Department

Judge Scarpulla spoke about her commitment to the Commercial Division and to moving forward the Commercial Division rules and law by doing such things as working with the technology committee to update the ESI rules. Judge Scarpulla also spoke about the importance of making sure that the Commercial Division stays commercial and that the cases the Commercial Division takes are really commercial cases, because there is pressure to have the Commercial Division take cases that are really true commercial cases. Judge Scarpulla also recommended that commercial litigators be schooled on data breach and privacy issues, which she views as a new “hot area” of litigation. She has seen a lot of new cases, including shareholder derivative cases, involving data breaches.

In a question and answer style discussion, Judge Scarpulla also discussed the following issues:

- *What can the Section do to keep the Commercial Division strong and advocate for the Commercial Division in light of the financial crisis?* Financial issues are a large problem that affects us all. The costs of the technology are high. It is very helpful to have lawyers

work collaboratively with the court on technology. It is much easier for the judge if someone else schedules the virtual meetings, rather than having the arrangements left to the judge and his/her staff.

- *Is it recognized and appreciated that there are attempts by the bar, via forum selection clauses, to have NY and NYC in particular be the forum for commercial cases?* This issue may not be as well recognized in other parts of the state as it is downstate.
- *How many panels have you sat on since elevation to the First Department, and how has the court adapted to the COVID-19 environment?* Judge Scarpulla has sat on two panels, one virtual and one live. Plexiglas has been installed around each judge within the courtroom, which although protective is not ideal because it makes things difficult to hear. Do not feel bad about yelling to make sure you are heard by the panel. Judge Scarpulla liked the virtual oral argument experience better than the live argument, and said that virtual proceedings have gone very well.
- *There are more women currently on the First Department bench than there are men. Have you noticed any change with regard to gender diversity?* Judge Scarpulla had not noticed the gender breakdown on the current bench, but said that if it is true that there are more women than men currently sitting on the First Department that would not be a bad thing. There needs to be more commitment to diversity.

Approval of July 1, 2020 Minutes

The minutes of the July 1, 2020 meeting were amended to reflect changes Gregory Arenson submitted, and a motion to approve the minutes as amended was made, seconded and approved unanimously.

Report on Section Webinars

Jonathan Fellows reported that the Section's webinars have been going very well and congratulated everyone in the Section who has been involved in the webinars. There are upcoming events on October 6th relating to cybersecurity, November 19th on e-sports, and December 3rd on virtual lawyering. Mark Berman gave an update on the upcoming December 3rd virtual lawyering program, and indicated that it is going to be a multi-hour presentation on topics including ADR, cybersecurity & SHIELD Act, risk management and possibly something on labor and employment. It will be a practical for the commercial litigators

Update on Hon. Judith S. Kaye Commercial and Federal Litigation Scholarship

Jonathan Fellows reported that a request for applications will be sent out in the next few days. It is important that everyone encourage eligible individuals in their firms and who they know to apply.

Update on Shira A. Scheindlin Award for Excellence in the Courtroom

Jonathan Fellows reported that although the event is traditionally held in November in the ceremonial courtroom of the SDNY, we are unable to do that this year due to the pandemic. The Section will instead announce the award recipients in November and honor them at the mock trial event scheduled to be held in-person (hopefully) in Spring 2021.

Update on NYSBA Annual Meeting 2021

Ignatius Grande reported that the annual meeting will be a virtual event. We are trying to make it as interactive as possible so we can still attract good attendance and participation. The CLE panels will be held in the afternoon on January 20, 2021. We are still working on the panels and topics, but expect one will relate to cybersecurity. After the panels, we are planning to have a half hour or forty five minutes of networking and informal discussion with several judges. There will also be a virtual gathering held the day the before the CLE panels in lieu of the traditional Thurgood Marshall Courthouse reception, where Chief Judge Livingston will be making remarks and then the Section will conduct its annual business meeting.

Update on Section's Mentoring Committee and Other Committee Activities

Jonathan Fellows and Daniel Wiig reported on committee activities. Jonathan reported that he has requested all committee chairs to provide updates on committee rosters and their plan for activities to be held over the next few months. He also discussed a desire to merge the CPLR Committee into the current Legislative/Judicial Initiative Committee, and to have Vince Syracuse and Helen Hechtkopf serve as Co-Chairs of the merged committee. There is also a desire to have the following individuals appointed to committee leadership roles: Natasha Shishov to be appointed as a Co-Chair of the Appellate Practice Committee, and Ralph Carter to be appointed as a Co-Chair of the Committee on Commercial Division. Daniel Wiig also discussed the Mentoring Committee, which had been dismantled a few years ago after a period of inactivity, but which we want to reestablish with Maryanne Stallone and Maverick James serving as Co-Chairs. A motion to approve the changes noted above was made, seconded and unanimously approved.

Federal Procedure Committee's Report on Invoking the Fifth Amendment Privilege in Civil Matters

Steven Ginsberg and Lauren Bernstein presented the report. The report represents the work of approximately nine people over a couple of years, with Steven Ginsberg and Lauren Bernstein doing a lot of the heavy lifting for the report. The report stemmed from civil case that involved complicated issues of potential waiver of the 5th Amendment privilege, who and how can it be invoked, revocation of the privilege, adverse inference applying to a party when invoked in civil proceeding, and other issues. The report explores the 5th Amendment privilege in both civil and criminal cases. A motion to adopt the report as a report of the Section was made, seconded and unanimously approved. The report will be published as a report of the Section on the website and it will be submitted to The Litigator for publication.

Social Media Committee's Report on Law Firm Trade Names/Survey on Juror Use of Social Media & Messaging

Scott Malouf presented the report. Until a few months ago, attorney use of trade names were prohibited in New York, but they are now permissible. The report was prepared as a simple resource for practitioners regarding the use of trade name. A motion to adopt the report as a report of the Section was made, seconded and unanimously approved. The report will be published as a report of the Section on the website.

Update on NYSBA Health Law Section's Report

Jonathan Fellows reported that the Section submitted comments on the Health Law Section's report only to the extent that it related to the Commercial Division resolving disputes arising out of the COVID-19 pandemic. The Section submitted comments on that commercial related issue, but chose to not comment about the mandatory vaccine aspects of the report.

Other Business

Mark Berman reported that the House of Delegates approved cybersecurity being one of the required areas for CLE. The issue is now before the CLE Board. If approved, New York would be the first state to include cybersecurity as a CLE requirement. A determination from the CLE Board is expected next week.

Meeting adjourned at 7:42 p.m.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on October 13, 2020.

Members Participating via Zoom

Jonathan Fellows, Chair	Hon. Karla Moskowitz	Gregory LaSpina
Daniel Wiig, Chair Elect	Ralph Carter	Peter Pizzi
Ignatius Grande, Vice Chair	Richard Dircks	Robert Holtzman
Anne Sekel, Treasurer	Kevin Quaratino	Laurel Kretzing
Jessica Moller, Secretary	Jeffrey Harradine	Bernice Leber
James Wicks	Stephen Roberts	Mark Berman
Helene Hechtkopf	Scott Malouf	Vincent Syracuse
Paul Sarkozi	Suzanne Messer	Maverick James
Hon. Frank Maas	Jay Himes	Hank Greenberg*
Claire Gutenkunst	Hon. Helen Freedman	Stephen Ginsberg*
Lou DiLorenzo	Michael Cardello	Catherine Carl (NYSBA)*
Viktoriya Liberchuk	Gregory Arenson	Simone Smith (NYSBA)*
Lauren Wachtler		

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:04 p.m.

Guest Speaker

Hank Greenberg, Past President NYSBA

Hank Greenberg commended the Section for being an impactful group within NYSBA and a constant source of inspiration, professionalism and world class work.

Mr. Greenberg spoke about Chief Judge DiFiore’s Commission to Reimagine the Courts, and explained the way in which the Commission is structured and what it is tasked with doing. The Commission was empaneled in June, and is made up of attorneys from all sectors of the bar. The COVID-19 pandemic revealed the limitations of the technological capacity of the courts and practitioners, and is tasked with making proposals on how the justice system can improve these limitations moving forward, focusing on the constituents of the courts (litigants), increasing the access to justice, and build a virtual court system.

Most of the work of the Commission is being done on the “working group” level. There are six working groups: (1) a technology working group (Mark Berman and Sharon Porcellio co-Chairs) focusing on technological capacity (software, hardware, etc.) and making recommendations for

improvement; (2) an online courts working group, focusing on online dispute resolution; (3) a regulatory innovation group; (4) a structural innovation working group, focusing on implementing an e-filing system state-wide; (5) a trials working group, focusing on improving and streamlining the presentation of evidence; and (6) an appellate practice working group, focusing on bringing all appellate courts to same level of technological ability.

The Commission meets as a whole every 5-6 weeks, and will be having public comment sessions and engaging in targeted outreach. The Commission is expected to prepare multiple reports on the Commission's work, the first of which was released within two weeks of the Commission's first meeting and proposed guidelines on how to begin restarting grand jury proceedings and jury trials.

Approval of September 17, 2020 Minutes

A motion to approve the minutes of the September 17, 2020 meeting was made, seconded and unanimously approved.

Report on Nassau/Suffolk Commercial Division Program

Michael Cardello reported on the Section's virtual event held on September 17, 2020. A panel of six Commercial Division Justices from Nassau and Suffolk Counties had discussed the impact of COVID-19 has had on how they have handled proceedings and what they intend to do in the future. It was a very interactive discussion, and provided very practical and helpful information about how the judges were handling conferences, hearings and potentially bench trials in the future. The event was co-sponsored by Nassau and Suffolk County Bar Associations.

Update on New Commercial Division Rules

Ralph Carter reported that a recent administrative order takes effect today and amends Commercial Division Rule 11-g to provide for a heightened confidentiality designation of "attorneys eyes only."

Report on Effect of Budget Cuts on the Judiciary and Commercial Division

Dan Wiig reported that as a result of the budget cuts Chief Administrative Judge Marks has reported there are 49 Supreme Court justices who are not being certificated/re-certificated, including three Commercial Division justices. It also appears that the justices' second and third law clerks will not be replaced once they leave. A discussion was had about potential avenues for the Section to address the issue of law clerks not being replaced.

Report on Appointment to the Commercial Division and Potential Vacancies

Dan Wiig reported that two Commercial Division justices are retiring from New York County, and it appears that both of the retiring justices will be replaced. The Section also provided recommendations to Chief Administrative Judge Marks on replacements for the vacancy created by Judge Scarpulla being elevated to the First Department.

Update on NYSBA Annual Meeting 2021

Ignatius Grande reported that the Section's virtual CLE program during the annual meeting is scheduled for to be held on January 20, 2021. The CLEs will relate to measures attorneys need to take to avoid cyber breaches, and how to use court sponsored mediation and other ADR measures for moving forward cases that have been delayed as a result of the pandemic. There will also be a

networking happy hour with virtual breakout rooms. We are looking for sponsors for the programs; please let Ignatius or Jonathan know of any sponsors.

Update on Hon. Judith S. Kaye Commercial and Federal Litigation Scholarship

Jonathan Fellows encouraged the Section to publicize the scholarship to eligible attorneys who could apply.

Update on Upcoming Events

Ralph Carter provided an update on the upcoming virtual lawyering event scheduled for December 3, 2020. The event will give best practices for practitioners and include different modules on cyber risk, virtual mediations and depositions, insurance, ethical issues, hiring and firing in a virtual world.

Kevin Quaratino reported on series of events being presented by the Young Lawyers Committee, which is intended to provide lawyers with skills that may be helpful in a pandemic environment. The first event is scheduled for November 18, 2020 and will focus on building a professional personal brand.

Federal Procedure Committee's Report on Virtual Depositions

Gregory Arenson presented the Federal Procedure Committee's report on virtual depositions. The report provides an overview of issues that you may encounter in doing a virtual deposition and best practices in conducting a virtual deposition, and proposes a stipulation that can be used for virtual depositions. The report addresses issues such as having the court reporter give the oath virtually, troubleshooting technology issues in advance, the vendor being used, visibility of the witness and all counsel throughout the deposition, preparation and sharing of exhibits, and witnesses notes and communications. Further discussion and a vote to adopt the report was tabled for a special meeting of the Executive Committee to be held in two weeks.

Other Business

Jonathan Fellows advised that the Section officers are looking at whether the Section can offer individuals willing to serve as mediators for the courts, and a discussion was had on the issue of compensating mediators in Commercial Division matters.

Gregory Arenson reported that the Section Caucus is considering the issue of costs of CLE and what share, if any, of the revenue generated from CLEs should go to the Sections.

The meeting adjourned at 8:02 p.m.

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

Minutes of the Special Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on October 28, 2020.

Members Participating via Zoom

Jonathan Fellows, Chair	Scott Malouf	Hon. Helen Freedman
Dan Wiig, Chair Elect	Mark Davies	Robert Holtzman
Ignatius Grande, Vice Chair	Jeffrey Zaino	Steve Hochman
Anne Sekel, Treasurer	Richard Dircks	Peter Pizzi
Jessica Moller, Secretary	Maryanne Stallone	Viktoriya Liberchuk
Mark Berman	Paul Sarkozi	Catherine Carl (NYSBA)*
Vincent Syracuse	Laurel Kretzing	Simone Smith (NYSBA)*
Gregory Arenson	Stephen Roberts	
Jeffrey Harradine	Kan Nawaday	

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:32 p.m.

Federal Procedure Committee's Report on Virtual Depositions and Model Stipulation

Greg Arenson presented on the Federal Procedure Committee's report on virtual depositions and model stipulation. The report is intended to be a resource on best practices for conducting remote depositions. A motion to have the report adopted as a report of the Section was made (Greg Arenson), seconded (Stephen Roberts), and unanimously approved. The report will be published as a report of the Section on the website and it will be submitted to The Litigator for publication.

New Commercial Division Rule on Hyperlinking

Mark Berman reported on a new Commercial Division rule that will be taking effect on November 16, 2020 and requires hyperlinks be included in papers filed in commercial cases. The Section will be presenting a CLE on the new rule with Counsel Press on November 13th.

Innovation Tournament

Mark Berman gave an update on the Innovation Tournament that will be conducted virtually on January 11-12, 2020. JAMS and AAA are sponsoring the event. It is anticipated that 100-200 law students and 40-50 dispute resolution practitioners will participate in the tournament. The tournament will involve students working with practitioners and the Computer Science Department of Hofstra University to design apps that are intended to improve the dispute resolution process and help underrepresented populations handle disputes, and the winners of the tournament will have their apps created. Only students enrolled in a law school within New York State are eligible to participate.

The meeting adjourned at 6:51 p.m.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on November 12, 2020.

Members Participating via Zoom

Jonathan Fellows, Chair	Maryanne Stallone	Scott Malouf
Daniel Wiig, Chair Elect	Ralph Carter	Richard Dircks
Ignatius Grande, Vice Chair	Paul Sarkozi	Vincent Syracuse
Anne Sekel, Treasurer	Stephen Roberts	Michael Cardello
Jessica Moller, Secretary	Kan Nawaday	Hon. Sylvia Hinds Radix
Hon. Shira Scheindlin	Tony Harwood	Mark Berman
Hon. Frank Maas	Jeffrey Harradine	Natasha Shishov
Hon. Helen Freedman	Lauren Wachtler	Peter Pizzi
Hon. Karla Moskowitz	James Wicks	Bernice Leber
Gregory Arenson	Laurel Kretzing	Hon. Mae D'Agostino*
Mark Davies	David Rosenberg	Catherine Carl (NYSBA)*
Jeffrey Zaino	Stephen Hochman	Simone Smith (NYSBA)*

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:03 p.m.

Guest Speaker

Hon. Mae D'Agostino, U.S. District Court Judge, N.D.N.Y.

Judge D'Agostino spoke to about two civil jury trials that she conducted in-person in August and September, and the various protocols that were implemented to keep everyone safe during the COVID-19 pandemic as follows:

- Prior to the start of the trials, the court had retained an infectious disease specialist to review the courtrooms and courthouse and to give an opinion if in-person trials could be safely held. At the time, the infection rate in Albany County was less than 1% and there was a determination that in-person trials could move forward in a safe manner.
- When potential jurors were summoned for jury duty, letters were included with the jury summons to express the court's understanding of the COVID-19 pandemic but that they were being asked to still serve in-person, and to tell potential jurors that if they did not want to serve under these conditions that they would just need to say so. Approximately 50 people of the approximately 150 summonses that were sent out said they did not want to serve in light of COVID-19 and they were immediately excused.

- Both trials were held on the first floor of the courthouse in order to keep jurors from using the elevators/stairs and to keep them in as few places as possible within the courthouse. The jurors were not provided with snacks or coffee as way to prevent congregating around the food areas. Each juror was given a “COVID goody bag” with hand sanitizer, Clorox wipes, etc.
- All jurors and court personnel were told that they needed to take their own temperatures and complete the court’s health screening form, which worked well.
- The entire courtroom, including the carpet, was sanitized every night. Air filters and filter systems were also changed to comply with CDC guidelines. Disposable covers over the microphones were used, and the witness stand was sanitized in between each witness.
- Everyone (all jurors, the judge, lawyers, parties, and court personnel) wore masks, except witnesses were allowed to wear a clear face shield rather than a mask when testifying. Judge D’Agostino asked the jurors whether would be able to judge credibility of a witness wearing mask, and all jurors said yes, but it was determined a clear face shield could be worn.
- Lawyers were not permitted to move about the courtroom during the trial and did everything from counsel’s table. If there was a need for a bench conference, the Judge, attorneys and a court reporter went out into a secure hallway outside the courtroom for the bench conference. Alternatively, the bench conference could be held in another courtroom.
- Judge D’Agostino asked the attorneys to make all evidence electronic in order to keep papers from being passed around. For jury deliberations, one binder of exhibits in hard copy was sent into the jury room with the jurors, and also gave them a box of gloves to use in handling exhibits.

After the verdicts, Judge D’Agostino spoke with the jurors and asked if they felt the court had done everything possible to keep them safe, or if there was anything the court could have done better. All of the jurors said they felt safe. The jurors were also instructed that if they were to get sick with COVID-19 within the two weeks after the trial, they needed to call both the Department of Health and the court. Thankfully, there were no calls and no one got sick as a result of the in-person trials.

Announcement of Scheindlin Award recipients

Hon. Shira Scheindlin announced the recipients of the Scheindlin Award for Excellence in Trial Practice as Bernice Leber and Lauren Wachtler. Both are groundbreaking leaders in the profession, groundbreaking trial attorneys and very deserving of the award. Both will be formally presented with this award at a Section event on April 22, 2021 in the S.D.N.Y., hopefully in-person.

Review of October 13, 2020 and October 28, 2020 Minutes

A motion to approve the minutes of the October 13, 2020 meeting was made, seconded and approved unanimously. A motion to approve the minutes of the October 28, 2020 special meeting was made, seconded and approved unanimously.

Section's Diversity and Inclusion Plan

Kan Nawaday presented the Section's proposed diversity and inclusion plan that he prepared with Hon. Sylvia Hinds Radix. A motion to adopt the proposed diversity and inclusion plan as the plan of the Section was made, seconded and approved unanimously.

Report on the Progress of the Mentoring Program

Maryann Stallone presented on Section's mentoring program. Maryanne is working with Maverick James to reinvigorate mentoring program in order to provide new attorneys with great networking programming and mentors. They are looking for individuals who are interested in mentoring, and are working on outreach to newer lawyers (10 years or less in practice) to participate with the program. They are trying to match mentors and mentees both by practice area and also based on personalities and interests as way to help foster a good connection. Applications for the program may be submitted by December 31, 2020.

New Commercial Division Rule on Hyperlinks

Ralph Carter reported on the new Commercial Division rule requiring hyperlinks in memoranda of law, which will take effect on November 16, 2020. Ralph noted that under the new rule hyperlinking does not automatically result in the hyperlinked documents being included into the record, and that there is a carveout to the hyperlinking requirement where a party in good faith is unable to comply with the new rule. A webinar CLE on the new rule is being presented by the Section on November 13, 2020.

Request for Public Comment on a Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent

Ralph Carter presented on the request for public comments on the proposed Commercial Division rule to allow evidentiary hearings and non-jury trials to be held remotely on consent. Comments are to be submitted by December 18, 2020. Please forward any comments to Ralph in advance of the Section's next Executive Committee meeting so comments can be discussed at that meeting.

Proposed Rule 8.4 of Rules of Professional Conduct

Tony Harwood and Anne Sekel presented on the potential for an amendment to be made to Rule 8.4(g) of the New York Rules of Professional Conduct, which addresses discrimination by lawyers, in order to bring the New York rule more in-line with the ABA rule on this issue. The New York rules prohibits attorneys from engaging in "unlawful discrimination" in the practice of law and does not make a specific reference to harassment as a form of unlawful discrimination. The ABA rule does not limit the prohibition to "unlawful" discrimination and does include a reference to harassment. If modified, there may also be a change in the exhaustion of remedies requirement

and potential expansion of the New York rule to apply outside of the employment context. Please send any comments or thoughts on these issues to Tony and Anne in advance of the Section's next Executive Committee meeting so comments can be discussed at that meeting.

Update on Annual Meeting

Jonathan Fellows reported that there was a change in the cost of the annual meeting for Section members to now include an option of "early bird" registration at the reduced rate of \$119 for Section members for the half-day program. Ignatius Grande gave an update on the panel programs that will be offered by the Section at the annual meeting on January 20, 2021. One of the panels will be on cybersecurity and data privacy, and one of the panels will be on how attorneys can use court-sponsored ADR programs to move forward cases that were delayed by the COVID-19 pandemic.

Update on Proposed Budget Cuts for the State Judiciary and Reaction of Judges

Daniel Wiig gave an update on what the Section may be able to do to advocate for the Commercial Division in light of the State's budget cuts. The Section officers are working on a letter to the Court's leadership with possible recommendations and things to be considered.

Update on Hon. Judith S. Kaye Commercial and Federal Litigation Scholarship

Jonathan Fellows advised that he has received a small number of applications, and has extended the application deadline in order to get additional applications. Please continue encouraging eligible applicants to apply.

Update on Upcoming CLEs and Events

Jonathan Fellows gave an update on the Section's upcoming CLE, including an event being organized by the Section's Young Lawyers Committee for January 2021 to commemorate the late-Justice Ruth Bader Ginsburg.

The meeting adjourned at 7:54 p.m.

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

Minutes of the Meeting of the Executive Committee of the Commercial and Federal Litigation Section held in accordance with the rules of the New York State Bar Association on December 2, 2020.

Members Participating via Zoom

Jonathan Fellows, Chair	Michael Fox	Jay Safer
Daniel Wiig, Chair Elect	Claire Gutenkunst	Paul Sarkozi
Ignatius Grande, Vice Chair	Jeffery Harradine	Maryann Stallone
Anne Sekel, Treasurer	Tony Harwood	Vincent Syracuse
Jessica Moller, Secretary	Jay Himes	James Wicks
Hon. Helen Freedman	Stephen Hochman	Jeffrey Zaino
Hon. Frank Maas	Kathy Kass	Hon. Jay Francis*
Hon. Karla Moskowitz	Laurel Kretzing	Hon. Henry Pitman*
Gregory Arenson	Viktoriya Liberchuk	Todd Drucker*
Michael Cardello	Scott Malouf	Matthew York*
Ralph Carter	Kan Nawaday	Catherine Carl (NYSBA)*
Michael Cryan	Peter Pizzi	Simone Smith (NYSBA)*
Mark Davies	Kevin Quaratino	Nikki Borofsky (JAMS)*
Richard Dircks	Stephen Roberts	

*Guest Attendee

Section Chair, Jonathan Fellows, called the meeting to order at 6:03 p.m.

Guest Speakers

Hon. James “Jay” C. Francis IV (Ret.) and Hon. Henry Pitman (Ret.), JAMS

Judge Pitman spoke to the Executive Committee about some of the differences between being a neutral magistrate on the bench and being a neutral at JAMS. As a magistrate, Judge Pittman often conducted settlement conferences and at JAMS he now conducts mediations; although called different things they are functionally the same kind of proceeding. He generally follows same procedure at a JAMS mediation that he held when conducting a settlement conference on the bench, including holding a joint session at the beginning with an introduction from each side before break into separate sessions. There are some notable differences, however. At JAMS, his mediations tend to involve larger claims than the cases that he mediated while on the bench. Also, at JAMS, the parties involved in mediations are seemingly more motivated to settle, as compared with the parties that were ordered to participate in settlement conferences when he on the bench. A big difference at JAMS is absence of law clerks.

Judge Francis said that he had similar experiences as Judge Pitman. But a notable difference for Judge Francis is that he transitions to JAMS at the outset of the COVID-19 pandemic. It was a

very unusual experience coming in under such challenging circumstances, but Judge Francis said that conducting arbitrations and mediations remotely during the pandemic has worked seamlessly. He has had very few technology problems. The only challenge that he has encountered is he is not able to knock on a door to alert parties when he is entering a virtual mediation room like he would be able to do if the parties were in-person. In addition, Judge Francis said that when he came to JAMS he was very surprised to discover that the discovery process in arbitration is similar to discovery in litigation. He thought discovery in arbitration would be more streamlined, but discovery is often as broad in arbitration as it would be in federal court. He has also seen fewer discovery disputes in JAMS arbitrations than in court.

Judge Pitman and Judge Francis also answered some questions posed by members of the Executive Committee, including the following:

- *What have you seen attorneys do wrong, or could do better, in a virtual arbitration or mediation?* Attorneys should make sure their clients are comfortable with the technology and how the virtual proceeding is going to go. Take advantage of the practice session if available.
- *How does the limited review of an arbitration award impact how you approach the arbitration?* It does not impact how they approach the case at all. The goal at an arbitration is still to “get it right” on the facts and law. They may include as many string cites in their written arbitration award as they may otherwise have included in an opinion when on the bench, but that is generally it.

Review of November 12, 2020 Minutes

A motion to approve the minutes of the November 12, 2020 meeting was made, seconded and approved unanimously.

Update on Progress of Mentoring Program

Maryann Stallone gave an update on the progress of the Mentoring Program. She said that there has been great interest in the program, including from several other NYSBA sections as well as potential mentors and mentees. The application process is set to end on December 31, 2020. Once all applications are in, they will pair mentors and mentees based on practice area and common interest to extent possible.

Update on In-Person NYSBA Events

Jonathan Fellows advised that NYSBA has issued directive that there will be no in-person meetings or other events through June 30, 2021. The Section’s officers are reviewing what to do about the Section’s annual Spring Meeting and the mock trial event that had been scheduled to be held in the spring.

Update on Annual Meeting

Ignatius Grande gave an update on the Section's annual meeting programming. In lieu of the traditional luncheon, a virtual reception and the Section's annual meeting will be held on the evening of January 19, 2021 at which the Chief Judge of the Second Circuit will be speaking. The vote on the proposed slate of the Section's officers will be taken at the annual meeting on January 19th. The CLE program will be held on the afternoon of January 20, 2021, and will consist of two panel discussions – one on how attorneys can use court sponsored ADR and other tools to move along their pandemic delayed cases, and one on how cybersecurity and data privacy obligations are impacting commercial litigators. Be sure to register and continue encouraging participation in both events.

Request for Public Comment on a Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent

Ralph Carter presented the Commercial Division Committee's draft report on the new proposed rule that would allow virtual evidentiary hearings and non-jury trials on consent. Under the proposed rule, virtual proceedings would be permitted as long as video technology meets specified requirements and the parties consent. The Committee believes the Section should strongly endorse the proposed rule. However, the Committee would like rule to specify that the court (not the parties) will be the administrator of the technology platform in order to ensure the court is the "gatekeeper" for witnesses and members of the public, and so that the court can handle any sealing issue that may come up. The Committee also thinks the rule should make clear that the parties' written consent is required, not just consent. The Section must submit its comments on the proposed rule on or before December 18, 2020. A motion was made and seconded to endorse the proposed rule and approve the Committee's draft report as a report of the Section subject to any further substantive comments received before the December 18th submission deadline. The motion was approved unanimously. If any further substantive comments are received, they will be circulated to the Executive Committee.

Request for Public Comment on a Proposed New Commercial Division Rule on Remote Depositions and a Remote Deposition Protocol

Gregory Arenson presented the Commercial Division Committee's draft report on the new proposed rule that provides for remote depositions by stipulation or court order. Greg reviewed the substance of rule, and noted that the protocols proposed with this rule are similar (although there are some differences) to what is contained within the Section's report/stipulation for virtual depositions that was passed in October 2020. The Committee believes the Section should strongly endorse the proposed rule, but would like to add another factor to the other undue hardship factors that would need to be considered by the court before ordering a remote deposition—i.e., compare the relative cost of a virtual deposition versus an in-person deposition. The Committee also believes that video recording should not be required and that stenographic recording should be sufficient. A motion was made and seconded to endorse the proposed rule and approve the Committee's draft report as a report of the Section. The motion was approved unanimously.

Proposed Amendment to Rule 8.4 of Rules of Professional Conduct

Tony Harwood presented on the proposal to amend Rule 8.4(g) of the New York Rules of Professional Conduct to bring it more in-line with Rule 8.4(g) of the ABA Model Rules of Professional Conduct relating to harassment and discrimination in the legal profession. Not many states have adopted ABA's rule in whole; some states have adopted something close, but there are a variations between the states. The Section's Ethics and Professionalism Committee is proposing nine substantive recommendations with regard to the proposed amendment, each of which is detailed in the Committee's draft report that was circulated in advance of the meeting. A robust discussion regarding the proposed amendment and the Committee's draft report occurred, during which it was a modification to the Committee's recommendation (g) was proposed and accepted. A motion to adopt the report as amended was made and seconded. The motion passed with 13 votes in favor, 3 votes opposed and 2 abstentions.

Update on Proposed Budget Cuts for the State Judiciary and Letter to OCA

Daniel Wiig gave an update on the budget cuts in the judiciary. A letter regarding the issue was submitted to the Chief Administrative Judge, Deputy Chief Administrative Judge, and the Administrative Judge of New County Supreme Court on November 23, 2020.

Update on Section Committee Meetings

Jonathan Fellows advised that each committee should hold a meeting by the end of January 2021 in order to discuss what events or other activities the committee is going to do in 2021.

Section CLEs and Events

Jonathan Fellows reported that the Section held a successful Town Hall event in Syracuse with two of the Fifth Judicial District's Commercial Division justices. Thank you to Suzanne Messer for organizing this event.

Kevin Quaratino spoke about an event honoring the late-Justice Ruth Bader Ginsburg will be held in January 2021. It will be a webinar about her impact and approach to the law presented by people who knew her, including Judge Robert Katzmann, her family and former law clerks.

Ignatius Grande also encouraged everyone to register to be a faculty member for the upcoming Innovation Tournament.

The meeting adjourned at 7:54 p.m.