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Commercial and Federal Litigation Section Newsletter

A publication of the Commercial and Federal Litigation Section of the New York State Bar Association

Annual Meeting CLEs on Bankruptcy, Affirmative Action, and CPLR

AI and the Legal Profession

Recent Commercial Cases of Interest in the New York Court of Appeals

Commercial & Federal Litigation Section

Save the Date

Commercial & Federal Litigation Section 2024 Spring Meeting

May 17-19, 2024

The Gideon Putnam
Saratoga Springs, NY

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Message From the Chair

Greetings, Section members and friends!

Welcome to the spring edition of the *Commercial and Federal Litigation Section Newsletter*. As you will see, ComFed has been busy. I am so proud of the work that we have accomplished as a Section over the past few months. It is a true testament to the deep bench of talented and dedicated attorneys who comprise our membership, and it is the number one reason to join ComFed and become an active participant in our programming.

In January, the Section hosted another successful Annual Meeting CLE program and luncheon. The morning began with three timely CLEs coordinated by Helene Hechtkopf, the program chair (and Section Vice-Chair): "Everything You Wanted To Know About Bankruptcy Law But Were Afraid To Ask"; "The Supreme Court Outlawed Affirmative Action in College Admissions: What That Means for Private Employers"; and "CPLR Update for Commercial Litigators." Participants then adjourned to a lively cocktail reception and luncheon where they mingled with over 30 judges from state and federal courts throughout New York. As wonderful as it was to catch up with old friends and colleagues and network with new acquaintances at the reception, the highlight of the luncheon, which was attended by more than 200 commercial and federal litigators, was the presentation of the Stanley H. Fuld Award to the Chief Judge of the New York Court of Appeals, Honorable Rowan D. Wilson. The Stanley H. Fuld Award recognizes a member of the legal profession who has contributed significantly to the practice of commercial law and litigation in New York. Chief Judge Wilson, with his background in complex commercial litigation from his decades as a litigation partner in private practice at Cravath, Swaine and Moore, was a perfect recipient. And the Chief Judge's thoughtful acceptance remarks, which touched on the utter importance of dissents and consciously shaping the law for the issues of the future and the generations who will proceed us, was nothing short of inspired. It is no exaggeration to say that even the most cynical litigator in the audience left the luncheon reinvigorated and uplifted.

The night before the Annual Meeting, ComFed hosted an evening at the Second Circuit. Section members and friends gathered for tours of the Thurgood Marshall Courthouse led by court historians, remarks from Chief Judge Debra Ann Livingston and Judge Kevin Castel about the fascinating and important law that has been created in the courthouse, and drinks, hors d'oeuvres, and beautiful views in the Justice Ruth Bader Ginsburg Library.

Anne Sekel

In early February, Chief Judge Wilson generously joined ComFed again for a fireside chat with Section Secretary Kevin Quaratino and former Chair Dan Wiig. Among other topics, the Chief Judge shared his path to the bench and his visions for the future of the courts in New York, as well as giving us some glimpses of his excellent sense of humor. The event was as entertaining as it was informative, and we could not be more appreciative of Chief Judge Wilson's support of our Section.

Our series for junior lawyers, "Meet New York's Commercial Judges: By and for Junior Lawyers—Part 11," continued in late February with the Honorable Deborah A. Chimes, Justice of the Supreme Court of the State of New York, Erie County.

And for those who practice on Long Island, our district representatives, Tom Telesca and Ross Kartez, planned a wonderful evening at the Crest Hallow Country Club in Woodbury. The event was a great spotlight on the Nassau and Suffolk County Commercial Divisions, with participation by all the counties' Commercial Division judges and a program entitled "The Future of the Commercial Division on Long Island and Beyond: What To Expect in the Coming Years."

In May, we will be heading to the Gideon Putman Resort and Spa in Saratoga Springs for our Spring Meeting. The meeting is scheduled to take place from May 17 to 19. Michael Cardello III, our Chair Elect, is the program chair and is putting together interesting programming and lots of opportunities to relax and enjoy each other's company. We hope to see you there!

Warm regards,

Anne B. Sekel

CLE: Everything You Wanted To Know About Bankruptcy But Were Afraid To Ask

By Katharine Smith Santos

The first CLE program of ComFed's Annual Meeting featured an update on bankruptcy litigation and financing. Speakers included Creditors' Rights and Bankruptcy Litigation Committee Co-Chairs Alan J. Brody of Greenberg Traurig and Sheryl Giugliano of Ruskin Moscou Faltischek, as well as Hon. Jil Mazer-Marino, U.S. Bankruptcy Court, E.D.N.Y., and Fred Stevens of Klestadt Winters Jureller Southard & Stevens.

Giugliano began with an overview of the types of bankruptcy proceedings and the players. The Bankruptcy Code provides for Chapter 7 liquidations, Chapter 11 reorganizations, and Chapter 13 proceedings for individuals only. Less well-known are small business reorganizations that can go forward under Subchapter V of Chapter 11 more cheaply and quickly than regular Chapter 11 proceedings.

The main players are the debtor or debtor-in-possession; the U.S. Trustee, an employee of the U.S. Department of Justice; Chapter 7 or Chapter 11 Trustees, otherwise known as private trustees, who are entitled to statutory fees; Subchapter V Trustees, who do not receive statutory fees; secured creditors; and the creditors' committee of unsecured creditors, usually all represented by the same attorney.

Judge Mazer-Marino characterized the U.S. Trustee as a watchdog and the private trustees as bus drivers of the bankruptcy proceeding. The Subchapter V Trustees, in contrast, fulfill a merely administrative role, she added.

Brody then gave the audience a crash course in debtor-in-possession financing. He explained that in a Chapter 11 reorganization, the business continues in the ordinary course, but to do that it needs financing either through a pre-petition loan or new money. Businesses aware that they will soon face bankruptcy often begin financing negotiations before resorting to the bankruptcy court.

Sometimes existing lenders will extend additional financing because they do not want a new lender to take a first position lien, Brody noted. An old lender can take a new lien on previously unencumbered assets. Alternatively, an old lender can use new money to pay off its old loan to achieve or maintain first position status in a process known as "rolling up" or "rolling over" the prepetition debt.

Certain bankruptcy courts have promulgated detailed rules governing debtor-in-possession financing, and parties must follow these rules carefully to obtain the desired result. The bankruptcy courts for the Southern and Eastern Districts of New York and for Delaware make these rules widely available on their websites, Judge Mazer-Marino informed the audience.

The speakers then turned to a description of the various types of bankruptcy litigation. In addition to the bankruptcy case itself, there can also be adversary proceedings and preference actions.

The definition of adversary proceedings broadly covers any litigation arising in or related to cases under the Bankruptcy Code. Some debtors have successfully pulled pre-existing litigation into bankruptcy court by using 28 U.S.C. 1452 to remove those cases to a federal forum even where no federal question or diversity jurisdiction exists.

(continued on next page)

CLE: The Supreme Court Outlawed Affirmative Action in College Admissions—What That Means for Private Employers

By Jillian McNeil

On June 29, 2023, the Supreme Court of the United States announced a decision in the consolidated cases of *Students for Fair Admissions, Inc. v. President and Fellow of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et. al,* 124 S. Ct. 2141 (2023), banning affirmative action in college admissions. In the Commercial and Federal Litigation Section's second CLE panel at Annual Meeting, the panelists considered the impact of this landmark decision on private employers and the attorneys who advise them.

The panel, moderated by Robert Holtzman of Kramer Levin Naftalis & Frankel LLP, was comprised of Jill Rosenberg of Orrick Herrington & Sutcliffe LLP, Louis P. DiLorenzo of Bond, Schoeneck & King PLLC, and Paula Edger, an attorney who previously practiced employment and workplace discrimination law for the New York City Commission on Human Rights and is currently the CEO of PGE Consulting Group LLC, an organizational strategy firm that provides training and education solutions at the intersection of professional development and diversity, equity, and inclusion (DEI).

Mr. DiLorenzo opened the discussion by providing a brief analysis of the 113-page *Students for Fair Admissions* decision. He described how, applying a strict scrutiny standard, the Supreme Court determined that Harvard's and UNC's admissions policies, which expressly considered an applicant's race, could not "be reconciled with the Equal Protection Clause" and were, therefore, impermissible. Consequently, an applicant's race can no longer be a consideration, in any manner, for a university admissions decision. The Supreme Court did, however, leave the door open for some consideration of an individual's personal experience of race in their admissions de-

(continued on next page)

Everything You Wanted To Know About Bankruptcy (*continued from page 4)*

Preference actions are filed in bankruptcy court to allow a trustee or debtor-in-possession to recover payments made shortly prior to the bankruptcy filing. The panelists noted that there used to be a cottage industry devoted to suing everyone who received payment 90 days before the debtor commenced the bankruptcy suit, and amounts were so small that the creditors defaulted rather than spending money hiring an attorney to defend the action. Rules now exist to limit such abuse, they noted.

In concluding remarks on the topic of bankruptcy litigation, Judge Mazer-Marino advised attorneys to pay careful attention at the beginning of a bankruptcy proceeding, because "the first couple days in a Chapter 11 case is when the table is set." Stevens' main takeaway for attorneys unfamiliar with bankruptcy was that counsel representing the debtor-in-possession or trustee need to seek court permission to be paid their attorneys' fees, making recovery of fees a "hassle." Brody stated that the automatic stay can be violated by something as simple as sending a demand letter to a debtor already in bankruptcy, but that plaintiffs can still pursue actions against the debtors' guarantors, who are not covered by the stay.

The panelists lastly guided the audience through a case study incorporating issues of bankruptcy, constructive trust, and fraudulent conveyances. A lively question-and-answer session followed, including a question asked by former Section Chair Paul Sarkozi, who wondered, "Where might non-bankruptcy litigation counsel's instinct be wrong" in a bankruptcy context. Judge Mazer-Marino responded that key procedural differences can be found in the bankruptcy court rules, which do not always mirror the Federal Rules of Civil Procedure.

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The Supreme Court Outlawed Affirmative Action in College Admissions (*continued from page 5)*

terminations. For example, applicants may speak to how their heritage or culture motivated them to overcome certain obstacles or helped them to develop certain characteristics and strengths they will bring to the university. The lines here are not clearly drawn, and we will have to wait to see how this is interpreted in the future.

The panel then turned to discuss the impact of *Students for Fair Admissions* on private employers, who are not bound by the same laws as universities. While this decision does not control private employers' conduct, it certainly provides guidance as to how courts are likely to treat considerations of race across the board. Ms. Rosenberg noted that diversity was never a compelling interest in the employment arena, such that race could never have been a direct factor in favor or against any employment decision under the existing laws. However, both employers and employees greatly value a diverse workforce, and DEI initiatives are common among private employers. True private affirmative action programs, on the other hand, while technically permissible, are exceedingly rare (or, as Mr. DiLorenzo stated, are "unicorns that don't exist"). To withstand scrutiny, such programs must meet a grueling standard, and must be temporary.

The *Students for Fair Admissions* decision presents the question: how do private employers adapt and still embrace diversity? While targeted outreach and recruitment are okay, all applicants must still have the same opportunities to apply through postings for jobs, mentorship programs, and so forth. The panel discussed how certain large law firm employers, which often had race-conscious elements for summer internships and fellowship programs, faced particular scrutiny in a series of filed and threatened lawsuits. Following these suits, the law firms changed their programs, either making them open to all individuals or focusing on race in a neutral way. Ms. Rosenberg then directed our attention to a case filed in federal court in Atlanta in August 2023: *American Alliance for Equal Rights v. Fearless Fund*. Fearless Fund is a private equity fund that operates a grant and mentorship program specifically for Black women-owned businesses. American Alliance for Equal Rights claims this fund is discriminatory and violates Section 1981 of the Civil Rights Act's "guarantee of race neutrality" in the making of "contracts." This case, which is proceeding in the Eleventh Circuit, is likely to go to the Supreme Court in some form and will have a significant impact on private employers and their contracts. The panel opined that this series of decisions is likely a trend and that we are likely to see similar decisions further restricting DEI initiatives and minority programs in the private sphere going forward.

In her opening comments, Ms. Edger asked the attendees to consider, is the *Students for Fair Admissions* decision and those that are following in its wake the end of DEI in private employment? She answered with a resounding "no." *Students for Fair Admissions* "is not a stop sign, but a yellow light." Employers need to "slow down, look around and keep going." Experience has shown that, when employers stop providing DEI programs for fear of their legal risk, their employees leave. Most people recognize that diversity is better for all of us, and that affinity group mentorship and other similar programs can benefit everyone. Therefore, employers need to put real effort and thought into advancing their DEI initiatives, and to be "thoughtfully inclusive" going forward. In closing, Ms. Edger urged the audience to "look at ourselves and ask what is right," for "the time is always right to do what is right."

Jillian L. McNeil is an associate at the firm of Jaspan Schlesinger Narendran LLP. Her practice focuses on commercial litigation and employment law.

CLE: Recent CPLR Developments

By Madeline Greenblatt

The Commercial and Federal Litigation Section of the New York State Bar Association continued its morning live-program CLE sessions with a segment entitled "CPLR Update for Commercial Litigators," featuring David Horowitz and Katryna Kristoferson of the Law Offices of David Paul Horowitz, PLLC, as well as Hon. Justice John R. Higgitt, Associate Justice of the Appellate Division, First Department.

Mr. Horowitz prefaced the rule-change discussion with an important announcement—the 60th anniversary of the CPLR! The CPLR was adopted by the New York Legislature in 1962 and went into effect on September 1, 1963.

CPLR 321(d)

The first rule change the presenters covered during the CLE session was CPLR 321, which was amended to include a new subdivision "(d)," and which became effective on December 16, 2022. It provides:

> (d) Limited scope appearance. 1. An attorney may appear on behalf of a party in a civil action or proceeding for limited purposes. Whenever an attorney appears for limited purposes, a notice of limited scope appearance shall be filed in addition to any self-represented appearance that the party may have already filed with the court. The notice of limited scope appearance shall be signed by the attorney entering the limited scope appearance and shall define the purposes for which the attorney is appearing. Upon such filing, and unless otherwise directed by the court, the attorney shall be entitled to appear for the defined purposes.
>
> 2. Unless otherwise directed by the court upon a finding of extraordinary circumstances and for good cause shown, upon completion of the purposes for which the attorney has filed a limited scope appearance, the attorney shall file a notice of completion of limited scope appearance which shall constitute the attorney's withdrawal from the action or proceeding.

This new subdivision allows parties attempting to represent themselves *pro se* in civil actions in New York state court to seek limited-scope legal assistance and to encourage judges to permit attorneys to appear on behalf of the *pro se* parties for limited purposes.

After hearing numerous questions from the audience concerning the applicability of this new subdivision to various scenarios, Mr. Horowitz noted that although the amendment does not define in what capacity an attorney may make a limited appearance on behalf of a client or at what particular juncture during a litigation, he envisioned limited scope appearances to be particularly suited for situations in which a participating litigant needed an attorney to appear on his or her behalf at a court conference (such as a residential mortgage foreclosure conference). He also emphasized that it is crucial for the *pro se* client and the appearing attorney to define the scope of the limited appearance in a retainer agreement in order to avoid some foreseeable issues down the road.

Justice Higgitt added that the amendment may be helpful for attorneys who are pinch-hitting for *pro se* clients regarding complex, nuanced motions, affording them the opportunity to "come in cleanly and get out cleanly" without the rigmarole of having to move to be substituted in or relieved as counsel.

CPLR 2106

The panel then addressed the newest amendment to Rule 2106 of the CPLR. Effective January 1, 2024, CPLR 2106 allows a statement by "any person, wherever made, subscribed and affirmed by that person to be true under the penalties of perjury," to be used in a New York action in lieu of, and with the same force and effect as, an affidavit.

The amendment provides that an affirmation should include the following language:

> I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
>
> (Signature)

The previous version of CPLR 2106 allowed only attorneys, physicians, osteopaths, and dentists to submit unsworn

affirmations in a New York civil case. The new change expands the use of CPLR 2106 affirmations to anyone, aligning New York law with federal standards of allowing the use of unsworn declarations under penalty of perjury, and alleviating the burden and formalities of notarization.

Commercial Division Rule 27

The panelists then turned to a new amendment to Rule 27 of the Rules of Practice for the Commercial Division (effective August 31, 2023) concerning motions in limine. Mr. Horowitz noted that he believes motions in limine to be one of the most effective and underutilized tools available to litigators in terms of ascertaining what will be or will not be admissible at trial. Justice Higgitt agreed and added that making a motion in limine on evidentiary issues not only gives a litigant clarity or predictability on how a critical piece of evidence will or not will be used at trial, but allows a litigant to preserve that point for appeal.

Whereas the old rule provided no specific guidance about the subject matter to be included in motions in limine, or the timing of opposition papers, the amended rule now includes a deadline for the service of opposition papers—i.e., no later than two days before the return date of the motion—and provides guidance on the types of broad issues that motions in limine should address.

For example, motions in limine should address (1) the receipt or exclusion of evidence, testimony, or arguments of a particular kind or concerning a particular subject matter; (2) challenges to the competence of a particular witness; or (3) challenges to the qualifications of experts or to the receipt of expert testimony on a particular subject matter. Lastly, the amended rule also requires that motions in limine not be used as substitutes for summary judgment motions.

Interstitial Period—First and Second Department Split

Mr. Horowitz then spoke about a recent Second Department decision of interest, *HSBC Bank USA, N.A. v. Rubin*, (2022 N.Y. Slip Op. 05682 [2d Dep't 2022]), which dealt with the issue of whether a party is eligible for affirmative relief during the interstitial time between an order of dismissal and the entry of a judgment. In *Rubin,* the plaintiff-lender filed a motion for the appointment of a temporary receiver following dismissal of an action. The Supreme Court denied the plaintiff's motion, finding that there was no pending action on which the court could entertain the motion. The Second Department reversed, holding that the order of dismissal did not divest the court of the authority to reach the merits of the plaintiff's motion. An action that is dead, but not buried, may be revived and relief may be granted during "the interstitial time existing between an order of dismissal and the entry of a judgment."

Justice Higgitt noted the tension between the Second Department's holding in *Rubin* and the First Department's seemingly contrary ruling in *Favourite Ltd. v. Cico,* 208 AD3d 99 (1st Dep't, 2022), in which the First Department held that the trial court lacked the discretion to grant leave to amend a complaint that had been dismissed on appeal without leave to replead. In *Cico*, the First Department dismissed the plaintiffs' second amended complaint for lack of standing and remanded the matter to the trial court for entry of judgment. After dismissal, the defendant never acted on that order by obtaining the entry of judgment, and the plaintiffs attempted to revive the dismissed action by filing a motion for leave to amend. The trial court granted plaintiffs' request, but the First Department reversed. The First Department held that following dismissal there was nothing left to amend, and the entry of a subsequent judgment constitutes a "mere ministerial act." *Cico* will be argued before the Court of Appeals in April.

Overall, the CLE session was nuanced and highly informative and will certainly inform litigation practice in the bar for 2024 and beyond.

Madeline Greenblatt, associated with Farrell Fritz, P.C., is a litigator who represents a broad range of individuals and entities in complex commercial matters. She has extensive experience in all phases of litigation in both state and federal courts as well as arbitrations and mediations with the American Arbitration Association and JAMS. Prior to joining Farrell Fritz, Madeline worked in private practice with an emphasis in general commercial litigation and real estate litigation.

Chief Judge Rowan D. Wilson of the New York Court of Appeals Receives Fuld Award

By Katharine Smith Santos

(L-R): Section Treasurer Maryann Stallone, Chair-Elect Michael Cardello, Hon. Rowan D. Wilson, Vice-Chair Helene Hechtkopf

After the January 17, 2024, morning CLE programs, ComFed hosted a luncheon in the Trianon Ballroom of the Midtown Hilton. The luncheon's highlight was the presentation of the 2024 Stanley H. Fuld Award for outstanding contributions to the development of commercial law and jurisprudence in New York to the Hon. Rowan D. Wilson, Chief Judge of the New York Court of Appeals.

The luncheon kicked off with introductory remarks from NYSBA President Richard Lewis. Speaking to a full room of approximately 300 people, Lewis expressed the sentiment that Section members should be "proud of this Section and your place in the legal community."

Stepping in for Section Chair Anne Sekel, who was unable to attend, Chair-Elect Michael Cardello thanked Vice-Chair Helen Hechtkopf for organizing the event. To applause, Cardello acknowledged the many judges and former Section Chairs in attendance.

The Nominating Committee then took the stage to announce next year's slate of officers: Chair Michael Cardello of Moritt Hock & Hamroff, Chair-Elect Helene Hechtkopf of Hoguet Newman Regal & Kenney, Vice-Chair Maryann Stallone of Tannenbaum Helpern Syracuse & Hirschtritt, Treasurer Ralph Carter of Workday, and Secretary Viktoriya Liberchuk of Farrell Fritz. Section representatives to the

NYSBA House of Delegates for 2024-2025 will include Anne Sekel of Foley & Lardner and Ignatius Grande of Berkeley Research Group, with Jonathan Fellows of Bond, Schoeneck & King as alternate.

At the culmination of the luncheon, the Section conferred the 29th Annual Fuld Award on Chief Judge Rowan Wilson. Judge Wilson received his A.B. degree from Harvard College in 1981, and his J.D. from Harvard Law School in 1984. From 1984 to 1986, he served as a judicial law clerk to the Hon. James R. Browning, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit. In 1986, he joined the firm of Cravath, Swaine & Moore as an associate and attained partnership in 1991. In 2017, he was nominated as an Associate Judge of the New York Court of Appeals, and in 2023 he became the Court's Chief Judge.

The Fuld Award was presented to Judge Wilson by Evan R. Chesler, who served as chair of Cravath, Swaine & Moore from 2013 through 2021 and who subsequently retired at the end of 2023. Chesler lamented the lack of public trust in "our institutions and those who lead them," citing statistics from the Pew Research Center demonstrating that trust in government has hit the lowest point in 70 years. What we sorely need, said Chesler, is more governmental leaders like Chief Judge Wilson—"trusted conveners who help different groups coalesce around goals."

Chesler lauded Judge Wilson's personality and temperament, stating that he "always acted with dignity and integrity" and "never said an unkind word about anyone." Chesler added, "I learned more from him than I ever taught him."

Judge Wilson's riveting acceptance speech hooked the listeners' attention from the start. "What I want," he said, "is something I can't get and you can't give me—I want to be Stanley H. Fuld." The late Chief Judge Fuld of the New York Court of Appeals was known for his "forward-thinking, unrelenting commitment to fairness," stated Judge Wilson.

After becoming Chief Judge in 1966, Judge Fuld authored more than 1,300 opinions. His judicial career was marked by "studiousness, practicality, and unrelenting discipline," Judge Wilson remarked.

According to Judge Wilson, two themes can be discerned from the main events of Judge Fuld's life: 1) adapting the law to address the needs of the times; and 2) the centrality of family.

Judge Wilson described with admiration the "powerful and influential dissents" authored by Judge Fuld during his tenure on the Court of Appeals. These dissents persuaded the legislature to amend the New York Business Corporation Law in line with Judge Fuld's vision.

While guiding and shaping the development of the law, Judge Fuld carefully kept his family at the center of all he accomplished. In his chambers, he displayed a photograph of himself on the bench of the Court with each one of his six grandchildren seated in the remaining chairs. Judge Fuld kept close to him "a reminder of for whom we work—our children and our children's children," concluded Chief Judge Wilson. The audience then rose to its feet in a spontaneous ovation honoring this eloquent jurist.

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Above (L): Chair-Elect Michael Cardello
(R): Treasurer Maryann Stallone with Hon. Rowan D. Wilson

Meet New York's Commercial Judges: By and for Junior Lawyers—Part 9

By Kate Clendenen

On October 26, 2023, the Commercial and Federal Litigation Section held its ninth installment of its series devoted to encouraging junior attorneys to interact with and learn from New York's Commercial Division Justices. This session featured the Honorable Linda S. Jamieson. Beginning in November 2002, Justice Jamieson was elected as a Justice of the State Supreme Court. In the years that followed, Justice Jamieson presided over a variety of cases, including, but not limited, to torts, real estate, commercial, employment discrimination, medical malpractice, contact disputes, matrimonial actions, and family matters. Justice Jamieson presently sits in a Civil Trial Part and the Commercial Division of the Supreme Court. During her conversation with junior and future lawyers, Justice Jamieson imparted valuable wisdom as to best practices for appearing before the Commercial Division. This conversation particularly focused on aspects of discovery, brief writing, and oral argument.

Once one is in the discovery stage of litigation, Justice Jamieson emphasized that more issues can be resolved with less discovery than most young lawyers would expect. She explained that a common misconception among junior attorneys is that one cannot accomplish anything until one has everything. However, in Justice Jamieson's experience, attorneys can often make meaningful progress before engaging in intensive discovery. This is important to bear in mind for the sake of the client. Justice Jamieson expressed that she prioritizes efficient discovery to avoid wasting litigants' money. Though it is important to collect some information through preliminary discovery, she recommended that attorneys leverage New York's presumptive alternative dispute resolution process to resolve as much as they can early on. To maximize efficiency at this stage of litigation, Justice Jamieson explained that she prefers to settle issues in conferences whenever possible rather than through discovery motion practice. This ensures that the matter progresses quickly and efficiently.

With respect to brief writing, Justice Jamieson recommended that junior lawyers keep the basics in mind. Proofreading is important—typos and sloppiness will not be well received. The best briefs are written in a straightforward style. There is no need for flowery language to overcomplicate the flow of the brief. She further explained that it is important to keep the brief succinct and focused. Writers' focus should be on only the pertinent facts of the case and the elements required by law. Justice Jamieson cautioned junior attorneys against becoming entangled in the weeds or on the less critical details; those early in their careers are prone to doing this, which necessitates consulting senior attorneys. She recommended that all junior attorneys seek out the guidance of their supervising attorneys and request feedback. This support is essential to developing a sense for what is of greatest importance.

The most important aspect of oral arguments is to know your case. Justice Jamieson explained that when the time comes to enter the courtroom, an attorney should not have to rely on any papers. Bullet point notes are fine, but she warned against any long-form materials. Once the attorneys begin looking at pages in front of them, they lose the judge and jury's attention because they become less engaging. An attorney should know their argument cold. This guidance is not exclusive to courtroom proceedings; it is also important for preliminary conferences. Justice Jamieson emphasized that the judge's first opportunity to meet the attorneys is during the preliminary conference—and first impressions are critical. Most of the time, she is able to resolve some issues at the preliminary conference, so it is advantageous to be prepared to have a meaningful, informed discussion. Because junior attorneys will have limited opportunities to practice their courtroom etiquette in an actual courtroom before a judge, Justice Jamieson recommends that they take the time to come to court. Not everything can be learned from behind a desk or on "Law & Order." Those early in their careers should sit in real courtrooms and observe the typical decorum. By observing direct and cross examinations as well as openings or closings, new attorneys will develop a sense for how to dress, act, and hold oneself in open court.

Justice Jamieson's advice for the junior and future attorney attendees was thoughtful and sensible. There is no need to overcomplicate the task at hand, but there are also no shortcuts to developing necessary skills and doing good work. Junior lawyers must seek out the guidance of seasoned professionals and dedicate time to honing their craft. Achieving efficiency in processes like discovery will save clients' time and money; the junior lawyer's task is to invest time and effort early on to develop pathways to such efficiency.

Kate Clendenen is an associate at Foley & Lardner LLP.

Meet New York's Commercial Judges: By and for Junior Attorneys—Part 10

By Tyler Wilson

On November 9, 2023, the Commercial and Federal Litigation Section hosted the tenth webinar in a series of conversations between junior attorneys and Commercial Division justices. For this event, the guest was Justice Daniel J. Doyle of the Supreme Court of the State of New York, Monroe County. The event served as an informative session, allowing young attorneys to learn more about how to practice in front of the Commercial Division. Justice Doyle assumed the position of Commercial Division Judge for the 7th Judicial District earlier this year, while also serving as the Supervising Judge for the Civil Supreme Court.

Justice Doyle comes to the Commercial Division with a wealth of experience that helps guide his opinions. After beginning his legal career with the Monroe County District Attorney's Office, Justice Doyle entered private practice. He first worked for a large upstate New York law firm before starting his own private practice, which was focused on civil and criminal litigation. Justice Doyle also served as the Deputy Town Attorney for the Town of Irondequoit. Thereafter Justice Doyle left private practice to serve as Special Counsel to the County Executive of Monroe County. Justice Doyle was then elected to the New York State Supreme Court in 2006 and was reelected to another 14-year term in 2020.

When asked what the most important thing a lawyer can do when appearing in front of him, Justice Doyle mentioned being prepared. Justice Doyle understands that people, especially lawyers, are busy and noted that showing up prepared helps save time for all of those involved in the case. He also stressed the importance of being professional in the way attorneys present themselves. In a time where some interactions are becoming less formal, Justice Doyle appreciates attorneys who make it a point to be professionally dressed and ready to present their case.

For young lawyers in particular, Justice Doyle emphasized the importance of going out and meeting people in person. He recalled many instances in his career where he resolved minor disputes with opposing counsel simply by stopping by their office. He explained that there is no substitute for in-person discussions and stressed that much can get resolved by a short conversation, whether by speaking with opposing counsel or a fellow attorney at your firm. Justice Doyle also noted how important it is to be honest in the profession, especially in the courtroom. He understands that mistakes will be made and there will be questions posed that attorneys cannot answer, but it is imperative that an attorney be honest when these things happen, and then the issue can be resolved from there.

Justice Doyle advised junior attorneys to make it a priority to get experience in the courtroom and interact with judges. He suggested that junior attorneys ask to attend court appearances and offer to cover conferences whether they are in-person or virtual, as these serve as opportunities to get to know opposing counsel and the judge while becoming more familiar with the case.

When it comes to legal writing, Justice Doyle noted that being concise is appreciated. The more unnecessary language in a brief, the easier it is for the attorney's argument and ultimate point to get lost. Additionally, he stated the importance of understanding the cases you cite. He noted that many times attorneys will cite a case thinking it supports their argument, but the issues or rationale may not be on point with what the attorney is trying to argue. This miscitation makes briefs more difficult to read and can hurt the credibility of the attorney.

Ultimately, Justice Doyle's main message was to have humility. His advice pertains to attorneys at all stages of their careers, because even when things are going well there is always another challenge around the corner, and staying humble is the best approach.

Tyler Wilson is an associate at Bond, Schoeneck & King. His practice focuses on general litigation including representing and advising clients on a wide variety of commercial litigation issues.

The Life and Times of the Hon. Guido Calabresi

By Katharine Smith Santos

Above: Hon. Guido Calabresi and Prof. Norman Silber

On October 10, 2023, ComFed hosted a virtual fireside chat between the Hon. Guido Calabresi, Circuit Judge, U.S. Court of Appeals for the Second Circuit, and Prof. Norman I. Silber of Hofstra Law School about Prof. Silber's newly released book *Outside In: The Oral History of Guido Calabresi* (Oxford Univ. Press, 2023).

Former ComFed Section Chair Ignatius Grande introduced the guests, explaining that he met Judge Calabresi 30 years ago when then-Dean Calabresi was a faculty advisor for an Italian-American organization at Yale Law School. Grande praised the jurist not only for his important contributions to the field of law and economics but also for always finding time for former students, clerks, and friends.

Judge Calabresi was appointed in July 1994 to the Second Circuit, after serving as dean and Sterling professor at Yale Law School. His distinguished academic career included graduating summa cum laude from Yale College in 1953 and magna cum laude from Yale Law School in 1958, and being awarded membership in Phi Beta Kappa and Order of the Coif. After graduating from law school, he clerked for Justice Hugo Black of the U.S. Supreme Court. Judge Calabresi has since authored seven books and more than 100 articles on legal subjects, noted Grande.

Prof. Silber is the Boas-Claster Distinguished Professor in Civil Procedure and Associate Dean for Intellectual Life at Hofstra Law School. He joined the faculty there in 1989 after practicing law at Patterson, Belknap, Webb & Tyler.

After Grande's introductory remarks, the guests began by describing the collaborative process of researching and writing the book. Prof. Silber started interviewing Judge Calabresi eleven or twelve years ago. "Every Monday for seven or eight years, at the house, in chambers, even in Italy," said Silber. The professor also interviewed 100 or more people, including Yale faculty, judges, and Judge Calabresi's personal friends. The final product was condensed and edited into about 40 chapters about Judge Calabresi's personal and professional life. The book focused on four major aspects of the judge's life: 1) his Italian heritage; 2) his escape from fascism as a refugee to the U.S.; 3) his tenure as dean of Yale Law School; and 4) his years as a judge after being appointed by President Bill Clinton. Throughout the book, Silber strove to connect Judge Calabresi's jurisprudence to his prior life experiences. "You can't understand one without the other," Silber said.

Characterizing the book-writing process as "great fun," Judge Calabresi next delved into the substantive legal areas covered in the publication. He stressed the importance of jurisdiction in federal practice, since federal courts are by their nature courts of limited subject matter jurisdiction. Describing a case that nearly became derailed by jurisdictional issues after sixteen years of intense litigation, the judge strongly advised attorneys practicing in federal court to address jurisdiction early.

When choosing a forum, attorneys should also keep in mind that many issues of common law, such as contract or tort, are better decided by state courts than federal court. The temptation in federal cases is for both lawyers and judges to rely on federal decisions construing state law. Ideally, state law issues in federal cases should be resolved based on state court precedent, the judge opined.

Prof. Silber and Judge Calabresi then discussed how federal appellate judges tend to decide the case before them

with an eye to the future. In *Holcomb v. Iona College* (2d Cir. 2008), for example, a basketball coach claimed he suffered from racial discrimination because his wife was an African American. Although on a first reading, Title VII of the Civil Rights Act of 1964 seemed to apply only to discrimination based on the plaintiff's own race, the Second Circuit read the statute more broadly.

The panelists were well aware that the broad reading could be extended to cover cases involving discrimination based on same-sex marriage, and it later was. "*Iona* was adopted by all the Circuits," Judge Calabresi proudly stated. Prof. Silber added that Title VII jurisprudence now encompasses an associational theory of discrimination, i.e., discrimination based upon the plaintiff's relationship with someone else. The decision constituted "an incremental change with huge implications," said Silber.

The conversation subsequently turned to an examination of when a judge should concur. "The temptation to speak to the world is great," mused Judge Calabresi. "Sometimes you concur not because you are writing to history but because you are writing to the legislature," he added. Congress or an administrative agency may have been sloppy, and it becomes a judge's role to speak to other law-making institutions.

On one occasion, Judge Calabresi expressed in a concurrence that while he voted to follow binding precedent from a higher court, he firmly believed that the U.S. Supreme Court had decided wrongly and he was "confident that some day a different result would hold because it is the correct one in the law." On another occasion, he concurred in his own opinion to avoid forcing the other panel members to decide whether they agreed with him on that point or not.

The next topic of discussion was the pressures that affect judicial independence. The threat of impeachment does not impose a strict limit on judicial independence since "you don't get rid of judges because of the way they write an opinion," stated Judge Calabresi. The possibility of promotion may actually have a greater impact.

People are often promoted "from magistrate to district judge to appellate court to the U.S. Supreme Court -- that can affect what judges do," explained Judge Calabresi. He praised U.S. Supreme Court Justice Sonia Sotomayor as "magnificent" because while she knew she was being considered for appointment to the highest court "she continued to do what she thought was right."

Federal judges can also be affected by funding crunches. Although judicial salaries are constitutionally protected, judges can become dependent on administration and clerks and buildings. The independence of state court judges comes under more pressure because of the need to seek election and/or reelection, he said.

Along the lines of preserving judicial independence, Judge Calabresi maintained that judges are the ones who must craft their own code of judicial ethics, whether that code applies to appellate court judges or Justices of the U.S. Supreme Court. "If judges don't, Congress will—but they will do it badly," he stated.

An important component of judicial ethics is a standard defining when judges should recuse themselves from a case. A judge who has a personal or financial connection to a case and who has been randomly assigned as a trial judge or member of an appellate panel can recuse themselves at the least provocation because they can easily be replaced. On the other hand, in the case of the U.S. Supreme Court or an appellate court sitting *en banc,* "you can't replace yourself," Judge Calabresi explained.

Prof. Silber remarked that the harder question is whether a judge should recuse himself or herself because of a religious conviction regarding the death penalty, for example. Judge Calabresi answered that judges who cannot follow the law could recuse themselves. "But if you believe in the rule of law and can follow it, don't recuse yourself; you will stay up in the middle of the night to see if there's a correct interpretation of the law that's also right as matter of policy," he added. Judge Calabresi's parting words to the lawyers watching were to "always argue the equities because it will make judges work harder—that's how the law moves forward."

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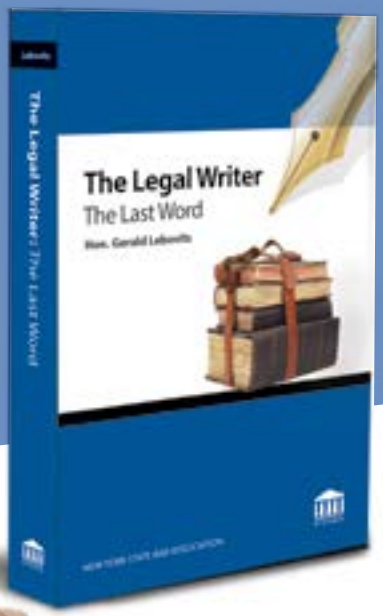
NYSBA PUBLICATIONS

The Legal Writer: The Last Word

Author
Hon. Gerald Lebovits



For over the past 20 years, Hon. Gerald Lebovits has educated attorneys on the finer points of legal writing with practical, real-world advice in his aptly named column, "The Legal Writer."

The column, a fixture in the NYSBA *Journal*, was so popular that two previous books were published "The Legal Writer: Writing It Right" and "The Legal Writer: Drafting New York Civil-Litigation Documents."

Now, Judge Lebovits cements his legacy with "The Legal Writer: The Last Word" – a collection of in-depth columns spanning 35 chapters. The book includes practical legal-writing advice, writing and punctuation exercises, lessons on citation, and a 17-part series dissecting the very best legal writers of our time, including Ruth Bader Ginsburg, Antonin Scalia, and Judith Kaye. The third (and final) book in the Legal Writer series provides attorneys with another essential resource for success.

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AI and the Legal Profession

By Keitha Duhaney

L-R: Ralph Carter, Ignatius Grande, Hon. James Wicks

Alumni, students, and faculty convened in the atrium of St. John's Law School building, eager to hear from artificial intelligence experts Maura Grossman and Moya Novella, alongside federal judges Hon. Wicks and Hon. Castel. This distinguished panel delved into the nuanced ethical considerations surrounding the advancements in AI technology in reference to the legal field.

The legal profession is on the brink of a significant transformation, as artificial intelligence (AI) promises to reshape the way we approach law and justice. The event, moderated by Ralph Carter and Ignatius Grande, helped to shed light on the implications, challenges, and opportunities presented by AI in the legal field.

Maura Grossman, a research professor from Canada deeply involved in the growth of AI, kicked off the discussions by defining AI as software capable of performing cognitive functions associated with human intelligence. Specifically, she highlighted generative AI, a subset trained on vast data sources like the internet, capable of creating new content across various media formats.

Moya Novella, data privacy counsel for IBM, delved into the nuances of generative AI, distinguishing it from traditional AI. She explained how large language models like ChatGPT learn by analyzing patterns and trends in massive data sets, fundamentally altering the landscape of AI learning. Novella stressed the significance of understanding the limitations and abilities of these models.

She also addressed the existing legal framework applicable to AI, citing a joint statement by regulatory bodies indicating their intent to enforce regulations. She highlighted the NIST AI Framework, which establishes foundational principles for safe AI, stressing the need for transparency in AI tool development.

She also shed light on recent executive orders, particularly one issued by President Biden on October 30, 2023, emphasizing data privacy in the context of AI. The potential for specific rules addressing the legal field within these orders hinted at an imminent shift in how the legal profession operates, raising questions about the impact on privacy, consumer rights, and safety.

Hon. Castel and Hon. Wicks shared their perspectives on the practical applications of AI in the legal system. Hon. Castel highlighted AI's potential to automate and streamline tedious tasks for lawyers, such as generating narratives based on transcripts. He also discussed AI's role in assisting judges, especially in areas like sentencing guidelines, while cautioning against unconscious biases.

Hon. Castel shared a fascinating real-world case where AI, specifically ChatGPT, played a pivotal role. The case involved lawyers using ChatGPT hallucinations about nonexistent cases, leading to sanctions under Rule 11 for the misinformation generated. This practical example underscored the responsibility of lawyers to ensure the accuracy and reliability of AI-generated content submitted in legal proceedings.

Chair Anne Sekel

Hon. Kevin Castel

Hon. Wicks underscored the importance of lawyers being aware of the benefits and risks associated with AI. He emphasized the need for meaningful conversations with clients about the use of technology and how it might affect legal fees and confidentiality. He addressed the evolving legal standards associated with AI, highlighting the interconnectedness of various rules, emphasizing the need for lawyers to remain aware of the benefits and risks associated with existing technology, aligning with the principles outlined in ethical rules such as 1.1 and 1.4 regarding competency and communication.

The event's discussions also touched upon challenges such as coding bias, privacy concerns, and the potential misuse of AI in legal settings. The speakers encouraged legal professionals, especially junior attorneys, to be vigilant about the rules and policies of their firms regarding AI use. The conversation extended to the global effort to legislate AI, with varying perspectives on the level of regulation. The speakers acknowledged the need for flexible rules that can keep pace with rapidly advancing technology.

The discussion extended to the profound implications of AI on access to justice, as Grossman pointed out the potential for individuals who cannot afford legal representation to draft documents using online AI tools. However, she also raised concerns about the rising threat of deepfakes, making it challenging for judges and juries to discern the authenticity of audiovisual evidence.

As the event concluded, the speakers offered advice to SJU students. Grossman encouraged law students to embrace machine lawyering technology and statistics. Hon. Wicks emphasized the importance of AI as a tool, not a replacement for judgment and expertise, while Novella highlighted the vast career opportunities AI presents in the legal field.

Mr. Carter, one of the moderators, emphasized the importance of embracing technology rather than fearing job displacement. He urged legal professionals to stay competitive and pondered the profound impact AI would have on every practice area. He also discussed the potential for an AI governance practice, foreseeing a new frontier for legal professionals to navigate the complexities of AI ethics and regulations. This highlighted the need for lawyers not just to adapt to AI but also to actively contribute to the development of ethical standards and governance practices within the legal field.

Hon. Castel reinforced the idea that, despite the influx of AI, there are no shortcuts in the practice of law. He emphasized the necessity of reading, understanding cases, and maintaining a healthy skepticism. The importance of human judgment and a discerning eye in the face of advancing technology resonated as a recurring theme throughout the event.

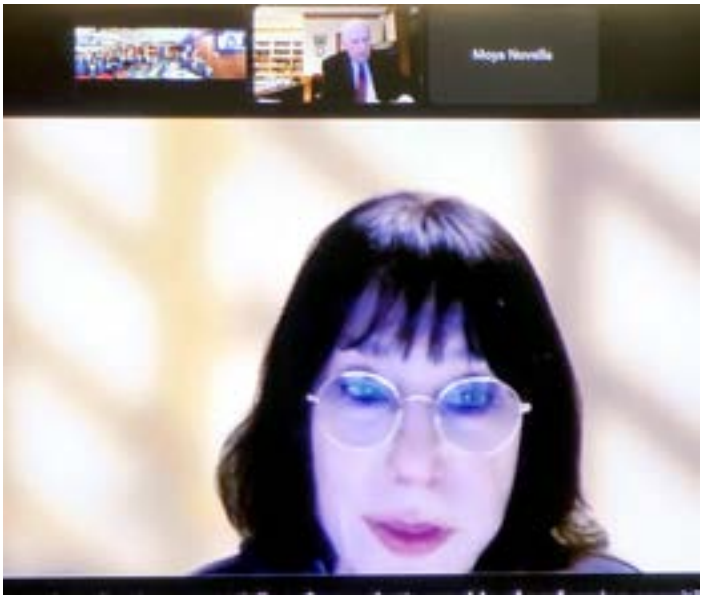
Left: Moya Novella

Above: Ralph Carter; Below: Hon. James Wicks
Below right: Prof. Maura Grossman.

In navigating the evolving landscape of AI in the legal profession, the key takeaway was a call for adaptability, continuous learning, and a thoughtful, ethical approach to incorporating AI into legal practice.

The event provided a comprehensive exploration of AI's impact on the legal profession, from technological intricacies to real-world applications and ethical considerations. As the legal landscape continues to evolve, it is clear that legal professionals must not only adapt to AI but actively shape its integration within the framework of ethical, transparent, and responsible legal practice.

Keitha-Clemon Duhaney is a third-year law student at St. John's University. She is the Vice President of the Corporate Law Society and a senior staff member of the Moot Court Honor Society. In her free time she loves to play Monopoly with friends or write short stories.



Observational Notes: Former Section Chair Tracee Davis and Others Honored at Taking the Lead 2023

By Aleyda Castro

On the evening of November 16, 2023, the Commercial and Federal Litigation Section hosted the annual event "Taking the Lead 2023: Empowering Women Lawyers in Commercial Cases; Winning Strategies and Techniques." The event, held at the Ceremonial Courtroom of the Daniel Patrick Moynihan U.S. Courthouse, showcased the skills of women commercial litigators through a mock trial re-enactment of the recent civil trial *Griffin v. Sheeran*, which was tried in the same courthouse. An awards ceremony and reception followed the mock trial.

The program began with a welcome from Maryann C. Stallone, Treasurer of the Commercial Federal Litigation Section. Stallone discussed the importance of supporting women litigators in their careers, especially when considering the 2017 ComFed report "If Not Now, When? Achieving Equity in the Courtroom and in ADR." The 2017 report found that women are lead counsel in only 25 percent of cases in courtrooms across the state of New York. This figure decreased when they looked at complex commercial litigation cases, finding that the more complex the case, the less likely that a woman appeared as lead counsel. These stark statistics highlighted the continuing need for events and initiatives like "Taking the Lead." After Stallone's welcome, the evening continued with the mock trial.

A group of junior attorneys served as defense counsel for Mr. Sheeran, and a group of senior attorneys served as plaintiffs' counsel for Ms. Griffin. Each side presented an opening statement, a direct examination, a cross examination, and a closing statement. Once each side made their closing statements, the junior attorneys received feedback from the panel of judges. Notably, two of the attorneys who served as part of the senior attorney group had participated in the "Taking the Lead" event seven years ago as part of the junior attorney team. Both attorneys are now partners at their respective firms.

The Hon. Shira. Scheindlin served as the presiding judge for the mock trial, alongside the Hon. Mae A. D'Agostino, Hon. George Daniels, Hon. Melissa Crane, and the Hon. Ellen Tobin. Each judge offered feedback to specific participants, after which Judge Scheindlin offered feedback to the entire group of junior attorneys.

The advice offered by the judges shared several common themes: be clear and straight to the point in your delivery; engage the audience and connect with the jury through eye contact; be conversational but stay professional; the story you want to tell should guide the questions you ask; remember that an effective and compelling summation of the case is the crown jewel of a trial.

After the mock trial, Section Chair Anne B. Sekel presented five women litigators with the Judith Kaye Commercial and Federal Litigation Scholarship. The purpose of the scholarship is to help the winners continue to develop and hone their litigation skills by attending the Section's Commercial Litigation Academy for free. The recipients were Mary D'Agostino, Becky (Hyun Jeong) Baek, Alexandra Gallo-Cook, Amanda M. Leone, and Rachel Morgenstern.

The award ceremony proceeded with Hon. Andrea Masley of the Supreme Court of New York, New York County Commercial Division, presenting the Hon. Shira A. Scheindlin Award for Excellence in the Courtroom to Tracee Davis of Seyfarth Shaw. Davis is a former Chair of the Commercial and Federal Litigation Section, the first Black woman and first person of color to serve in that position.

"I'm often the first, and often the only," Davis shared, while she reflected on her career as a Black woman commercial litigator. In her remarks, she brought to the forefront the importance of intersectionality in the legal field and demonstrated the additional challenges that come into play for women of color and people of color in the legal field. She highlighted the role that mentorship has played in her career and shared the importance of being open to new opportunities to be able to learn and grow. In concluding her reflection, she emphasized why we must foster diverse perspectives and voices as we continue to support women in commercial litigation.

With women being lead counsel in only 25 percent of cases in courtrooms across the state of New York, there is a lot of room for progress so that young women attorneys joining the field do not have to continue to encounter situations where they are the first, the only, or both.

Aleyda Castro is a law graduate with Foley & Lardner LLP.

Recent Commercial Cases of Interest in the New York Court of Appeals

By Connie Boland and Seth M. Rokosky

The New York Court of Appeals is the state's highest court and regularly resolves questions of import for commercial litigation. The Court has recently considered a number of interesting issues, including the legality of New York City's property tax system[1] and the interpretation of business-interruption insurance in the context of COVID-19 contamination.[2] The Court also will impact the law on several other significant issues that could have broad implications for those conducting business in New York.

For example, on February 14, 2024, the Court heard oral argument in *Syeed v. Bloomberg, L.P.*, in which the Court considered whether a nonresident plaintiff states a claim under the New York City or New York State Human Rights Laws if she can demonstrate that she was deprived of a New York City or State-based job opportunity on discriminatory grounds.[3]

The case involved a South Asian-American woman who worked for Bloomberg's Washington, D.C. news bureau. The plaintiff filed a class action against Bloomberg, L.P., which operates in New York City, alleging discrimination due to failure to promote her to positions in New York.[4] The district court dismissed her claims, concluding that she could not demonstrate a discriminatory impact *in* New York City or State because she did not live or work in New York.[5] The Second Circuit certified the question for review in the New York Court of Appeals, explaining that the denial of *prospective* employment may be sufficient to state a claim under the City and State Human Rights laws.[6] The Second Circuit noted that the appeal implicates important policy questions for New York, commenting that it could expand the potential liability of employers in the state, or it could insulate them from liability for alleged discriminatory conduct.[7] On March 14, 2024, the New York Court of Appeals ruled in the plaintiff's favor, citing the required "liberal construction" of the statutes and reasoning that a nonresident who has been discriminatorily denied a job in New York City or State that requires the employee to be physically present there loses the chance to work, and perhaps live, within those geographic areas.[8]

On March 12, 2024, Court heard oral argument in *Lelchook v. Société Générale de Banque au Liban SAL*, on the issue of whether an entity that acquires all of another entity's liabilities and assets also inherits that entity's status for purposes of personal jurisdiction.[9] The case relates to rocket attacks in Israel in 2006, after which U.S. citizens alleged that the Lebanese Canadian Bank violated the federal Anti-Terrorism Act by providing extensive financial assistance to Hezbollah.[10] In 2011, Societe Generale de Banque au Liban SAL (SGBL) acquired the bank's assets and liabilities through a purchase agreement under the laws of Lebanon, and the plaintiffs sued SGBL in New York.[11]

The district court dismissed the case for lack of personal jurisdiction, reasoning that New York law recognizes an inherited-jurisdiction theory only upon a "merger" of the two entities in question.[12] The Second Circuit, however, certified the question to the Court of Appeals, explaining that the jurisdictional effect of acquisitions, absent a merger, remains unclear.[13] The Court noted that the case raises important policy considerations: on the one hand, permitting a bank to acquire all assets and liabilities without inheriting the entity's status for purposes of jurisdiction could lead to abuse and could harm tort claimants; on the other hand, New York law seeks to facilitate business combinations and adopt clear, predictable rules of liability and jurisdiction.[14]

On February 15, 2024, the Court heard oral argument in a case involving the scope of New York State antitrust law and the distinctions between the "notice pleading" standard applicable in New York State courts and the plausibility pleading standard applicable in federal courts.[15] In *Taxi Tours, Inc. v. Go New York Tours, Inc.*, the appellant asserted counterclaims against two competitors in the "hop-on, hop-off" sightseeing bus tour industry in New York City.[16] Among other things, appellant alleged that its competitors engaged in anti-competitive conduct in violation of the Donnelly Act by entering into exclusive agreements with key New York City attractions requiring the attractions to do business only with them and threatening not to do business with attractions if they worked with appellant.[17]

On appeal, the appellant argued that the Supreme Court and the First Department erroneously dismissed its counterclaims because they ignored the plain language of the Donnelly Act, which is broader than the federal Sherman Act and prohibits a broader range of anti-competitive conduct.[18] The appellant further contended that the lower courts erroneously applied the pleading standard articulated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), rather than the notice pleading standards of CPLR 3013.[19] Appellant initially

filed a case in federal court, alleging, among other things, federal and state claims under the Sherman Act and the Donnelly Act.[20] The district court dismissed all claims, but the Second Circuit dismissed the claims under the Donnelly Act without prejudice, so those claims could be asserted in state court.[21] This appeal raised potentially intriguing issues regarding the comparative scope of federal and state antitrust law and afforded the Court of Appeals an opportunity to comment on pleading standards in antitrust cases brought in New York courts. The Court ultimately ruled in the plaintiff's favor in a short opinon that cited the "liberal notice pleading standards."[22]

Connie Boland is a Partner in the Business Litigation Group at Thompson Hine LLP. Connie has nearly thirty years of experience handling complex commercial litigation and arbitration matters involving financing disputes, securities and common law fraud claims, broker/dealer disputes, and claims relating to life insurance disputes.

Seth Rokosky is Of Counsel at Gibson, Dunn & Crutcher, LLP, where he focuses his practice in the Appellate and Constitutional Law group. He was formerly an Assistant Solicitor General for the State of New York.

Together, they are Co-Chairs of the Commercial and Federal Litigation Section's Appellate Practice Committee.

Endnotes

1. *See Tax Equity Now NY LLC v. City of New York*, APL-2022-00049.
2. *See Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp.*, APL-2022-00160.
3. *See* CTQ-2023-00001.
4. *See Syeed v. Bloomberg, L.P.*, 58 F.4th 64, 66-67 (2d Cir. 2023).
5. *See id.* at 67.
6. *See id.* at 67-70.
7. *See id.* at 70-71.
8. *See* N.Y. Slip Op. 01330 (Ct. App. Mar. 14, 2024).
9. *See* CTQ-2023-00002.
10. *See Lelchook v. Société Générale de Banque au Liban SAL*, 67 F.4th 69, 71 (2d Cir. 2023).
11. *See id.*
12. *Id.*
13. *See id.* at 81.
14. *See id.* at 87-88.
15. *See Taxi Tours Inc., et al., v. Go New York Tours, Inc., et al.*, Index No. 653012/2019, NYSCEF Doc. Nos. 238, 243, and 241; NYSCEF Doc. No. 241, at 22-23; and 210 A.D.3d 451, 452-53 (1st Dep't 2022).
16. *See* Taxi Tours, Court of Appeals No. APL, 2023-00025, Brief for Defendant/Counterclaim Plaintiff-Appellant, at 3-4.
17. *See id.*, at 2-3; 6-8.
18. *See id.* at 2 - 3.
19. *Id.*
20. *Id.* at 9-10.
21. *Id.*
22. *See* N.Y. Slip Op. 01333 (Ct. App. Mar 14, 2024).

Under Consideration
Book Review of Attorney Escrow Accounts, 5th Edition

By Jeffrey Cunningham

The fifth edition of *Attorney Escrow Accounts: Rules, Regulations and Related Topics*, edited by Peter V. Coffey and Anne Reynolds Copps (the "5th Edition"), is a comprehensive guide to navigating the complexities of handling attorney escrow accounts. Written, edited, and updated by New York practitioners, the 5th Edition tackles the wide range of challenges of attorney escrow accounts from the mundane to the abstract.

Not surprisingly for the fifth edition of any compilation of multiple lawyers, while offering valuable real-world guidance and full of practical applications, at times the 5th Edition can get bogged down in academic, law review-style discourse. Excusing that reality, one finds real gems of simple insight throughout the generally readable and actionable chapters. My favorite pearl demonstrating this helpful approach comes early on: "It is helpful to purchase checks in a different color from your general and other accounts." Such easy but effective tools are presented throughout the 5th Edition, while only occasionally diving into the minutiae generally of interest to ethics lawyers and academics. There is a slight missed opportunity in the 5th Edition: the new updates fail to explore the more cutting-edge issues of the practice of law involving attorney escrow accounts, such as the impact of panic-inducing major bank failures, the rise of legal artificial intelligence, and the impact of COVID-19 and the exponential growth in the remote practice of law.

That being said, the 5th Edition is a must read for New York lawyers. It opens with the largest update, a brand new chapter explaining the nuts and bolts of how to open and manage an escrow account. This is really an excellent addition and reads like a YouTube DIY video feels. The clarity provided highlights the 5th Edition's utility for both newly minted lawyers and more experienced grizzled veterans alike. This chapter equips attorneys with the knowledge necessary to effectively create, manage, and monitor escrow accounts and client funds, and it pairs very nicely with the 5th Edition's newly revised appendixes, which offer related ethics opinions, forms, and templates.

Chapter 2 gives a deep dive into the actual day-to-day handling of attorney escrow accounts together with specifics on New York's idiosyncratically named Interest on Lawyer Accounts (IOLA) program, including an interesting review of a range other attorney activities with escrow ramifications. While discussing the importance of compliance with the rules, this section presents ample real-world case law to compliment the statutory framework and ethics rules and opinions.

The 5th Edition continues with Chapter 3's review of escrow agreements generally, with specific examination of the role of the attorney. Providing the essentials of escrow agreements, the contractual source of the relationship, and the unique duties involved, the book explores the attorney's obligations regarding escrow funds in the larger context. Chapter 4 focuses on the star of the escrow show: the IOLA account, its statutory framework, and intersecting ethics rules. Four specific New York cases are explored, perhaps in a bit more detail than the chapter demands. Non-IOLA accounts are briefly discussed, but a further comparison of the two options would be helpful in future editions. Chapter 4 wraps up with a really nice presentation of three real case studies showing the powerful public interest impact of the IOLA program that is helpful for lawyers both on a practical level but also from a professional responsibility perspective.

Continuing along the public interest track, Chapter 5 explores New York's Lawyers' Fund for Client Protection (the "Fund"). The history and financial accounting of the Fund is examined well beyond the needs or interest of most practitioners, but case law examples and quotations from actual claimants of the Fund, wronged by their attorneys, provides valuable real world caution.

The 5th Edition, like its forbearers, provides a comprehensive but useable resource for lawyers in New York and beyond. On top of the valuable main chapters, the 5th Edition offers seven helpful appendixes. These tools are excellent resources for attorneys dealing with escrow account management, including the applicable statutes, ethics opinions from New York and other states, and annotated forms for seemingly every conceivable attorney escrow account scenario.

Regardless of firm size or practice areas, the 5th Edition is a valuable asset to any lawyer's library that will be equally at home on the desk for active use as on the bookshelf with other reference works.

Jeffrey Cunningham is a member of McAngus, Goudelock & Courie in New York City. He serves as outside General Counsel to solo to mid-sized law firms and defends lawyers sued for legal malpractice and facing attorney discipline.

Tech Topics
Key Takeaways From NYSBA Questionnaire Report on Virtual Procedures

By Danielle Gatto and Lauren Bernstein

I. Introduction

In this post-COVID-19 world, practitioners have been fully acquainted with all things "virtual"—conferences, depositions, oral arguments, and trials. While there can be no serious doubt that this technology is here to stay, the question that the Federal Procedure Committee of the NYSBA Commercial and Federal Litigation Section sought to answer was whether lawyers and the Court actually like this significant change to the practice of law.

Towards this end, the Federal Procedure Committee of the Section sent an online survey to all NYSBA members, as well as separate requests to the various members of the judiciary. The survey was open from June 1, 2022, to December 16, 2022, and over that time the Committee received over 170 responses from judges (approximately 21) and lawyers (approximately 158).

The survey was entirely voluntary and no efforts were made to obtain a representative sample. As a result, respondents were overwhelmingly commercial litigators concentrated in Albany, New York City, and Nassau County, and anyone without access to email and a web browser was entirely cut out (albeit such individuals were unlikely to have any opinion on these types of virtual practices). Despite the non-scientific nature of this sampling, the results the Committee received made it clear that many types of virtual proceedings are popular and likely here to stay.

In particular, virtual depositions and status conferences appeared to be widely popular—over 75% of respondents favored both remaining an option in a post-pandemic world. The reason for this popularity was simple: efficiency. Overwhelmingly, practitioners responded that having a virtual option for these more quotidian aspects of lawyering frees up their time and allows them to deliver better client service at a lower cost.

That said, the results were not nearly as favorable for virtual hearings or trials. Few respondents reported much experience with these types of virtual proceedings, and many expressed skepticism about their practicality and effectiveness, particularly when it comes to having the ability to confront a witness face-to-face or to present a large number of exhibits.

Ultimately, the key takeaway from our survey appears to be that commercial lawyers in New York have fully embraced virtual proceedings as a new, useful, and cost-effective tool that in many cases may be more suitable than traditional in-person proceedings, but no one wants the option to conduct in-person proceedings to be off the table in any case that demands them.

II. Virtual Depositions

A majority of the attorneys who participated in the survey have conducted between 0-10 virtual depositions since February 1, 2020. According to the results, approximately half of the attorneys described their experiences with conducting, defending, or attending virtual depositions as neutral or favorable. This included their experience with the use of technology, stenographers, and the costs associated with conducting a virtual deposition. However, with respect to the utilization of exhibits and whether virtual depositions are more efficient than in person depositions, the results varied, and there was no majority opinion. When asked whether virtual depositions should continue assuming COVID-19 remains sufficiently receded to permit in-person depositions, approximately 40% of the participants responded with the quintessential lawyer response—sometimes (and nearly 36% of the participants responded with an affirmative "yes" to this inquiry).

III. Virtual Conferences

While more than 60% of the respondents had not participated in virtual court conferences before the onset of the pandemic, more than 80% of the participants had participated in six or more such conferences since. Their experience with the format has been overwhelmingly favorable, particularly because of the associated monetary costs, with nearly 70% of respondents finding virtual conferences both more effective and more efficient than in-person conferences. While judges mostly expressed no view on the matter, the limited number of judges that did express an opinion (only 25) expressed similarly favorable views as practitioners.

IV. Virtual Hearings

The survey also asked various questions on experience with virtual hearings. According to the survey, before COVID-19, hearings were primarily conducted in person and infrequently conducted virtually.

Since COVID-19 began, almost all attorneys who answered the survey said that they have participated in at least one virtual hearing, and approximately 50% of attorneys surveyed said they have participated in more than six virtual hearings (with nearly 12% of attorneys who participated in more than 40). Most of the attorneys who answered the survey said that their experience using technology was favorable (including using exhibits, eliciting testimony from witnesses, and using a court reporter) and cost effective. More than 50% of participating practitioners described their experience with judges in remote court hearings as favorable as well.

Most of the judges who answered the survey similarly described their experience as favorable and effective (as compared to in-person hearings).

Lastly, the majority of attorneys who answered the survey said that they believe virtual hearings would and should continue after COVID-19 sufficiently receded for in-person court hearings to return unabated.

V. Virtual Trials

Despite there being significant input from the participants on the various other virtual procedures that have been utilized since the onset of COVID-19, unfortunately, few participants have been involved in virtual trials. Indeed, nearly 94% of the participants had no experience with virtual trials (either as a practitioner or as a judge) and, thus, had no opinion on, *inter alia*, use of exhibits, eliciting testimony, or costs.

VI. Conclusion

As can be seen from the results of the survey, commercial lawyers in New York recognize that virtual proceedings are a useful tool that can be helpful in certain cases to lower costs and increase efficiency. With that being said, the complete elimination of in-person proceedings is not a concept that individuals who participated in the survey would support.

Danielle B. Gatto is a partner in the litigation group at Forchelli Deegan Terrana LLP, concentrating her practice in the areas of commercial litigation and real property actions. She is a member of Federal Procedure Committee of the Commercial and Federal Litigation Section of the New York State Bar Association and is the co-chair of the Commercial Litigation Committee of the Nassau County Bar Association.

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CPLR Amendments: 2023-24 Legislative Session

(2023 N.Y. Laws ch. 1-777; 2024 N.Y. Laws ch.1-49, 61-105)

CPLR	Chapter (Part) (Subpart, Item, §)	Change	Eff. Date
105(s-1)	151	Extends repeal date to 6/30/24	6/30/23
213-c	777(42)	Deletes cross-references to certain criminal sexual acts	1/1/24
215(8)(b)	777(43)	Deletes cross-references to certain criminal sexual acts	1/1/24
503(g)	570	Provides that in an action to recover charges incurred by a student in furtherance of his or her education, the place of trial shall be the student's residence in NY State, if the student is state resident	10/25/23
1101(f)	55(A,14)	Extends repeal date to 9/1/25	5/3/23
2106	559	Strikes the requiement that the affirmant be a doctor, dentist, or osteopath and provides that any person, wherever located, may affirm in a New York State action	1/1/24
3102(e)	138(5)	Changes "abortion services or procedures" to "legal protected health activity," as defined in Crim. Proc. Law § 570.17(1)(b)	6/23/23
3102(e)	143(4)	Adds gender-affirming care	6/25/23
3119(g)	138(4)	Changes "abortion" to "legal protected health activity," as defined in Crim. Proc. Law § 570.17(1)(b); adds express consent requirement	6/23/23
3119(h)	143(3)	Adds provision on subpoenas related to gender-affirming care	6/25/23
3215(f)	57(Y,A,1)	In an action arising from medical debt, requires application to include certain additional affidavits, except for hospitals and health care professionals	10/30/23
3215(j)	57(Y,A,1)	Requires chief administrative judge to issue for affidavits for actions arising from medical debt	10/30/23
3436-a(a)	138(7)	Changes "performs an abortion or provides reproductive heath care" to "engages in legally protected health activity"	6/23/23
4550	138(6)	Adds new section on admissibility of evidence related to legally protected health activity	6/23/23
6501	630(7)	Regulates filing of notice of pendency by a DA's office or the AG	12/14/23
7510-a	679	Adds a provision on confirmation of award for public sector arbitrations	11/21/23
8018(b)(6)	428	Adds to additional services without fee the filing of an application for an extreme risk protection order	9/15/23
213-c(b)	23(39)	Adds additional crimes to 20-year statute of limitations	1/30/24
215(8)(b)	23(40)	Adds a crime formerly defined in Penal Law § 130.50	1/30/24
506(b)(5)	91(1)	Adds venue provisions for proceedings challenging apportionment by the legislature	2/28/24
3102(e)	101(4)	Adds a definition of gender-affirming care	6/25/23 [sic]
3119(g)(1)	89(2)	Adds an exception where express consent is not feasible because of patient's injury or death	6/25/23 [sic]
3119(h)	101(3)	Adds a definition of gender-affirming care	6/25/23 [sic]

Notes: (1) 2023 NY Laws ch. 585 also amended CPLR 2106, effective October 25, 2023, to change "physician, osteopath or dentist" to "health care pratitioner," but this amendment was superceded by 2023 NY Laws ch. 559, which deleted any requirements as to a profession.

2023-2024 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's 2023 N.Y. Orders 1-28 and 2024 N.Y. Orders 1-4; Adopted Rules on OCA website, http://ww2.nycourts.gov/rules/comments/index.shtml; amended rules on appellate court websites)

22 N.Y.C.R.R. §	Court	Subject (Change) Link to Order	Eff. Date
202.6	Sup.	Replaces "Child Victims Act" with "Adult Survivors Act" in RJI	
202.70(g), Rule 2	Sup.	Requires notification of settlement and discontinuance by both e-filing and letter, but without the terms, and withdrawal of pending motions and appeals https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO-284.pdf	1/3/23
202.70(g), Rule 5	Sup.	Extends to 3rd and 4th Dept's; provides that neither court nor clerk are responsible for notifying parties of appearances https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO-285.pdf	1/3/23
202.70(g), Rule 27	Sup.	Adds additional requirements to motions in limine https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/Comm-Division-Rule-27.pdf	6/5/23
202.70(g), Rule 28	Sup.	Requires counsel to pre-mark exhibits and specificity of objections to exhibits https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/Comm-Division-Rule28.pdf	7/5/23
202.70(g), Rule 29	Sup.	Modifies procedure for identification of deposition testimony https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO%20Commercial%20Division%20Rule%2029%20-%20signed.pdf	8/31/23
202.70(g), Rule 30(b)(1)	Sup.	Replaces presumptive weight of parties' preferences with court consideration of such preferences and other factors https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO%20134%20Rule%2030%20Commercial%20Division.pdf	4/30/23
202.70(g), Rule 32	Sup.	Modifies procedure for scheduling of witnesses https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO%20216_Commercial%20Division%20Rule%2032.pdf	8/31/23
850.5	3rd Dep't	Exempts from e-filing only causes in which appellant/petitioner is exempt under 22 NYCRR § 1245.4(a) and Part 1240 matters https://www.nycourts.gov/ad3/RulesOfPracticePart850.pdf	1/31/23
Part 52	All	Establishes procedure for ex parte requests for judicial accommodation by persons with a disability http://www.nycourts.gov/LegacyPDFS/rules/comments/orders/Part52-AO.pdf	2/16/24
202.70(b)(1)	Sup.	Adds to list of Commercial Division cases technology transactions and/or commercial disputes involving or arising out of technology https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO77-Commercial-Division.pdf	2/14/24
202.70(g), Rule 9-b	Sup.	Adds a provision on appointment of referee pursuant to CPLR 4301 and 4317(a) https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO77-Commercial-Division.pdf	2/14/24

Proposed Rules of Interest to Civil Litigators (2023-2024)

(http://ww2.nycourts.gov/rules/comments/index.shtml)

Note: The comment periods for the following proposed rules have expired, except as noted. Comments must be submitted to rulecomments@nycourts.gov.

December 28, 2023: Request for Public Comment on a proposal to add a new Part 53 to the Rules of the Chief Judge continuing the Litigation Coordinating Panel
https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/LitigationCoordinatingPanel.pdf

November 16, 2023: Request for Public Comment Regarding a New Matrimonial Rule 202.16-c and New NYSCEF Appendix to Ensure Compliance with Domestic Relations Law § 235 Regarding Access to NYSCEF by Attorneys in E-Filed Matrimonial Actions
https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/9RequestForPublicComment-MatrimonialRule-111623..pdf

October 18, 2023: Request for Public Comment Regarding Standardized Notice of Petition Forms Outside New York City
https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/NoticeOfPetitionFormsOutsideNYC-101823.pdf

August 21, 2023: Request for Public Comment on Amending 22 NYCRR § 202.12 Concerning Preliminary Conferences
https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/RPC%20NYSBA%20202.12%20with%20exhibits.pdf

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Fifth Edition

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