

MINUTES

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

Minutes of the Meeting of the Executive Committee of the Commercial & Federal Litigation Section held in accordance with the rules of the New York State Bar Association on Thursday, December 15, 2016.

MEMBERS PRESENT

**Mark A. Berman, Chair
Robert Holtzman, Vice Chair
Deborah Edelman, Treasurer
Jamie Sinclair, Secretary
Gregory Arenson
Thomas Bivona
Robert L. Haig
Jay Himes
Laurel Kretzing
Michael Rakower
James Wicks
Mark Zauderer
Isaac Zaur**

MEMBERS PARTICIPATING BY PHONE

**Mitch Katz, Chair Elect
Hon. Brenda K. Sannes**
David Bassett*
Steven Bennett
Mark Davies
Susan Galbato
Jonathan Fellows
Chris Fitzpatrick*
Hon. Helen Freedman
Ignatius Grande
Hon. Carla Moskowitz
Sharon Porcellio
Courtney Rockett
Stephen Roberts
Natasha Shishov
David Tennant
Dan Wiig**

** indicates non-executive committee member guest*

***indicates guest speaker for the meeting and non-executive committee member guest*

The meeting came to order at 5:31 p.m.

Section Chair Mark Berman's Welcome Remarks

Mr. Berman welcomed the Executive Committee Members to the meeting, which was also being video-conferenced from Syracuse, where our guest speaker Hon. Brenda K. Sannes addressed us. Mr. Berman asked all Executive Committee Members attending the meeting by telephone to send Section Secretary Jamie Sinclair an email so that she could record their attendance for the meeting's minutes. Mr. Berman also asked all Executive Committee Members attending the meeting in person to sign in on the meeting's attendance sheet.

Annual Meeting Update – January 25, 2017

Section Vice Chair Robert Holtzman provided an update of the planning for the Annual Meeting, which will be held at the New York Hilton January 25, 2017. The Meeting will feature a two hour panel on ethics, for two ethics credits, and a panel on collateral attacks and appeals of arbitration awards for one credit. Following the CLEs in the morning, a cocktail hour and luncheon will be held, where the Fuld Award will be presented to the entire Second Circuit in honor of its 125th year anniversary. Mr. Holtzman advised that the Section expects great attendance, and encouraged members and their firms to reserve tables for the luncheon soon, which they can do by emailing Mark Berman or Mr. Holtzman to request the form.

Evening at the Thurgood Marshall Courthouse with the Second Circuit– January 24, 2017

Section Chair Elect Mitch Katz reported on the status of this event planned for January 24, 2017. The event is targeted to attract young lawyers and will feature tours of the courthouse and a cocktail hour as well as welcomes by Judges Katzmann and Castel as well as NYSBA President Gutekunst. Section members were encouraged to blast this event out to their firms in order to encourage attendance.

Approval of the November 16, 2016 Meeting Minutes

The Minutes of the November 16, 2016 Meeting were unanimously approved by all Executive Committee Members present.

Approval of the December 6, 2016 Special Telephonic Meeting Minutes

The Minutes of the December 6, 2016 Special Telephonic Meeting were unanimously approved by all Executive Committee Members present.

Nomination Report

Section Chair Mark Berman reported on the Nomination Report, which was authored by Melanie L. Cyganowski, the Chair of the Nominating Committee. The following persons were unanimously nominated for each office as noted: Mitchell Katz, Chair; Robert N. Holtzman, Chair-Elect; Laurel Kretzing, Vice Chair; Jamie L. Sinclair, Secretary; and Sandra Rampersaud, Treasurer. Additionally, the 2017-2018 Delegates to the House of Delegates will be James Wicks, Mitchell Katz and Mark Berman. Tracee Davis will serve as the alternate.

Report on the NYSBA Committee on Continuing Legal Education Re: Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement

Section Chair Mark Berman reported that during the December 6, 2016 Special Telephonic Meeting of the Executive Committee, the Section's Diversity Committee Working Group's Report in support of the "Report of the NYSBA Committee on Continuing Legal Education's Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys" was unanimously approved by all Section members participating. Gregory Arenson, as Section Caucus CLE Chair, noted that our Section's comments were very thorough and he is currently collating and summarizing input from all Sections, which he will submit to the Section Caucus prior to when reports are due to the House of Delegates. Mr. Arenson thanked Mark Berman and Carla Miller, and all others who participated in the drafting of the Report.

Spring Meeting Update – May 19-21, 2017

Section Chair-Elect Mitch Katz reported on the status of the 2017 Spring Meeting, noting that the following topics are being considered for the CLE portions of the meeting: trade secrets, non-compete agreements, restrictive covenants and privilege issues. He advised there may be a tech show as part of the weekend's events.

Guest Speaker: Brenda K. Sannes, U.S. District Court Judge, Northern District of New York

Judge Sannes began her remarks by introducing her two law clerks, David Bassett and Chris Fitzpatrick, who were also present at the meeting via video conference from Syracuse. Judge Sannes then provided a summary of her own background, which included, *inter alia*, having worked as a prosecutor for 26 years, as well as working in private practice both in Syracuse and elsewhere. Judge Sannes discussed the case load of the Northern District, which features a large docket of *pro se*, habeas corpus and social security cases. She also discussed her perspective and suggestions to attorneys for drafting dispositive motions, including focusing on the elements of each claim and argument strategy. She advised that in the Northern District most motions are taken on submission, but that oral argument may be granted upon request. She also encouraged practitioners to be accurate when citing case law, as the failure to do so affects counsel's credibility. Judge Sannes encouraged Section Members

present to consider serving as *pro bono* counsel, as there is a need for counsel in many of the prisoner cases in the District.

Judge Sannes then fielded questions from Executive Committee Members. Judge Sannes concluded her remarks by thanking the Executive Committee for their time and for allowing her to speak at our Executive Committee Meeting. Section Chair Mark Berman thanked Judge Sannes for taking the time to speak to the Section's Executive Committee.

Transition to NYC Only Meeting and Introduction to Issues Concerning Report Voting

The Syracuse teleconference then ended and the Section began its local only portion of the meeting with out of town attendees dialing in, and which included voting on several pending draft reports of the Section.

Section Chair Mark Berman began by first advising attendees that at a meeting of the officers of the Section, held the week before, it was decided that due to, among other things, the disparate views members had concerning the draft reports under consideration at the November 16th and December 6th meetings, the fact that different members attended both of those meetings, and the records of the Section not making clear which executive committee members were officially entitled to vote, under these unusual circumstances, more than a simple majority would be required for the Executive Committee to approve the subject Section reports, as Mr. Berman sought to ensure that any approval of such reports would be supported by a "consensus." Citing Article 5, Section 6 of the Bylaws of the Section, which allows the officers to adopt rules of procedure for the Executive Committee and the lack of clarity in the Section's Bylaws as to specifically when a majority vote is required, Mr. Berman announced that 75% of the votes participating would be required in order to pass one of the subject reports so as to try to ensure that under these circumstances a report would be approved by "consensus." There was a discussion and questions were raised at the meeting regarding who was entitled to vote under the Section's Bylaws and the number of votes required to approve a Section report, and the officers' view governed this meeting.

Draft Report re: Proposed Amendment to Rule 26 of Rules of the Commercial Division Addressing the Limitation of Total Hours of Trial

Three versions of the report were up for discussion: the Second Revised Report, dated 12/9/16 (recommending adoption, tab 4A); the First Revised Report, dated 12/6/16 (opposing adoption, tab 4B); and the Original Report (recommending adoption, tab 4C).

Section Chair Mark Berman invited Section Member Robert L. Haig to introduce the proposed rule and elaborate on the Advisory Committee's thought processes behind it. Mr. Haig explained that he had spoken with Section Member Gregory Arenson, who previously had voiced opposition to the rule, and the two had come up with a proposed compromise to add the word "substantially" to the second to last paragraph of version 4A, so that it would read:

Although a new rule may not be necessary to further define the Court's discretion and authority to impose such time limitations, the Section concludes that the benefit to practitioners, corporate counsel, clients, and judges of having a rule explicitly describing that authority substantially outweighs not having such a rule.

A vote was taken and the proposed report (Second Revised Report, dated 12/9/16, tab 4A, recommending adoption) was passed with over 75% of the votes.

Draft Report re: Proposed Commercial Division Rule Addressing Consultation on Expert Testimony in Advance of Trial

Three versions of the report were up for discussion: the Second Revised Report, dated 12/9/16 (recommending adoption); the First Revised Report, dated 12/6/16 (opposing adoption); and the Original Report (recommending adoption).

Section Chair Mark Berman invited Section Member Robert L. Haig to introduce the report and elaborate on the Advisory Committee's thought processes behind it. Mr. Haig began by again stating that he had spoken with Gregory Arenson, who had previously opposed the report, and had come with proposed compromise that included the addition of the word "substantially" to the second to last paragraph of version 5A, so that it now read:

The Section does have two issues about the proposed new rule. One is that a new rule may not be necessary to clarify the Court's inherent power to require counsel to consult in good faith concerning anticipated expert trial testimony. However, the Section concludes that the benefit to practitioners, corporate counsel, clients and judges of having a rule explicitly describing that power substantially outweighs not having such a rule.

A discussion took place regarding the proposed rule. A vote was held on the Second Revised Report, dated 12/9/16 (tab 5A, recommending adoption) with the proposed additional word "substantially," and the motion did not pass with 75% of the votes. A vote was then held on the First Revised Report, dated 12/6/16 (tab 5B), opposing adoption of the new rule. The motion did not pass with 75% of the votes. A vote was then held on the Original Report, recommending adoption of the new rule (tab 5C), and the motion did not pass with 75% of the votes.

Draft Report re: Proposed Commercial Division Rule Addressing Consultation on Forum Selection Clauses

Section Chair Mark Berman explained that following the special telephonic meeting on 12/6/16, and the discussions thereat, the officers drafted a Revised Report, dated 12/9/16, recommending adoption of the proposed rule (tab 6A). The Original Report, opposing adoption, was also up for discussion (tab 6B). Section Member Robert Haig presented the

Advisory Council's thought processes behind the proposed forum selection clause rule. He stated that having this clause set forth in the Commercial Division Rules would allow easy access to a model clause when parties are drafting an agreement.

A discussion took place regarding the proposed rule. Suggested edits to the first Revised draft (dated 12/9/16, tab 6A) were made, which included: (1) changing the Executive Summary to read: "The Section recommends adoption of the rule" (and omitting "but notes certain issues with respect to the language of the proposed model language"); (2) modifying Section III by omitting "and suggestions" from the title, and omitting the first three paragraphs of such Section; and (3) modifying the fourth paragraph to omit the language "but suggests that the model language be modified as follows" [and everything thereafter]. Thus, as revised, modified Section III would read:

III. Response to further the goals of the proposal:

The Section believes it is helpful to the bench, the bar, and clients, particularly those located in New York, to include in the rules of the Commercial Division model forum selection rules, and therefore supports adoption of the Proposal.

A vote was taken on the Revised Report (dated 12/9/16, tab 6A, recommending adoption), which included the edits noted above. The motion did not pass with 75% of the votes. A vote was then taken on Revised Report, dated 12/9/16, (tab 6A, recommending adoption), without the edits noted above. The motion did not pass with 75% of the votes. A vote was then taken on the Original Report, tab 6B, (recommending against adoption), and the motion did not pass with 75% of the votes.

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

Section Chair Mark Berman invited Section Member Mark C. Zauderer to provide an overview of the Advisory Council's thought processes behind the proposed rule. Mr. Zauderer discussed, among other issues, client concerns about the use of unsealed documents at trial and the tension sealing had with other competing interests, and the differences between sealing and confidentiality orders. A discussion took place regarding the proposed rule.

The Revised Report (Tab 7A) recommended adoption of the rule, but recommended, among other things, that the rule address differently the consideration of the "interests of the parties" and limited the specific factors that a court may consider in deciding whether to seal records. The Original Report (Tab 7B) recommended adoption of the rule as drafted. A suggestion was made to alter the language of the Revised Report (tab 7A) to revise the definition in Section I regarding the "interests of the parties" to insert the words "without limitation" before phrase "the protection" so that it would read:

The interests of the parties may include, without limitation, the protection of proprietary or commercially sensitive information, including without limitation (i) trade secrets, or (ii) current or future business strategies.

Further discussion took place regarding economic injury and competitive damage, the public interest in open court records, corporate clients' interests, and a recent case decided by the First Department reversing an order sealing records (*Maxim Inc. v. Feifer*, 2016 NY Slip Op 08319 (1st Dep't Dec. 13, 2016)).

A vote was held on the Revised Report, dated 12/9/16, which included the edits noted above (inclusion of the words "without limitation"). The motion failed, not receiving 75% of the votes as needed. A vote was held on the first version of the Report (recommending adoption), and the motion failed, not receiving 75% of the votes as needed.

Conclusion

Section Chair Mark Berman thanked everyone in attendance for their patience and participation in the meeting. The meeting adjourned at approximately 8:40 pm.