Continuing Legal Education Program
Second Circuit Judicial Council
New York State – Federal Judicial Council

WHICH COURT? STATE OR FEDERAL AND WHY?/SELECTING YOUR CLIENT'S JURISDICTION

NDNY Handout

TAB 1: Handout—*TEN IMPORTANT STRATEGIC DIFFERENCES BETWEEN LITIGATING IN FEDERAL V. STATE COURT*

TAB 2: Discussion Hypotheticals

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Additional program materials available at Second Circuit CLE website (http://ww2.ca2.uscourts.gov/cle/login.aspx):

June 2012 *REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* by the Task Force on Commercial Litigation in the 21st Century

August 15, 2013 *PRELIMINARY DRAFT OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE* (Excerpted) (also available in full at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx)

TAB 1

TEN IMPORTANT STRATEGIC DIFFERENCES BETWEEN LITIGATING IN FEDERAL VS. STATE COURT

1. EXPERT DISCLOSURE/DISCOVERY

A. WRITTEN EXPERT REPORT/DISCLOSURE

Federal: Fed. R. Civ. P. 26 (a)(2) requires, in most cases, disclosure of a detailed expert report signed by a testifying expert setting forth all materials and matters considered, scientific or technical theories relied upon, and disclosure of all opinions to be given at trial. The report must contain information regarding expert's payment, a listing of all prior cases for a four year period and a listing of qualifications. This disclosure is usually regulated in the action's case management order through sequential deadlines allowing for the disclosure of counter experts and rebuttal opinions. Parties are permitted more in depth supplemental discovery of facts and data underlying the described opinion as part of this disclosure as a pre-cursor to expert depositions.

The expert's trial testimony is usually limited to four corners of what is disclosed in his/her expert report. *See, e.g., Bristol–Myers Squibb Co. v. Rhone–Poulenc Rorer, Inc*., 2000 WL 356412, at *2 (S.D.N.Y. Apr. 2, 2000) (holding that "direct testimony by any expert witness at trial shall be limited to the contents of the Expert Report").

New York State: Under C.P.L.R. § 3101(d)(1), state court practice requires a less robust expert disclosure. The required disclosure is limited to the subject matter upon which the expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the expert's qualifications, and a summary of the grounds for each expert's opinion. The rules do not require a report prepared and signed by the expert, and often times the expert disclosure is prepared by party counsel.

In practice, the timing of expert disclosure is not always governed by a deadline in a pretrial order, in which case it is only required upon the request of the other party. *See* C.P.L.R. § 3101(d)(1)(i). Moreover, there is often no penalty for making this disclosure after discovery has closed provided there is no intentional failure to disclose and no prejudice flowing from the delay. *See, e.g., Marchione v. Greenky*, 5 A.D. 3d 1044, 1045 (4th Dep't 2004).

With respect to the content of the disclosure, the expert's testimony must not be "so inconsistent with the information and opinions contained [in the expert witness disclosure], nor so misleading, as to warrant preclusion of the expert testimony or reversal." *Byrnes v. Satterly*, 85 A.D.3d 1711, 1712 (4th Dept. 2011); *Ruddock v. Happell*, 307 A.D.2d 719, 721 (4th Dept. 2003) (citations omitted). So long as the disclosure is not wholly inconsistent with the actual testimony, it is likely to be allowed at trial. *See, e.g., Hageman v. Jacobson*, 202 A.D.2d 160, 161 (1st Dept. 1994).

Significance: In practice, the Federal system requires much more detailed advance disclosure of an expert's opinions, analysis, and credentials. There is less surprise at trial as to the nature of the specific opinions to be advanced, providing more of an opportunity to meaningfully rebut an opponent's experts and to evaluate the expert's assumptions and opinions prior to trial.

B. EXPERT DEPOSITIONS

Federal: In federal court, depositions of testifying experts are part of the normal and customary discovery process. An expert may be precluded at trial from testifying to opinions not disclosed in his/her expert report, and otherwise not disclosed during his/her deposition. *See, e.g., Aktiebolag v. Andrx Pharmaceuticals, Inc*., 2002 WL 193153, at *1-6 (S.D.N.Y. Feb. 6, 2002).

New York State: In state court, parties may not depose an expert without a court order and a showing of special circumstances. *See Repka v. Arctic Cat, Inc.*, 300 A.D.2d 1019, 1020-21 (4th Dept. 2002); *Columbia Telecommunications Group, Inc. v. General Acc. Ins. Co. of America*, 275 A.D.2d 340, 340 (2d Dept. 2000); *Padro v. Pfizer, Inc.*, 269 A.D.2d 129, 129 (1st Dept. 2000).

Significance: In federal court, there is much more complete advance notice of an expert's opinions, his/her testimony, and his/her ability to hold up to cross examination. Not only does this permit better preparation of a defense to, and/or cross examination of, and expert's opinion, it gives a more complete advance picture of the strength of that expert as a witness.

2. **EXPERT WITNESS CHALLENGES**

Federal: In federal court, the trial court generally exercises more scrutiny as a "gate keeper" under Fed. R. of Evid. 702, as fleshed out in *Daubert v. Merrill Dow Pharmaceuticals* and its progeny, evaluating the admissibility of expert opinion based on its inherent reliability. The court's assessment requires an evaluation of whether the expert, and/or his/her opinion, satisfies a minimum reliability threshold in terms of: (1) the scientific or technical theory employed; (2) the sufficiency of the underlying factual basis, data, and/or assumptions underpinning that theory; and (3) the qualifications, credentials, training of the expert enabling him/her to render that opinion.

New York State: In state court, the trial courts hear challenges to expert reliability under the standard set forth in *Frye v. United States*. While the standard in principle is not too different from *Daubert*, in practice it is very unusual for a trial court to preclude an expert under *Frye*. In most cases where such a challenge is made, the opinion is admitted subject to an opponent's ability to undermine it through cross examination and counter experts. The trial courts

most typically hold that criticism of the reliability of a given expert, or his/her opinions, are a question of *weight* rather than admissibility.

Significance: In any action that may turn on expert testimony, and especially an action involving issues or litigants prone to advance "junk science," a party in such an action may be better off in federal court where there appears to be a higher threshold for the admissibility of expert testimony, and a more searching inquiry on the issue of threshold reliability of such opinion.

3. PLEADING SUFFICIENCY STANDARD

Federal: While both courts' procedural rules have self-described "liberal" pleading standards, the federal court standards became materially more stringent following the issue of two recent decisions by the United States Supreme Court—*Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Those cases have had the effect of heightening the standard of review for evaluating pleading sufficiency, rejecting the practice of conclusory pleading of claim elements as factual assertions, and requiring the pleading of *specific* facts that would present a "plausible" ground for recovery under the existing law.

New York State: Motions to dismiss in state court for pleading sufficiency are evaluated only after affording the pleadings a liberal construction, accepting the facts alleged in the pleading as true, and giving the claimant the benefit of every possible favorable inference to determine whether the facts as alleged fit within any cognizable legal theory. *See ABN AMRO Bank, N.V. v MBIA Inc.*, 17 N.Y.3d 208, 227 (2011). In practice, pre-answer motions to dismiss based on pleading sufficiency are rarely successful.

Significance: If you are defending a case with questionable merit based on the pleadings and a "kitchen sink" approach articulating causes of action and you have the opportunity to remove, you may have a better chance at disposing of the case on a pre-answer motion in federal court than in state court.

4. VOIR DIRE – JURY SELECTION

Federal: With some very limited exception, jury selection in federal court is conducted by the trial judge and limits a trial attorney's participation in the juror *voir dire* process. *See, e.g.*, N.D.N.Y. Local Rule 47.2.

New York State: Jury selection in state court is attorney-run, in large part, outside the presence of the trial judge with trial counsel controlling the *voir dire* process. *See generally* Appendix E, Uniform Rules for the New York State Trial Courts.

Significance: Where the outcome of a particular trial, based on its merits, is likely to turn on the particular perspective and/or outlook of the jurors, the state court *voir dire* process may allow a more accurate picture of the perspective and biases of the jurors. The federal jury selection process, on the other hand, may allow for more uncertainty as the jury make-up and less ability to plumb potential biases. Some practitioners believe that under the state court system the initial intimacy with the jury through the *voir dire* process is critical to establishing credibility with the jury and obtaining a more accurate picture of whether the jury will positively or negatively view a particular theory of the case.

5. INTERLOCUTORY APPEALS

Federal: Interlocutory trial court decisions may not be appealed to the Second Circuit without court approval requiring a demonstration that the interlocutory decision involves (1) "a controlling question of law"; (2) as to which there is a "substantial ground for difference of opinion"; and (3) "an immediate appeal" may "materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b); *Liberty Synergistics Inc. v. Microflo Ltd.*,718 F.3d 138, 146, n.8 (2d Cir. 2013).

New York State: New York state procedure allows appeal as of right to the Appellate Division from interlocutory orders. *See* C.P.L.R. § 5501. Such interlocutory appeals will *not* automatically stay the underlying proceedings.

Significance: Depending on the type of action and the trial judge, it may be advantageous to a litigant to have the opportunity to seek immediate appeal of the interlocutory decisions entered by the trial judge leading up to trial. For the same reasons, there may be instances where the absence of interlocutory appeals in the federal court system may be advantageous to a litigant.

It is also important to consider that the state court right to interlocutory appeals can have the practical effect of delaying the proceedings and/or increasing the cost of the litigation.

6. FED. R. CIV. P. 30(B)(6)

Federal: Fed. R. Civ. P. 30(b)(6) allows a party to notice a deposition of a corporate deponent by designating particular topics, rather than identifying a particular corporate representative. The rule requires the corporate deponent to produce a witness to give binding testimony on each of the topics, regardless of the witness's personal knowledge. Thus, the rule creates an obligation on the corporate deponent to prepare the witness to give correct answers on each of the identified topics. *Soroof Trading Development Co., Ltd. v. GE Fuel Cell Systems*, LLC, 2013 WL 1286078, at *2 (S.D.N.Y. March 28, 2013).

New York State: While the CPLR allows parties to take depositions of corporate deponents, it requires the party to identify the particular officer, director, member or employee by "description or title." *See* C.P.L.R. 3106(d). The rule, however, gives the corporate deponent the right to designate a different person as a witness. The witness's testimony however is limited to their personal knowledge, and a party must seek often seek court permission to depose a subsequent representative of the corporation. *See, e.g., Zollner v. City of New York*, 204 A.D.2d 626 (2 Dept. 1994).

Some practitioners rely on the "description" language in C.P.L.R. § 3106(d), to create a corporate deposition notice with a list of topics *a la* Rule 30(b)(6). The argument being that the noticing party is "describing" the knowledge that they would like the designated corporate deponent to have. Regardless of the validity of this practice, which finds little support in the rule or interpretive case law, there is no mechanism in the CPLR for *requiring* a corporate deponent to given *binding* responses on all relevant issues, outside of the extent of the witness's particular personal knowledge.

Significance: Fed. R. Civ. P. 30(b)(6) can be a powerful discovery tool where a corporation is a party to an action. It can make corporate discovery more efficient and avoid the obligation to depose serial corporate witnesses to obtain discovery and/or admissions on all relevant topics. Because there is no procedural corollary in New York State procedure, this is an issue to consider when choosing a forum.

7. EXTRA-TERRITORIAL REACH OF FED. R. CIV. P. 45

Federal: Where an action relies on testimony from non-party out-of-state witnesses, Rule 45 provides for nationwide service of deposition subpoenas on out-of-state witnesses. Thus, the Rule allows an attorney admitted in New York State and enrolled in the bar of the Northern District of New York, to sign, issue, and serve subpoenas out of other federal districts nationwide to conduct depositions in those locations for a case pending in the Northern District. *See* Fed. R. Civ. P. 45(a)(2)(b) and (a)(3)(A). There is no requirement that a proceeding be initiated in the locale where the deposition is being taken, or that the subpoena be issued by a local practitioner therein.

New York State: Prior to January 1, 2011, the procedure for obtaining out-of-state discovery from non-parties was cumbersome, requiring a motion in the New York trial court seeking an order issuing letters rogatory and an open commission to the clerks in the out-of-state counties where the witnesses reside, requesting that those courts the issue of a deposition subpoenas in aid of the New York action. *See* C.P.L.R. § 3108*; Wiseman v. American Motors Sales Corp*., 103 A.D.2d 230 (2d Dept. 1984); *Morgan v. Dell Co., Inc.*, 185 A.D.2d 876, 878 (2d Dept. 1992) (*citing* Siegel, Practice Commentaries, CPLR C3108:5 at 462).

Recently, however, multiple states have adopted versions of the Uniform Interstate Depositions and Discovery Act ("IDDA"), which in New York became effective as C.P.L.R. § 3119. This CPLR provision, however, only aids out-of-state litigants seeking to conduct depositions *in* New York State. For New York litigants, a party seeking an out-of-state must first determine whether the state of residence of the witness has passed the IDDA and then comply with that state's procedures for the issuance of the extraterritorial subpoena. At present, the following states passed versions of the IDDA: New York, Kansas, Mississippi, Vermont, Nevada, Oregon, North Carolina, Delaware, Utah, Tennessee, Montana, Colorado, Kentucky, Maryland, Idaho, Virginia, South Carolina, New Mexico, District of Columbia, Georgia, Washington, Hawaii, California, Indiana, Iowa, Arizona, South Dakota, Alabama, North Dakota, Pennsylvania, and Michigan. For all other states, litigants must follow the previous cumbersome letters rogatory/commission procedure.

Significance: For actions that will turn on the testimony and documentation from multiple out-of-state non-party witnesses, Rule 45 provides a significant advantage in efficiency for gathering that discovery.

8. **TIME TO VERDICT**

Federal: The Northern District of New York is one of the most congested federal districts in the country. This has resulted in delay in the issuance of decisions on dispositive motions and in the setting of trial dates. The current policy of the district is to require that case management orders specify that trial is to be scheduled within eighteen months of the filing date of the action. However, cases routinely surpass this benchmark and it is not uncommon for a dispositive motion to be pending for over a year before being decided, delaying the prosecution of the case for that time period.

It should also be noted that federal district courts are obligated to give first priority to the scheduling of criminal trials, which often can result in serial delays to the scheduling of contemporaneous civil trials.

New York State: While there are aspects of state procedure that contribute to delay as well, certain facets of New York State procedure may permit a litigant to push a case to resolution faster than is customary in federal court. Generally, under state court procedure, the attorneys decide when the case is ready for trial. Moreover, dispositive motions are required to be decided within 60 days, *see* C.P.L.R. § 2219, and, anecdotally, are generally decided sooner than their federal counterparts.

Significance: In certain circumstances, justice delayed is justice denied. If the circumstances of a particular dispute require early resolution, and delayed resolution may, itself, cause severe prejudice or otherwise render a victory merely

Pyrrhic, a litigant choosing between the two forums may want consider this factor.

9. EXPENSE

Significance: Generally, from an anecdotal standpoint, litigating in Federal Court is more expensive than litigating in New York State Court. It is hard to pinpoint a reason for this disparity given that the nuts and bolts of a given litigation are essentially the same in each forum, however, certainly aspects of the discovery process in federal court—like the enhanced expert discovery right—will tend to increase the expense of a litigation. Nonetheless, the estimate that I give clients is that litigating the same dispute in federal court will cost them 35% more than state court in terms of overall litigation expense. While there are other factors that may make this additional investment worth it, for the financially-strapped client, this may be an important consideration in choosing a forum.

10. JURY POOL COMPOSITION

Federal: In the Northern District of New York, civil juries are selected from voter registration and Department of Motor Vehicle driver's license records within a multi-county geographic area surrounding the courthouse. *See* N.D.N.Y. Local Rule 47.1. For example, for the Syracuse courthouse, the jury pool is selected from Onondaga, Cayuga, Cortland, Madison, Oswego, and Tompkins Counties. *See id*.

New York State: For civil trials in the New York State Supreme Court, juries are selected at random from residents of the county in which the trial court sits from sources which include voter registration, driver's license records, income tax records, and other authorized sources. *See* N.Y. Judiciary L. § 506; *see also* 22 N.Y.C.R.R. § 128.3. For example, Onondaga County selects jurors from voter registration records, driver's license records, property tax rolls, lists of recipients of Department of Labor benefits like unemployment benefits, and list of recipients of social services benefits.

Significance: Depending on your desired juror profile, the geographic and methodological differences selecting the juror pool between forums may provide some advantages in establishing jurors with your desired juror profile. For example, for a case venued in Federal Court in the City of Syracuse, as opposed to the same case venued in Onondaga Supreme Court also in Syracuse, the federal jury pool is likely to be proportionally more rural than the state court equivalent drawn only from Onondaga County.

HONORABLE MENTION: OTHER DIFFERENCES TO CONSIDER

- Limitations on certain aspects of federal discovery including (i) seven hour limit on depositions; (ii) ten deposition limit per party; and (iii) twenty-five interrogatory limit

- Compulsory Counterclaim Rule in Federal Court
- The use and availability of Magistrate Judges
- The use of electronic filing vs. conventional paper filing
- Differences in the nature of pretrial submissions/*in limine* motions
- Differences in the complexity and brevity of the judicial decisions from the body of decisional law providing *stare decisis* for a particular forum

TAB 2

WHICH COURT? STATE OR FEDERAL AND WHY?/SELECTING YOUR JURISDICTION
Federal Judicial Council Advisory Committee

Discussion Hypotheticals

Hypothetical No. 1

You have just been retained by Acme Investments Group, Inc. and its principal, Joseph Dunham, to defend an action that has been filed against Acme, Dunham, and Acme's outside counsel, David Smith, in New York State Supreme Court for the County of Albany. Plaintiff John Paine is a former investment services client of Acme, which managed a discretionary investment account for Paine. Paine alleges federal securities fraud, state common law fraud and breach of fiduciary duty against all three defendants, in connection with Acme's management of his investment account, and claims damages in excess of $5 million. In addition, Paine has asserted a separate $500,000 breach of contract claim against Dunham individually – that claim relates to a business partnership/investment deal between Paine and Dunham. The Complaint does not make clear whether and to what extent the facts of the breach of contract claim will overlap with the facts of the fraud and breach of fiduciary duty claims.

You have reviewed the Complaint and believe that there is at least a reasonable chance of getting the federal securities fraud, state common law fraud and fiduciary duty claims against Acme and Dunham dismissed based on failure to plead the claims with sufficient particularity. If that motion were to succeed, it would significantly reduce the value of the case and increase the potential for a quick settlement. If that motion does not succeed, the factual complexity of the claims will result in a costly and extended discovery process, including extensive electronic discovery. The nature of Paine's causation and damage claims for his securities losses will certainly require expert witnesses, both with respect to the reasonableness of the investments in question and the claimed losses.

For jurisdictional purpose, all parties are citizens of New York. Co-defendant David Smith was served with the State court Summons and Complaint 25 days ago. Acme and Dunham were served 5 days ago. You have contacted Paine's counsel and obtained a 30-day extension on your time to answer or move against the Complaint. You need to advise your client on the practical and strategic implications of removing the case to the U.S. District Court for the Northern District of New York.

Practical questions:

(1) How much time do Acme and Dunham have to file their removal papers

(2) Do you need to get co-defendant David Smith's consent if your clients decide to remove?

Strategic questions – How do the following aspects of the case weigh in the removal decision?

(1) The desire to file a motion to dismiss for failure to plead federal securities fraud, common law fraud and breach of fiduciary duty with adequate specificity, and the impact on settlement prospects if such a motion were to succeed;

(2) The anticipated complexity of the disclosure process, including potentially extensive electronic discovery;

(3) The likely importance of expert witnesses in the case;

(4) The separate common law breach of contract claim against Dunham;

Hypothetical No. 2

You represent an Illinois corporation (incorporated in Delaware, principle place of business in Illinois) being sued by Syracuse company (incorporated in New York, principal place of business in Syracuse) under the New York Uniform Commercial Code for damages and lost profits associated with sale and installation of an allegedly defective automated manufacturing assembly line. The equipment was originally sold for $800,000, is complicated to operate, and utilizes a proprietary computer program sold as part of the system automation. The action is filed in New York State Supreme Court, Onondaga County. Plaintiff's manufacturing facility is located in the City of Syracuse and employs 250 workers from Onondaga County. The dispute in the action will turn on the operating rate and performance characteristics of the equipment based on its computer programing, as well as the plaintiff's calculation and forecast of its lost profits. Both issues will rely heavily on expert opinion evidence. In terms of relative resources, your client is much larger and has a greater ability to absorb attorney's fees and costs.

You need to make a decision on whether to remove the case, what considerations drive your decision?

Hypothetical No. 3

You represent a small Upstate, New York company in the Adirondacks who bottles and sells sparkling spring water under a distinctive trade name, that has strong regional sales and more limited national sales. Recently, a multi-national beverage company has started selling a flavored water brand, including sales occurring throughout New York State, that utilizes a derivation of your client's trade name. Your client has a federal registration for its trademark and has been using its trade name in commerce for the last 30 years. Your client wants to bring an action to enjoin the national beverage company from infringing on its trademark.

There is concurrent jurisdiction over your client's claims for trademark infringement, so you can choose between federal and state court. The potential defendant, because of its size, has unlimited resources to defend the litigation. Your client, on the other hand, while solvent, is cash strapped and is operating on thin margins based on its aging bottling and packaging equipment

and its antiquated distribution system. However, in the rural Adirondack county in which your client's facility is located, your client is the second largest employer in the county.

You need to make a recommendation to your client on how to proceed, and specifically whether to sue the action in Supreme Court of your home county, or to sue in federal court in the Northern District of New York, which will likely be assigned to a judge in Utica or Albany. What considerations drive your decision?

Hypothetical No. 4

Your client ABC Corp, is a North Carolina manufacturer of packaging machines that are custom designed to provide assembly line packaging for various manufacturing concerns. The plaintiff, an employee of a New York sauerkraut company, fell asleep during the third production shift and accidentally thrust his arm into a pinch point in the conveyer belt system of one of ABC's custom-designed packaging machines resulting in de-gloving and multiple fractures to his dominant arm. Plaintiff has sued ABC for negligence and strict product liability in New York State Supreme Court alleging that his injuries were caused by a defect in the design of the conveyer system of the ABC packaging machine.

The Complaint does not indicate the amount of the damages sought. Plaintiff is a citizen of New York. ABC is a citizen of North Carolina and Delaware. There are no other non-diverse co-defendants. You are considering your options with respect to removal, and must provide a recommendation to your client in that regard. What factors should you be considering with respect to choosing the forum? What are the relevant issues, if any, with respect to effecting removal?

TAB 3

Biographical information: Rosemary S. Pooler

Rosemary S. Pooler is a United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit. At the time of her appointment in 1998, she was a United States District Judge for the Northern District of New York.

Judge Pooler received her B.A. from Brooklyn College in 1959, an M.A. in History from the University of Connecticut in 1961, and her J.D. from the University of Michigan Law School in 1965. She also attended the Program for Senior Managers in Government of Harvard University in 1978, and earned a Graduate Certificate in Regulatory Economics from the State University of New York at Albany in 1978.

Judge Pooler engaged in the private practice of law in Syracuse from 1966 until 1972. She served as Assistant Corporation Counsel/Director of the Consumer Affairs Unit for the City of Syracuse from 1972 to 1973. From 1974 to 1975, Judge Pooler was a District Representative on the Common Council of the City of Syracuse. From 1975 until 1980 she was Chair and Executive Director of the Consumer Protection Board of the State of New York. She served as a member of the New York State Public Service Commission from 1981 until 1986. In 1987, Judge Pooler was Staff Director of the Committee on Corporations, Authorities and Commissions of the New York State Assembly. She was Visiting Professor of Law at Syracuse University from 1987 until 1988, and was Vice-President for Legal Affairs of the Atlantic States Legal Foundation from 1989 until 1990. In 1990, she became a Justice of the Supreme Court, Fifth Judicial District, State of New York, and served in this position until becoming a United States District Judge for the Northern District of New York in 1994.

Judge Pooler is a native of the City of New York.

JUDGE NORMAN A. MORDUE

Judge Mordue joined the Federal Bench on December 4, 1998 following his presidential Nomination and Senate Confirmation in October 1998. The Senate voted on Judge Mordue's nomination in just 16 days, the shortest time to confirm any judge during the entire Clinton administration. Judge Mordue served as Chief Judge for the Northern District of New York from March 13, 2006 to December 15, 2011, and recently took senior status.

Judge Mordue played high school football as a quarterback in Elmira, New York and was awarded a full football scholarship to Syracuse University to play under Coach Ben Schwartzwalder. Couch Schwartzwalder converted Judge Mordue to a runningback. He was a member of the 1964 Sugar Bowl team.

Judge Mordue graduated from Syracuse University in January 1966 with a Bachelor's degree in Economics, and later returned to graduate from the College of Law in 1971.

Following his completion of ROTC as a Distinguished Military Graduate and Distinguished Military Student, he was commissioned into the Regular Army as a Second Lieutenant in the Infantry. After the Infantry Officers Basic Course, he reported to his platoon in C Company, 1st Battalion, 12th Cavalry, First Air Cavalry Division. While leading his platoon in the Republic of Vietnam, Lieutenant Mordue was awarded our Nation's second highest military honor, the Distinguished Service Cross for extraordinary heroism, and the Bronze Star with "V" device for valor for "courageous leadership and tenacious devotion to duty." He was medically retired as a Captain in December of 1968 as a result of wounds sustained in combat.

While in law school, Judge Mordue worked for two years as a Law Clerk in the Onondaga County District Attorney's Office. After graduating in 1971, as a member of the Justinian Honorary Law Society and the recipient of the Phi Alpha Delta award for academic excellence, he continued for ten more years as a prosecutor. He worked his way up from Law Clerk to Chief Assistant District Attorney in charge of Felony and Homicide prosecutions, with a 100 percent conviction rate. He was elected in a contested race for Onondaga County Court Judge and served from 1983 to 1985. He was cross-endorsed in 1985 by all four parties and served thirteen years as a New York State Supreme Court Justice. He formerly taught trial practice for eight years at the Syracuse University College of Law as an Adjunct Professor of Law.

Judge Mordue's military decorations include: the Combat Infantryman's Badge, Distinguished Service Cross, Bronze Star with "V" device, the Air Medal, the Purple Heart, and various Campaign and Service Medals. He was a moving force in creating the Korea-Vietnam Memorial in downtown Syracuse, the first monument in the country dedicated to both the Korean

and Vietnam Conflicts. As a lawyer he is a member of numerous state and local bar associations in addition to his recognition as the highest rated lawyer for competence and integrity by the Martindale-Hubble attorney rating service.

In August 1985, Judge Mordue was inducted into the Elmira, New York Sports Hall of Fame for football. In 1990, Judge Mordue was awarded the high honor of being named a Letter Winner of Distinction from Syracuse University. In 1999, Judge Mordue was inducted into the Syracuse University ROTC Alumni Hall of Fame. In 2002, Judge Mordue was presented the Distinguished American Award from The Central New York Chapter of the National Football Foundation and College Hall of Fame. In September 2009, Judge Mordue was honored with the Zunic Award by the Syracuse University Football Club.

Judge Mordue is married to the former Christina A. Peterson. They have three children, Daniel, Jackie and Michael, and two grandchildren, Jennifer and Katie.

DEBORAH H. KARALUNAS obtained a Bachelor of Arts degree from Cornell University in 1978 and graduated cum laude from Syracuse University College of Law in 1982. At the College of Law, Karalunas was a member of the International Law Review, Moot Court and the Justinian Honor Society.

Following law school, Karalunas clerked for United States District Court Judge Howard G. Munson in the Northern District of New York. In 1983, Karalunas joined the law firm of Bond, Schoeneck & King in Syracuse, New York where she later became a partner. During her 20 years in the litigation department of that firm, Ms. Karalunas represented a variety of corporate, municipal and individual clients in the state and federal courts of New York and other states. Her practice included intellectual property, commercial, employment, antitrust, ERISA, environmental and personal injury litigation.

In 2002 Karalunas was elected to serve as a Supreme Court Justice in the 5th Judicial District. She presides over a panoply of civil cases including personal injury, commercial, intellectual property, constitutional and environmental. In 2007 Karalunas was appointed presiding justice of Supreme Court, Commercial Division, Onondaga County.

Justice Karalunas has been an active member of various bar associations. In addition to serving as chair of several committees and sections, she served on the Board of Directors of the Onondaga County Bar Association and the Central New York Women's Bar Association. Justice Karalunas also was the President of the Central New York Women's Bar Association and Presiding Member of the Judicial Section of the New York State Bar Association. She currently serves on the Onondaga County Bar Foundation and as a Delegate to the New York State Bar Association.

Karalunas lectures frequently for state and local bar associations on many substantive law and trial practice topics. She also is a regular guest speaker, lecturer and moot court judge at Syracuse University College of Law.

Justice Karalunas and George, her husband of 33 years, have three children: Sarah (31), Evan (28) and Brian (24).

BIOGRAPHY OF THE HON. DAVID E. PEEBLES

Judge Peebles was sworn in and began serving as a Magistrate Judge on May 22, 2000. He received a Bachelor of Aerospace Engineering degree from the Georgia Institute of Technology in 1972 and a Juris Doctorate from the Syracuse University College of Law in 1975, both with Honors.

Judge Peebles began his legal career as an Assistant Onondaga County District Attorney, and thereafter served as Law Clerk to the Hon. Howard G. Munson, United States District Judge for the Northern District of New York. He is also a former partner in Hancock & Estabrook, LLP, a firm with which he was affiliated since September, 1978. While at Hancock & Estabrook, Judge Peebles served as Chair of the firm=s Labor and Intellectual Property Law Departments, and was a member of the firm=s Executive and Practice Management Committees.

Judge Peebles has served as a member of the Onondaga County Bar Association, and on the boards of several charitable and community organizations. He has also authored articles for and spoken at programs offered by the New York State Bar Association and the Onondaga County Bar Association on a variety of topics, including federal practice. In addition to the law, Judge Peebles has several outside interests, including music. In the past he has played trumpet in a variety of settings, including having performed with the Atlanta Symphony Orchestra and toured with the Jimmy Dorsey Orchestra.

Mr. Katz is a shareholder in Menter, Rudin & Trivelpiece, P.C. He is a member of its Board of Directors and manager of the Litigation practice group. Mr. Katz handles complex commercial litigation in state and federal courts in cases involving creditors' rights, lender liability defense, limited liability companies and partnerships, shareholder disputes in closely held corporations, contract disputes, trade secrets and technology licensing matters, employers' rights under non-competition and confidentiality agreements, and contested commercial foreclosure actions. He has tried cases to juries and judges, argued before appellate courts and presented matters to arbitrators and mediators. As a business litigator, his work includes problem solving activities including negotiating settlement agreements in the context of the business disputes he handles. Mr. Katz also provides litigation support to the firm's Business Restructuring and Bankruptcy practice group in complex matters arising under and in connection with cases filed under Chapter 11 of the bankruptcy code.

In February, 2013 he was named to the permanent Commercial Division Advisory Council by Chief Judge Jonathan Lippman of the State of New York. The purpose of the Council is to ensure that New York State resolves commercial disputes in ways that benefit the business community and the state’s economy.

Mr. Katz serves on the New York State Bar Association's Task Force on the State of Our Courthouses. He is the co-chair of the Committee on the Commercial Division, of the Commercial and Federal Litigation Section of the New York State Bar Association, serves as the Secretary of the Board of Trustees of the Northern District of New York Federal Court Bar Association and serves as co-chair of its committee on Continuing Legal Education. He is currently a member of the Board of Directors of Volunteer Lawyer Project of Onondaga County, Inc.

Mr. Katz has lectured on commercial litigation issues for the New York State Bar Association, the Northern District of New York Federal Court Bar Association, the Central New York Bankruptcy Bar Association and the Capital District Bankruptcy Bar Association. As past chairperson of the Commercial Law Section, he organized the Onondaga County Bar Association's award winning programs at the Syracuse Technology Garden. He served as a member of a statewide focus group concerning the Commercial Division convened by Chief Administrative Judge Pfau. Mr. Katz was from 2009 to 2011, Secretary of the Board of Medtech Association, an organization promoting the bioscience industry in Central New York.

Jonathan B. Fellows

Jonathan Fellows graduated cum laude from Hamilton College in 1980, and graduated magna cum laude from the Cornell Law School in 1985, where he served as Editor-in-Chief of the Cornell Law Review.

He served as a law clerk to the Honorable Phyllis A. Kravitch of the United States Court of Appeals for the Eleventh Circuit.

After his clerkship, he joined Bond, Schoeneck & King, where he maintains a diverse litigation practice.

He has tried numerous cases to verdict in both state and federal courts. He has also tried numerous cases in other forums such as FINRA, AAA, and JAMS, and before administrative tribunals such as the Division of Human Rights and the Division of Tax Appeals.

Doreen A. Simmons

Doreen A. Simmons is the leader of the Environmental Practice at the Syracuse-based law firm of Hancock Estabrook, LLP. She has more than 30 years of experience representing major and mid-sized industries, individuals, municipalities and not-for-profit organizations in State and Federal litigated matters and regulatory proceedings, primarily involving environmental laws. Her expertise extends to environmental compliance, acquisitions, permitting and auditing. A graduate of Purdue University and Albany Law School of Union University, Ms. Simmons served upon graduation as a Senior District Attorney in the County of Onondaga, where she served in the felony trial unit, thereafter, joining Hancock Estabrook, LLP in 1981.

Ms. Simmons received the Honorable James R. Duane Award in 2006 for contributions to the Federal practice and in September received The American Inns of the Court 2013 Professionalism Award for the Second Circuit Court of Appeals. She is the Founding President of the Northern District of New York Federal Court Bar Association and a selected Fellow of the New York State Bar Foundation. She has been active in the New York State Bar Association Environmental, and Commercial and Federal Litigation Sections. Ms. Simmons serves as Chair of the New York State Character and Fitness Committee, Fifth Judicial District, and is a member of the Second Circuit Joint Federal and State Judicial Council Committee.

John G. Powers — Bio

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John Powers is a Partner at Hancock Estabrook, LLP and specializes in commercial and civil litigation, practicing in federal and state court. He previously practiced in Washington D.C. with Arent Fox, LLP and was a Judicial Law Clerk for two years for the Honorable Frederick J. Scullin, Jr., former Chief Judge of the United District Court for the Northern District of New York.

Mr. Powers regularly presents on topics relating to federal civil procedure and is a past co-chair of the Federal Practice Committee for the NDNY Federal Court Bar Association.

Mr. Powers received his law degree from Syracuse University College of Law, a Master's Degree in Public Administration from the Maxwell School of Citizenship and Public Affairs, and his undergraduate degree from the United States Military Academy, at West Point, NY. He is admitted to practice in New York and the District of Columbia, the federal courts for the Northern, Southern, Western, and Eastern District of New York, as well as the Second Circuit and Federal Circuit Courts of Appeals and the United States Supreme Court.

Mr. Powers is a US Army veteran and devotes a considerable amount of time to veterans issues and represents numerous veterans on a *pro bono* basis. He volunteers as the director and principal staff attorney for the Central New York *Veteran's Pro Bono Clinic* sponsored by the Onondaga County Bar Association. He has been recognized for his pro bono services, receiving the *Empire State Counsel* designation by the New York State Bar Association in 2012, the 2011 NYSBA *President's Pro Bono Service Award* for the 5th Judicial District, the 2011 *Humanitarian of the Year Award* from Vietnam Veterans of America Central New York Chapter #103; and the 2010 OCBA *Distinguished Pro Bono Service Award* from the Onondaga County Bar Association.