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On Higher Ground?: Baseball's Antitrust Exemption

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NEW YORK STATE BAR ASSOCIATION



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Mark A. Berman

Ganfer & Shore LLP
New York City

NYSBA

Commercial and Federal Litigation Section

Spring Meeting

The Otesaga
Cooperstown, NY
May 13 - 15, 2016

This MCLE program offers up to 6 MCLE credit hours consisting of 1.5 in Professional Practice, 2 Skills, 1.5 in Law Practice Management, and 1 in Ethics





CLE Information

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York's MCLE rule, this program will qualify for **UP TO a total of 6 MCLE**. The break down is **1.5 in Professional Practice, 2 Skills (Transitional), 1.5 Law Practice Management (Transitional) and 1 in Ethics (Transitional)**.

Discounts and Scholarships:

New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, anyone who requires financial aid may apply in writing, **not later than ten working days** prior to the start of program, explaining the basis of his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. For more details, please contact: Lori Nicoll, New York State Bar Association, One Elk Street, Albany, New York 12207. 518.487.5563 or Inicoll@nysba.org.

Accommodations for Persons with Disabilities:

NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Lori Nicoll at 518.487.5563 or Inicoll@nysba.org.

Childcare Information

To inquire about childcare services call the Otesaga Hotel directly at (607) 547-9931 and ask for the Concierge. ***It is advisable to do this prior to your arrival.***

SCHEDULE OF EVENTS

Friday, May 13

- 3:00 p.m. – 6:30 p.m. **Registration – Oak Room**
- 6:30 p.m. – 9:30 p.m. **Children’s Pizza Party and a Movie** – Abner Doubleday Room
(Event will be dependent on a minimum of at least 5 children pre-registered for the event.)
- 6:30 – 7:30 p.m. **Cocktail Reception – Baseball Hall of Fame**
- 7:30 p.m. – 9:30 p.m. **Dinner – Baseball Hall of Fame**
- Welcoming Remarks** – **James M. Wicks, Esq.**, Section Chair
- NYSBA Welcome** – **David P. Miranda, Esq.**, President, New York State Bar Association
- Dinner Speaker: **Professor of Law Ross E. Davies**, George Mason School of Law. Professor Davies is a two-time winner of the Doug Pappas Award from the Society for American Baseball Research. His work on baseball and the law has appeared in numerous publications, including the Journal of Supreme Court History, the Baseball Research Journal, the NYU Journal of Legislation and Public Policy, the Seton Hall Journal of Sports & Entertainment Law, the Texas Review of Entertainment & Sports Law, and the Green Bag. Professor Davies clerked for Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit.
- The title of his talk will be **The Ten Greatest Lawyers in Baseball: A Contentious Ballot**, and it will include an interactive audience vote.

Saturday, May 14

- 7:00 a.m. An informal 5K run is planned for this morning for all those who are interested. We will convene at 7:00 a.m. at the hotel entrance and start the run promptly at 7:10 a.m. Walkers are welcome too!
- 7:00 a.m. **Breakfast – Glimmerglass Dining Room**
- 8:00 a.m. **Registration – Lake Room**
- 8:00 a.m. **Continental Breakfast with Exhibitors – Iroquois Room**
- 9:00 a.m. – 12:00 p.m. **General Session – Ballroom**
- 9:00 – 9:10 a.m. **Opening General Session Remarks** – **James M. Wicks, Esq.**, Section Chair
- NYSBA Welcome** – **Claire P. Gutekunst, Esq.**, President-Elect, New York State Bar Association
- Program Overview** – **Mark A. Berman, Esq.**, Section Chair-Elect and Spring Meeting Program Chair
- 9:10 – 10:25 a.m. **On Higher Ground?: Baseball’s Antitrust Exemption. (1.5 Professional Practice)**
The panel will consider the history, expansion, and endurance of the antitrust exemption for baseball, including discussing decisions calling the exemption into question in light of the doctrinal expansion of Congressional authority under the Constitutional Commerce Clause and the increasingly business-like nature of baseball; recent decisions relating to the baseball exemption; the Supreme Court’s deference to Congress on whether the antitrust exemption should still be applied; efforts in Congress itself to consider possible legislation; whether treating Major League Baseball differently from the NFL, NBA, and other professional sports leagues is appropriate; and the tension between the Supreme Court’s commitment to stare *decisis* and the Court’s acknowledgement that the antitrust exemption is “inconsistent” and “illogical.”
- Moderator: **Jay L. Himes, Esq.**, Labaton Sucharow LLP, New York City
- Panelists: **Hon. Rosemary S. Pooler**, Second Circuit Court of Appeals, Syracuse, NY
Seth Bloom, Esq., Bloom Strategic Counsel PLLC, Washington, D.C.
Edward Diver, Esq., Langer, Grogan & Diver P.C., Philadelphia, PA
Ed Edmonds, Associate Dean, Notre Dame Law School, Notre Dame, IN
Professor Michael Salinger, Professor of Management and of Economics, Boston University, Boston, MA

SCHEDULE OF EVENTS

Saturday, May 14 (continued)

9:00 a.m. – Noon

Children's Program at the Farmer's Museum

This is a supervised interactive teaching program. The children will be visiting all the shops including the Printing Press, Furrier Stable, Apothecary Drug Store, including the outdoor exhibition Otsego: A Meeting Place, located on the shore of beautiful Otsego Lake. This exhibit explores the lives and culture of the Haudenosaunee (Iroquois) people through their art, stories, and objects. The site includes a 19th century Seneca Log House from the Tonawanda Reservation and a reproduction 17th century Mohawk Bark House. **(Event will be dependent on a minimum of at least 10 children pre-registered for the event.)**

10:25 – 10:45 a.m.

Refreshment Break with Exhibitors – Iroquois Room

10:45 a.m. – 11:35 a.m.

Social Media and Its Effect on the Jury System (1.0 Skills)

This multi-dimensional panel will examine issues surrounding the use of social media by jurors and by attorneys during voir dire and the resulting actual and potential impact on jury trials. The depth of information now available to attorneys concerning potential and sitting jurors is extraordinary. The first part of the program will demonstrate through a role play re-enactment how advanced technologies can transform responses on a one-page jury questionnaire into a comprehensive amalgam of information about a potential juror, including, among other things, information relating to his or her social media relationships. Using the information collected, there will be a mock voir dire of a juror. The second part of the program will focus on juror misuse of social media, the prevalence of which will be highlighted by a recent study using software that enables users to view public Tweets by geographical location and in particular around the courthouses in lower Manhattan. The panel will discuss issues raised during the role play and study and a number of cutting-edge issues in the "jury and social media" world, with a particular focus on the Section's Social Media Jury Instruction Report. For instance, should jurors be advised that attorneys may have investigated their backgrounds or that attorneys may monitor their public social media posts? Are courts limited to issuing jury instructions to address technological changes and to explain the risks of engaging in improper social media usage, or should courts go further and require, for example, jurors to sign pledges not to inappropriately use social media?

Moderator:

Carrie H. Cohen, Esq., Assistant United States Attorney Southern District of New York, New York City

Panelists:

Mark A. Berman, Esq., Ganfer & Shore, LLP, New York City

Hon. John M. Curran, New York State Supreme Court, Appellate Division, Fourth Department, Buffalo, NY

Vishal C. Gupta, Esq., Steptoe & Johnson LLP, New York City

Jonathan D. Lupkin, Esq., Lupkin & Associates PLLC, New York City

Scott L. Malouf, Esq., Pittsford, NY

Wendy Conway Schmidt, Esq., Deloitte Advisory Business Intelligence Services, Deloitte Financial Advisory Services LLP, New York City

Scarlett Kim, Esq., Deloitte Advisory Business Intelligence Services, Deloitte Financial Advisory Services LLP, New York City

Paul D. Montclare, Esq., Mitchell Silberberg & Knupp LLP, New York City

Lauren J. Wachtler, Esq., Mitchell Silberberg & Knupp LLP, New York City

11:35 a.m. – 12:00 p.m.

Ethical Issues Relating to Social Media Communications and Jurors (.5 Ethics)

The panel will continue with a discussion of ethical issues concerning what may constitute an attorney's improper "communication" with a juror resulting from monitoring a juror's social media posts and under what circumstances must the court be notified of a juror's social media misconduct.

12:00 – 2:00 p.m.

Advancing Women in the Profession Luncheon Discussion. Continuing the Section's acclaimed program at the 2016 Annual Meeting, all meeting attendees are invited to a working lunch on Saturday (immediately following the panel presentations, but prior to the afternoon activities). The lunch will be an open forum to discuss the Section's initiative to advance women in the profession, including increasing the number of women who have a primary role in the courtroom, and program planning for 2016-17. **Pre-registration is required and limited to 30 attendees. No CLE will be given at this luncheon.**

12:00 p.m.

Buffet Lunch – Main Dining Room

SCHEDULE OF EVENTS

Saturday, May 14 (continued)

- 1:00 p.m. **Golf** – at Leatherstocking Golf Course. Tee times have been reserved. Prior sign up required on the registration form. **Individual fees payable at Golf Pro Shop.**
- 2:00 – 6:00 p.m. **Afternoon Free for Recreation**
- 6:30 – 9:30 p.m. **Children’s Pizza Party and a Movie** – Abner Doubleday Room
(Event will be dependent on a minimum of at least 5 children pre-registered for the event.)
- 6:30 – 7:30 p.m. **Cocktail Reception – Veranda Lower Terrace**
- 7:30 – 9:30 p.m. **Gala Dinner – Ballroom**
- Presenter: **Presentation of the Robert L. Haig Award for Distinguished Public Service**
Mark C. Zauderer, Esq.
Flemming Zulack Williamson Zauderer LLP
New York City
- Recipient: **Hon. Karen K. Peters**
Presiding Justice
Appellate Division, Third Department

Sunday, May 15

- 7:00 a.m. **Breakfast – Glimmerglass Dining Room**
- 8:30 a.m. **Registration – Lake Room**
- 8:00 – a.m. **Continental Breakfast with Exhibitors – Iroquois Room**
- 9:00 a.m. – 12:00 p.m. **General Session – Ballroom**
- 9:00 – 10:00 a.m. **So You Think You Are Effective in Mediation – Not So Fast! Sticky Mediation Issues and How To Address Them. (1.0 Skills)**
This panel will discuss differing ways to deal with difficult situations such as when a party refuses to make a demand, whether opening statements can assist or hurt the mediation process, client relations such as how to get your client in tune with where negotiations need to go to reach a settlement, where “principle” has infected a client’s perception of the realities of his situation, how mediators can help break what appears to be an intractable impasse and where the dispute is a “do or die” situation for a company.
- Moderator: **Stephen P. Younger, Esq.,** Patterson Belknap Webb & Tyler LLP, New York City
- Panelists: **Simeon H. Baum, Esq.,** Resolve Mediation Services, Inc., New York City
Hon. Helen E. Freedman, New York State Supreme Court, Associate Justice, Appellate Division, First Department, (Ret.), JAMS, New York City
Dina R. Jansenson, Esq., JAMS, New York City
Matthew R. Maron, Esq., Assistant General Counsel-Litigation, The Trump Organization, New York City
Shelley Rossoff Olsen, Esq., JAMS, New York City
Mark C. Zauderer, Esq., Flemming Zulack Williamson Zauderer LLP, New York City
- 10:00 – 10:25 a.m. **Sticky Ethical Issues in Mediation (.5 Ethics)**
The panel will also address such sticky ethical issues as when a party and/or her attorney is “known” not to be telling the truth in a mediation and when privileged communications are improperly revealed during the mediation process.
- 10:00 – 11:00 a.m. **Children’s Fishing Tournament – Otesaga Dock**
Children of all ages are invited to participate in a fishing tournament at the Otesaga dock. Children 6 years and younger will need to be accompanied by a parent. Children 14 years and older will need to obtain a fishing license. Prizes will be awarded. Pre-registration is required.
(Event will be dependent on a minimum of at least 5 children pre-registered for the event.)

SCHEDULE OF EVENTS

Sunday, May 15 (continued)

10:25 – 10:45 a.m.

Refreshment Break

10:45 a.m. – 12:00 p.m.

Proportionate and Cost-Efficient eDiscovery: An Oxymoron? (1.5 Law Practice Management)

“Proportionality” is the new buzzword in eDiscovery since amendments to the Federal Rules of Civil Procedure went into effect on December 1, 2015. This panel will explore what it means for eDiscovery to be “proportionate,” and will offer practical tips and strategies that parties can implement immediately to achieve the just, speedy, and inexpensive resolution of their disputes in state and federal courts. Alternatives to be explored include: cooperation and meet-and-confer strategies; phased discovery; the use of technology-assisted review (“TAR”) and other advanced search tools; claw-back agreements and Rule 502(d) orders; and categorical privilege logs. This panel of well-known judges and practitioners, who are experienced in eDiscovery matters, will offer their perspectives on controlling the burgeoning costs of eDiscovery.

As a special feature, in advance of the panel, registrants will be provided with the link to an on-line TAR tool containing approximately 300,000 emails from Jeb Bush’s eight-year term as governor of Florida. Registrants will be able to test and hone their eDiscovery search skills using a state-of-the-art tool.

Moderator:

Maura R. Grossman, Esq., Wachtell, Lipton, Rosen & Katz, New York City

Panelists:

Hon. Andrew J. Peck, United States Magistrate Judge for the Southern District of New York, New York City

Hon. Barbara R. Kapnick, New York Supreme Court, Associate Justice, Appellate Division, First Department

Ignatius A. Grande, Esq., Hughes Hubbard & Reed LLP, New York City

Sandra J. Rampersaud, Esq., Cravath, Swaine & Moore LLP, New York City

Anne S. Rutland, Esq., Buffalo, NY

12:00 p.m.

Adjournment & Departure

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What's There to do in Cooperstown

The Farmers' Museum

Step back in time and experience history at *The Farmers' Museum*, where skilled artisans rekindle the traditions of 19th-century rural New York: blacksmithing, spinning and weaving, broom making, woodworking, and printing. See 19th century furnishings, period botanical specimens, a working farmstead with heritage breeds of animals, an early 19th-century wallpaper manufactory, and the Cardiff Giant. The museum offers hands-on activities, daily programs and special events throughout the year. **Hours: 10 a.m. to 5 p.m. daily**



Fenimore Art Museum

An elegant 1930s neo-Georgian mansion with terraced gardens overlooking Otsego Lake. Fenimore Art Museum is a showcase of premier collections of American art. The museum features changing exhibitions, with paintings by Edward Hicks, silver from Albany, and works by folk artist Eddie Lee Kendrick. Contemporary photography, James Fenimore Cooper memorabilia, Hudson River School paintings and more. Also enjoy the acclaimed Eugene and Clare Thaw Collection of American Indian Art in the state-of-the-art American Indian Wing. The museum offers gallery tours and multi-media programs daily, and special events throughout the year. **Hours: 10 a.m. to 5 p.m. daily.**

National Baseball Hall of Fame and Museum

Located on Main Street in the heart of picturesque Cooperstown, the *Hall of Fame* is one of the country's major tourist destinations and is surely the best-known sports shrine in the world. Opening its doors for the first time on June 12, 1939, the *Hall of Fame* has stood as the definitive repository of the game's treasures and as a symbol of the most profound individual honor bestowed on an athlete. It is every fan's "Field of Dreams" with its stories, legends, and magic to be passed on from generation to generation. **Hours: 9 a.m. to 9 p.m. daily.**

Brewery Ommegang

Don't leave Cooperstown without visiting Belgium! *Brewery Ommegang* is dedicated to brewing authentic traditional Belgian beers in America. Visit the farmstead brewery, take a tour, sample unique ales, and discover Belgian roots you never knew you had. **Hours: 11 a.m. to 6 p.m. daily.**



Fly Creek Cider Mill & Orchard

Located three miles from Cooperstown, Fly Creek has been squeezing apples into cider since 1856. Tour the old-fashioned water-powered mill where the tradition of cidermaking comes alive. **Hours: 9 a.m. to 6 p.m. daily.**

Check out this website for fun things to do with your children.

www.cooperstownforkids.com



NEW YORK STATE BAR ASSOCIATION
MEETINGS DEPARTMENT

One Elk Street
Albany, NY 12207