THE MOTHER COURT

A NEWSLETTER OF THE SDNY CHAPTER OF THE FEDERAL BAR ASSOCIATION

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Nancy Morisseau, President SDNY Chapter

FBA SDNY Chapter program held with the Hispanic National Bar Association and The LGBT Bar Association of Greater New York (LeGaL), on "Intersectionality and the LGBTQ Latinx Legal Community"

A MESSAGE FROM THE PRESIDENT

"And then the sun took a step back, the leaves lulled themselves to sleep and Autumn was awaked."
– Raquel Franco

Dear SDNY Chapter Members, Colleagues, and Friends:

Welcome to our Fall issue! September is a month of fresh starts or just re-booting routines. It is the beginning of fall, the start of the a new school year, and for some of us, the return to in-person work post pandemic. Every day is a new beginning in itself. What would be the first thing you would change, today?

In this issue, the Hon. Denny Chin (2d Cir.) shares his experience with the RISE Court; three leading e-discovery practitioners discuss how a solution can sometimes become a problem; two corporate lawyers discuss the legal impacts of COVID-19 on M&A deals; and a not-for-profit executive director reports on Congress' examination of the Social Security Administration during the pandemic.

As always, there is a brief review of past programs and upcoming events.

Look for our Winter issue in January!

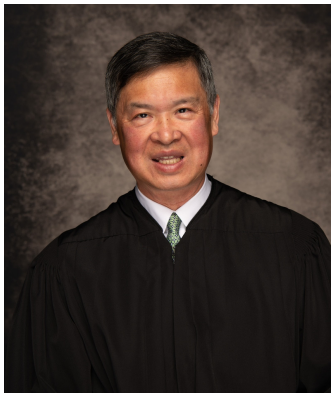
RISE: THE SDNY'S REENTRY PROGRAM

BY: HON. DENNY CHIN

On January 29, 2019, the United States District Court for the Southern District of New York launched its RISE Court. RISE stands for Reentry through Intensive Supervision and Employment, and the program seeks to help individuals with criminal convictions reenter society after their release from prison through increased supervision and initiatives to encourage employment.

I was asked by Judge Denise Cote, who spearheaded the effort to start the program, to preside over the first RISE Court -- what eventually became known as RISE Court I. I was assigned twenty individuals on supervised release who were in the high and moderate risk categories for recidivism. All had been convicted of serious crimes -- racketeering, gun violations, and narcotics trafficking. Their prison terms ranged from five months (for the one woman in the group) to 240 months.

Inspired by the long-running STAR Court in Philadelphia, we assembled a terrific team: Probation Officer (now Probation Officer Specialist) Lisa Faro and her colleagues from the Probation Office; representatives from Federal Defenders of New York and the SDNY U.S. Attorney's Office; Columbia Law School students; and volunteer lawyers and law firms. Joining Judge Cote in planning and implementing the program were her colleagues Judges Paul Engelmayer and Ronnie Abrams.



The Hon. Denny Chin is a Senior United States Circuit Judge of the United States Court of Appeals for the Second Circuit. He was a United States District Judge of the United States District Court for the Southern District of New York before joining the federal appeals bench. Judge Chin was the first Asian American appointed as a United States District Judge outside of the Ninth Circuit.

"Nine of the participants completed the requirements; seven had their terms of supervised release reduced by one year. Two of the participants never missed a session and they did so well their ten-year terms of supervised release were reduced by seven years. "

We had sessions in court every two weeks. We met as a group, but I spoke to each participant individually. The concept was to create a positive, supportive environment to help the supervisees transition back to their communities by providing employment opportunities, counseling, and training, and assistance with civil legal issues such as child support arrears, identification document problems, and unpaid traffic tickets. And if the participants successfully completed a year in the program, I would recommend to the sentencing judge that their term of supervised release be reduced by a year.

We completed RISE Court I in January 2020, but we certainly had setbacks along the way. Three participants were terminated from the program because they were arrested for selling heroin. Marijuana was a complicating factor, as many participants tested positive for marijuana use. One individual was dismissed from the program because he was caught giving a urine sample with a "whizzinator."

But overall, we believe we accomplished a great deal, and the program was enormously gratifying. The supervisees bonded as they supported and encouraged each other. They worked hard, maintaining employment, looking for work when they were unemployed, attending training courses (including, for example, commercial driver's licensing and food handling courses), and attending counseling sessions. Over the course of the year, we could see their attitudes improving and their anger dissipating.

Nine of the participants completed the requirements; seven had their terms of supervised release reduced by one year. Two of the participants never missed a session and they did so well their ten-year terms of supervised release were reduced by seven years. One participant, who had served a twenty-year term of imprisonment, went to culinary school, graduated, and obtained a job cooking for senior citizens. Another participant -- who had worked three jobs for a year -- brought his daughter to a session, as she was going off to college later that week. I said to the young woman: "Your father is very proud of you; he talks about you all the time. But you should be very proud of him as well, for he has worked so hard." And even a participant who did not complete the requirements benefitted -- he told us at the end that this was the longest he had stayed out of jail since he was thirteen years old.

Because of the success of RISE Court I, in July 2019 the SDNY started a second cohort of twenty participants, RISE Court II (supervised by our beloved Judge Deborah Batts and then by Magistrate Judge James Cott after her untimely death) and later a third cohort of twenty participants, RISE Court III (supervised by Judge Raymond Lohier). When the pandemic hit, RISE Courts II and III went virtual, proceeding by telephone. Both sessions, however, were completed, and this past June we had a joint graduation for all the participants in RISE Courts I, II, and III who completed the requirements. Our guest speaker was Congressman Hakeem Jeffries, who started his legal career in the SDNY as a law clerk for Judge Harold Baer Jr.

In April 2021, I started another session of RISE Court, with a new cohort of ten participants, trimmed down because of the pandemic. This fall the program will be expanding to the White Plains Courthouse, with Judge Cathy Seibel presiding, and Judges Cott and Lohier will also start new sessions.

We are grateful to the supervisees, who worked so hard and taught us so much, as well as all who participated, including the hard-working and dedicated individuals in the Probation Office; Peggy Brown-Goldenberg and her colleagues at Federal Defenders; Alexi Mantsios at the U.S. Attorney's Office; those who served as liaisons and coordinators (Frederick Schaffer, James Moss, and Daniel Beller); and the lawyers at Gibson, Dunn & Crutcher, Jenner & Block, and Proskauer Rose.

Left to right: Judge Denny Chin, Jerel Pool, and Probation Officer Specialist Lisa Faro

ESI PROTOCOLS: ESI TOOL TURNED ESI PROBLEM?

BY: DAWSON HORN, DAVID KESSLER, AND HON. ANDREW PECK (RET.)

When electronically stored information ("ESI") started escalating costs and delaying the resolution of disputes because discovery needed to be redone, judges and practitioners bemoaned the fact that much of this could have been avoided if only the parties talked to each other early in the case and agreed how the parties would fulfill their discovery obligations. Both the 2006 and the 2015 amendments to the Federal Rules of Civil Procedure enshrined this idea, and almost every serious writing on e-discovery espouses the benefits of early discussions and cooperation (even if the exact meaning of that term can be debated).

The concept of early discussions and cooperation, however, transformed into the concept of an ESI Protocol -- a term not found in the Federal Rules – but originally designed to capture what the parties had agreed to with respect to the discovery process. Initially, these protocols were relatively simple agreements as to the production format for loose, unstructured ESI (e.g., Excels in native format, other file types like Word documents in TIFF format, as well as specific metadata fields to be produced in a load file). Over time, ESI Protocols have grown more elaborate and complex, can address numerous aspects of discovery including search terms, privilege logs, and technology-assisted review ("TAR"), and can take months to negotiate. Ironically, parties can spend more time discussing their ESI Protocols than they do the meaning of the document requests and objections the Protocol is meant to facilitate.

Worse, parties now litigate the ESI Protocols both before, during, and after discovery. Thus, the supposed time and cost-saving device too often becomes a contentious negotiation that delays discovery and then leads to motion practice.

In this article, we make some suggestions to the bench and bar in an effort to make the use of ESI Protocols less burdensome and more consistent with the goal set forth in Rule 1 of the Federal Rules of Civil Procedure, to facilitate a "just, speedy, and inexpensive determination" of actions.

- **Litigants, do your homework.** Often parties make commitments based on assumptions about their data. For example, they assume there will be only XXX terabytes of data or only YYY key word hits. When those assumptions prove incorrect, the litigant may be forced to deviate from the commitment in the Protocol to which it had agreed. Where that commitment is memorialized in court ordered ESI protocol, that can be a significant problem. Before entering a Protocol, ask for time to understand the landscape of the collection. So, we offer three guidelines: Don't guess. Where you don't know, don't commit. And where you need to, seek time to do some homework on the data sources (e.g., sampling, interview client IT personnel) to give you actual information you can rely upon.
- **Does this really need to be in a Protocol?** The authors submit that an overarching purpose of an ESI protocol is to have the trains run on time and facilitate resolution of the inevitable surprise derailments. Tested against that standard, you may find many provisions of an ESI protocol that some consider standard, need not be included. We encourage parties to think hard about whether each and every element of the process needs to be memorialized in an ESI Protocol, especially one to be Court ordered. Remember, the goal is to have an ultimate production that meets Rule 26 standards. It may not be important to memorialize the mode of transportation or route taken to get to that destination.
- **Eschew unnecessary complexity.** This is related to the above. The parties should understand that, especially in large cases with many types of data, well laid discovery plans may have to change depending on the circumstances. In the words of former heavyweight champion, Mike Tyson: "Everybody has a plan until they get punched in the mouth." When your ESI Protocol is exceptionally detailed, you are constrained in your ability to respond to circumstances as they develop (punches in the mouth or terabytes of newly discovered data).

- **The advantages of TAR can be negated by an overreaching ESI Protocol.** The genius of data analytics and evidence-based discovery methods is that they are dynamic and let the document populations and data reveal information that enables the discovery architect to be efficient in separating the wheat from the chaff. ESI Protocols often cut this off at the knees. Not only are they negotiated early in matters when neither side has enough information to know how TAR may work in the matter, but rigorous requirements restrict parties' ability to adapt to changing circumstances and what the data is telling a responding party. An overly restrictive protocol turns discovery into a mechanistic process and disables the discovery architect from acting "in light of experience and guided by intelligence."

Don't let the ESI Protocol interfere with the self-executing nature of the Federal Rules. This plays out in two contexts:

- First, the Federal Rules of Civil Procedure do not mandate ESI Protocols and the discovery plan required by Rule 26(f) does not contemplate the intricate requirements now seen in complex ESI Protocols (especially around keywords and TAR). Discovery is self-executing and each party is only bound by the Rules. If a party fails to comply with its discovery obligations, there is a mechanism to address it. Savvy parties and lawyers will seek agreements where they can gain clarity on their responsibilities, but imposing unnecessary (or more burdensome) obligations should be avoided. Sedona Principle 6 – that the responding party is in the best position to determine how it will search for and produce responsive documents and ESI - should carry the day. Indeed, for these reasons we suggest that courts should tread very carefully before imposing any ESI Protocol over a party's objection.

- Second, the case law is littered with examples of the unintended consequences of ESI protocols. One of those unintended consequences is that a party can find that it has negotiated itself out of the protections afforded by the Federal Rules and Sedona Principle 6– especially where the ESI protocol becomes “so ordered” by the court. In the case of *In re Valsartan*, 337 F.R.D. 610 (D.N.J. 2020) for example, Defendant Teva Pharmaceuticals argued that Court should rely on a Rule 26 proportionality analysis to evaluate the propriety of its use of a review methodology different from that it had earlier agreed to in its ESI protocol with plaintiff.

The court, however, disagreed. It held that a court "must first decide what the Protocol requires and whether Teva violated these requirements." Id. at 617. The court stated "there is no legitimate question that the Court’s Order trumps Teva’s proportionality argument. If the protocol has been violated the Court’s task is to decide the relief to be granted, not to do a proportionality analysis under Fed.R.Civ.P. 26(b)(1)." Id.

And note that a “right to amend clause” will not necessarily get you out of this situation. Some might argue that parties who feel that the Protocol is imposing an undue burden can always ask the opposing party or court to amend the order. In our view, this is almost never effective as it only leads to more expensive negotiations, leveraged concessions, and motion practice with the very real possibility the Court holds the party to their agreement and refuses to change the protocol.

August 4, 2021, virtual launch of the *Talking with Trailblazers* series featuring Patricia Martone, a renowned patent attorney, arbitrator, adjunct professor and currently a research fellow with multiple awards.

To conclude, we believe that attention to these suggestions will lessen the instances of unanticipated negative results flowing from ESI Protocols. When parties reach quick agreement about discovery parameters that help each side clarify obligations so that neither side makes unnecessary errors, ESI Protocols (or agreements) are helpful tools that can reduce friction. Where ESI Protocols become overly complex documents that attempt to address every discovery contingency in advance and bind responding parties in ways that do not enable them to freely use their legal judgment to changing circumstances, they can miss their intended goal of securing a "just, speedy and inexpensive" determination.

*** The views expressed in this article are those of the authors and do not necessarily represent the views of their respective organizations.***

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FBA SDNY CELEBRATES HISPANIC HERITAGE MONTH SEPTEMBER 15 - OCTOBER 15

FBA SDNY Chapter Supports the U.S. District Court (SDNY) Summer Law Intern/Clerk Program

The FBA SDNY Chapter and the FBA Judicial Division enabled more than 21 law interns/clerks from the U.S. District Court (SDNY) to participate in the SDFL Summer Law Clerk hybrid internship program this summer. During the program, participants split their time between in-person and remote work, engaged in writing assignments, observed court proceedings, and met with judges around the country. Immediate Past President FBA SDNY Chapter, and FBA Board of Directors Member the Hon. Mimi Tsankov, participated in the program as a featured speaker.

Law clerks and interns in the SDFL Summer Law Clerk Program

IMPACT OF COVID-19 on M&A Deals

BY: MICHAEL J. ZUSSMAN AND JACOB G. SHULMAN

Despite a brief pause at the outset of the COVID-19 pandemic, middle-market companies adapted quickly. Mergers & acquisitions (M&A) continued, but the pandemic led to important changes in deal work.

Operational Changes

COVID-19 introduced companies to a minefield of new legal issues, such as furloughing or terminating employees and experiencing a remote workforce. Companies scrambled to update remote access to servers and maintain cybersecurity compliance, and applied for payroll loans under the Paycheck Protection Program (PPP). With many employees now asking to work remotely permanently, companies must ensure compliance in each jurisdiction under corporate, labor, and tax laws. In addition to remote work policies, employers must also provide clarity on in-person rules for social distancing, masks, and vaccination requirements. Companies must reveal these changes during due diligence, and in the purchase agreement schedules as related to material adverse events, legal non-compliance, and other changes outside of the ordinary course.

PPP Loans

Many companies have PPP loans outstanding. While sellers typically deliver a company debt-free at closing, buyers have closed over PPP loans, escrowing the outstanding amounts anticipating forgiveness. The PPP escrow is released to seller to the extent the loan is forgiven, with the balance returned to the buyer. Deal attorneys must also carefully characterize PPP loans. While technically debt, sellers anticipating full forgiveness should seek to avoid the PPP loan affecting the economics of the deal. To the extent not forgiven, the PPP loan will cause a purchase price adjustment.

Deal Economics

Deals are often priced based on EBITDA, but now, deal attorneys will factor in lost revenues and profits; employment changes, supply chain disruptions, loss of revenues, and other declines related to COVID-19; all of which affect the company's balance sheet. Some customers declared bankruptcy or ceased business, further impacting the company's bottom line. Buyer's counsel will require clarity of all such changes.

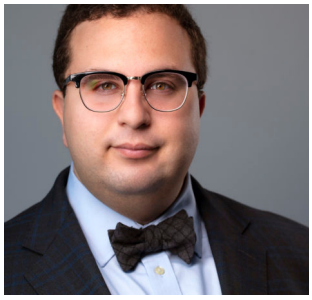
Due Diligence

Due diligence shifted during the pandemic and buyers now request information about material changes in compensation or benefits, employee hours, and layoffs or furloughs as a result of COVID-19. Buyers investigate sellers' compliance with new laws, such as FFCRA and the CARES Act, and require sellers to demonstrate multi-jurisdictional compliance with laws where remote employees newly reside.

Buyers analyze commercial relationships to determine the existence of material reductions or cancellations, delays, force majeure events, and defaults that have or may negatively impact the company from satisfying its contractual obligations. The increased diligence is also due to more frequent use of representations and warranty insurance, which leads to more fulsome diligence and disclosures.

A version of this article first appeared in the August 2021 issue of New Jersey Lawyer, *a New Jersey State Bar Association publication*.

Michael J. Zussman, the 2015-2016 FBA Chapter president, is a partner at OlenderFeldman LLP in Summit, NJ.



Jacob G. Shulman is an associate in the corporate department at OlenderFeldman LLP in Summit, NJ.

CONGRESS EXAMINES SSA CUSTOMER SERVICE DURING THE PANDEMIC

BY: BARBARA R. SILVERSTONE

Over a year after the Social Security Administration closed its doors to the public due to the Covid-19 pandemic, The Senate Finance Committee held a hearing on April 29, 2021 entitled “Social Security During COVID: How the Pandemic Hampered Access to Benefits and Strategies for Improving Service Delivery.” The witnesses were SSA Deputy Commissioner of Operations Grace Kim; Peggy Murphy, the manager of the Great Falls, Montana district office and Immediate Past President of the National Council of Social Security Management Associations (NCSSMA); Tara McGuiness of the New America Foundation think tank, who worked on Affordable Care Act portals and other government benefits application processes; and Kascadare Causeya, who assists people who are homeless and at risk of homelessness in Portland, Oregon with their disability claims.

In March 2020, SSA closed both hearing offices and local offices to protect both its employees and the population served. Hearings for disability claims have been held by phone for much of the past year. Because much of the work at local offices is done in person and on paper, most offices were not equipped to work remotely. As a result, work backed up, and processing of initial claims for disability has slowed down. Deputy Commissioner of Operations Grace Kim testified that the managers who are going in to the offices are scanning millions of documents as a “work around,” but such a system slows productivity.

The offices are only open to the public with appointments, and only for certain limited situations. Many individuals applying for Supplemental Security Income are unable to complete the application on their own, yet cannot get appointments in the offices. Senator Rob Wyden (D-OR) chair of the Senate Finance Committee noted that “Social Security and social distancing go together like oil and water.” Claimants have been asked to mail in original proof of identification, such as green cards, drivers licenses or passports, which could leave them without these important documents for several weeks. Senator Wyden gave Social Security two weeks to provide the Senate Finance Committee with a detailed plan outlining alternative ways to get this information. Ms. Murphy of NYSSMA stated that the offices to reopen and summarized: “This is a moment for SSA to redefine itself, its mission and its place in the public sphere and finally move into the 21st Century.”

Barbara Silverstone is the Executive Director of the National Organization of Social Security Claimants' Representatives.

UPCOMING PROGRAMS

- **SEPTEMBER 30, 2021** – TALKING WITH TRAILBLAZERS SERIES FEATURING JESSICA BERMAN, DEPUTY COMMISSIONER, NATIONAL LACROSSE LEAGUE
- **OCTOBER 13, 2021** – VIRTUAL GAME NIGHT WITH YOUNG LAWYERS DIVISION OF CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION (CITBA)
- **OCTOBER 14, 2021** – FBA SDNY INSTALLATION CEREMONY
- **OCTOBER 21, 2021** – CLERKING IN THE FEDERAL COURTS
- **NOVEMBER 3, 2021** – TRANSGENDER ATHLETES AND HIGH SCHOOL SPORTS
- **DECEMBER 9, 2021** – FBA SDNY VIRTUAL HOLIDAY PARTY
- **JANUARY 20, 2022** – SEXUAL HARASSMENT IN THE WORKPLACE: TITLE VII AND NYSHRL

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