

# Commercial and Federal Litigation Section Newsletter

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

## Message from the Outgoing Chair

It has been an honor and privilege to serve as Chair—indeed the first Chair of color—of the Commercial and Federal Litigation Section. This has been an extraordinary year for all of us. Because of the hard work and dedication of your officers, the Executive Committee, and so many talented members, I can report that our growing and strong Section is in wonderful condition. I know I am leaving you in the most capable hands. Greg Arenson will be a great Chair.



Tracee E. Davis

Reflecting on the past year, we should all be proud of our Section’s accomplishments. There are so many, the confines of this article will not permit me to list them all. So I will highlight only a few.

The Section’s newly formed Committee on Commercial Jury Charges, headed by Judge Andrea Masley,

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## Message from the Incoming Chair

It is my privilege and honor to serve as the twenty-fifth Chair of the Commercial and Federal Litigation Section. That calls for a celebration (of the Section’s accomplishments, not my accession to the Chairmanship), and the Section will celebrate its 25 years of existence on October 23, 2013, with a reception at the Stanley H. Kaplan Penthouse in the Samuel B. and David Rose Building in New York City. All Section members are invited.



Gregory K. Arenson

Looking back at the 25 years of the Section’s history (and I have been a member the entire time), I see that, among other things, the Section has played major roles in the formation of the Commercial Division, the elimination of occupational exemptions for jurors, the enactment of Local Rule 26.3 of the Rules of the United States District Courts for the Southern and Eastern Districts of New York providing for uniform definitions for discov-

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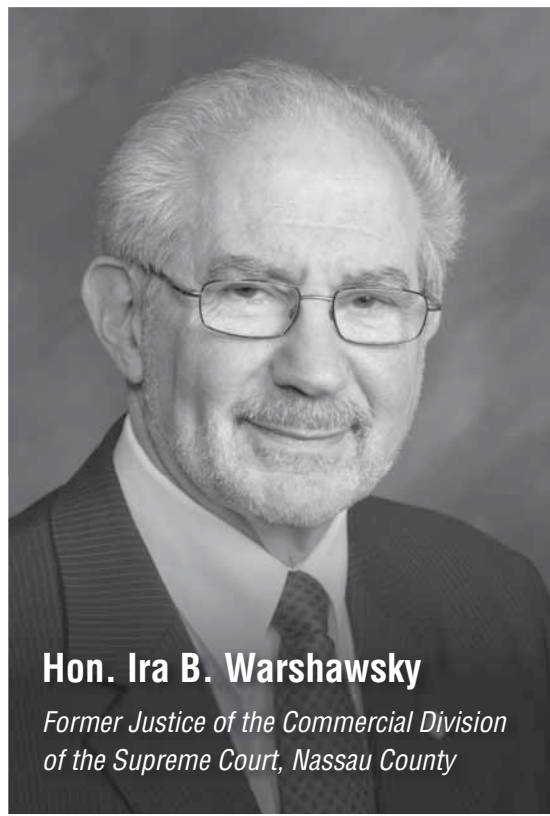
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# HON. IRA B. WARSHAWSKY

**Former Supreme Court Justice of the state of New York,  
Nassau County, has joined NAM's New York Metro panel**



**Hon. Ira B. Warshawsky**

*Former Justice of the Commercial Division  
of the Supreme Court, Nassau County*

Judge Warshawsky has been a distinguished member of the New York judiciary for the past 25 years. As a New York Supreme Court Justice in Nassau County's Commercial Division from 2002 through 2011, he presided over various high-stakes business claims and disputes, including business valuation proceedings, corporate and partnership disputes, class actions and complex commercial cases. Immediately prior to this appointment, Judge Warshawsky handled general litigation, including products liability, from 1998 to 2002. From 1987 to 1997, he sat in the Nassau County District Court presiding over a wide variety of matters.

According to the 2009/2010 New York Judge Reviews, Judge Warshawsky has been praised for keeping a "calm" demeanor, even during highly charged, high-profile cases. Lawyers interviewed described Judge Warshawsky as "one of the hardest working, intelligent, even-handed judges who has a very good sense of justice." He has been described as a "top-notch judge" who is known for encouraging settlement negotiations without being overly aggressive. One attorney stated, "Judge Warshawsky is one of the best judges I have ever appeared before in the nation."

**Judge Warshawsky is available to hear cases in any of  
NAM's offices throughout the New York Metropolitan area.**



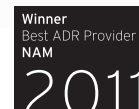
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## Message from the Outgoing Chair

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who with the incredible work of former Section Chair Lauren Wachtler, Commercial Division Justice Shirley Kornreich, and one of our newest jurists, Judge Melissa Crane, presented several substantive reports, including proposed jury instructions, which were enthusiastically received by the official Pattern Jury Instructions Committee. Through their efforts, we have managed this year, hopefully, to establish a solid working relationship with the official PJI Committee that will continue to grow under Greg's leadership.

During this past year, the Section also established a Committee on Legislative and Judicial Initiatives, headed by former Section Chair Vince Syracuse. With the Committee serving as a vehicle, the Section can now effectively work on issues and legislation affecting the state and federal judiciary and the advancement of commercial litigation. Indeed, this year, with the Committee's assistance, the Section became one of the leading voices of the New York State Bar Association in advocating before Congress the need for adequate funding of the federal judiciary and in extolling the deleterious impact budget cuts will have on the administration of justice.

During the year, the Section also established what may be the first of its kind, a Committee on Social Media, to address the legal issues that crop up in discovery of social media and in the use of social media by attorneys. Due to the leadership of Co-Chairs Mark Berman and Ignatius Grande, the Section now has a presence on Twitter and can be followed at @nysbacomfed. Also another first, the Section was invited to join the American Bar Association's delegation to Cambodia. Headed by Eastern Bankruptcy Court Judge Elizabeth Stong, our Section participated in a week-long international legal exchange that focused on the rule of law in the U.S., the role of judges in facilitative case management, and the importance of establishing specialized commercial courts.

As I said at the onset, these are just a few of the Section's numerous accomplishments this past year: time and space do not allow me to list them all. However, I cannot leave this subject without mentioning some of the contributions made by our other committees, which were tremendously active all year. For instance, our Committee on E-Discovery, headed by Connie Boland and Adam Cohen, produced an update to our highly acclaimed Best

Practices Guide to E-Discovery, which was adopted by the NYSBA. Our Federal Judiciary Committee, under Jay Safer's and John Winter's leadership, produced an update to our Section's Guide to Individual Practices of Federal and Magistrate Judges in the Southern and Eastern Districts. Our Committee on CLE, headed by Kevin Smith, presented our Section's highly touted Commercial Trial Academy for the second straight year. Finally, our Committee on Diversity, through the tireless dedication of Hon. Barry Cozier, Carla Miller, and former Section Chair Lesley Friedman Rosenthal, presented the Smooth Moves Event at Lincoln Center for the seventh straight year.

Needless to say, we have achieved a good deal, and having had the wonderful opportunity to work with our Section's Executive Committee and, in particular, my fellow officers Greg, Paul Sarkozi, Jim Wicks, Rebecca Hollis, and Jackie Grodin, I am certain our Section's tradition of making significant contributions to the bench and the bar will continue to grow.

I owe Greg, Paul, Jim, Rebecca, and Jackie an enormous debt of gratitude, for without them this year would not have been the success that it was. I also give special thanks to all of Section's former chairs whose visionary leadership is what's made our Section great. Particularly, I thank former Section Chairs Lauren Wachtler, Jay Safer, Jonathan Lupkin, and Vince Syracuse for rolling up their sleeves and contributing even more of their time, extraordinary talent, and expertise to the Section. I also thank Judge Stong for offering me the once-in-a-lifetime opportunity to travel to Cambodia and to speak about the greatness of our wonderful legal system. And a very special thanks to my firm, Zeichner Ellman & Krause, LLP. They generously sponsored my trip to Cambodia and permitted me to hold this second "full time" job during the past year. I personally thank Justice Charles E. Ramos, who, in addition to everything else, graciously hosted the Cambodia Delegation, which came to New York two weeks after my return.

Finally, I thank all of you for the honor of allowing me to serve as your Chair this past year. It was truly a privilege.

**Tracee E. Davis**

## Message from the Incoming Chair

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*(Continued from page 1)*

ery requests, and the promotion of civility in litigation resulting in the New York State Standards of Civility, which are now Appendix A to the Rules of Professional Conduct adopted by the Appellate Divisions effective April 1, 2009. We have taken the lead in promoting diversity and in mentoring young lawyers. We have also become one of the premier sources of policy proposals for the entire New York State Bar Association.

As I said at the Section's spring meeting on May 4, I have three themes for my year as Chair: continuation, communication, and celebration. I have already discussed the last; I will now turn to the other two.

### Continuation

We must continue our major role in the development of the law and practice in New York. In June 2012, as the culmination of former Chair David Tennant's initiative, the Section adopted the report of its Faster-Cheaper-Smarter Working Group describing ways to reduce the time and cost of traditional commercial litigation, with some emphasis on alternative dispute resolution. Many of the same ideas re-surfaced in the Report and Recommendations to the Chief Judge of the State of New York of The Chief Judge's Task Force on Commercial Litigation in the 21st Century. Now, Chief Judge Jonathan Lippman has appointed a Commercial Division Advisory Council to implement those ideas. I expect the Section to support the efforts of the Advisory Council through its members on the Council (including my three immediate predecessors as Chair—Tracee Davis, David Tennant, and Jonathan Lupkin—and my successor, Paul Sarkozi) and through further proselytization of the ideas underlying the Section's commitment to faster, cheaper, and smarter commercial litigation. We also will explore ways to support the New York International Arbitration Center created earlier this year.

The Section has long had a commitment to diversity. We have an annual networking program, Smooth Moves, Career Strategies for Attorneys of Color, which, under the leadership of previous Chair Tracee Davis, Carla Miller, and former Judge Barry Cozier, had its highest attendance (in excess of 250 persons) last spring. The Section also sponsors a minority law student summer fellowship with a Commercial Division justice. For the last two years, the Section has conducted the Theodore T. Jones Jr. Students of Color Moot Court Competition at the University of Buffalo Law School. I hope to continue and expand these initiatives.

This spring, the Section adopted a report outlining issues regarding third-party litigation funding and continued the dialog with a CLE panel at our spring meeting. I am encouraging the Section's Ethics and Professionalism Committee, co-chaired by Jim Wicks and Tony Harwood, to distill the learning and produce a report expressing a reasoned view of third-party litigation funding that can be adopted as the policy of the State Bar.

Last winter, the Section created one of the first bar association committees devoted to social media, co-chaired by Ignatius Grande and Mark Berman. The Social Media Committee has already instituted the Section's Twitter feed and has organized a CLE program on How Social Media Is Changing the Practice of Law. I anticipate that the Committee will comment on proposed legislation and continue to educate the Section about the risks and benefits of using social media.

Last year, the Section formed a Special Committee on Commercial Jury Charges, co-chaired by Judges Andrea Masley and Melissa Crane, to comment upon and develop recommendations for pattern jury instructions to be considered by the New York State Official Committee on Pattern Jury Instructions. The Section submitted recommendations concerning piercing the corporate veil, bona fide and good faith purchasers for value, breach of fiduciary duty, aiding breach of fiduciary duty, breach of contractual warranty, and fraudulent inducement. I expect that in the upcoming year the Committee will present further recommendations concerning pattern jury instructions relating to contract issues.

The Section published version 2.0 of its Best Practices in E-Discovery in New York State and Federal Courts. At its April 5, 2013, meeting, the Executive Committee of the State Bar adopted it as the policy of the entire Association. It provides practical, concise advice and a reference for best practices in a rapidly evolving area of the law. We now must make it available electronically and otherwise to as many judges and practitioners as feasible.

For two decades, the Section has commented upon proposed changes in the Federal Rules of Civil Procedure and Federal Rules of Evidence. The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has authorized the publication for comment of substantial revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, and 84 of the Federal Rules of Civil Procedure proposed by the Advisory Committee on Federal Rules of Civil Procedure. I hope the Section will comment on the proposals, including controversial



changes in the scope of discovery and the implementation of sanctions for preservation failures.

This past year's Chair, Tracee Davis, has been at the forefront of the State Bar's efforts to bring to Congress's attention the debilitating impact of sequestration on the ability of the third branch of the government, the federal judiciary, to fulfill its constitutional mandate and provide a forum where our commercial clients may resolve their disputes fairly and expeditiously. I will continue these efforts.

### Communication

All these activities are less meaningful if Section members cannot learn about and participate in them. The key is communication. Thanks to the Social Media Committee, the Section now tweets. Our handle is: @NYSBAComFed. Our website at [www.nysba.org/ComFed](http://www.nysba.org/ComFed) is scheduled to be re-launched in the fall of

2013. For Section members only, it includes archived and searchable editions of this publication, our Section's magazine *NYLitigator* (published twice a year), archived CLE program books, and substantive case reviews from Loislaw LawWatch. For all visitors, it includes special reports, committee activities, and a calendar of events. It is my goal to provide information to Section members that will aid them in their daily practice of law and provide a tangible benefit for membership in the Section.

In sum, I see my role as Chair of the Commercial and Federal Litigation Section as facilitating the work of the outstanding Section committees through CLE, reports, and articles; enabling communications with our many Section members through traditional, electronic and social media; and encouraging new members and participation in the Section's many worthy activities.

Greg Arenson

## *NYLitigator* Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article published in the *NYLitigator* is a great way to get your name out in the legal community and advertise your knowledge. Our authors are respected statewide for their legal expertise in such areas as ADR, settlements, depositions, discovery, and corporate liability.

MCLE credit may also be earned for legal-based writing directed to an attorney audience upon application to the CLE Board.

If you have written an article and would like to have it considered for publication in the *NYLitigator*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information to its Editor:

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Authors' Guidelines are available under the "Article Submission" tab on the Section's Web site: [www.nysba.org/NYLitigator](http://www.nysba.org/NYLitigator).

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# Spring Meeting 2013: From Tomb Raiders to Whistleblowers with Detours for Third-Party Litigation Funding and Procedure in SDNY Complex Cases

By Mark A. Berman

Picturesque Saratoga Springs in May—what could be better! More than 150 people attended the Commercial and Federal Litigation Section’s Spring Meeting on May 3-5 at the Gideon Putnam Hotel. The meeting was attended by 32 judges, including recently confirmed New York State Court of Appeals Judge Jenny Rivera and other appellate and trial court judges from the federal and state courts. The Section was honored to have among the attendees President-Elect James R. Silkenat of the American Bar Association and President-Elect David M. Schraver of the New York State Bar Association, who praised the Section for its excellent work.



The Friday night audience was entranced by Howard Spiegler’s description of stolen artworks and their recovery

Over salmon, during the opening banquet, we listened intently to a program reminiscent of “Raiders of the Lost Ark” entitled “From Tomb Raiders in Turkey to Hitler’s Crimes Against Humanity: Recovering Stolen Artworks and Other Cultural Property.” Presented by Howard N. Spiegler of Herrick Feinstein, LLP, all that was missing was Indiana Jones’ fedora. The presentation highlighted an area that many are curious about, but few have any conception of—the utter magnitude of antiquities that have come into the possession of museums and private collections that had been stolen from their owners by grave robbers or by the Nazi regime. Because museums in the past have sought to remain blind to this situation, we learned that, to prove that a specific piece of art that a museum may have purchased for tens of millions of dollars was stolen, native countries seeking to recover such art incredibly often rely upon the testimony and documents of the actual grave robbers to verify the artifact’s provenance. We also heard that because of the notoriety and success of certain cases that have resulted in the return of

cultural property to their native lands, often museums, rather than risk negative publicity, now contact counsel in advance concerning a purchase of art to see if there are any “issues” with the piece’s provenance. Apparently, over 200,000 pieces of art stolen by the Nazis remain unaccounted for.

Saturday morning welcomed a presentation near to every practitioner’s heart: an overview of the Southern District of New York’s new “Pilot Project Regarding Case Management in Complex Civil Cases,” which seeks to streamline motion practice, discovery, and trial in civil matters, and a preview of proposed changes in the Federal Rules of Civil Procedure regarding case management, discovery, and preservation. The program was moderated by former Section Chair Jay Safer of Locke Lord LLP and was led by United States District



Howard Spiegler of Herrick Feinstein speaking on Friday night about stolen artworks



Former Section Chair Jay Safer introducing the first Saturday morning panel on the Southern District of New York Pilot Program and Practice in Complex Cases



From left to right: SDNY Judge Victor Marrero, Former EDNY Chief Bankruptcy Judge Melanie Cyganowski, and Jones Day’s Steven Bennett listening to Judge Scheindlin

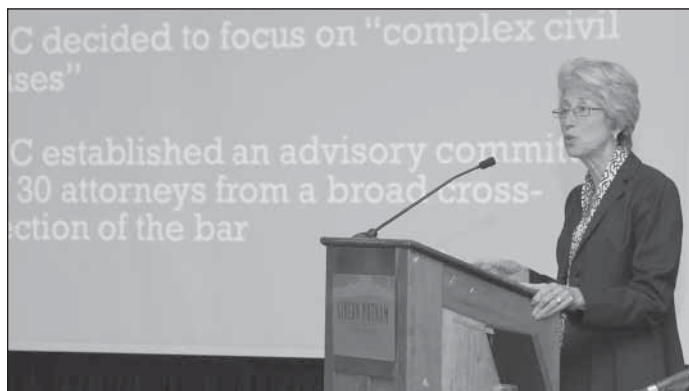
Judge Shira A. Scheindlin, also a former Section Chair, who was instrumental in the drafting of and adoption by the SDNY of this Project. Other panelists were SDNY District Judge Victor Marrero, former EDNY Chief Bankruptcy Judge Melanie L. Cyganowski, and Steven C. Bennett of Jones Day.



Then-NYSBA President-elect, now President, Dave Schrauer welcoming participants in Saturday morning's MCLE programs

We learned that over 2,000 cases have been made part of the Pilot Project since it was adopted in 2011. Judge Scheindlin emphasized that under the Pilot Project a proportionality assessment of discovery costs needs to be made at the initial court conference. The audience heard that judges really do listen to what counsel say about case management and, as a result, for instance, "timed" trials, suggested by counsel, have successfully taken place. Judge Scheindlin stressed that under the Pilot Project judges are required to expedite decisions on discovery motions. Judge Marrero added that requiring letters to be sent to the court concerning contemplated motions actually resulted in fewer motions being made; and, in some instances, with counsels' consent, disputes were decided on the letters submitted. Judge Cyganowski noted that a Federal Judicial Conference survey of attorneys in approximately 400 recently closed cases found that pre-motion conferences actually helped. Judge Scheindlin told the audience that she was surprised that lawyers appearing before her are not asking for FRE 502(d) orders, which would otherwise protect a privilege from being waived by an improper discovery disclosure.

Judge Scheindlin then spoke about the proposed new Federal Rules of Civil Procedure. She highlighted



SDNY Judge Shira Scheindlin explains the details of the SDNY Pilot Program and proposed changes in the Federal Rules of Civil Procedure

proposed new FRCP 26(b)(1), which would eliminate the current two tiers of relevance and would require "proportionality" to be addressed in connection with the permitted scope of discovery. She also spoke about the proposed new amendment to FRCP 37(e), which would, for failure to preserve information, allow for curative measures, but would impose sanctions only for willful or bad faith conduct. Judge Scheindlin commented, however, that the factors listed as relating to an actor's state of mind do not make sense for determining bad faith or willfulness, but do make sense for determining negligence or recklessness.

A panel discussing third-party litigation financing ("TPLF") followed, which was organized by Section Treasurer James Wicks and moderated by Professor Patrick Connors of Albany Law School. While TPLF is a new concept to many, it is a "hot button" issue that must navigate New York's Rules on Professional Conduct, including concerns that the transmittal of highly sensitive and privileged information to a third-party financing company could result in the waiver of the attorney-client privilege. Addressing the ethics issues, the audience had the benefit of hearing from Jeremy Feinberg, Statewide Special Counsel for Ethics in the Office of Court Administration. Other panelists included Professor Anthony Sebok of Benjamin N. Cardozo Law School, John H. Beisner of Skadden Arps, John P. "Sean" Coffey, then Managing Director of BlackRobe Capital Partners, LLC, and Harvey R. Hirschfeld, President of LawCash.



Then-Section Treasurer, now Vice-Chair, Jim Wicks introducing the Saturday morning panel on Third-Party Litigation Funding



The Third-Party Litigation Funding panel from left to right: moderator Albany Law School Professor Patrick Connors, Skadden Arps' John Beisner, BlackRobe's then-Managing Director Sean Coffey, OCA's Jeremy Feinberg, LawCash's President Harry Hirschfeld, and Cardozo Law School Professor Anthony Sebok



Simply, TPLF companies provide money to a party so it is able to “afford” to commence or continue a lawsuit in return for a share of a future damage award or monetary settlement. The panel addressed those situations where, in a multi-million dollar commercial dispute, a large company, because of perhaps limited risk tolerance to expense or budgetary constraints, could not or would not be willing to fund a multiple-year litigation that might incur millions of dollars per year in attorneys’ fees. At the other end of the spectrum, the panel addressed the somewhat more mundane, but equally as important, situation where a personal injury plaintiff needs to have his or her life needs paid during the course of an ongoing litigation, but simply is unable to afford them. These expenses



Attendees at the SDNY Pilot Program learning about proposed changes in the Federal Rules of Civil Procedure

could include tuition, food, or, for instance, mortgage payments that need to be made to stave off foreclosure of the plaintiff’s home while a negligence action makes its way to trial. John Beisner commented that, in the commercial case, the core ethical issue is control while, in the consumer case, the ethical dilemma is the intrusion of the funder into the settlement process.

Under either scenario, TPLF is non-recourse, and, if there is no recovery by the plaintiff, the funding



Then-Section Vice-Chair, now Chair-Elect Paul Sarkozi presenting the awards for outstanding golfing achievements at the spring meeting



Questioning by the audience of the Third-Party Litigation Funding panel

company is not entitled to repayment of its money. In both cases, due diligence by the funding company is performed before money is advanced. However, we learned that, in complex commercial cases, the investigation of the facts and the analysis of the legal issues could take months before a funding company would agree to “invest” in a lawsuit. In such cases, which may seek recovery in excess of \$50

million, it was noted that the financing company often has an interest in seeing that counsel for the plaintiff also assumes some risk as well, such as by taking the case on a partial contingency.



Second Circuit Judge Reena Raggi describing the accomplishments of EDNY Chief Judge Carol Amon

Amon as the Eastern District’s “biggest cheerleader.” In receiving her award, Chief Judge Amon spoke fondly about the history of the Eastern District and honored her fellow judges of the District. She especially “shouted out” Senior Judges Weinstein, Wexler, Spatt, Glasser, and

After having the afternoon off to golf or enjoy the springs, judges and lawyers gathered to honor Chief Judge Carol Bagley Amon of the Eastern District of New York with the Robert L. Haig Award for Distinguished Public Service. The award was presented by Second Circuit Judge Reena Raggi, a prior winner of the Award and a friend of Judge Amon for the past thirty years, who proudly described Chief Judge



From left to right: Then-Section Chair Tracee Davis, EDNY Chief Judge Carol Amon, the Robert L. Haig Award for distinguished public service, Second Circuit Judge Reena Raggi, and then Chair-Elect, now Chair, Greg Arenson





Then-Section Chair Tracee Davis summarizing her accomplishments during the previous year

Platt, all from the “Greatest Generation,” for their leadership and for what they have added to the intellectual prowess of the District. Chief Judge Amon also noted the importance of Magistrate Judges for the efficient functioning of the District.

At the gala dinner, Section Chair Tracee E. Davis spoke about the achievements of the Section, which included drafting new pattern jury instructions, following legislative initiatives that would affect the Section and its members, and the adoption of the second edition of the Section’s “Best Practices” on electronic discovery. Tracee presented the Section’s Service Award to New York City Civil Court Judge Andrea Masley for her work on, among things, assisting in the drafting of new pattern jury instructions.



Then-Section Chair-Elect, now Chair, Greg Arenson welcoming the attendees at the Saturday night gala dinner

Gregory K. Arenson, Chair-Elect of the Section, laid out his ambitious mission for the upcoming

year as the three “Cs”—“communication, continuity and celebration.” As for “communication,” he highlighted the Section’s new social media committee, which will seek through the use of social media to increase the presence of the Section in the New York State Bar Association and beyond. Greg stressed the Section’s “continuity” of all the excellent work it had done during the past year. Lastly, the Section will “celebrate” its 25th year anniversary in 2013 and Greg, one of the founding members of the Section, announced that a gala event will be held at Lincoln Center on October 23, 2013, to honor the Section’s achievements.



Second Circuit Judge Reena Raggi presenting the Robert L. Haig Award for distinguished public service to EDNY Chief Judge Carol Amon

Sunday morning brought together a trio of awesome panels focusing on the Federal and State False Claims Act, as well as the SEC’s “whistleblower” program, moderated by attorneys from Getnick & Getnick (Richard J. Dircks and former New York City Criminal Court Judge Margaret J. Finerty) and by Dana Syracuse, Assistant New York State Attorney General. The “take away” from these panels was that the New York State “whistleblower” statute passed in 2007 is the broadest of its type in the nation—a tribute to our State—and that “whistleblower” cases are in effect a public-private partnership with government and counsel representing our citizenry working together to recover money from companies and



EDNY Chief Judge Carol Amon accepting the Robert L. Haig Award for distinguished public service

individuals who have defrauded, in effect, the taxpayers of the United States and New York State. The speakers spoke about the difference between the United States and certain foreign countries where employees are concerned that, if they “blew” the whistle on a company, a government official who “learned” of the “issue” might then conspire with the company to “cover-up” the



Then-Section Chair Tracee Davis presenting the Section’s Outstanding Service Award to Judge Andrea Masley for her work on changes to New York State pattern jury instructions



The first Sunday morning panel on the Federal False Claims Act, from left to right: Getnick & Getnick’s Richard Dircks, Getnick & Getnick’s Neil Getnick, Assistant U.S. Attorney Pierre Armand, and WilmerHale’s Jennifer O’Connor

“situation,” with the company, then retaliating against the employee.

A panelist currently employed by a government agency (Assistant United States Attorney Pierre Armand), as well as a panelist who formerly worked for government (WilmerHale’s Jennifer O’Connor), each spoke proudly of the success of the federal “whistleblower” program. The third panelist was Neil V. Getnick, co-chair of the Section’s Civil Prosecution Committee. We heard that in 2012, for instance, federal “whistleblower” cases resulted in the recovery of over \$9 billion to the United States. Even though “whistleblowers” receive a considerable amount of any recovery, the government’s “return on such investment” in such cases is often as high as 15-1. Each of the speakers emphasized the need for private counsel to present the government with a “well-packaged” dossier of the “situation,” given that 80% of “whistleblower” cases are not joined by the federal government. The panelists also discussed the benefits of the statute’s lengthy limitations period, as well as the various defenses that defendant companies have to “whistleblower” actions. Interestingly, we learned of a surprising statistic: 82% of “whistleblowers” in one form or another inform their employer of the “situation” before consulting private counsel or communicating with the government, but frequently such disclosure does not make it to the right person or is disregarded because it is vague or unsubstantiated.

We heard from two New York State Assistant Attorneys General, Sally G. Blinken and Randall M. Fox, and the Senior Advisor and Counselor to the Attorney General Gregory M. Krakower, that the New York State False Claims Act applies not just to Medicaid fraud but also to non-Medicaid fraud and includes tax, procurement, grant, and pension fraud. The statute also covers fraud committed on coun-



The second Sunday morning panel on the New York False Claims Act, from left to right: Assistant Attorney General Dana Syracuse, Special Assistant Attorney General Sally Blinken, New York Attorney General Taxpayer Protection Bureau Chief Randall Fox, and Senior Advisor and Counsel to the Attorney General Gregory Krakower

ties and cities located within the state. In fact, because of the broad scope of the New York State False Claims Act, the New York State Attorney General created the Taxpayer Protection Bureau, which is the first bureau to be created in the Attorney General’s office in years. The audience also learned that, unlike its federal counterpart, the New York State False Claims Act protects against “blacklisting” by other companies in the industry where the “relator” or “whistleblower” works.

The last panel, made up of current and former SEC attorneys, SEC Assistant Regional Director Michael J. Osnato, Jr. and Jordan A. Thomas of Labaton Sucharow, and an attorney from the defense bar, Nixon Peabody’s Carolyn G. Nussbaum, spoke about the SEC’s “whistleblower” program. It should be axiomatic to all counsel that the best person to evaluate and analyze a potential securities fraud is one who formerly worked on the “inside.” Thus, taxpayers should be pleased to learn that the SEC actively hires individuals who formerly worked in the financial services industry, so it will have the “firepower” to properly evaluate tips it receives. Unfortunately, the audience learned that a 2009 survey found that, while 70% of employees knew of wrongdoing, 60% thought “whistleblowing” would not help, and 40% did not think they would be protected from retaliation by an employer for “whistleblowing.” The SEC is seeking to counter this perception and points to the option of “whistleblowers” before the SEC to remain anonymous. The uniform advice of panelists on both sides of the “v” was that companies that are the subject of potential claims should not focus on who the whistleblowers are but on whether they have a “problem.”

The weekend ended with a beautiful afternoon left to explore Saratoga Springs and perhaps the museum at the horse track.



The last MCLE panel of the spring meeting on the SEC Whistleblower Program, from left to right: Getnick & Getnick’s Margaret Finnerty, Nixon Peabody’s Carolyn Nussbaum, SEC Assistant Regional Director Michael Osnato, Jr., and Labaton Sucharow’s Jordan Thomas



# Section Presents Its Seventh Annual “Smooth Moves” CLE Program for Attorneys of Color and the Honorable George Bundy Smith Pioneer Award to Esteemed Attorney Ken Standard

By Carla Miller

In 2013, the Commercial and Federal Litigation Section presented its seventh annual “Smooth Moves” program, which is the Section’s premiere diversity event organized to attract attorneys of color to more active participation within the Section. Since its inception in 2007, Smooth Moves has included both a CLE program and a networking reception, culminating in the presentation of the Section’s Honorable George Bundy Smith Pioneer Award. The Pioneer Award is given each year to an attorney of color whose career accomplishments exemplify those of the retired Court of Appeals jurist for whom the award is named: legal excellence, community involvement, and mentoring.

The CLE program this year was entitled “Enhancing Your Professional Profile through Board Service: Opportunities in the For-Profit and Non-Profit Sectors.” The program featured two outstanding attorneys, Sharon Bowen (Partner, Latham & Watkins LLP) and Alfonso Carney (Principal, Rockwood Partners LLC and Chairman, NY State Dormitory Authority), and Commercial Division Justice Jeffrey Oing, all of whom have spent a substantial portion of their professional careers in service on numerous boards. Michele Coleman-Mayes (Vice President, General Counsel, and Secretary for the New York Public Library) provided engaging moderating for the panel’s discussion, which focused on the panelists’ perspectives on the career and business development opportunities afforded by service on for-profit and not-for-profit corporate boards, with an emphasis on the ethical challenges presented for attorneys serving on such boards

The George Bundy Smith Pioneer Award was established by the Section in recognition of Judge Smith’s work in the civil rights movement and his 30 years of public service in the New York judiciary, including 14 years as an associate judge of the Court of Appeals. This year’s Pioneer Award was presented to Kenneth G. Standard, Esq., who has been one of the most respected leaders of the New York bar for decades.

The youngest of five siblings, born to working class immigrant parents in Brooklyn toward the end of the Great Depression, Standard’s parents had limited formal

schooling but always emphasized to him the importance of obtaining a quality education. Taking that advice to heart, Standard graduated from Harvard College and later Harvard Law School—the only African American graduate in his law school class. Standard has been a member of the Harvard Club of New York City since 1962 and became the Club’s first minority President in 1999. During that time, he helped to foster a relationship between the Club and StreetSquash, a Harlem-based youth enrichment program that combines squash instruction with academic tutoring, college preparation, college visits, community service, and mentoring for its members. Standard’s career in the law has been equally distinguished by the range of his experience in his practice, by his leadership and participation in professional and other organizations—including a stint as the President of the New York State Bar Association, and his current seat on the American Bar Association’s Board of Governors—and by the work he has done to enhance diversity and inclusion nationally, regionally, and individually. Over the course of his professional life, he has had pioneering and challenging positions in both the private and public sectors and extensive experience as a counselor and litigator.

Past recipients of the Section’s Pioneer Award include Hon. George Bundy Smith himself (JAMS—New York); Cesar A. Perales (New York Secretary of State, and Co-Founder, and past President and General Counsel, Puerto Rican Legal Defense and Education Fund); Elaine R. Jones (Director-Counsel Emeritus, NAACP Legal Defense and Educational Fund); the Honorable Carmen Beauchamp Ciparick; the pioneering, father-son law practice of Kee & Lau-Kee; and Associate Justice Samuel Green (retired).

Finally, the Section awarded the Commercial Division’s Minority Law Student Fellowship at the event to a first year law student, who will spend the summer working in the chambers of a Commercial Division justice. The New York Bar Foundation provides a stipend for the fellowship recipient. Catalina Ford, a first year law student at Fordham University School of Law, was selected as this year’s Minority Fellow. Ms. Ford spent the summer of 2013 in the chambers of Commercial Division Justice Jeffrey Oing.



# Fordham Law Student Receives the New York Bar Foundation's Commercial and Federal Litigation Section Minority Fellowship

Catalina Ford, a first-year student at Fordham University School of Law, is the 2013 recipient of the Commercial and Federal Litigation Section Minority Fellowship, the New York Bar Foundation has announced.

As the recipient of the \$6,000 fellowship, Ford worked this summer in the chambers of New York State Supreme Court Commercial Division Justice Jeffrey Oing.

"We are thrilled to present this prestigious fellowship to Catalina Ford. She has excelled in her first year of law school," said Bar Foundation President Cristine Cioffi (Cioffi • Slezak • Wildgrube). "We expect that this fellowship will help her achieve her goal of becoming a commercial litigator."

A graduate of Agnes Scott College, Ford expects to graduate from law school in May 2015. She is a member of the Latin American Law Students Association and the recipient of the Patricia M. Hynes Scholarship for Women. She also is a hotline volunteer with WomensLaw.org and a volunteer research assistant at the Moving Minds Forward Foundation.



Left to right: Catalina Ford, recipient of the Commercial and Federal Litigation Section Minority Fellowship, with the Honorable George Bundy Smith; Kenneth G. Standard of the Kenneth G. Standard Diversity Internship Program and past-President of the New York State Bar Association; and Glenn Lau-Kee, then-President-elect designee of the New York Bar Association

"We received several commendable applications for the Commercial and Federal Litigation Section Minority Law Student Summer Fellowship. We are delighted to present the 2013 fellowship to Ms. Ford, a remarkable and bright young woman," said Tracee E. Davis (Zeichner Ellman & Krause), then-chair of the Commercial and Federal Litigation Section. "Our goal is to increase the representation of lawyers and students from a diverse range of backgrounds in commercial litigation and to provide fellows with an opportunity to gain practical experience by clerking in the Commercial Division. We are

pleased to join with the New York Bar Foundation to offer this opportunity."

"I am extremely honored to be chosen as this year's Commercial and Federal Litigation Section Fellow. I look forward to working with Justice Oing and hope to take full advantage of the opportunities this summer presents," said Catalina Ford.

To learn more about the New York Bar Foundation and how to support its charitable programs, go to [www.tnybf.org](http://www.tnybf.org), phone 518-487-5650 or email [foundation@tnybf.org](mailto:foundation@tnybf.org).



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# Third-Party Litigation Funding Explored by the Section

By James M. Wicks

The Section has embarked on a study of the ethical and legal ramifications of third-party litigation funding (“TPLF”). On April 16, 2013, the Section unanimously adopted a *Report on the Ethical Implications of Third-Party Litigation Funding* prepared by the Committee on Ethics and Professionalism. It is available on the Section’s website; and, while not recommending a particular position, the Report provided a framework for a panel discussion of the topic at the Section’s Spring Meeting.

The Report provides a useful overview of what TPLF involves, namely, providing funding to a party to pursue a lawsuit in return for a share of any damages award or settlement. TPLF takes various forms, the most popular of which is either consumer funding or large-scale commercial or corporate financing. Funding for litigation has been in existence for many years in this and other countries. A fundamental question, however, is whether such arrangements are in fact “loans” at all.

In New York, the Association of the Bar of the City of New York issued Formal Opinion 2011-2 identifying the key ethical concerns involved with TPLF. Opinion 2011-2 takes the view that “[i]t is not unethical per se for a lawyer to advise on or be involved with such arrangements.” However, the City Bar cautions against five potential pitfalls, including: (i) the potential illegality of the TPLF arrangement; (ii) issues with the attorney failing as an advisor; (iii) possible conflicts of interest; (iv) failure to obtain a waiver of privilege; and (v) losing control over the proceeding.

According to the Report, many states have considered and approved of third-party litigation financing, so long as certain disclosures are made. In addition, the U.S. Chamber of Commerce’s Institute for Legal Reform (“ILR”) raised a critical analysis of TPLF, particularly large-scale corporate TPLF, as opposed to consumer funding. The ILR takes the position that commercial litigation finance should be subjected to federal regulation under the Federal Trade Commission, similar to the regulation of the securities markets by the Securities and Exchange Commission.

The Report identifies and examines recurring themes that have developed through case law, ethics opinions, bar association reports, and legislation throughout the country. Although many issues and sub-issues exist, there seem to be five principal issues surrounding the discus-

sion: first, champerty and maintenance; second, attorney-client privilege and confidentiality; third, conflicts of interest; fourth, control over the proceedings; and fifth, fee-sharing with non-lawyers.

Regarding champerty and maintenance, some states have not adopted any prohibitions and, therefore, would not prohibit TPLF: Arizona, California, Connecticut, Massachusetts, New Jersey, New Hampshire, New Mexico, South Carolina, and Texas. Other jurisdictions today have abandoned champerty restrictions. Several states, however, still recognize champerty, and thus possibly TPLF prohibitions, such as Minnesota and Delaware. New York takes a more progressive view, adopting a more lenient stance towards its application.

Maintaining confidentiality and privilege is critical in litigation. However, it is important to TPLF lenders and their investors to fully understand the risk in which they are investing. As with due diligence in any corporate transaction, the more information gathered, the better one can assess the risk. Accordingly, the lender often requires the lawyer to release client information. But do these disclosures involve waivers of confidentiality and privilege that require the client’s consent? The Report identifies the cases and other legal authorities addressing this very sensitive issue.

The Report also addresses the concern over who has “control” of the proceeding. Mere payment by a third party of legal fees for another has traditionally not entitled the payor to obtain information ordinarily protected by client confidentiality. Nonetheless, TPLF may cause some confusion as to who actually owns the claim, who controls the lawsuit, and how conflicts between competing directions of the funder and the client should be resolved.

Finally, fee-sharing or fee-splitting is an issue often raised by critics of funding arrangements. In New York, a lawyer may not share legal fees with a non-lawyer under the Rules of Professional Conduct. Where does this leave TPLF? Is it really fee-sharing with a non-lawyer? The Report identifies the current authorities that address this issue.

The Committee on Ethics and Professionalism expects to further explore this issue and, if possible, articulate a reasoned view to be adopted by the Section.

# CPLR Amendments: 2013 Legislative Session

(2013 N.Y. Laws ch. 1-283, 285-308)

CPLR §	Chapter, Part (Subpart, §)	Change	Eff. Date
217-a	24(1)	Clarifies cross-references to notice of claim provisions	6/15/13
1101(f)	55(E)(16)	Extends expiration of CPLR 1101(f) until Sept. 1, 2015	3/28/13
3012-b	306(1)	Adds provision on certificate of merit in certain residential foreclosure actions	8/30/13
3015(e)	21	Repeals proviso	5/2/13
3101(d)(1)(iv)	23(4)	Repeals CPLR 3101(d)(1)(iv)	2/17/14
3103(a)	205	Authorizes anyone about whom discovery is sought to move for a protective order	7/31/13
3408	306(2)	Requires filing of proof of service within 20 days regardless of method of service	8/30/13
4106	204	Changes selection, deliberation, and discharge of alternate jurors	1/1/14
5241(a)(13)	270(1)	Adds definition of "issuer"	4/27/14
5241(b)(1), (d), (f)	270(2), (4), (5)	Changes "creditor" to "issuer"	4/27/14
5241(c)(1)	270(3)	Changes contents of income execution	4/27/14
5241(g)	270(6)	Changes contents of remitted payments and requires notification to issuer when debtor no longer receives income	4/27/14
5242(c)-(g)	270(7)	Reletters paragraphs; changes "respondent earns wages" to "debtor has income"; changes contents and transmittal of income deduction order; adds income payors and changes contents and recipient of payments; requires notification to issuer when debtor no longer receives income	4/27/14

Notes: (1) 2013 N.Y. Laws ch. 22, deemed eff. as of 11/1/13, makes technical changes to Jud. Law §§ 478, 484, and 485-a, as amended by 2012 N.Y. Laws ch. 492, relating to practicing or appearing as an attorney-at-law without being admitted or registered. (2) 2013 N.Y. Laws ch. 113, eff. 7/12/13, adds Nassau County to the list of counties in which certain classes of cases in supreme court may be commenced by electronic means.

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## 2013 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's N.Y. Orders 1-20 of 2013)

22 NYCRR §	Court	Subject (Change)
202.5-b(b), (d)-(f), (h)	Sup.	Adds provisions on signatures, proof of service, format of e-filed documents, notification of e-filing, filing in NYSCEF system, service of interlocutory documents, service of notice of entry; adds provisions on e-filing in small claims assessment (SCAR) proceedings
202.5-bb(a), (b), (e)	Sup.	Deletes certain definitions; permits SCAR representatives to claim exemption from e-filing; authorizes court to require additional hard copy from persons exempt from e-filing; adds RPTL to service alternatives
202.10	Sup.	Adds provision on requesting appearances at conferences by telephone or other electronic means



22 NYCRR §	Court	Subject (Change)
202.12-a(b)(3)	Sup.	Adds provision on consequences of plaintiff failing to file proof of service of summons and complaint within 120 days after commencement of action in certain counties
202.16-a(1)	Sup.	Amends provisions on automatic orders
202.28	Sup.	Adds provision requiring notification to court of discontinuation of actions in certain instances
202.58(b), (e), (f)	Sup.	Adds provisions on e-filing
500.1(h), (o)	Ct. App.	Requires submission of other cited materials not readily available; requires request for acknowledgement of receipt be accompanied by additional copy of papers
500.2(a), (b), (f)	Ct. App.	Adds cross-reference to § 500.27(e); requires compliance with clerk's instructions for submission; authorizes clerk to reject non-complying briefs and record material
500.5	Ct. App.	Changes procedures for sealing documents
500.9(a)	Ct. App.	Clarifies that appeal is taken by serving as well as filing notice of appeal
500.10	Ct. App.	Adds that Court may transfer appeal
500.11(k), (l)	Ct. App.	Requires material submitted digitally pursuant to § 500.11 to comply with clerk's specifications and instructions and changes reference from Appellate Division to intermediate appellate court; requires compliance with sealing and redaction requirements of § 500.5
500.12	Ct. App.	Reduces number of copies of brief required to be filed from 19 to 9 (plus original); clarifies that appeal is taken by serving as well as filing notice of appeal; requires material submitted digitally comply with clerk's instructions; requires compliance with sealing and redaction requirements of § 500.5
500.13(a)	Ct. App.	Requires that briefs also contain questions presented and point headings; deletes authorization for supplementary appendix in respondent's brief
500.14	Ct. App.	Reduces number of copies of appendices or full records required to be filed from 19 to 9 (plus original); encourages that appendices and supplementary appendices be separately bound; requires that full records contain the CPLR 5531 statement; requires full records be authenticated or stipulated to; changes reference from Appellate Division to intermediate appellate court; requires material submitted digitally comply with clerk's instructions; requires compliance with sealing and redaction requirements of § 500.5
500.17(c)	Ct. App.	Deletes reference to Albany sessions
500.23	Ct. App.	Reduces from 19 to 9 copies of briefs required to be filed; transfers provision on contacting Clerk's Office and on website; deletes authorization for amicus movant on motion for leave to appeal to also request permission to submit amicus brief on appeal itself (a new motion is required)
500.26	Ct. App.	Reduces from 25 to 10 number of copies of appellant's Appellate Division brief and record or appendix and of respondent's brief; reduces from 24 to 9 number of copies of appellant's letter with arguments (plus original) and of respondent's letter in opposition
500.27(e)	Ct. App.	Requires clerk to notify parties of time periods for filing briefs in digital format
800.24-b	3d Dep't	Requires presiding justice to appoint departmental advisory committee on civil appeals management program
1210.1	All	Amends content of Statement of Client's Rights

Note that the court rules published on the Office of Court Administration's website include up-to-date amendments to those rules: <http://www.nycourts.gov/rules/trialcourts/index.shtml>.

# Notes of the Section's Executive Committee Meetings

## February 13, 2013

Guest speaker Douglas C. Palmer, Clerk of the Court, United States District Court, Eastern District of New York, discussed the likely impact of sequestration on the Eastern District specifically and the Federal Courts generally.

The Executive Committee discussed the work of the Section's new Committee on Social Media and also suggested changes to the E-Discovery Committee's and CPLR Committee's proposed revisions to the Unified Court System's E-Discovery Working Group Proposed Amendments to the Uniform Rules of the Trial Courts (22 NYCRR § 202.12(b) and (c)(3)) and the Rules of the Commercial Division (22 NYCRR § 202.70(g) (Rule 8)) requiring counsel to confer prior to the preliminary conference in cases reasonably likely to involve electronic discovery. The Bankruptcy Committee provided an update on the *Stern v. Marshall* Report and noted that the American Bar Association had approved the resolution as amended by the Section. The Special Committee on Pattern Jury Instructions reported on its work with the PJI Committee of the New York State Supreme Court Judges' Association.

## February 27, 2013

The Executive Committee approved for submission to the PJI Committee of the New York State Supreme Court Judges' Association the memoranda of the Section's Special Committee on Pattern Jury Instructions and the Appellate Practice Committee regarding *Bona Fide Purchasers for Value and Piercing the Corporate Veil*. The Executive Committee also discussed changes to the E-Discovery Committee's and CPLR Committee's proposed response to the Unified Court System's E-Discovery Working Group's Proposed Amendments of the Uniform Rules of the Trial Courts (22 NYCRR § 202.12(b) and (c)(3)) and the Rules of the Commercial Division (22 NYCRR § 202.70(g) (Rule 8)) requiring counsel to confer prior to the preliminary conference in cases reasonably likely to involve electronic discovery.



## March 12, 2013

Guest speaker, Hon. Marcy S. Friedman, Commercial Division Justice, New York County, discussed her experience in Housing Court, discovery in the Commercial Division, and her approach to motions. The Executive Committee discussed the work of the Special Committee on Pattern Jury Instructions, the E-Discovery and CPLR Committees' work on uniform rules on e-discovery, the Committee on Social Media, the Antitrust Committee, and the Alternative Dispute Resolution Committee.

## April 16, 2013

Guest speaker, Michelle A. Levitt, Associate General Counsel of AIG, discussed AIG's litigation expense reduction measures. The Section's Chair-Elect discussed the e-discovery guidelines approved by the NYSBA Executive Committee on April 5. At the request of the Section's CPLR Committee, the Executive Committee approved the Committee on Courts of Appellate Jurisdiction's Recommendation for Uniform Rules Governing Omission and Redaction of Sensitive Information from Court Filings. The Executive Committee also approved the adoption of the Section's Report on Third Party Litigation Funding.

## May 8, 2013

Hon. A. Gail Prudenti, Chief Administrative Judge of the Courts of the State of New York, discussed the importance of keeping open the lines of communication between bench and bar; the role of the newly formed Advisory Council, which will examine the recommendations of the Chief Judge's Task Force on Commercial Litigation; the Task Force Report's proposals on expert disclosure and electronic filings; and the Chief Judge's top legislative initiatives for the coming year.

The Executive Committee heard updates on the Section's report on third party litigation funding, the work of the Committee on Social Media, an upcoming Section report on a Congressional proposal to apply the federal judicial code of conduct to the United States Supreme Court, and the work of the Special Committee on Pattern Jury Instructions.

# Former Section Chairs Meet to Discuss Section's Plans and Advise Current Officers for the Coming Year



Former chairs of the Section gathered June 27 to advise current officers on activities for the upcoming year. Pictured from left to right are: David H. Tennant, Robert L. Haig, Tracee E. Davis, Hon. Shira A. Scheindlin, Mark C. Zauderer, Jay G. Safer, Lewis M. Smoley, Sharon M. Porcellio, Vincent J. Syracuse, Carrie H. Cohen, Paul D. Sarkozi, Lesley F. Rosenthal, Gregory K. Arenson, Peter Brown, Jonathan D. Lupkin, Deborah E. Edelman, Jaclyn H. Grodin, and Mark H. Alcott

Mark H. Alcott, Deborah E. Edelman, Tracee E. Davis, Sharon M. Porcellio, and David H. Tennant discuss the Section's plans for the upcoming year



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## Looking for Past Issues?

***NYLitigator***

<http://www.nysba.org/NYLitigator>

***Commercial and Federal Litigation  
Section Newsletter***

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