

# 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

I am proud to have been the Section’s 25th Chair, but I am especially proud of the efforts of so many Section members who have made the past year a success. We have met my goals to continue to produce excellent reports and CLE programs, to communicate through 21st-century media as well as print, and to celebrate the Section’s 25 years.



**Gregory K. Arenson**

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## Message from the Incoming Chair

I am truly honored to begin my service as the Chair of the Commercial and Federal Litigation Section, and I invite each of you to work with us to fulfill our mission of being *the premier bar organization dedicated to business litigation in New York*. We have a very ambitious agenda for the next year—one that will raise our profile and involvement in the state and federal courts, one



**Paul Sarkozi**

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### Celebration

On October 23, 2013, the Section celebrated its 25th anniversary at the Kaplan penthouse in the Rose building at Lincoln Center thanks to former Chair Lesley Rosenthal with aid from New York State Bar Association Section Liaison Beth Gould. Nearly 200 persons attended, about a quarter of whom were judges. A highlight of the evening was the videotaped words of wisdom from past Chairs, which may still be viewed on the Section's website. The evening was capped by remarks from two friends of the Section—former New York Court of Appeals Chief Judge Judith S. Kaye and Second Circuit Court of Appeals Chief Judge Robert A. Katzmann.

### Reports

The bread and butter of the Section's activities are the reports we produce on topics of interest and the educational programs we present in a variety of venues. It has been a productive year.

In March, we adopted Social Media Ethics Guidelines to help answer ethical challenges presented by social media. They were prepared by the Section's Social Media Committee under the guidance of Co-Chairs Mark Berman and Ignatius Grande. The Guidelines, which have received a favorable press, cover attorney advertising, furnishing advice through social media, review and use of evidence from social media, communicating with clients through social media, and researching jurors and reporting misconduct.

In June 2013, thanks to the Social Media Committee with input from the Employment and Labor Committee co-chaired by Robert Holtzman and Gerry Hathaway, the Section issued a memorandum opposing legislation in the New York State legislature prohibiting employers or educational institutions from requesting from an employee, applicant, or student any user name, password, or other means for accessing a personal account or service through electronic communications devices. Although the legislation did not pass in 2013, it was revived in the 2014 legislative session.

In September 2013, the Section approved a report on proposed amendments to the Federal Rules of Civil Procedure concerning case management, discovery, and spoliation, which report was submitted to the Advisory Committee on Civil Rules of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. This report was a product of the Section's Federal Procedure Committee under the direction of Jim Parver and Michael Rakower and the Electronic Discovery Committee under the direction of Connie Boland and Adam Cohen. Michael also testified before the Advisory Committee on November 7. Southern District of

New York District Judge John G. Koeltl, who is a member of the Advisory Committee and one of the prime movers behind the proposed amendments, praised the Section's contribution: "The comments reflected the extensive work of your committee and the even-handed consideration of the proposals. The comments were in the highest tradition of the Association."

In addition to commenting on proposed changes in the Federal Rules of Civil Procedure, the Section has commented on changes proposed this year by the Commercial Division Advisory Council in practices of the Commercial Division of the state courts. At the behest of the Commercial Division Committee under the leadership of Mitch Katz and Julie North, the Section has: (1) approved provisions for accelerated adjudication actions to be adopted in pre-dispute contracts; (2) endorsed a limit of 25 interrogatories restricted at the outset to witness identities, logistical information about documents, and damages, while relegating any contention interrogatories to the end of discovery; (3) supported a pilot program in the New York County Commercial Division to send one in five cases to mediation within six months of assignment; (4) favored a pilot program to be tried in New York County to refer complex discovery issues to a pool of very experienced and highly qualified attorneys with knowledge of e-discovery issues acting as special masters; and (5) supported a proposal to encourage categorical privilege logs. Also, the Section adopted a report prepared by the Electronic Discovery Committee endorsing a proposal for guidelines for electronic discovery from non-parties with substantial modifications to be consistent with governing case law and any other applicable rules, including the CPLR. All these comments were transmitted to the New York State Office of Court Administration for consideration in the rule-making process. Already, the limitation on the number of interrogatories has been adopted.

The Section has also commented on proposed amendments to the CPLR to conform to certain federal practices. The Section's CPLR Committee, headed by Jim Bergin and Tom Bivona, took the lead in addressing these issues. The Association's CPLR Committee proposed a modification of CPLR 4547 regarding the admissibility in subsequent proceedings of statements or conduct in settlement negotiations so that it conformed to Federal Rule of Evidence 408. However, the federal rule includes a provision for the benefit of the United States Department of Justice, with which the Section disagreed. We therefore submitted to the Association's Executive Committee a partial opposition to permitting the admission into evidence in a subsequent criminal proceeding of a party's conduct or statements made in negotiation of a prior civil dispute between the defendant and a government agency.

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The New York State–Federal Judicial Council proposed a new CPLR 4549 to correspond to Federal Rule of Evidence 502 on disclosure of communications protected by the attorney-client privilege or as attorney work product, and to Federal Rule of Civil Procedure 26(b)(5) (B) regarding an interim procedure for preventing the circulation or use of inadvertently produced information. The Section approved the concept but disapproved the specific wording of the proposals.

The Section's Commercial Jury Charges Committee, co-chaired by Judges Andrea Masley and Melissa Crane, was active. It made two proposals to the New York State PJI Committee. One was to amend the presentation on good-faith and *bona-fide* purchasers by adding a discussion of void and voidable title. The second was to include an expanded discussion of breach of fiduciary duties addressing direct versus derivative claims and breach of fiduciary duty in the context of limited liability companies. The proposals were principally the work of committee members Melissa Yang and Rebecca Smithwick, respectively. A modified version of the analysis of void and voidable title was also published in the Spring 2014 issue of the *NYLitigator*.

### Programs

One of the Section's more unusual education programs was presented in January to a group of Kosovar jurists and academics. In conjunction with the United States Department of Commerce Commercial Law Development Program and the New York County Commercial Division, Ted Semaya and Clara Flebus, Co-Chairs of the International Litigation Committee, and I discussed the operation of the Commercial Division and alternative dispute resolution. Every word was translated to and from Albanian.

There also were more standard CLE programs. At the outset of my tenure, Mark Berman and Ignatius Grande led panels on Social Media in the Context of Litigation and Criminal and Civil Litigation Investigations. At the end, the Alternative Dispute Resolution Committee under Charlie Moxley with the Co-Chairs of the International Litigation Committee offered a panel at the New York International Arbitration Center on the importance of international arbitration in New York practice. Last fall, Richard Friedman put together four programs around the state on basic federal civil practice. This spring, former Chair Vince Syracuse ran five programs around the state teaching basic lessons on ethics and civility. The White Collar Criminal Litigation Committee co-chaired by Evan Barr and Joanna Hendon produced a panel on international criminal enforcement and investigations and Richard Dirks of the Committee on Civil Prosecution and former Judge Peggy Finerty conducted a program

on blowing the whistle on fraud. The latter two also published a related article in the Spring 2014 issue of the *NYLitigator* on the federal False Claims Act and the SEC whistleblower program.

Vice-Chair Jim Wicks organized a lively and well-attended Annual Meeting in January. The CLE topics were How Social Media Has Altered the World of Legal Ethics and The Interplay of Delaware and New York Law in Resolving Corporate and Commercial Disputes. Included on the latter panel was Delaware Vice Chancellor J. Travis Laster. Over lunch, the Section proudly presented to its former Chair and United States District Judge for the Southern District of New York Shira A. Scheindlin for, among other things, her seminal work in e-discovery, the Stanley H. Fuld Award given to a member of the legal profession who has significantly contributed to the practice of commercial law and litigation.

In April, under the direction of Co-Chairs Barry Cozier and Carla Miller, the Section's Diversity Committee presented to more than 200 people the Association's premier annual diversity program Smooth Moves. The CLE component concerned Social Media Strategies for Attorneys: Marketing Techniques, Practice Tips, and Ethical Quandaries. The George Bundy Smith Pioneer Award was presented to Kay Crawford Murray for her long-term, outstanding service as the founding General Counsel of the Department of Juvenile Justice of the City of New York.

Chair-Elect Paul Sarkozi conducted an informative Spring Meeting at the Cranwell Resort in early May for approximately 180 participants, including more than 30 judges. The CLE programs addressed views from the appellate bench as to whether a complex commercial appeal is different from other appeals; PRISM, Snowden and the NSA—National Security Litigation in the Digital Age; Alternative Discovery Resolution—Using Referees, Masters and Mediators to Find Solutions to Discovery Disputes; Best Practices for Expert Witnesses in Federal and State Court Business Litigation; and Ethical Issues in the Investigation of Commercial and Federal Lawsuits. The keynote speaker was New York City Corporation Counsel Zachary W. Carter. During the gala dinner, the Section's Robert L. Haig Award honoring a member of the legal profession who has rendered distinguished public service was presented to iconoclastic and soon-to-retire New York Court of Appeals Judge Robert S. Smith.

### Communications

Thanks to Scott Malouf the Section has an extremely active Twitter presence. In a little over a year, he has sent more than 2,000 tweets. For his efforts, Scott received

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the Section's Distinguished Service Award at the Spring Meeting.

During the year, the Section's website was re-launched. It is now easier to read and to access. Section members may review previous issues of the *NYLitigator* and the Section's newsletters, as well as the activities and reports of the Section's more than 25 committees, which can also link their members through online communities.

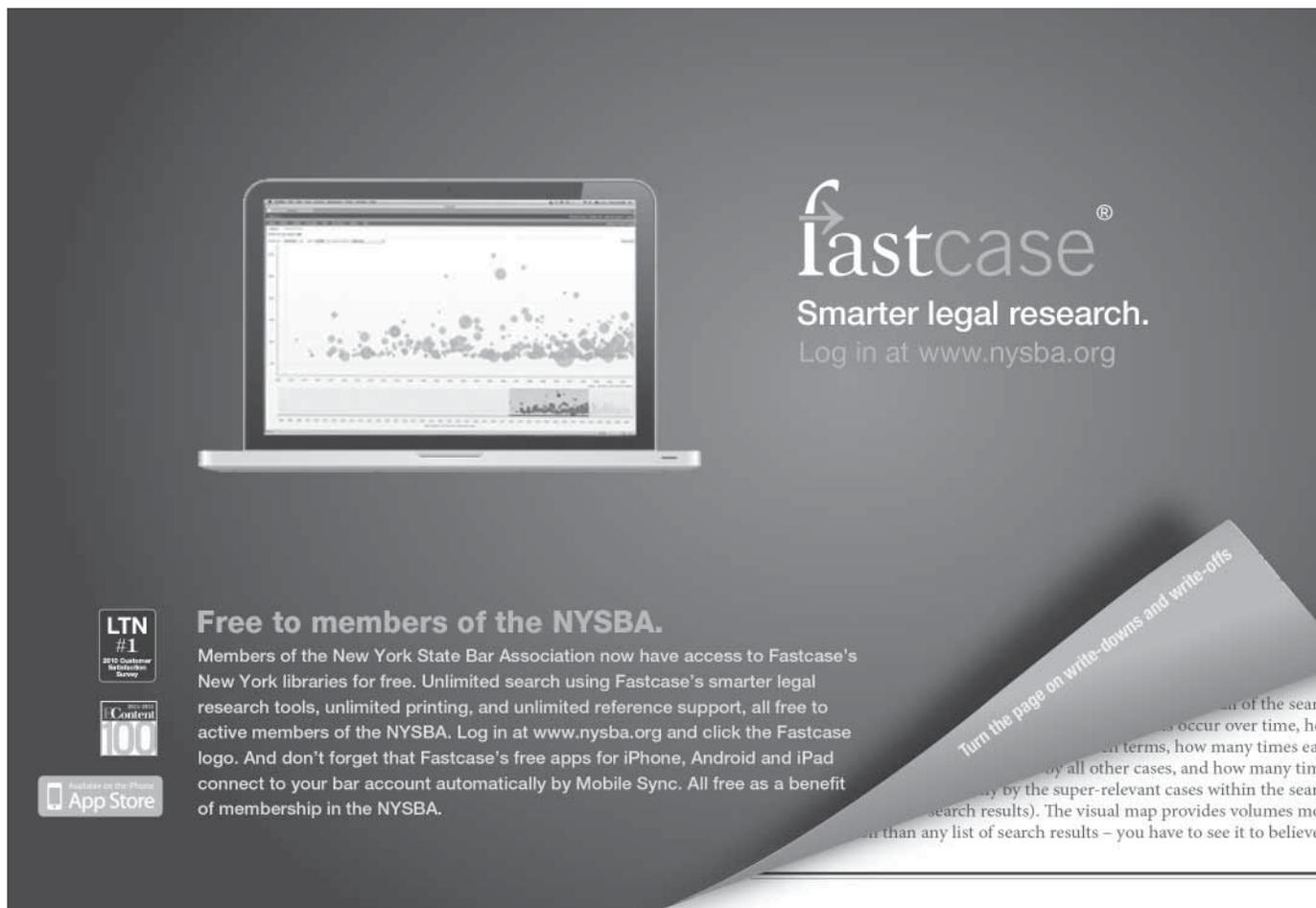
We did not neglect old-fashioned print media. Mark Davies produced three issues of the Section's newsletter to provide information and summaries of the day-to-day activities of the Section for Section members. Under new editor Teresa Bennett, the *NYLitigator* published three, not the usual two, issues. Among the articles was one by Peter Pizzi, Co-Chair of the Internet and Intellectual Property Litigation Committee, outlining in January the issues for streaming broadcast content under the copyright laws, which anticipated the granting of *certiorari*, and the opinion by the Supreme Court in *American Broadcasting Companies, Inc. v. Aereo, Inc.* The Spring issue included an article by Judge Melissa Crane and Bob Becker on guidelines for

privilege logs, which, among other things, prefigured the proposal by the Commercial Division Advisory Council to encourage categorical privilege logs. That issue also included a copy of Judge Scheindlin's acceptance speech for the Fuld Award in which she outlined issues concerning the digital information revolution and privacy.

\* \* \*

This year could not have been a success without the dedicated efforts of the Section's officers. As I have said, Chair-Elect Paul Sarkozi and Vice Chair Jim Wicks put together excellent Spring and Annual Meetings, respectively. Treasurer Deborah Edelman improved the financial condition of the Section by adding to our surplus. Secretary Jackie Grodin accurately recorded the Executive Committee discussions. I have relied on them all for advice and thank them for it. I am confident the Section remains in good hands as Paul and Jim move up and Mark Berman is added to the team as Vice-Chair. I look forward to at least another 25 years of the Section's leadership of the bar.

Greg Arenson



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