FROM THE CHAIR

by Mitchell L. Bach

I have received a number of recent communications from Committee members which asked me how they can become more involved. It occurs to me that many of you may be wondering about the same thing. We welcome your involvement, and we would like to make it as clear and as easy for you as possible.

The Committee meets three times a year: at the Annual Spring Meeting of the ABA Section of Business Law, usually in late March or early April; at the ABA Annual Meeting, in early August; and our Committee’s Annual Stand-Alone Meeting, in late November or early December. The fastest way to plunge into Committee activities, and to figure out what you would like to become involved in, is to attend one or more of these meetings. This is always a great networking opportunity, with excellent CLE programs. We also manage to have a pretty good time. I actually met my wife at the Spring Meeting in St. Louis in 1987, and I also have formed and nourished some of my closest professional relationships at these meetings. This is always a great networking opportunity, with excellent CLE programs. We also manage to have a pretty good time. I actually met my wife at the Spring Meeting in St. Louis in 1987, and I also have formed and nourished some of my closest professional relationships at these meetings. We have included in this issue a Schedule of the Committee Programs and Meetings at the Section’s Spring Meeting in Nashville (March 31 to April 3, 2005).

Our Subcommittees meet at both the Spring Meeting and the Annual Meeting. This is usually when Subcommittees discuss recent developments in their practice areas, and plan their activities and future educational programs. At the Section’s Spring Meeting and the ABA Annual Meeting, I also meet
with all the Subcommittee Chairs and other Committee leaders. These leadership meetings are also open to all Committee members, and many of our current leaders (including myself) have become involved in our Committee by “crashing” such a meeting. The Section makes it easy for members to become informed and integrated by providing “hosts” to assist “first-timers” at these meetings, as well as Committee Roundups where you can find out what is going on throughout the Section and meet representatives from many Committees.

If you can’t attend one of these meetings, or if you want to get involved immediately, without waiting for a meeting to come up, I have a couple of suggestions. It is easy (and free of charge) to join one or more of our Subcommittees, if you are member of the Section. All our Subcommittees and contact information for our Subcommittee leaders are listed in this newsletter and on the Committee’s web page at this address: http://www.buslaw.org/cgi-bin/controlpanel.cgi?committee=CL150000&info=Leadership

Contact the Subcommittee leaders in your practice areas. There are many opportunities for immediate Subcommittee involvement. For example, authors and editors are needed for our massive Annual Review of Development project, which has become recognized as the most comprehensive and reliable source of up-to-date information regarding commercial and business litigation, throughout the United States. If you would like to become involved in this project, and you have difficulty contacting a Subcommittee leader, please let me know.

Another writing opportunity for you is to help with our quarterly Network newsletter. Our tireless Newsletter Subcommittee Chair, Paul Masinter, would be happy to hear from you. Paul is also looking for articles of interest from our members for publication in Network. Paul’s contact information is as follows:

Paul J Masinter
Stone Pigman Walther Wittmann LLC
546 Carondelet St
New Orleans, LA 70130-3588
Phone: (504) 593-0882
Fax: (504) 596-0882
Email: pmasinter@stonepigman.com

You also might want to get involved in our Committee’s Task Force on Litigation Reform and Rules Revision, chaired by Mike Flynn. The Task Force is now working on a number of interesting projects: ongoing review of the proposed Model Code of Judicial Conduct, in conjunction with the Section’s Professional Conduct Committee; review and monitoring of the proposed new rules regarding electronic discovery; review and providing input regarding proposed new admission rules in U.S. District Courts for out of state attorneys; and review of the Uniform Foreign Money Judgments Enforcement Act. This Task Force is always involved in new and interesting developments which directly impact our members and all commercial litigators. If you are interested, Mike’s contact information is as follows:

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World Savings Bank
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1901 Harrison St.
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If you don’t see a Subcommittee that interests you, think about starting a new one. At the upcoming Spring Meeting in Nashville, we shall consider a proposal from Gabe Galanda and Heidi Staudenmaier for a new Subcommittee on Tribal Courts and Indian Business Litigation. We are also reviewing a proposal from Melanie Damian who wants to organize a new group for women advocates in commercial litigation.

If you have other ideas or questions as to how you can get involved, please feel free to contact me. Also, welcome again, all you new members! As always, I invite input, thoughts and suggestions from all Committee members. Please contact me by telephone, email or snail mail at Eckert Seamans Cherin & Mellott, LLC, 1515 Market St., Philadelphia, PA 19102, Phone: 215-851-8466; Fax: 215-851-8383; mbach@eckertseamans.com.
SCHEDULE OF COMMITTEE PROGRAMS AND MEETINGS AT THE SPRING MEETING

Environmental Litigation
Saturday    4/2/2005    10:00AM - 11:00AM

ERISA and Pension Litigation
Friday      4/1/2005    4:00PM - 5:00PM

Financial Institution Litigation
Thursday    3/31/2005    10:00AM - 11:00AM

Indemnification & Insurance and Corporate Counseling & Litigation
Thursday    3/31/2005    10:30AM - 12:00PM

Intellectual Property Litigation
Saturday    4/2/2005    10:00AM - 11:30AM

Joint Meeting: Bankruptcy Litigation
Thursday    3/31/2005    1:00PM - 2:30PM

Partnerships & Alternative Business Entities
Friday      4/1/2005    3:30PM - 4:30PM

Program: Annual Review of Developments in Business and Corporate Litigation
Thursday    3/31/2005    2:00PM - 5:00PM

Program: Non-Federal Question Class Actions: Recent Developments and Strategies
Thursday    3/31/2005    8:30AM - 10:30AM

Securities Arbitration
Friday      4/1/2005    4:00PM - 5:00PM

Securities Litigation
Friday      4/1/2005    2:00PM - 3:30PM

Task Force on Litigation Reform and Rules Revision
Friday      4/1/2005    4:00PM - 5:00PM

SCHEDULE OF COMMITTEE PROGRAMS AND MEETINGS AT THE SPRING MEETING

Business and Corporate Litigation
Administrative Committees, Subcommittee Chairs and Task Force Chairs
Friday      4/1/2005    5:00PM - 6:00PM

Alternative Dispute Resolution
Friday      4/1/2005    10:30AM - 12:00PM

Antitrust and Trade Litigation
Friday      4/1/2005    1:00PM - 2:30PM

Appellate Litigation
Friday      4/1/2005    11:00AM - 12:00PM

Business and Corporate Litigation
Friday      4/1/2005    8:00AM - 8:15AM

Business Courts
Thursday    3/31/2005    9:00AM - 10:00AM

Business Torts
Thursday    3/31/2005    1:00PM - 2:00PM

Class and Derivative Actions
Saturday    4/2/2005    9:00AM - 10:00AM

Committee Forum: Arbitration – The Good, The Bad and The Ugly
Friday      4/1/2005    8:15AM - 10:00AM

Committee Dinner:
Thursday    3/31/2005    8:00PM

Criminal and Enforcement Litigation
Friday      4/1/2005    11:00AM - 12:00PM

Employment Litigation
Friday      4/1/2005    4:00PM - 5:00PM
“BUILDING YOUR CAREER”
THREE THINGS TO CONSIDER IN ORDER TO REACH YOUR GOALS

by The Honorable Elizabeth S. Stong1

What are three things that a woman lawyer, or any lawyer, should consider in order to reach her goals? This is not an easy question! Set forth below are some observations that reflect my own experience in private practice and, more recently, in making a move to the bench.

First, in order to reach your goals, you have to have some goals – and they need to be your goals reflecting your dreams, aspirations, talents, skills, ambitions, and potential. Over the nearly twenty-five years since I began law school, it seems that lawyers, individually and as a profession, have narrowed the definition of what it means to be a successful lawyer. All too often, criteria that can be quantified and analyzed in the trade press – the top firms, the top cities, the leading summer programs, and of course, the AmLaw 100 – provide a default definition of goals for lawyers and legal institutions. As law students become lawyers, and as lawyers progress in their professional careers, it can seem that our options are somehow more limited. Lawyers should not, and probably cannot, bifurcate their professional and personal selves, or somehow try to leave their personalities at the door upon entering the office, boardroom, or courtroom. As a lawyer, you will be consulted for your judgment as well as your technical skill, and that requires both head and heart.

Second, in order to reach your goals, you need to be absolutely as skilled as possible at what you do, and to integrate all of your talents into your professional life to the fullest extent possible. The law is a challenging profession, and it is important to be as good as possible at every aspect of your professional life. This requires hard work, the highest standards of professionalism, role models and mentors, and no small measure of good luck. But this also requires bringing your whole self to your professional life, and being who you are – and making a strength of your diversity. Lawyers should not, and probably cannot, bifurcate their professional and personal selves, or somehow try to leave their personalities at the door upon entering the office, boardroom, or courtroom.

Third, in order to reach your goals, you need to be willing to take some risks – and to fail, sometimes publicly. Most lawyers have been lucky in life, and many lawyers are lucky enough to reach a point in their professional lives where, by most customary measures, they are a success. Many of these same lawyers seem to report a certain amount of professional dissatisfaction. Why is there a disconnect between professional success and professional satisfaction? The answer may be, at least in part, that we do not always do as well as we should in identifying our own goals as they evolve over the decades that make up a career in the law, or in taking the risks that would permit us to reach those goals, such as pursuing a job change in mid-career. As your goals evolve, and a dream job crosses your path, it can seem risky to take the plunge and apply for it, particularly if others – colleagues, clients, family, friends – will know if you do not succeed. But as Wayne Gretsky said, “you always miss the shots you don’t take.” And as my late mother said, “they have to pick someone, dear – it might as well be you!”

1 The Honorable Elizabeth S. Stong is a United States Bankruptcy Judge for the United States Bankruptcy Court for the Southern District of New York. Judge Stong presented this paper on August 7, 2004 at the ABA Annual Meeting.
IS DEAL MEDIATION THE NEXT BIG THING?

by Abigail Pessen

Your client is negotiating the merger and acquisition of his company.

Your client is negotiating to sell her shares in a family-owned corporation.

Your client is negotiating the purchase of an easement on adjacent property.

Your client is negotiating with a local government agency for permission to open a chain of sidewalk cafes.

Your client is negotiating to acquire a patent from a foreign company.

Your first reaction to using a mediator in any of these negotiations may be “mediator shmediator. I’ve read ‘Getting to Yes.’ Why add another layer of cost and complication to a transaction that may already involve finders, brokers, and lawyers?”

Indeed, although mediation of legal disputes is becoming widespread, using mediators to get deals done is uncommon. Except in collective bargaining, where mediators often are brought in to help hammer out contract terms, commercial transactions generally are negotiated without the aid of an intermediary. After all, according to Economics 101, market forces will cause deals to be made on economically rational terms with no outside intervention needed.

Business lawyers know from bitter experience, however, that deals sometimes self-destruct, even when walking away is counter to their clients’ best interests. This can happen when large egos collide, when mistrust and suspicion cloud judgment, and when unfamiliar cultural norms drive negotiating techniques. In all of these circumstances, mediators can be valuable.

Mediators – unlike the finders, brokers, and lawyers working on the deal – are impartial. That impartiality allows both sides to trust the mediator. While parties often are unwilling to disclose their true priorities to their counterparts for fear that the disclosure will be exploited, they may safely tell the mediator, in confidence, what matters most to them. With that knowledge, the mediator can help formulate proposals that satisfy both parties’ needs. Moreover, the simple device of having proposals emanate from the mediator neutralizes the parties’ natural tendency to react suspiciously to terms proposed by the other side. Awkward issues such as future enforcement of the deal terms, allocating risk for future liability, and reporting requirements – all of which may lead to resentment – may be raised and negotiated more easily through an intermediary.

Multi-national transactions are particularly well-suited for deal mediation. Negotiating multi-national transactions is often more challenging than domestic deal-making, given disparate customs, negotiating styles, and expectations. Mediators can help decipher cultural forces that are causing one side or the other to behave mystifyingly. As business lawyers find themselves increasingly doing business in the global village marketplace, deal mediation may be worth considering.

In sum, mediation has its place in the negotiation of business transactions. While mediators are not presently being widely used to assist in business negotiations, do not be surprised if you encounter deal mediation in the near future.

1. Abigail Pessen is the Alternative Dispute Resolution Subcommittee Chair and the principal in Abigail Pessen Mediation Services.

2. Most of these examples and a thorough and fascinating analysis of deal mediation are contained in Scott Peppet’s excellent article, “Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?”, 38 Ohio St. J. on Disp. Resol. 283 (2004).

SUBCOMMITTEE REPORTS

BANKRUPTCY LITIGATION SUBCOMMITTEE

by William K. Zewadski

Recent meetings of the Bankruptcy Litigation Subcommittee have been especially well attended.

The Subcommittee met jointly with the Creditors’ Rights Subcommittee at the annual meeting of the ABA in Atlanta, August 2004. An excellent panel was chaired by Creditors’ Rights Committee Vice-Chair Carolyn P. Richter of Atlanta, who spoke on securitization issues in loans and leases. The October 11, 2004 joint meeting in Nashville for the National Conference of Bankruptcy Judges included Bankruptcy Judge Michael Williamson speaking on evidence issues in bankruptcy litigation.

The Co-Chair, William Zewadski, and Bankruptcy Judge Elizabeth Stong began the November 19, 2004 Fall Meeting of the Committee in Washington DC with the latest installment of “Bankruptcy for Breakfast,” including “The Top Ten Tips for Corporate Counsel” and “The Top Ten Developments in Bankruptcy Litigation for 2004.”

The Subcommittee puts on three programs at its meetings each year, including the Section’s Spring Meeting and the Annual Meetings of the ABA and the National Conference of Bankruptcy Judges. The next program will be in Nashville during the Spring Meeting, with the Subcommittee's program at 1:00 PM on Thursday, March 31, 2005 on current topics of interest - some of which have not even occurred as of the date of this report! New rulings from the Supreme Court on bankruptcy topics have already occurred in 2004 and more will occur by the meeting, so be sure to stop by!

JOINING THE SUBCOMMITTEE

Joining the Subcommittee is as simple as being a member of the ABA and emailing to co-chair, William Zewadski, Tampa, of your interest in joining. Send your email to z@trenam.com. Please think of other attorneys you know who might be interested in joining and let them know how easy it is to do so.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE

by William D. Johnston

During the upcoming Business Law Section Spring Meeting in Nashville, members of the Indemnification and Insurance Subcommittee will again join with members of the Corporate Counseling and Litigation Subcommittee to discuss recent legislative, rule-making, and case law developments as well as director and officer liability insurance "market" conditions. We also will share ideas for upcoming programs and articles, and we will discuss how best to ensure that subcommittee membership is helpful to all practitioners – both in-house and outside. The joint meeting will take place on Thursday, March 31st, from 10:30 a.m. to noon.

As always, new members (and visitors) are welcome. Vice Chair Janet McFadden and I look forward to seeing you in Nashville!

MEMBERSHIP SUBCOMMITTEE

by The Honorable Elizabeth S. Stong

There is no better way to get involved as an active member of the Business and Corporate Litigation Committee than to come to the Section’s Spring Meeting! As always, the Committee will kick off its activities on Thursday, with programs on hot topics in class action jurisdiction in the morning and the Committee's annual review of litigation developments in the afternoon. This full day of programming is followed by the Committee's dinner on Thursday evening at Valentino’s Restaurant in downtown Nashville. The dinner is well attended by Committee leaders, old-timers, and newcomers alike, and
provides a great opportunity to learn about opportunities to publish, speak, and work on policy issues related to litigation for the Committee and the Section, all in a pleasant, informal, and collegial setting. And finally, on Friday morning, the Committee Forum will address the latest developments in arbitration law - and there have been plenty. So if you are thinking about coming to Nashville, come and get involved! And if you are thinking about getting involved in the Committee, come to Nashville!

**PUBLICATIONS SUBCOMMITTEE**

*by Heidi M. Staudenmaier*

The efforts of the Publications Subcommittee will be showcased at the Section's Spring Meeting through the voluminous materials assembled for the 2005 Annual Review of Developments in Business and Corporate Litigation. The 22-chapter materials will be available to all meeting attendees on CD Rom. An Executive Summary of the materials also will be available in "hard copy" format.

The materials will be published in book form this summer by ABA Publishing.

Thanks to the 60-plus authors who took part in the mammoth effort of preparing the materials:

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The following excerpt from the chapter in the Annual Review of Developments on Bankruptcy Litigation gives an example of what is available in the Annual Review’s articles:

§ 4.4.1 New from the Supremes in 2004

The Supreme Court ruled on no business bankruptcy areas this year, but concentrated on consumer bankruptcies in a series of decisions. In 2004, there were several bankruptcy, tax and pension related cases of interest. These rulings continued its involvement in bankruptcy law that it has evidenced in recent years, marking a big change from its years of quietude on bankruptcy doctrine under the prior Bankruptcy Act. It is now not uncommon for the Court to rule on several bankruptcy cases in each term.

A dominant trend as to bankruptcy matters is for the Court to find “plain meaning” in the
Code to guide it, to the exclusion of legislative history or the underlying principles guiding bankruptcy jurisprudence or practice. As noted below, this direction is sometimes strained and often surprises the bar as established bankruptcy custom is overturned.

1. **Kontrick v. Ryan**, 124 S. Ct. 906 (2004), involved a debtor's waiver of defense to comply with bankruptcy rule 4004. The Court unanimously ruled that the debtor must raise a defense of a creditor's time limit for objections to discharge before a decision is rendered or it is waived. The 60 day time limit of the rule is not jurisdictional, as the rules do not expand or limit jurisdiction as stated in rule 9030, thus overruling the Eleventh Circuit's position and agreeing with the rulings of the Second, Fourth and Seventh Circuits.

2. **Lamie v. United States Trustee**, 124 S. Ct. 1023 (2004), in a split decision, held that § 330(a) does not authorize fees to debtor's attorneys who work after conversion without court order. The Court found the language unambiguous despite a grammatical error in the statute and refused to resort to legislative history to interpret the statute. Three justices concurred but would have looked at the legislative history. See Bowles, "Watching Sausage Being Made – the Supreme Court, Not the FDA," 23 ABI J. 30 (2004); Jackson, "Lamenting Lamie and the Appointment of the Chapter 11 Trustee," 23 ABI J. pp. 28ff (Nov. 2004).

3. **Till v. SCS Credit Corp.**, 124 S. Ct. 1951 (2004), decided, more or less, the Court's approach to the appropriate interest rate for cramdown of a secured claim in a Chapter 13 case. The decision is difficult since no clear majority came together, but a group of four justices concluded that a prime plus or "formula rate" by looking to the national bank prime rate is correct instead of the "presumptive rate," the "coerced loan rate," or the "costs of funds" approach. Another concluded only a risk-free rate of interest is correct. The dissent of four justices supported the contract rate as presumptively appropriate. For a further exploration of how the decision plays out in practice, see Greenspan and Nelson, "UnTill We Meet Again: Why the Till Decision Might Not Be the Last Word on Cramdown Interest Rates," 23 ABI J. pp. 48ff. (Dec./Jan 2005). A definitive ruling on rates to be used in a chapter 11 cramdown awaits.

4. **Tennessee Student Assistance Corp. v. Hood**, 124 S. Ct. 1905 (2004), held in a 7-2 decision that an undue hardship discharge proceeding brought under rule 7006 against a state agency is not precluded by the Eleventh Amendment, because, the Court oddly said, it is an in rem, proceeding dealing with the debt, and the state was not involved in personam. The Court did not rule on the issue on which it had granted certiorari of whether the Congress had intended to overrule state sovereignty in enacting the Bankruptcy Code.

5. **Yates v. Hendon**, 124 S. Ct. 1330 (2004), held that the working sole proprietor of a business may use ERISA's protection for a pension if it covers one or more participants.

6. **United States v. Galletti**, 124 S. Ct. 1548 (2004), held by unanimous opinion, that where a partnership is assessed for taxes under 26 U.S.C. § 6501(a), the statute of limitations was extended for collection from general partners who are secondarily liable and they need not be separately assessed.

8. *In re Koons*, 125 S. Ct. 460 (2004), involved the applicability of the $1000 statutory damages cap in truth in lending cases, with the Court holding the cap applies.

**ORDERING THE ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION**

As noted, the 2005 *Annual Review of Developments in Business and Corporate Litigation*, a time-saving guide summarizing legal developments on business and corporate litigation issues, will be available on CDROM at the Spring Meeting. By the Committee, the Annual Review brings together thorough summaries of recent cases, legislation, trends and developments in business litigation topics. This reference will keep you current with annual updates. A necessary reference for every business litigator.

This Summer, ABA Publishing will publish the Annual Review in book form. To order this publication, click [http://www.abanet.org/buslaw/catalog/r5070397.html](http://www.abanet.org/buslaw/catalog/r5070397.html) or call (800)-285-2221.

Overnight delivery is available for an additional cost when orders are placed before 2:00 p.m. Central Standard Time. Please ask the service representative for details when you place your order.

**AUTHOR! AUTHOR! – “BUSINESS LAW TODAY” ARTICLES REQUEST**

“Business Law Today” is the national magazine of the Section of Business Law of the American Bar Association. The magazine is published six times a year as a membership benefit for approximately 60,000 Section members. “Business Law Today” is a magazine, not a law review. We are looking for articles that are enjoyable to read. We publish basic articles directed to business lawyers unfamiliar with a substantive area as well as articles on technical legal issues, but the presentation should be direct and comprehensible.

Articles run around 2,000 to 3,000 words. Manuscripts must not have been published previously. However, seminar materials that have been revamped into simple, readable articles are acceptable. Additionally, any articles previously published in an ABA newsletter (such as *Network*) or firm newsletters are acceptable. The complete author guidelines are available through the Section’s Website, [www.abanet.org/buslaw/blt/guidelines.html](http://www.abanet.org/buslaw/blt/guidelines.html), or Rew Goodenow directly at “Business Law Today,” Editor-in-Chief, Marshall Hill Cassas & deLipkau, Reno, Nevada 89505-2790 (775) 323-1601, (775) 348-7250 (fax), rgoodenow@mhcl-law.com.

The Business and Corporate Litigation Committee newsletter is published four times a year by the American Bar Association, Section of Business Law, Business and Corporate Litigation Committee. The views expressed in the Business and Corporate Litigation Committee newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Business and Corporate Litigation Committee. If you wish to comment on the contents, please write to the Business and Corporate Litigation Committee, Section of Business Law, American Bar Association, 321 North Clark Street, Chicago, Illinois 60610. © 2004 by the American Bar Association.
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