Message from the Chair

Fellow Members of the Business and Corporate Litigation Committee (BCLC):

If you haven't already, please register for our Section's inaugural Annual Meeting (Hyatt Regency Chicago, Chicago, Ill., September 11-13). We'll have our popular Committee Dinner, co-sponsored by the Judges' Initiative, on Thursday, September 11th at Joe's Seafood, Prime Steak & Stone Crab @ 7:30 p.m. From Thursday through Saturday, we'll have a number of content-filled subcommittee meetings and our open committee leadership meeting. Our Pro Bono and Public Service subcommittee will also be hosting a Public Service Project with Junior Achievement. Finally, we have another great line-up of sponsored and co-sponsored CLE programs planned throughout the meeting, including "Avoiding Discovery and Trial Practice Disasters: Tales from the Bench and Trenches" and "Cutting Edge Issues in Intellectual Property Litigation." For you road warriors out there, BCLC will also be hosting "When Three is a Crowd: Issues in Managing Complex, Multidistrict, and Cross-Border Litigations." Finally, among our co-sponsored programs, the Corporate Counsel Committee will be hosting "How Inside and Outside Corporate Counsel Can Work Together to Maximize the Value of Corporate Legal Services."

The Section's inaugural Annual Meeting will be a special one. In addition to the traditional Section Luncheon and the Section Dinner (the latter of which will be held at the Art Institute of Chicago), there are a great number of social networking breakfasts, receptions, and even a "Section Suite Crawl" among four hospitality suites, each with its own signature food and drink selections. Overall, the meeting will be a valuable opportunity to learn, network, and gather with colleagues and to speak with Section leadership, including our very own Bill Johnston.

As you will see from our revised BCLC Photo Leadership Roster, our Committee prides itself on providing early, meaningful opportunities to its members for writing, speaking, leadership, and fellowship. Each of you is our best means of attracting, retaining, and promoting BCLC members. Please take a moment to reach out to colleagues—practicing attorneys, members of the judiciary, law school professors, and law students—and invite them to join BCLC. If your colleagues are already members, please encourage their active participation in our subcommittees. Best of all, invite them to Chicago!

Finally, with this issue of the Network Newsletter, special thanks to Gary Zhao and Alyn Beauregard for all that they do to produce it and to Mac McCoy for all his work in updating our photo leadership roster. As always, please let me know if you have questions, and enjoy the remainder of the summer. I hope to see you in Chicago!

Patrick T. Clendenen
Chair, Business and Corporate Litigation Committee
Rule 3.5 of the ABA Model Rules of Professional Conduct governs attorney contact with judges, jurors, and other officials. It provides:

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate; or
(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Thus, pursuant to Rule 3.5(b), a lawyer may not communicate with a potential juror prior to trial nor may the lawyer communicate with any juror during trial unless otherwise authorized by law or court order. In Formal Opinion 466, the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "Standing Committee") addressed the propriety of lawyers monitoring jurors' internet presence. The opinion addressed "three levels of lawyer review." Those three levels are:

1. Passive lawyer review of a juror's website or electronic social media that is available without making an access request where the juror is unaware that a website or electronic social media ("ESM") has been reviewed;
2. Active lawyer review where the lawyer requests access to the juror's ESM; and
3. Passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer.

The Standing Committee began its analysis by noting that "there is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice." The Committee also recognized an "equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents." While the Standing Committee "strongly encourage[d]" the courts and counsel to specifically address the question of reviewing juror presence on the internet, the formal opinion assumed that no specific order was in place governing the lawyers' conduct and, instead, looked to Rule 3.5.

The Standing Committee concluded that the first category of review, passive review of a juror's website or ESM, that is available without making an access request and of which the juror is unaware, "does not violate Rule 3.5(b)." The Standing Committee likened this conduct to "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions." Such conduct would not violate Rule 3.5(b), because the "mere act of observing that which is open to the public would not constitute a communicative act."

The Standing Committee next determined that the rule bars a lawyer from sending an access request to a juror. That is, it would be inappropriate for counsel, directly or indirectly, to send a Facebook friend request to a prospective juror. Doing so would be a communication prohibited by the Model Rule. Continuing its prior analogy, the Standing Committee wrote that sending an access request "would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house."

The Standing Committee then addressed the question of whether it would violate Rule 3.5 for the lawyer for passively review a website or ESM that was
set up "to identify fellow members of the same ESM network who have passively viewed the juror's ESM." The Committee found that a lawyer "who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror." The Committee found that such conduct would be "akin to a neighbor's recognizing the lawyer's car driving down the juror's street and telling the juror." In this regard, the Standing Committee's opinion is contrary to Formal Opinion 2012-2 of the Association of the Bar of the City of New York Committee on Professional Ethics. In the New York opinion, it was found that the message identifying the ESM viewer was a communication covered by the Rule because it involved "the process of bringing an idea, information or knowledge to another's perception-including the fact that they have been researched."

The Standing Committee finally addressed the question of whether lawyers must report juror misconduct in the use of social media to the court. While such conduct was not the subject of the Standing Committee's opinion, the Committee did note that lawyers reviewing websites and ESM in a manner consistent with the opinion could become aware of juror misconduct involving the use of such media. Rule 3.3 of the Model Rules and its legislative history "make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding." The Committee concluded that the text of the rule does not impose an affirmative obligation on the lawyer to report conduct that falls short of being criminal or fraudulent. In determining whether juror internet communications in violation of the Court's directives must be reported, the Committee noted that "[t]he materiality of juror internet communications to the integrity of the trial would likely be a consideration in determining whether the juror has acted criminally or fraudulently." The Committee suggested that, in extreme cases, criminal contempt could be warranted, which could trigger the attorney's obligations.

**Directors, Officers, and In-House Counsel: You Think You’re Covered, But You’re Probably Not (And What To Do About It)**

No one these days doubts that businesses of all kinds face increasing risk of having their actions questioned by regulators and other law enforcement authorities. Less well known to the executives of these businesses (despite wide publication) is the concept of the "corporate internal investigation." To escape or mitigate legal responsibility for actions of its employees or executives, the company hires outside counsel to conduct an internal investigation. This is today the preferred means of investigating behavior that may be legally troubling for the involved company.

The facts and allegations that give rise to an internal investigation can reach the attention of the company's chief legal officer, senior management, or board in any number of ways. They may be communicated from a wide variety of sources, some of them informal. These investigations, by their very nature, commence without there being a specific charge of misconduct against any specific individual and even without there having been first identified a discrete alleged wrongful act. Almost invariably, however, the investigation involves potential violations of criminal law. Raising the stakes is today's public clamor for corporate agents to be brought to justice for criminal misconduct and the general recognition that innocent shareholders should not pay for the defense costs, much less the penalties, that are incurred by corporate agents who are viewed in hindsight as having implicated the company in violations of criminal law.

For over two years, the Director & Officer Liability Committee has focused on whether the existing framework of statutory law, case law, insurance coverage, and court practices and attitudes are dealing effectively with the corporate internal investigation and the attendant criminalization of executive conduct. This year, the Director & Officer Liability Committee combined forces with three other Committees of the Business Law Section of the ABA—Corporate Governance, Private Equity and Venture Capital, and Corporate and Business Litigation—to sponsor a two-hour session to bring the profession up to date on these efforts. Five panelists with diverse perspectives shared observations, personal experience, and expertise before, during, and after the program. This was truly a knowledgeable and experienced group. Read more...
Bankruptcy Litigation Subcommittee

The Bankruptcy Litigation Subcommittee presented two recent programs:

"The Outer Limits of Collective Action," Spring Meeting

This panel explored the extent to which minority lenders in a syndicate can be compelled to be bound by decisions approved by the majority lenders in actions, post-default. These issues often arise when the credit agreement (if a loan) or indenture (if a bond offering) does not directly address a situation, such as giving the agent or trustee the right to credit bid the debt allocated to each holder. Courts have inferred that the agent or trustee has that right, including the court in Chrysler's bankruptcy case in which all the assets of the company were sold at a 363 sale. *In re Chrysler LLC*, 576 F.3d 108 (2d Cir. 2009). In light of these court decisions, syndicated credit agreements of recent are expressly giving the right to credit bid exclusively to the agent. More troubling, however, are situations in which the majority approves a settlement that has the effect of releasing collateral or guarantors in direct violation of the terms of the credit agreement or indenture. One example is *Beal Savings Bank v. Sommer*, 8 N.Y. 3d 318 (2007), which enforced the terms of a settlement that gave a permanent forbearance to a guarantor, despite language in the loan agreement prohibiting a waiver or release of an obligor without the unanimous consent of the lenders. The decision shows the slippery slope of allowing such settlements to be enforced on a minority lender, outside of a chapter 11 plan process, which is the traditional way to obtain requisite approval for a settlement if unanimous approval is required under the credit agreement or indenture. The panel also discussed what they viewed as the "outer limits" of collective action, which is making a minority lender accept equity in a newly formed company established to credit bid and own the collateral. Tax and securities implications were discussed, as well as suggested provisions to include or address in the formation document for the newly-formed entity, often a limited liability company.


This panel laid out the financing structures used by solar developers to purchase and install solar for commercial or consumer end users, how and why the tax equity investor plays such a significant role in these financings, and issues to consider when the credit quality of the solar developer or the end user deteriorates. A bankruptcy or assignment for the benefit of creditors as a liquidation or restructuring tool was discussed, including the arguments the transaction parties could raise in those proceedings.

The Bankruptcy Subcommittee will also be sponsoring the "Bankruptcy for Breakfast" program at the Fall Meeting in Washington, D.C.

Chair: Sarah Cave, Hughes Hubbard LLP
Vice Chair: Carolyn Richter, Troutman Sanders LLP

Business Torts Subcommittee

The Business Torts Subcommittee is pleased to report that it is teaming up with the Trial Practice Subcommittee for a joint meeting during the New Business Law Section Annual Meeting in Chicago, September 11-13. During the Spring Meeting in Los Angeles, the closely aligned Business Torts Subcommittee and Trial Practice Subcommittee recognized the many benefits of coordination between the two subcommittees while maintaining the unique specialties each subcommittee has to offer. In furtherance of this endeavor, the Business Torts Subcommittee and Trial Practice Subcommittee are also working on a joint CLE program featuring an interactive demonstration involving strategy considerations and trial skills in a hypothetical complex business litigation scenario. Finally, the Business Torts Subcommittee is currently involved in vetting chapter topics for the Business Torts Chapter of the next edition of the *Recent Developments in Business and Corporate Litigation* publications.
Business Torts Subcommittee Co-chairs:
Kevin Hormuth, Greensfelder, Hemker & Gale (St. Louis)
Peter Valori, Damian & Valori (Miami)

Corporate Counseling and Litigation Subcommittee

In the last four months, the Corporate Counseling and Litigation Subcommittee prepared the Corporate Law Developments chapter for the 2014 edition of Recent Developments in Business and Corporate Litigation. The chapter highlighted important decisions and legislative developments regarding mergers and corporate governance during 2013. At the Spring Meeting, the Subcommittee met jointly with the Indemnification and Insurance Subcommittee and discussed recent developments in corporate law, including forum selection and mandatory arbitration bylaws, both within and outside of Delaware, and the Delaware Supreme Court's recent MFW decision. The Subcommittee also discussed plans for future programming.

The Subcommittee does not plan to meet at the Business Law Section Annual Meeting, although it is a co-sponsor of proposed programming for that meeting. The Subcommittee expects to meet at the Business Law Section's Fall Meeting.

International Litigation Subcommittee

Our Subcommittee enjoyed a busy, sun-filled few days at last month's Business Law Section Spring Meeting in Los Angeles. We had a lively discussion with U.S. and international practitioners at our Subcommittee meeting, and greatly enjoyed the varied and informative CLE programming put on by BCLC.

In particular, our Subcommittee co-sponsored a dynamic program with the Young Lawyers Committee at the Spring Meeting, entitled “Moving Your Career Beyond the Fifty States-An Exploration of the Wealth of Possibilities of an International Legal Practice,” chaired by our own Stéphanie Lapierre and including Angel Wang as speaker. We also contributed our annual chapter on International Litigation to the Recent Developments in Business and Corporate Litigation, now in print.

Preparations are well underway for our next meeting, the Business Law Section Annual Meeting in Chicago in September. Our Subcommittee will join the Expert Witness Practice Subcommittee of the Corporate Governance Committee in putting on a non-CLE program entitled "Expert Witnesses in Domestic and International Litigation: Tips and Pitfalls." Our Vice Chairs, Dr. Alfredo Rovira and Angel Wang, will both be speaking on this panel. We look forward to seeing you there!

Finally, we welcome new members to the Subcommittee. We encourage any attorneys with an interest in international litigation to join us at our Subcommittee meeting at the Business Law Section Annual Meeting in Chicago in September.

Co-Chairs: Stéphanie Lapierre and Deborah Templer
Vice Chairs: Angel Yingjun Wang and Dr. Alfredo Rovira

Judges Initiative Committee

The Judges Initiative Committee co-sponsored two programs at the Spring Meeting, "The Nationwide Innovation of Specialized Business and Commercial Courts for Effective Resolution of Business Disputes" and "Innovations in Resolving Complex Business Disputes." Although similar in title, the two programs had different focuses.

The first program featured five Business Court Representatives, and Committee Co-Chair Judge J. Stephen Schuster, addressing the judge's perspective and advice on handling complex commercial litigation at each phase. This best practices, and "inside the judge's mind" panel dovetailed nicely with the Trial Practice Subcommittee's roundtable program the next day, "Tips from the Trial Bench," which included the opportunity to sit with the Business Court Representatives and other judges in a more intimate setting to have a dialogue. You can see some pictures from that event here. The Committee would like to thank Judges Gail Andler, Elihu Berle, Joseph Iannozzone, Patricia Mc Nemey,
and Christine Ward, along with Judge Schuster, for their wonderful participation; Mitchell Bach for planning the program; Lee Applebaum for moderating the panel; and Douglas Toering, Richard Renck, and Carmen Thomas for contributing original materials.

The second "Innovations" program used a hypothetical and some role-playing to compare how the same dispute would be addressed in different forums. The two practitioners on the panel "represented their clients," while the other panelists—a bankruptcy judge, two complex commercial litigation judges, and an arbitrator/mediator—described how they would handle the matter. An engaged audience jumped into, or was pulled into, the discussion, and offered valuable insights and perspectives. The Committee would like to thank Judges Audrey Carrion and Elizabeth Stong, Richard Chernick of JAMS in Los Angeles, Melanie Damian and Lee Applebaum for serving on the panel, and Judge Schuster and Merrick "Rick" Gross for moderating the panel, and engaging the audience. Rick Gross planned this program, and it was the culmination of so many excellent programs he has planned over the years as Chair or Co-Chair of the Subcommittee on Business Courts and the Judges Initiative Committee, as he ends his tenure as Committee Co-Chair. Thanks also to Lee Applebaum for contributing original materials.

Finally, like other Committees and Subcommittees, we are striving to improve our website and to make it useful for our members and others (who hopefully will become members). Please take a look if you have not seen it yet as well as the related website of the Subcommittee on Business Courts. Our thanks to Lee Applebaum who manages both websites, and to Graham Hunt who has provided such great support. For any Committee or Subcommittee that is thinking about developing your website, Graham and Lauren Shores are invaluable resources.

Membership Subcommittee

The Membership Subcommittee serves as the Business and Corporate Litigation Committee's (BCLC) liaison to the Business Law Section on matters related to member recruitment and retention.

Currently, the BCLC is the seventh largest committee in the Section, with 1,851 total members (1,618 lawyer, 78 associate, and 155 law student members). The BCLC maintained stable membership numbers, with 0.76% increase from last year (1,837 members). This growth is stronger than overall Section growth of 0.24%, but less than entire ABA membership growth of 1.58%. Notably, Section lawyer members have increased year-over-year for the first time since 2009, and there was an 8.43% increase in lawyer members belonging to a substantive committee. The increase of lawyer members in a substantive committee is significant because retention rates are much higher for members of committees than for those that are not. Finally, Section recruitment efforts in FY2014 to date, including email, direct mail, and telemarketing campaigns, have resulted in 1,096 new Section members.

The Subcommittee reported on our membership efforts at the Spring Meeting in Los Angeles. Recent efforts include the continuation of targeted email campaigns to prospective members utilizing the Section's redesigned marketing materials, as well as participation in the Section's monthly Membership Committee conference calls. In addition, the Section's popular "In the Know" CLE webinar series, a no-cost member benefit, has proven to be a strong recruitment and retention tool. The BCLC-sponsored "In the Know" program on alternative entities held on June 21, 2013 was very successful, with 1,157 registrants (second-highest registration for an "In the Know" program). Looking ahead, the BCLC will present another "In the Know" program on August 4, 2014, titled "Prosecution, Defense, and Settlement of M&A Stockholder Litigation—A Solution in Search of a Problem." Program details are available [here](http://apps.americanbar.org/buslaw/committees/CL15000pub/newsletters/201408/) and registration will be open soon.

The Membership Subcommittee welcomes the input of all Committee members in our outreach efforts.

Pro Bono/Public Service Subcommittee
At the 2013 Annual Meeting in San Francisco, the Subcommittee partnered with the Young Lawyer Committee and Pro Bono Committee to organize a meaningful and rewarding pro bono and public service project. A group of seven volunteers went to GLIDE, an organization that provides daily meals to those in need, to prepare lunch on August 9 (pictures from the event attached). Additionally, we supported the San Francisco Food Bank by hosting a virtual food drive and were able to raise $900 for the Food Bank, which translates to $5,400 worth of food that the Food Bank was able to supply with our donations.

At the 2012 Annual Meeting in Chicago, the Subcommittee partnered with the Young Lawyer Committee and Pro Bono Committee to connect with Junior Achievement of Chicago for “Ask an Expert Day,” where the volunteer team of approximately twelve attorneys, met with students from local high schools to discuss their career paths and education. Over fifty students attended.
Similarly, at the 2011 Spring Meeting in Boston, the Subcommittee partnered with the Young Lawyer Committee to host "JA for the Day" with the local Boston chapter of Junior Achievement. The volunteers spoke to local high school seniors on the topic of business ethics with an emphasis on legal ethics. The presentation paired Business Law Section volunteers with small groups of students to analyze and discuss video clips from legal films and sitcoms. (Picture attached).

In keeping with the Junior Achievement theme, the Subcommittee is partnering with the Young Lawyer Committee again for the 2014 Annual Meeting in Chicago to work with JA to organize another exciting and meaningful project. We look forward to having everyone participate and making this project the best yet! Details to follow in June. In the interim, if you would like to volunteer for the Annual Meeting project, please contact Kristin Gore at kgore@cfjlaw.com.
Securities Litigation Subcommittee

The Securities Litigation Subcommittee has been busy. We sponsored a program at the Spring Meeting in Los Angeles, "Prosecution, Defense and Settlement of M&A Stockholder Litigation - A Solution in Search of a Problem." The program had lively debate between defense and plaintiff's counsel and the wise counsel of two judges. We will be doing the program again as an "In The Know" webinar program on August 4, 2014. Program details are available at the "In the Know" website, http://www.ambar.org/intheknow. Registration will open soon. The subcommittee also was part of the Recent Developments program that the Committee presented at the Spring Meeting. Additionally, at the Annual Meeting of the Section in Chicago this September we will have a joint meeting with the Class and Derivative Litigation Subcommittee and as part of that meeting we will have a guest speaker from Cornerstone who will be presenting various statistics relating to M&A and Securities Litigation. Look for the schedule and plan to attend our joint subcommittee meeting.

Trial Practice Subcommittee

The Trial Practice Subcommittee presented the second annual "Tips from the Trial Bench" Program at the Spring Meeting in Los Angeles. Once again this program drew a capacity crowd that allowed seasoned trial lawyers, less frequent courtroom advocates, and law students to engage in conversation with Business Court Judges about best practices, pet peeves, and effective advocacy. Over a casual lunch program, participants were able to learn from the experience of others and hear first-hand the opinions of trial judges on what works and what doesn't in the courtroom. Co-chairs Judge Gail Andler and Daniel Formeller hosted and moderated the program that was planned and arranged by Vice Chair Michaela Sozio. We are especially appreciative of the Business Court Judges who make this program so attractive and so effective. Thank you to Judges Elihu Berle, Joseph Iannozzone, Patricia Mcnerney, Christine Ward, Audrey Carrion, Steven Perk, Amy Hogue, Cliff Newman, Stephen Schuster, Mark Denton, and Vice Chancellor Donald Parsons for your support and participation. We also extend our sincere appreciation to the Program Sponsors Tressler LLP, Greenberg Trauig, Proctor Heyman LLP, Judicate West and Loyola Law School (LA). Pictures from the Program can be
viewed here.

In collaboration with the Business Torts Committee we will be presenting a CLE Program entitled "Avoiding Discovery and Trial Disasters-Tales from the Bench and Trenches." This Program, presented by a panel of trial lawyers, in-house counsel, and judges is intended to stimulate thinking and discussion on best practices in the courtroom in complex business cases.

Finally, in collaboration with the Business Torts, Appellate, and Judges Initiative Committees, Trial Practice will be presenting two substantive non-CLE Programs in one session at the Fall Meeting in Chicago entitled "Belt and Suspenders: Tips for Using Technology at Trial and Having a Backup Plan," and "Looking Ahead to Trial: Deposition Strategies." These Programs are open to all Business and Corporate Litigation Committee members and other interested Business Law Section members.

Women Business & Commercial Advocates Subcommittee

Panel Presentation on April 12, 2014 in Los Angeles at
ABA Business Section Spring Meeting:
“Directors, Officers, and In-House Counsel: You Think You’re Covered, But You’re Probably Not (And What To Do About It)”

No one these days doubts that businesses of all kinds face increasing risk of having their actions questioned by regulators and other law enforcement authorities. Less well known to the executives of these businesses (despite wide publication) is the concept of the “corporate internal investigation.” To escape or mitigate legal responsibility for actions of its employees or executives, the company hires outside counsel to conduct an internal investigation. This is today the preferred means of investigating behavior that may be legally troubling for the involved company.

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For over two years, the Director & Officer Liability Committee has focused on whether the existing framework of statutory law, case law, insurance coverage, and court practices and attitudes are dealing effectively with the corporate internal investigation and the attendant criminalization of executive conduct. This year, the Director & Officer Liability Committee combined forces with three other Committees of the Business Law Section of the ABA -- Corporate Governance, Private Equity and Venture Capital, and Corporate and Business Litigation -- to sponsor a two-hour session to bring the profession up to date on these efforts. Five panelists with diverse perspectives shared observations, personal experience, and expertise before, during, and after the program.1 This was truly a knowledgeable and experienced group.

1 The panel was moderated by James Wing of Holland & Knight Miami and Chicago. Jim is a frequent speaker and author on this subject in specialty insurance publications and has actively litigated advancement rights for executives under criminal law scrutiny. He is currently the chairman of the D&O Insurance Subcommittee of the Director & Officer Liability Committee.

Francis Pileggi of Eckert Seamans Wilmington and Nancy Adams of Mintz Levin Boston are co-chairs of the Indemnification and D&O Insurance Subcommittee of the Corporate and Business Litigation Committee. Nancy regularly advises primary and excess insurance carriers in a variety of contexts and has extensive experience in D&O risk management, advancement and indemnity by-law drafting, and auditing executive protection programs. Francis is the noted creator of the respected Delaware Corporate and Commercial Litigation Law Blog (www.delawarelitigation.com) who regularly updates the profession on developments in this area. Francis also litigates cases involving advancement and indemnity.

Leslie Kurshan is a member of the California bar and a solicitor of England and Wales. Based in London, she is head of product development for the UK financial and professional lines practice of Marsh (the world’s largest insurance broker). Leslie is a former insurance coverage litigator, experienced at negotiating and drafting D&O policies for companies in the U.S. and Europe.

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In preparation, the panel assessed all recent ABA publications on point, including the 2012 and 2013 Checklists for Corporate Counsel Supervising the Creation or Renewal of an Executive Protection Program, the 2013 Annotated Model Indemnification Agreement, and the chapter on indemnification and advancement contained in the ABA’s “2014 Edition of Recent Developments in Business and Corporate Litigation.” The panel also reviewed an in-depth discussion of the Fifth Amendment to the U.S. Constitution as it applies to executives involved in corporate internal investigations and a 52-jurisdiction survey of the law relating to corporate advancement of litigation expenses (both distributed in the program materials), as well as other relevant materials, including the publications set out in the panelists’ resumes and cited in them.

The panel’s conclusions were neither pretty nor comforting to hear. The panel broke down its presentation by addressing separately each of the three elements of an acceptable executive protection program -- underlining that each of the three elements must be separately considered and then coordinated with the other elements: exculpation statutes, advancement and indemnification provisions of articles of incorporation, by-laws, or agreements, and D&O insurance. The conclusions of their coordinated presentations were as follows:

1. **Exculpation.** Almost all state statutes have a provision authorizing corporations formed under them to include a provision in their articles/certificate of incorporation insulating their directors (rarely do the statutes include officers) from liability for damages based on the breach of the fiduciary duty of due care (as opposed to the duty of loyalty). The charters of many (usually non-public) corporations lack such a provision, and under present political circumstances, it is frequently difficult to get one inserted into an existing charter.\(^2\) Court decisions vary as to whether a defense based on such a statute can be raised in litigation by a motion to dismiss or only as an affirmative defense, with the states adopting the latter view significantly reducing the utility of such protection because in those jurisdictions the provision may not be sufficient to avoid expensive discovery.

Bottom Line: **A lawyer creating or renewing an executive protection program should determine whether the corporation’s charter has such a clause and, if not, advise the client appropriately.**

2. **Advancement of Defense Costs -- Does the Executive Have an Enforceable Right to Advancement At All?** The “corporate internal investigation” has become the criminal law’s instrument of choice that can place interviewed executives in a legal quagmire fraught with risk. An interviewed executive without funding to secure immediate access to experienced counsel faces potentially catastrophic familial, personal, career, and financial loss. The panel emphasized the absolute need for executives to have secured in advance of the investigation a mandatory right to advancement from the company of his/her defense costs, repayment of which can be compelled by the company only if the executive is found to have acted in bad faith or to have acted contrary to the company’s interests in respect of the underlying matter without a reasonable belief that s/he

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Based in Dallas, Kara Altenbaumer-Price is the head of management and professional liability counseling for USI, the nation’s largest privately-held insurance broker. She was formerly a securities litigator and frequently counsels USI’s clients on “employed lawyer” coverage for in-house counsel, including those who are not simultaneously corporate officers.

\(^2\) In Delaware, however, exculpatory provisions are customary and appear in the certificate of incorporation of most corporations, whether public or non-public.
was acting appropriately. It is the job of drafting counsel to deliver that protection, assuming that
the company’s board has decided to grant it. (Corporate boards, once advised of the law, rarely
decide to provide advancement rights to directors and officers.)

It was emphasized that Delaware law (and presumably that of the twelve other U.S. jurisdictions
that are considered to follow Delaware in this area) does not mandate advancement unless the
right is specifically granted in the company’s by-laws, certificate of incorporation, or a separate
agreement. Granting executives mandatory “indemnity to the fullest extent permitted by law” or
other such general language is not sufficient to assure advancement in Delaware-pattern
jurisdictions. In stark contrast, fourteen jurisdictions follow the current Model Business
Corporation Act and reject the Delaware rule. Those jurisdictions’ statutes specifically provide
that a grant of mandatory indemnity rights alone includes a right to mandatory advancement
without further specificity. This means that in the remaining twenty Model Act-based states that
omit the language explicitly rejecting the Delaware rule, it can be argued that the omission of the
rejection implies that the Delaware rule has been adopted so that executives who are merely
“indemnified” have no right to mandatory advancement.

The 52-jurisdiction summary appended to the program materials catalogs these and other
potential statutory impediments to advancement in the various jurisdictions. Delay in
advancement resulting from having to litigate these questions alone can seriously harm an
executive who needs immediate assistance.

Bottom Line: Practitioners need to draft advancement and indemnification provisions of charters
and by-laws or agreements with sensitivity to these issues and may consider lobbying their Bar
representatives to the state legislatures to keep up to date through potential amendments to their
state’s corporate law statutes.

3. Advancement of Defense Costs – “Final Adjudication.” Equally striking are the
differences among the states on the critical issue of what is known as “final adjudication.”
Delaware lawyers report that in practice, a company that wishes to oppose a qualified, entitled
executive’s demand for advancement may not file affirmative defenses, counterclaims, or even
independent suits that force the executive to litigate facts relevant to an alleged breach of
fiduciary duty that might ultimately disentitle him to indemnity until and unless there is a
“final adjudication” in the underlying case or (perhaps) a final judicial finding in another case
or sworn admission of facts that constitute disabling misconduct. While this means, in
common law parlance, that the duty to advance defense costs remains no broader than the duty
to indemnify, breach of the latter duty may not be determined before there is a ruling in the
underlying (civil or criminal) case.

Query whether the same rule will necessarily be followed by courts in other Delaware-pattern
states or, for that matter, non-Delaware courts asked to apply Delaware law? For sure it will
likely not be followed in the three Delaware-pattern states that, consistent with the current Model
Act, require the executive to provide a written profession of innocence of breach of fiduciary
duty. Only a few states have even considered this issue, much less decided it.
Bottom Line: Practitioners should write a “final adjudication” provision into any advancement or indemnification charter or by-law provision or agreement intended to confer mandatory advancement. This is true even for Delaware practitioners whose advancees may need to seek court relief under Delaware law in jurisdictions outside of Delaware.

4. Advancement of Defense Costs—Fifth Amendment Complications. As noted above, the principal goal of the program was to explore the interaction between the criminal law as applied in corporate internal investigations and the advancement rights of indemnified executives. Even a completely innocent executive, when interviewed in an internal investigation, takes significant legal risks of which he is not generally aware. The panel demonstrated that he is given an “Upjohn Warning” (not a Miranda Warning), not to advise him of his rights, but to guarantee that what he says may be disclosed by the company’s private counsel to governmental authorities or prosecutors. The panel graphically posited a hypothetical where an innocent executive is first notified in the investigation that he has been (falsely) accused of criminal wrongdoing by a subordinate employee. The panel explained how both his verbal and nonverbal reactions to the accusation can be used against him later in court. The panel demonstrated the quandary in which he is placed and that even a decision to invoke Fifth Amendment rights in that context must be express or is waived under a recent 5-4 decision of the U.S. Supreme Court. *Salinas v. Texas*, -- U.S. --, 133 S.Ct. 2174 (2013).

The panel further pointed out that merely denying the (false) allegation would constitute a Fifth Amendment waiver and is thus anathema to experienced white collar defense counsel. This is because a premature denial of liability can be highly disadvantageous to the innocent indemnified executive’s legal interests. If he fails to respond at all or if he asserts Fifth Amendment rights, the panel explained that he can be, and probably will be, fired with all the personal, career, and financial damage that a termination entails. If he were a government employee, he could not be terminated unless he were first granted immunity and still refused to talk. As an employee of a private company, he has no such Constitutional protection. All these issues are explored in more detail in the Fifth Amendment memo contained in the program materials.

But all the news is not bad. The statutes of Delaware-pattern jurisdictions (except for the three that require the putative advancee to testify as to his innocence of breach of fiduciary duty) do not expressly condition advancement on the executive’s assertion of innocence. Thirty-one Model Act jurisdictions, however, impose the assertion of innocence requirement by statute, as does New York and New Jersey by implication. However, the panel was pleased to announce that an amendment to the Model Act has been approved on second reading by the Corporate Laws Committee to delete the requirement from the Model Act; the proposed deletion will be submitted to the ABA membership for comment in the May edition of *The Business Lawyer*. Of course, even if approved by the ABA, it may be years before the change is adopted by many states that follow the Model Act.

**Bottom Line:** Support for the Model Act amendment is crucial for those who wish to see greater clarity of executives’ advancement rights. In the meantime, practitioners should draft charter and/or by-laws or agreements that provide rights to advancement in a way that will not impair the advancee’s Fifth Amendment rights. Even if the state of incorporation omits the requirement, you rarely have control over which state’s courts will be called upon to decide the issue.
5. Can D&O Insurance Cure Certain Uncertainty With Respect To Advancement Reflected in the Common Law of Advancement? As detailed above, the common law of advancement does not have a uniform approach across jurisdictions. One would think that D&O insurance would spring to the rescue and write cover to insure executives against these deficiencies and complications. The panel’s conclusion was that it does not, at least completely, but that relief is on the way.

The panel explained the topsy-turvy growth and proliferation of covers in this area and furnished a chart demonstrating the current interaction of covers known as A-Side, B-Side, C-Side (when combined, ABC), towers of “follow-form” and sometimes non-follow-form excess cover, and specialty covers called “Side-A only difference-in-conditions” (DIC) cover. It was explained how the definition of “Claim” in most current policies requires, typically, a written complaint, criminal charge, maybe a Wells Notice, maybe a request for a statute of limitations tolling agreement, maybe a subpoena, and maybe a request for an interview by a recognized “enforcement authority” or one incident to a corporate derivative demand. But almost never does a policy define a “Claim” to include a “pure” corporate internal investigation initiated before any claim is made against anyone. The panel explained how the definition of “Claim” also invariably includes the allegation of a discrete “wrongful act” by the insured executive, also something by definition not involved in a corporate internal investigation. Thus, most of today’s policies fail to cover the principal catastrophic risk that today’s executives most commonly face.

But there was good news. The panel reported that two DIC policies currently on the market and a third to be soon announced have expanded the definition of “Claim” to include facts that form the basis of what is called a “notice of circumstance.” The latter is a concept heretofore used in insurance policies only to cement cover under a particular policy year for matters that may not ripen into a defined “Claim” until a later year when the D&O coverage may be non-existent or reduced. The two (and soon three) DIC policies effectively attach coverage earlier than other policies on the market so as to cover “pure” internal investigations without subjecting the insured to the risk that his/her failure to notify the item to the carrier will give the carrier a late notice defense.

This is a major and positive development. Still to be resolved (although a resolution is hopefully in process) is a means to protect an insured executive from losing his/her cover for breach of the policy’s cooperation clause if s/he or counsel is required to assert legal privileges against the insurance company for fear that communicated information can be subpoenaed by an adversary.

Bottom Line: Advise your boards of the coverage gaps in policies under their consideration, recommend DIC cover, and be sure the cover includes the “notice of circumstance = claim” feature described above. Remember, even if the form does not have the cover, it can be negotiated into the cover. The forms on the market are not exclusive representations of what can be achieved.
6. **In-House Counsel Exposure.** The panel was unable to give comfort to employed lawyers in terms of their ability to obtain advancement and indemnity from their own corporate clients under state Bar rules that prohibit lawyers from obtaining indemnity from clients for their own misconduct. It was further noted that most D&O policies that cover general counsel as a corporate officer exclude liability for professional services, thereby reducing D&O coverage for them and motivating them to obtain separate “employed counsel” coverage. Further uncertainty can arise in those cases (fortunately rare) where “employed counsel” are accused of conspiring with or aiding and abetting an allegedly miscreant corporate officer. In those cases, it is important that the employed lawyer’s policy cover all actions taken in the process of rendering legal advice, and not be limited strictly to professional negligence.

**Bottom Line:** Give careful attention to the policy language to be sure that “all risk” coverage for employed lawyers is obtained to the maximum extent possible.

7. **Implications for Legal Ethics.** Included in the program materials was the D&O Liability Committee’s “2013 Checklist for Corporate Counsel Managing the Creation or Renewal of an Executive Protection Program.” The Checklist attempts to catalog all the issues of exculpation, advancement and indemnity, and D&O insurance known on the date of its publication. New issues have already arisen since then and will be included in next year’s version. The current Checklist is intended to provide a “best practice” safe harbor. It also raises the question of counsel’s potential conflict in advising simultaneously the company’s board, members of which may be advancees/indemnitees, and in its capacity as counsel for the company itself. It resolves the conflict by acknowledging that one exists but pointing out that the conflict is that of the board itself, not that of counsel. This is because it is the statutes that put the board in the position of authorizing the company to grant mandatory advancement and indemnity so that the company may obtain and retain qualified personnel.

But as the advancement rights of executives are broadened and clarified through statutory and drafting improvements, is the answer so obvious? Can counsel managing or supervising the process remain completely objective when advising about advancement rights for executives who may be sued by the company itself for improper personal gain, or when advising on whether advancement rights should be limited, say, to a percentage of the insurance cover so as not to threaten the solvency of the company once insurance cover is exhausted? Should any one lawyer be compelled to advise a company on executive protection when one of its principal objectives is to decide how to handle the relationship between parties whose interests can become so starkly adverse? Can any lawyer be reasonably asked to put him - or herself in a position of being subject to later criticism that s/he led the overall board to a solution that to them seems so wrong in hindsight? Is this fair to the lawyer?

And how does any one counsel deal with the question of which executives should have separate cover to avoid their policy limits being exhausted by other accused (and no doubt disfavored and maligned) inside directors who become the targets of governmental prosecution, leaving the former exposed? Should the concept of “suitcase” cover be encouraged, whereby each director obtains separate cover for a single premium that covers his liability as a member of a board or of number of different boards, to which each company for which s/he is a director contributes?
To what extent is corporate counsel obliged to even raise these issues? And how does all of this affect the non-profit area whose boards are populated by wealthy individuals who are seriously exposed to claims but where the entity itself cannot be seen by charitable donors as using its assets to pay legal defense costs in derogation of its overall charitable mission?

Bottom Line: The panel leaves these issues of basic policy and legal/positional conflicts for future review.