Message from the Chair

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

As you will see from the subcommittee reports and articles in this issue of Network Newsletter, our committee had an entertaining, productive, and successful Spring Meeting in San Francisco. Our CLE, non-CLE, committee dinner, and Trial Tips from the Bench were all well-attended and presented. Thank you to our subcommittee leaders, and to my vice chairs, for all of your continuing efforts. The Business Law Section (BLS) Annual Meeting in Chicago, scheduled for September 17-19, 2015, will be presented at the Hyatt Regency Chicago. (Please note that the BLS no longer holds its annual meeting as part of the ABA Annual Meeting). Early-bird registration rates are in effect through July 24, 2015, and online registration is available here. We have another outstanding line-up of CLE and non-CLE programs, our committee dinner, and the Annual Pro Bono and Public Service Project, which is led by our subcommittee on Pro Bono and Public Service.

After five years of dedicated service as the Editor of Recent Developments in Business and Corporate Litigation, Bret Cohen has turned the reigns over to Brad Newman. Please thank Bret for his outstanding service and welcome Brad into this critically important role for BCLC. In addition, new BCLC leadership appointments will be made after the BLS Annual Meeting, so please check in with your subcommittee leadership about succession planning, and send your recommendations or interests to me.

As for ongoing projects, please be aware that we are in the process of considering whether to create a new Products Liability Subcommittee. If you or one of your colleagues has an interest, please contact me. Also, our webpage continues to grow in content, from subcommittee posts to great photos of our various programs and gatherings. To add to this collection, I plan to appoint a BCLC Historian to interview past chairs and map the significant milestones of our great committee. We also plan to add lists of all the awardees (and locations) from the Women Business and Commercial Advocates receptions and all our Annual Pro Bono and Public Service projects. Please let me know if you have interest in this important role and project for BCLC.

I'll be in touch relatively soon with more detailed information on the BLS Annual Meeting, and, in the interim, enjoy your summer!

Sincerely,

Pat
Patrick T. Clendenen
Chair
Business and Corporate Litigation Committee
American Bar Association, Business Law Section

Featured Articles

Habits (and Blunders) of Highly Successful Trial Attorneys: The View from the Bench
By Anne Steadman

During the April Section Meeting in San Francisco, I had the privilege of attending two great events focusing on promoting interaction between judges and trial lawyers, and promoting a dialog on what works (and what does not work) in corporate litigation.

The first event, held Thursday afternoon, was the Trial Practice and Business Torts Joint Meeting, "Ten Habits (and Blunders) of Highly Successful Trial Attorneys," cochaired by Kevin F. Hormuth and Peter F. Valori, and moderated by Judge Gail Andler, who sits on the Complex Civil Litigation Panel of the Superior Court in Orange County, California. The session consisted of an hour-long roundtable discussion with judicial representatives and practitioners. The judges offered their perspective, focusing mainly on courtroom presentation strategy.

A significant theme was the use (or misuse) of technology in the courtroom. While the judges agreed that effective use of technology (e.g., putting a relevant passage of a contract up on the ELMO projector) is very helpful, they agreed that there is a dangerous temptation for attorneys to use technology as a crutch. Attorneys were cautioned, "If you can't do your opening without your technology, this is a problem."

A second significant theme was the importance of providing the judge (and jury) with a larger framework into which they can fit the more complex details of the case, and the need to establish this framework early on in your trial presentation. For example, it was suggested that attorneys endeavor to distill the main ideas of their case down to a handful of bullet points and then fill in the detail as the presentation progresses. The judges reminded the practitioners that they should not be afraid that they are making things "too simple." Judges are busy and often need to switch gears quickly from one case to another. Even when your judge has spent hours reading and reviewing the papers, it is still helpful to have a framework that helps the judge reorient herself to your case. As Judge Denise Owens of the Mississippi Court of Chancery put it, lawyers would do well to remember the quote from the courtroom drama, Philadelphia, "Explain it to me like I'm a four-year old."

The theme of effective framing really resonated with me personally given my background as a teacher and academic prior to law school. Having attended many academic presentations on complex topics, I have found that the most effective speakers, whether addressing students or peers, are those who endeavor to make their presentation accessible rather than presuming that their audience will do all the work to put the pieces together. A very effective way to do this is to have three or four bullet point themes that you keep returning to: tell them what you're going to tell them, tell them, and then tell them what you've told them. Simple need not be patronizing. The goal is to be courteous to your audience and frame things so that they do not feel like they have to do your job of connecting the dots for you.

The second event was the "Tips from the Trial Bench" luncheon on Saturday. This event, which is in its third year, is present at every BLS Spring Meeting. The event is run by the BCLC Trial Practice Subcommittee, co-chaired by Judge Andler and Daniel R. Formeller, and is co-sponsored by the Judges Initiative Committee.

The lunch brought practitioners and judicial officers together at tables of six to eight people, with at least one judicial officer at each table. At my table, we had two judicial officers, Judge Andler and Judge Owens, two senior practitioners, several junior practitioners, a law student, and a law clerk. The mix of backgrounds and experience levels at the table made for an especially interesting discussion. One significant theme was the frustration expressed by practitioners concerning the failure of opposing counsel to cooperate in resolving discovery disputes and the perception that some judges "punish both sides equally" by forcing counsel to work it out without a lot of court supervision. One of the judges mentioned that she is willing to take a stronger hand in discovery disputes when practitioners are candid with her about what discovery really matters rather than pretending like everything is. One of the practitioners
mentioned that he had worked in a court where the judge required the attorneys to physically sit and confer in a conference room in the courthouse.

Themes at other tables included the merits of jury trials and the cost of eDiscovery. Pat Clendenen reported that both of these topics were raised at his table. The consensus was that juries generally get it right and that both judicial officers and practitioners should endeavor to encourage more jury trials. Concerning eDiscovery, several practitioners expressed a desire for more judicial management in order to help rein in the costs and complications of voluminous eDiscovery.

As a young lawyer and first time participant, I was impressed by the candid and cordial dialog between the judicial officers and practitioners at all stages of their careers, and the enthusiasm and commitment on both sides of the bench to making litigation more effective. This year's sponsors of the Tips from the Trial Bench lunch were:

- Damian & Valori LLP
- Greenberg Traurig LLP
- Golden Gate University School of Law
- University of the Pacific, McGeorge School of Law
- Nelson Mullins Riley & Scarborough LLP
- Santa Clara Law School
- Stanford Law School
- Tressler LLP
- University of San Francisco School of Law
- Wilk Auslander LLP
- Young Conaway Stargatt & Taylor LLP

### Subcommittee Reports and Updates

#### Business Divorce Subcommittee

Current and new members of BCLC continue to support and express enthusiasm about our newest subcommittee, Business Divorce. Approximately twenty people attended our subcommittee meeting at the Annual Meeting in Chicago. Kurt Heyman, Pete Ladig, and the Hon. Donald Parsons of the Delaware Court of Chancery discussed two of Vice Chancellor Parsons' recent business divorce cases, and numerous others participated in the discussion.

At the Fall Meeting in DC, we had standing-room only attendance at our subcommittee meeting. Two financial experts, Jaime d’Almeida from Duff & Phelps and Brett Margolin, Ph.D. from BDLS, made presentations regarding valuation issues that frequently arise in "business divorce" cases involving closely-held companies, including valuation of goodwill and selection of comparable public companies for a discounted cash flow (DCF) analysis. A number of judges from several jurisdictions were also in attendance and offered their views on the issues being presented.

At the Annual Meeting in San Francisco, we presented a panel entitled “50 Ways to Leave Your Lover, err . . . Business Partner: The Essentials of Business Divorce in Privately Held Entities,” which was one of the top five most attended panels during the entire Meeting (pdf / audio). The panel covered issues including dissolution, forced-buyouts, buy-sell agreements and the types of claims often brought in business divorce cases. Panelists included Kurt Heyman of Proctor Heyman Enerio LLP in Wilmington, DE (moderator); The Hon. Donald F. Parsons, Jr., Vice Chancellor of the Delaware Court of Chancery; Peter Ladig of Morris James LLP in Wilmington, DE; Eric Milby of Lundy Beldecos & Milby P.C. in Narberth, PA; Michaela Sozio of Tressler LLP in Los Angeles; and Melissa Donimirski of Proctor Heyman Enerio LLP in Wilmington, DE.

#### Business Torts Subcommittee

The Business Torts Subcommittee last met at the Spring Meeting in San Francisco in April 2015. The meeting was a joint Business Torts/Trial Practice
Subcommittee program and was a non-CLE presentation entitled "Top Habits of Highly Effective Trial Lawyers (and Top Blunders)." The discussion was led by Judge Gail Andler and focused on a topic-driven open question and answer format. Several members of the Business Torts Subcommittee contributed. The meeting was well attended and enjoyed by all.

The Business Torts Committee will meet next in Chicago at the Annual Meeting and will be a part of a substantive (though non-CLE) joint meeting on case management and how judges use case management orders. The meeting will be jointly held with the Judges Initiative Committee, the Subcommittee on Business Courts, the National Center for State Trial Courts Committee on Business, and Commercial Courts and the Trial Practice Subcommittee. I hope to see you all there.

**Corporate Counseling and Litigation Subcommittee**

In 2015, the Corporate Counseling and Litigation Subcommittee completed Chapter 13, Recent Developments in Corporate Law, which appears in the 2015 edition of the BCLC's *Recent Developments in Business and Corporate Litigation* treatise. The chapter highlighted important 2014 judicial decisions and legislative developments affecting mergers & acquisitions, corporate governance and other areas of corporate law. At the Business Law Section's Spring Meeting, co-author and the Subcommittee's Co-Vice Chair Emily V. Burton participated in the "Annual Review" CLE panel discussing certain of these developments (pdf / audio).

Also at the Spring Meeting, the Corporate Counseling and Litigation Subcommittee held its traditional joint meeting with the Indemnification and Insurance Subcommittee. Members of the subcommittees led discussions regarding recent amendments to the Delaware General Corporation Law, including developments related to Delaware's new ratification statutes, Delaware's Rapid Arbitration Act, and the so-called "private judging" movement gaining pace in other jurisdictions. Our subcommittee also completed its annual chapter of key court decisions from around the country on indemnification and advancement of directors and officers for the 2015 edition of the BCLC's *Recent Developments in Business and Corporate Litigation* treatise.

**Indemnification and Insurance Subcommittee**

At the Business Law Section Spring Meeting, the Corporate Counseling and Litigation Subcommittee held its traditional joint meeting with the Indemnification and Insurance Subcommittee. Members of the subcommittees led discussions regarding recent amendments to the Delaware General Corporation Law, including developments related to Delaware's new ratification statutes, Delaware's Rapid Arbitration Act, and the so-called "private judging" movement gaining pace in other jurisdictions. Our subcommittee also completed its annual chapter of key court decisions from around the country on indemnification and advancement of directors and officers for the 2015 edition of the BCLC's *Recent Developments in Business and Corporate Litigation* treatise.

**International Litigation Subcommittee**

The China America Legal Forum was held in Beijing, China on 4-5 September 2014. The Forum was supported by the ABA as a strategic partner, and President William Hubbard delivered a great speech at the Forum. As well as the ABA, AmCham China was another strategic partner. China International Legal Affairs & Culture Exchange Center ("CILACEC") and one of the most prestigious business and finance magazines, CAIJING Magazine, cohosted the event.

Besides President Hubbard, over thirty very high profile speakers gave speeches at the Forum, such as Judge David O. Carter from the United States District Court of the Central District of California; Mr. Andrew Levander, Chairman and Senior Partner of Dechert LLP; Mr. Junfeng Wang, Chairman of All Chinese Lawyers Association; Mr. Jianguo Wei, retired Vice Minister of Commerce, China; and many partners from well-known American law firms. There were over three hundred attendees at the Forum, many of whom were General Counsel and other business executives from big Chinese companies.
The Forum topic was *Law and Economy: Management of Legal Risk for International Business*. There were two plenary sessions in the morning and four branch sessions in the afternoon. The morning sessions focused on general law and culture, and on the differences between America and China. Other areas included recent updates on the American legal system, and reviewing the most important cases for Chinese companies in the U.S. courts after the year 2000. The four sessions in the afternoon covered topics about real estate, law on natural resources, M&A, financing in the U.S and I.P. law.

Although more and more Chinese companies are undertaking business in the U.S., they do not fully understand American law or culture, and therefore they have not been achieving their business aims. For this reason, the Forum put American legal professionals and Chinese business executives together. For American attorneys, it was a great chance to meet potential clients; for Chinese business executives, they gained some useful information and ideas to conduct business in the U.S., so it was a win-win situation for all attendees.

In China, legal forums are usually limited to academics only. This Forum was the first of its kind in China, which took a lot of effort to prepare and was such a huge accomplishment. Almost all attendees gave positive feedback, stating that it was "very informative and helpful," and they look forward to attending next year, as the Forum will be held annually based on relevant topics.

Angel Yingjun Wang, who is both a Vice Chair of the BCLC International Litigation Subcommittee and the founder and Chairperson of CILACEC, chaired the Forum. The Immediate Past ABA President, James Silkenat, assisted greatly to make the Forum a success. The Section of International Law represented the ABA to undertake the work. Judge Alvin Thompson and Justice Ruth McGregor also gave their full support. With so many people's hard work, the Forum achieved its goal and was a great success especially as it only took three months to prepare.

For more information, please visit [www.cilacec.org](http://www.cilacec.org).
Judges Initiative Committee

The Judges Initiative Committee (JIC) works closely with the Section’s Business Court Representatives (BCRs), in providing Section members the insight and availability of Business and Complex Litigation Judges, and the opportunity for individual dialogue and program panels. There is a natural relationship between the JIC, BCRs, and the BCLC. We regularly work together on a leadership and planning level, as well as with many of the BCLC's subcommittees.

The JIC and BCLC continue to cosponsor highly popular dinners at the Spring and Annual Meetings. At the Spring Meeting, our Committees cosponsored the program, "Getting your Evidence in at Trial and Using it Effectively in a Business Case." (pdf / audio) The panel was co-chaired by Steve Schuster and Lee Applebaum (JIC Co-chairs), and was moderated and planned by Steve Schuster and Michaela Sozio (Vice Chair of the Trial Practice Subcommittee). Business Torts Subcommittee Vice Chair Victor Vital was a panelist, as were BCRs Timothy Driscoll, Patricia McInerney, and Denise Owens. This program was very well received, drew great interest from those attending, and there were numerous requests that it be presented again in the future. In addition, at the Spring Meeting, the BCRs attended the joint meeting of the JIC and the Subcommittee on Business Courts; significantly participated in the joint non-CLE substantive program held by the Business Torts and Trial Practice Subcommittees; and fully attended the BCLC’s general meeting.

The JIC’s membership has increased significantly in the last year, and its website has become a resource for business and complex litigation judges nationwide.

Pro Bono/Public Service Subcommittee

At the 2012 and 2014 Annual Meetings in Chicago, the Pro Bono/Public Service Subcommittee partnered with the Young Lawyer Committee and Pro Bono Committee to connect with Junior Achievement of Chicago. In 2012, more than fifty students attended our "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. In 2014, a volunteer team of ten attorneys visited a local high school, Holy Trinity, where they conducted panels for the students at all grade levels, and discussed their backgrounds, paths to their careers in law, and answered questions from the students pertaining to their careers. The volunteers and students really enjoyed both events which were both a success.

For the 2015 Annual Meeting taking place in Chicago again, the Subcommittee will be continuing with the Junior Achievement theme, and is partnering again with the Young Lawyer Committee to work with J.A. to organize another exciting and meaningful project. We will be attending another local high school on the morning of Thursday September 17, 2015, to conduct a panel similar to the one in 2014. Details to follow regarding the specific time and location of the event, but we anticipate the event will take place between 10:30 a.m. and 12:00 p.m. We really look forward to having everyone participate and making this project another success! If you would like to volunteer for the Annual Meeting project, please contact Kristen Gore.
Securities Litigation Subcommittee

It has been a busy year for securities litigators. There have been a number of significant developments in private securities class actions as well as SEC enforcement and criminal prosecutions. The Subcommittee’s chapter in this year’s Recent Developments in Business and Corporate Litigation will reflect that activity.

We had a very well-attended joint subcommittee meeting at the Section’s Annual Meeting this past September in Chicago. Our subcommittee partnered with the Class and Derivative Litigation Subcommittee for a non-CLE program. We had a guest speaker, Olga Koumrian of Cornerstone Research, who gave a presentation on the statistics of securities class action filings in the federal courts and of cases challenging mergers and other change of control transactions. The presentation was well-received and generated a good discussion. We intend to have similar types of meetings in the future.

We are always interested in good ideas for programs, with or without CLE. If you have a program in mind, please contact Jay Dubow.

Trial Practice Subcommittee

What a great meeting! What a great city! What great programs and meetings!

The Trial Practice Subcommittee had another very busy, exciting and successful few days in San Francisco. As participants in programs, receptions and dinners we were able to greet old friends and make some new acquaintances.

Again we partnered with the Business Torts Subcommittee to host a lively discussion around the topic of "Trial Tips and Blunders." The discussion was led by Peter Valori from Miami and Judge Gail Andler from Orange County, California. As has been the case in the past, our Subcommittee meetings are greatly enhanced by the strong support and participation from our colleagues from the Judges Initiative Committee. Over a dozen Business Court Judges from around the country added their unique perspective to the discussion providing valuable insights to even the most experienced courtroom lawyer.

On Thursday evening many of our Subcommittee members enjoyed the memorable Women’s Reception and Business and Corporate Litigation dinner. The Honorable Chief Justice of the California Supreme Court, Tani Cantil-Sakauye, and the United States Attorney for the Northern District of California, Melinda Haag, were honored at the Reception. In addition to the usual collegiality, camaraderie and fun we were treated to a Scotch tasting featuring The Macallan and sponsored by the Edrington Group. What a treat!

Our Third Annual "Tips from the Trial Bench" luncheon again filled the room. This program, anchored by the Business Court Judges as well as prominent members of the local bench is always special. The program is designed to create a venue for an informal discussion with Business Court Judges in an up close and personal manner. A buffet lunch is provided thanks to the law firm and law school sponsors who continue to support this Program. Participants included seasoned trial lawyers as well as younger lawyers interested in improving their courtroom skills. Law students are always welcome.

Trial Practice Subcommittee members were active participants in a number of well-attended CLE Programs and we are pleased to be able to add the experienced views of our members to Programs that seek a trial lawyers’ perspective. There are many opportunities to participate in Section and Committee Programs, and this subcommittee has become a very active and useful resource for programs produced by other substantive law committees.

We are looking forward to another busy and productive meeting in Chicago in September. We are planning a joint subcommittee meeting with Business Torts and the Judges Initiative Committee to continue with the theme of best practices in the courtroom. The discussion is sure to be lively and informative.

You are most welcome to join us on this subcommittee as we plan programs and meeting content for upcoming meetings. If you would like to become a member
of the Trial Practice Subcommittee, please contact Michaela Sozio, Jennifer Gray, or Emily Burton.

We hope to see you in the Windy City in September.