Dear Fellow Members of the Business and Corporate Litigation Committee:

It's hard to believe that the Section Spring Meeting in New Orleans is right around the corner (April 6–8). The Business & Corporate Litigation Committee has an action-packed schedule which includes:

- Several excellent CLE programs ranging from business & corporate litigation legal updates, disaster litigation, hot issues in trial technology and world wide web legal issues
- Numerous Subcommittee meetings
- BCLC Joint Dinner with Judges Initiative & ADR Committee—Thursday night, April 6 (7:00–10:00 p.m.)
- Women's Business & Commercial Advocates reception—Thursday night, April 6 (immediately preceding the dinner)
- Public service project at local high school in collaboration with Junior Achievement—Thursday morning, April 6 (8:30–11:00 a.m.)
- Tips from Trial Bench Breakfast—Friday, April 7 (8:00–9:30 a.m.)
- BCLC Open Committee meeting—Friday, April 7 (4:30–5:30 p.m.)

Additional information concerning these events are in this Newsletter. To view the complete Spring Meeting schedule, click HERE. To purchase tickets for the Thursday night dinner, visit the Section Registration area at the Hyatt Regency New Orleans or contact Katie Koszyk directly.

Special Thanks to (1) Paul Masinter for his tremendous efforts in organizing numerous BCLC events in New Orleans; (2) Melissa Visconti for her assistance with sponsorships and the WBCA reception; (3) Hon. Mary Johnston and Michaela Sozio for spearheading the Tips from Trial Bench Breakfast; (4) Kristen Gore for coordinating the Junior Achievement Public Service event; (5) Brad Newman for leading the 2017 Recent Developments publication efforts; (6) Hon. Gail Andler, Hon. Mac McCoy, and Stuart Riback for their tireless efforts as BCLC Vice Chairs; and (7) last but not least, Alyn Beauregard for her amazing work on this Newsletter. And of course, Kudos to the awesome ABA Business Law Section staff who make it all happen!

As part of celebrating the BCLC’s 25th Anniversary at the Annual Meeting last September, our Historical Subcommittee, chaired by Steve Brauerman and Vanessa Tiradentes, conducted interviews of all the past BCLC chairs. We have been sharing these interviews in our Network Newsletters—this issue will feature the Hon. Elizabeth Stong, who served as BCLC Chair from 2000 to 2003. We are fortunate to have Judge Stong's continued enthusiastic support as Chair of the BCLC Membership Subcommittee and Director for the International Insolvency Institute. Judge Stong was one of my initial mentors and I appreciate everything she has done for me and the BCLC—and continues to do. Judge Stong not only is recognized as a leader in the American Bar Association but also on a global basis. Indeed, she recently travelled to Kampala, Uganda at the invitation of the Uganda Registration Services Bureau to participate as one of two
judicial experts in "Insolvency Week," a multidisciplinary workshop focused on education about Uganda's new insolvency law. Read about Judge Stong's unique experiences in Uganda in this Newsletter.

Be on the lookout for the April digital issue of "Business Law Today" which will feature BCLC's annual mini-theme, focusing on several topics from the 2017 Recent Developments in Business & Corporate Litigation. The 2017 Recent Developments is slated to be published this spring—it's a must purchase for all business litigators.

The Section's Annual Meeting will return to Chicago September 14–16. Discounted registration will be available at the Spring Meeting. Finally—SAVE THE DATE for the BCLC Fall Meeting in Washington, D.C., November 16–18.

If you're passing through Phoenix, please let me know and we can grab a cup of coffee. Happy Spring!

Best,
Heidi
Heidi McNeil Staudenmaier, Chair
Business and Corporate Litigation Committee
American Bar Association, Business Law Section

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The Honorable Elizabeth S. Stong, BCLC Chair 2000–2003
By Steve Brauerman and Vanessa Tiradentes, with special thanks to Mitchell Bach

The Honorable Elizabeth S. Stong is a United States Bankruptcy Judge for the Eastern District of New York. Prior to her appointment to the bench in 2003, Judge Stong was a litigation partner at Willkie Farr & Gallagher LLP in New York. Judge Stong served as the fourth Chair of the BCLC (and was the first woman to chair the Committee) from 2000 to 2003—succeeding Jim Holzman.

Judge Stong joined the Committee after attending the Section's Spring Meeting in Nashville in the mid-1990s. At the First-Timer's Reception and Committee Round-Up event on the first night of the conference, Judge Stong met a number of Committee leaders, including now-Section Chair Bill Johnston, who invited her to come to the BCLC's leadership dinner, which as it always has been, was open to everyone. The opportunity to meet Committee leadership at the dinner lead to Judge Stong's appointment as Chair of a new Task Force on Litigation Reform and Rules Revision, which supported the Committee's efforts to respond to requests for positions on policy matters, including House of Delegates Resolutions. After serving as Chair of the Task Force, Jim Holzman appointed Judge Stong as one of his Vice Chairs and she ultimately succeeded him as Chair of the Committee.
During her tenure, Judge Stong focused on growing the Committee's membership, engaging younger lawyers, developing additional pathways to leadership, increasing member engagement in meetings, launching a Pro Bono Subcommittee and annual hands-on public service project, and connecting directly with as many members as possible through publications (including the Committee newsletter and review of developments materials), meetings, and other techniques to share our best practices and ideas with the Section as a whole. Importantly, under Judge Stong's leadership, the BCLC revamped the Review of Developments program and added a publication component so that the various topical updates prepared by BCLC subcommittees would form a single, substantial volume published by the ABA and sold to members and the public.

The newly established Pro Bono Subcommittee, then chaired by past BCLC Chair Pat Clendenen, performed a number of service projects, including projects to clean out and refurbish a large back yard at Apna Ghar, a safe house for South Asian victims of domestic violence in Chicago; to paint the roof of a half-way house for drug addicts in Washington, D.C.; and to clean out and refurbish a day care center for families of modest means in San Francisco. The biggest accomplishments of Judge Stong's tenure include raising the profile of the Committee within the Section, and giving each and every member of the Committee the best possible experience—whether that individual is active in leadership, attends some of our meetings, or just receives our communications.

Judge Stong completed her term as Chair just as she was appointed to the Bench. At her "Farewell" Dinner, the Committee presented Judge Stong with a judge’s robe to thank her for her leadership and service to the BCLC. To this day, Judge Stong wears the robe on the bench nearly every day, which "always reminds [her] of the wonderful professional and personal relationships that [she has] been so fortunate to form in the Committee and Section." Judge Stong remains most proud of the extraordinary level of professionalism and friendship that the Committee fosters and nurtures among its members.

Featured Articles

It's A Long Way to Uganda . . . Or Is It?
By Hon. Elizabeth S. Stong

Kampala, Uganda is a long way from New York City. That was my first thought when I was invited by the Uganda Registration Services Bureau to participate as one of two judicial experts in "Insolvency Week," a multidisciplinary workshop designed to educate judges, lawyers, government officials, commercial bankers, and other stakeholders about Uganda's new insolvency law. It's a long way in miles—more than seven thousand, or about a third of the way around the world. It's far in time zones—in East Africa, the time is eight hours ahead of Eastern Time in the United States, so that as the business day ends on the shores of Lake Victoria, it's just getting started in Brooklyn. And it's a long trip—with no direct flights from JFK, or any other United States airport, it's necessary to connect; and one of the most convenient routes entails changing planes in Amsterdam and making a stopover in Rwanda.

Read more...

A Primer on Direct Examination
By Stephen T. LaBriola

This paper addresses some of the basics of examining a witness on direct. Each case and witness present different issues, but the fundamentals remain the same: preparation, theme, claim elements, and protecting the witness from attack.
Preparation

In a document intensive case, it may take days if not weeks to prepare a key witness. It takes time to learn the strengths and weaknesses of a witness, even in the simplest of cases. You need to prepare witnesses in-person, and you need to allot sufficient time for each witness.

Read more...

The Separation of Powers Dilemma Facing the CFPB

By Allison F. Jacobsen

The status of the Consumer Financial Protection Bureau (CFPB), and the executive authority to terminate Director Richard Cordray without cause has been the subject of litigation before the election of President Donald Trump, but now the issue has gained immediate attention.

Read more...

Leadership

BCLC Leadership Roster

Updated!

Click here to meet our Business Law Section Advisors, Continuing Advisors, and Business Court Representatives

Business Law Section Advisors

- Hon. Henry duPont Ridgely

Business Law Section Continuing Advisors

- Hon. Donald F. Parsons, Jr.
- Hon. Joseph R. Slights III

Business Court Representatives

- 2014–2016 Term
  - Hon. Jerome Abrams
  - Hon. Timothy Driscoll
  - Hon. Denise Owens
- 2016–2018 Term
  - Hon. Mary Johnston
  - Hon. Christopher Yates
  - Hon. James Gale

Business Law Fellows

For 17 years, the Fellows Program has represented the ABA Business Law Section’s commitment to encouraging the participation of diverse lawyers in Section activities. Through the Fellows Program, young lawyers, lawyers of color, lawyers with disabilities, and LGBT lawyers are provided a springboard to substantive leadership roles within the Section through unique leadership roles, mentorships and subsidized attendance at Business Law Section Meetings. Each spring, the Section selects Fellows to participate in a two-year term in the program. The next application deadline is May 1, 2017. Please encourage anyone who may benefit from this program to apply. Click here for more information on the program and how to apply.

"I applied to the ABA Business Law Section Fellows Program because I wanted to get more involved in the Business Law
Section. At the time I applied, I was involved with the ABA Young Lawyers Division, but I was close to aging out and I wanted to find a forum that would allow me to stay an active member of the ABA but also allow me to focus more on my substantive practice area. The Fellows Program was wonderful because it got me immediately involved with the Business Law Section, introduced me to its leadership, and placed me in a committee that covers my practice area. The Fellows Program also assisted me financially with attending meetings, which gave me the ability to attend three Business Law Section meetings in one year. I recently finished the two-year program, and because of my involvement through the Fellows Program, I was recently appointed as a vice chair of a subcommittee in the Business Law Section. Applying to the Fellows Program was one of the best decisions I’ve made in my professional career, and I encourage anyone that is interested in the Business Law Section and who wants to enhance their career to apply."

Edward Fitzgerald, Fellow, 2014–2016; Senior Counsel, Holland & Knight LLP, Orlando, FL

Meetings and Programs

Join Us in New Orleans for the 2017 Spring Meeting—great food, music, fun and—of course—CLE and Programs!

The ABA Business Law Section (BLS) will present more than ninety CLE programs at its Spring Meeting in New Orleans this April 6–8, 2017. Almost 2,000 registrants are expected to attend. Each registrant may choose from hundreds of substantive sessions that are open to all attendees.

Business and Corporate Litigation Committee Presents Three Successful CLE Programs at November 2016 Business Law Section Fall Meeting in Washington DC and Plans Four Programs for the Spring Meeting in New Orleans in April 2017

The Business and Corporate Litigation Committee presented three CLE programs at the Business Law Section Fall Meeting in Washington, D.C. on Friday, November 18, 2016.

Continuing a longstanding tradition, the day kicked off at 8:30 a.m. with "Bankruptcy for Breakfast," (pdf/audio) a ninety-minute program that looked at recent developments in insolvency law. On the panel were three bankruptcy judges: Hon. Elizabeth Stong of the Eastern District of New York; Hon. Frank Bailey of the District of Massachusetts; and Hon. Philip Brandt of the Western District of Washington. Also on the panel were Michael Rubinstein of Liskow & Lewis in Houston, and L. Katherine Good of Whiteford, Taylor & Preston LLP in Wilmington, Delaware. Sarah Cave of Hughes, Hubbard & Reed, LLP in New York chaired and moderated the program.

Spring Meeting Events at a Glance

Spring Meeting materials available here.

Alternative Dispute Resolution Joint Meeting
Saturday, April 8, 8:00 a.m.–9:00 a.m.
Strand 7, Level Two

**Appellate Litigation, Business Torts, Trial Practice Joint Subcommittee Meeting & Health Law and Life Sciences Committee Meeting**
Thursday, April 6, 1:00 p.m.–2:00 p.m.
Foster 1, Level Two

**Business and Corporate Litigation Open Committee Meeting**
Friday, April 7, 4:30 p.m.–5:30 p.m.
Celestin E, Level Three

**Business Courts Joint Subcommittee Meeting**
Thursday, April 6, 9:00 a.m.–10:00 a.m.
Foster 1, Level Two

**Business Divorce Subcommittee Meeting**
Friday, April 7, 9:30 a.m.–10:30 a.m.
Imperial 5D, Level Four

**Class and Derivative Actions Subcommittee Meeting**
Friday, April 7, 2:30 p.m.–3:30 p.m.
Bolden 6, Level Two

**Corporate Counseling & Litigation and Indemnification & Insurance Joint Subcommittee Meeting**
Thursday, April 6, 9:00 a.m.–10:30 a.m.
Strand 6, Level Two

**Criminal & Enforcement Litigation, Securities Litigation and Securities Arbitration Joint Subcommittee Meeting**
Friday, April 7, 10:30 a.m.–11:30 a.m.
Imperial 5D, Level Four

**Employment Litigation Subcommittee Meeting**
Friday, April 7, 4:00 p.m.–5:00 p.m.
Strand 6, Level Two

**Historical Subcommittee Meeting**
Thursday, April 6, 11:00 a.m.–12:00 p.m.
Imperial 8, Level Four

**In-House Litigation Management Subcommittee Meeting**
Friday, April 7, 9:30 a.m.–10:30 a.m.
Strand 5, Level Two

**International Litigation Subcommittee Meeting**
Friday, April 7, 11:00 a.m.–12:30 p.m.
Strand 14, Level Two

**M&A Litigation Joint Task Force Meeting**
Saturday, April 8, 10:30 a.m.–11:30 a.m.
Empire C&D, Level Two

**Partnerships and Alternative Business Entities Subcommittee Meeting**
Friday, April 7, 9:30 a.m.–10:30 a.m.
Imperial 6, Level Four

**Pro Bono & Public Service Subcommittee - Public Service Project**
Thursday, April 6, 9:00 a.m.–12:00 p.m.
Offsite,

**Program: Annual Review: Recent Developments in Business Litigation With Perspectives from the Bench**
Thursday, April 6, 2:30 p.m.–4:30 p.m.
Strand 11B, Level Two

Program: Data Driven Risk Assessment For Litigators and Transactional Lawyers-Presented by The Legal Analytics Working Group
Saturday, April 8, 10:30 a.m.–11:30 a.m.
Strand 10A, Level Two

Program: Legal Snarls in the World Wide Web
Friday, April 7, 2:30 p.m.–4:30 p.m.
Strand 13B, Level Two

Program: Litigating the Disaster Case
Thursday, April 6, 10:30 a.m.–12:00 p.m.
Strand 10A, Level Two

Program: Persuasion in the Technological and Media Age: Effective Use of Technology, Media, and Graphics at Trial and on Appeal
Friday, April 7, 10:30 a.m.–12:00 p.m.
Strand 10A, Level Two

Sports-Related Disputes Subcommittee Meeting
Thursday, April 6, 10:00 a.m.–12:00 p.m.
Strand 2, Level Two

Tips from Trial Bench Breakfast
Friday, April 7, 8:00 a.m.–9:30 a.m.
Celestin C, Level Three

Fall Meeting Photos

Publications

Business Law Today

One of the most important benefits the Business and Corporate Litigation Committee delivers to its members is the substantive and practical content we deliver through our publications and programming. We are pleased that the April issue of Business Law Today ("BLT") will be dedicated to a "mini theme" for our Committee. We will feature articles on the following important and timely issues:

1. "Conducting Business With Tribes in the Aftermath of the Dollar General Supreme Court Split: What You and Your Clients Need to Know" by Heidi McNeil Staudenmaier and Hannah K. Speirs;
2. "Private Planes, Investors and Nasdaq Rules: Delaware Supreme Court Gives Guidance on Director Independence" by Jay McMillan;
3. "The Defend Trade Secrets Act: One Year Later" by Brad Newman, Jessica Mendelson, and MiRi Song; and
4. "Authenticating Digital Evidence at Trial" by Michaela Sozio.

Stay tuned! We are always looking for content. Submissions are welcome by email.

Recent Developments In Business and Corporate Litigation Is A Valuable Tool For Business Litigators—Order Today

By Bradford K. Newman, 2017 Editor

Recent Developments in Business and Corporate Litigation will be published by early April 2017. Recent Developments in Business and Corporate Litigation comprises 19 chapters that provide practical analysis along with 2016 case

Members are encouraged to purchase this practical guide which incorporates superb insight from a diverse collection of national practitioners designed to assist both junior and seasoned practitioners. For those interested in contributing to next year's publication of the 2018 version of *Recent Developments in Business and Corporate Litigation*, we will begin our efforts in the fall of 2017, with chapters likely due November 30, 2017.

### Subcommittee Reports

#### Business Divorce Subcommittee

The Business Divorce Subcommittee will be meeting on Friday morning at the Spring Meeting in NOLA. As usual, we try to make these meetings substantive, even though CLE credit is not offered. Our friend Scott Unger from Stark & Stark in Lawrenceville, NJ, is scheduled to give a presentation on minority stockholder oppression, with a focus on New Jersey and Pennsylvania law. Attorneys from other jurisdictions recognizing this tort—and those from the few states that do not, such as Delaware—are welcome to share their learning as well. We hope to see you in the Big Easy! Contact Kurt Heyman with questions.

#### Class and Derivative Actions Subcommittee

The Class and Derivative Actions Subcommittee has completed its chapter on Class Actions, which is to be included again this year in the annually published *Recent Developments in Business and Corporate Litigation*. The Subcommittee plans to host a meeting later this year at the Business Law Section Annual Meeting in Chicago, to take place from September 14–16, where we will discuss potential CLE programming for future meetings.

Throughout the year, the Subcommittee will also be adding content to its webpage, so please let the chairs or vice-chairs know if you are interested in contributing.

The Subcommittee continues to welcome new members, and encourages anyone interested in this robust and growing area of litigation, whether defense or plaintiff side advocates, or in-house counsel, to join. If anyone is interested in getting
involved or learning more about the Class and Derivative Actions subcommittee, we encourage you to contact one of our co-chairs Kevin Metz or Kristian Brabander, or one of our vice chairs, Sarah Greenfield or Michael O'Brien.

Communications and Technology Subcommittee

Dear Subcommittee Leaders:

Our webpages are looking better, and some are terrific. Others could use work. It's a boost for your Subcommittee, and you, to liven up your webpages. Here are some suggestions for keeping up your webpages:

- Add links to articles from Business Law Today or The Business Lawyer relevant to your Subcommittee, even if not produced by your Subcommittee;
- Add pictures from meetings (which means pull out your iPhone and take a few at your meetings);
- Add links to program audio or materials from meetings; and
- Add some narrative on what you are doing as Subcommittee leader for the Subcommittee.

Take a look at Subcommittee and Task Force webpages for ideas.

You can send text or links to Graham Hunt or Lee Applebaum, and we will make sure they get posted.

LLC, Partnerships and Alternative Business Entities Subcommittee

We are excited to welcome Vice Chancellor Joseph R. Slights III from the Delaware Court of Chancery and Michael Maimone, Professor of Law at Tulane and partner at Drinker Biddle, as guests to our meeting on Friday, April 7 at 9:30 a.m. We will discuss recent alternative entity case law in the Court of Chancery from these two perspectives. We hope you can join us! Contact Meghan A. Adams with questions.

Membership Subcommittee

The BCLC is currently the eighth largest committee in the Business Law Section with 1,792 total members. From January 2016 to January 2017, the BCLC had growth in its Law Student and Associate membership ranks, with an increase in membership count of 8.12% and 1.22% respectively in these categories. However, the BCLC did experience a slight decline in its total membership count. During this period, the number of Lawyer members decreased by 5.02%, resulting in an overall decrease of 3.08% in membership. During this same period, the Section's membership had similar membership statistics, with increases in Law Student count and Associate count, but declines in Lawyers members, resulting in an overall decrease of only 1.91%.

Judge Elizabeth Stong continues to serve as Chair of the Membership Subcommittee, with Fellow Jonathan Stemerman and recent Fellows graduate Edward Fitzgerald serving as vice chairs. The Membership Subcommittee will report on current membership statistics and recruitment efforts at the upcoming Spring Meeting in New Orleans. As always, the Membership Subcommittee welcomes the participation of all BCLC members in its efforts to increase our membership. Contact Edward Fitzgerald with questions.

[Editor's note: Law students may join the ABA for free at www abaforlawstudents.com.]

Pro Bono and Public Service Subcommittee

The BCLC's Pro Bono and Public Service Subcommittee, in conjunction with the Young Lawyer Committee, is partnering with Junior Achievement at the Spring Meeting in New Orleans to offer career mentoring to high school students on
Thursday, April 6, 2017 from 9 a.m. to 11 a.m.** This year’s project will provide volunteers the opportunity to meet with high school students who are eager to learn about our careers and how they can be successful too! Volunteers will first meet with groups of students about their education, backgrounds, professions, personal challenges, offer advice, and answer questions. Lawyers, Judges, law students, and guests are welcome. Partners and shareholders at law firms, solo practitioners, please be prepared to discuss what it takes to run a legal practice and to acquire (and maintain) business and clients. To volunteer, please reply to ABA Business Law Section Program Specialist Justine Mershman, or BCLC Pro Bono and Public Service Subcommittee co-chair Kristin Gore.

**Please note: Volunteers will meet at 8:30 a.m. at the ABA Meeting headquarters in the Hyatt Regency New Orleans for the short trip to the school.

**Trial Practice Subcommittee**

By Judge Mary Johnston and Michaela Sozio

Please join us at our fifth annual Tips from the Trial Bench event at the Spring Meeting! We hope you can join us at Breakfast with the Bench at the Spring Meeting in New Orleans on Friday, April 7 from 8:00 a.m. to 9:30 a.m. We hold this event each year in conjunction with members of the Business Court Judiciary. This program has been filled to capacity each year with practicing lawyers of all skill and experience levels, and also provides law students with an opportunity to enter into conversation with trial lawyers and Business Court Judges in an informal setting. We thank the many judicial volunteers who make this event both possible and successful each year!

Be sure to check the Trial Practice Subcommittee webpage for updates on program planning for the Spring Meeting, including the date and time of our next joint subcommittee meeting. Contact Michaela Sozio with questions.
Kampala, Uganda is a long way from New York City. That was my first thought when I was invited by the Uganda Registration Services Bureau to participate as one of two judicial experts in “Insolvency Week,” a multidisciplinary workshop designed to educate judges, lawyers, government officials, commercial bankers, and other stakeholders about Uganda’s new insolvency law. It’s a long way in miles—more than seven thousand, or about a third of the way around the world. It’s far in time zones—in East Africa, the time is eight hours ahead of Eastern Time in the United States, so that as the business day ends on the shores of Lake Victoria, it’s just getting started in Brooklyn. And it’s a long trip—with no direct flights from JFK, or any other United States airport, it’s necessary to connect; and one of the most convenient routes entails changing planes in Amsterdam and making a stopover in Rwanda.

1 Hon. Elizabeth S. Stong is a United States Bankruptcy Judge for the Eastern District of New York, sitting in Brooklyn. She is a past Chair of the ABA Business Law Section’s Business and Corporate Litigation Committee. © 2017 Elizabeth S. Stong.
But what an opportunity—to support the process of giving a second chance to an enterprise facing financial difficulties through a reorganization, saving jobs, business relationships, and going-concern value, paying creditors, promoting entrepreneurship—all with the participation of all of the stakeholders in that process and with the support of the government entities charged with implementing the relevant laws. So of course, I said yes.

The planning process began immediately. The URSB contemplated five full days of programs and workshops during Insolvency Week—an extraordinary commitment of time and resources. The program included a two-day Colloquium on insolvency law in Uganda, where Justice Alastair Norris of the United Kingdom and I, together with Ugandan judges and lawyers, would lead the discussions. The Colloquium’s theme was “Enhancing Stakeholder Awareness on Insolvency,” and the objectives included developing a culture of business revival and rescue as opposed to liquidation.

The venue was outstanding and historic too—the Munyonyo Commonwealth Resort, on ninety acres of manicured grounds on the shores of Lake Victoria, reputedly the setting for conferences of the British Commonwealth countries in years past. The participants were similarly outstanding, with a breadth of experience and expertise from Uganda, Kenya, and other countries in the region, from the public and private sector, and representing the business sectors whose interests could be affected by the success or failure of a company’s restructuring.

Lake Victoria is stunningly beautiful. The calls of the birds began before dawn, and they were loud and lyrical and exotic. I rose early in order to prepare, and just as I would in New York, I went for a run to organize my thoughts—except that instead of running along New York harbor, I ran through the grounds and along Lake Victoria. I saw large flocks of enormous cranes and other birds, including one that looked like a pelican and stood at least four feet tall. On the lake, there were men in large flat wooden boats, fishing with big nets. Uganda straddles the Equator, and Kampala is located at less than one degree North latitude—so the seasons change little, and the sun rises within minutes of the same time year-round. Sunrise and sunset seem to look and feel different at the Equator. Much more pleasant than a late November run in New York! Next was breakfast, where the offerings were a mix of the very familiar (coffee, toast, eggs, yogurt) and the quite unfamiliar (fruits I have never seen before, ox kidneys in a stew).

The Colloquium began with a welcome from the Registrar General. The Registry has a very interesting and important role in the Ugandan government and economy, as it maintains official records of countless types, including company registrations, receiverships, trademarks, patents, copyrights, and other business-oriented matters. But it also maintains the records of daily
life, including births, deaths, adoptions, marriages, and the like, and as the Registrar observed, it was not so long ago that a birth certificate was considered something of a luxury.

The next speaker was a representative of the Supreme Court of Uganda, and he similarly emphasized the importance of our work to the courts and the economic development of the country. Even on the ride from the airport in Entebbe to Munyonyo, it was evident that energy and opportunity abounded—construction sites were frequent, open-air markets were filled with individuals and families, music and conversation was lively. With laws and procedures that would encourage entrepreneurs and investors alike, and courts that were transparent and trusted, economic opportunity could blossom for businesses from the very smallest microenterprise to the large company.

It was not easy to be the next speaker. I had worked hard to prepare, and yet I found myself wondering what my twenty years as a business litigator and thirteen years as a United States bankruptcy judge could possibly have to offer to my new Ugandan friends. Both their challenges and their opportunities were of a greater magnitude than anything I had dealt with in my practice or in my court. I spoke for my allotted hour, and yet it seemed to pass by in minutes. I spoke about our courts, and our “second-chance” bankruptcy law. I described its roots in our Constitution, where the Founders directed Congress in Article I “To establish an uniform Rule of Naturalization, and uniform Laws on the subject of bankruptcies throughout the United States.” And I described how it works today, where companies have the opportunity to restructure and pay their creditors, all in the context of a judicially-supervised reorganization.

I spoke about the importance of three central aspects of the judge’s role, including transparency, responsiveness, and value preservation. I explained my own view of the importance of transparency for a court, including a court dealing with businesses and families in financial distress. A transparent court can reestablish communications among the parties and confidence in the prospects of the reorganization. I described the need for responsiveness, both to keep a case moving forward and to set an example for the participants. And I emphasized the practical significance of value preservation, and ultimately, where possible, value creation. Much of what happens in a restructuring, and in the resolution of most business disputes, comes down to preserving the value for the benefit of the parties and solving the problem, whether by a decision at trial, a settlement process, or some other path. I explained how in my experience as a lawyer and as a judge, I had learned over and over again that courts and judges could, and perhaps should, play a key role in each of these areas.

We returned to these themes over and over again during the balance of the workshop, and they led to much common ground. We considered the different tools of debt restructuring, we worked through hypothetical scenarios of companies in insolvency proceedings, assessing options from the perspective of each stakeholder, including the company and its owners, the workers, the secured and trade creditors, and the tax authorities. We spoke candidly about the challenges for the court and all of the parties when there simply are not enough funds to meet the short-term demands of a situation. So many of the issues that we identified had common roots, and similar resolutions. The opportunity to preserve the value in a business relationship or an enterprise is precious, and fragile. Poor communication makes every business problem worse. Courts may have a window of opportunity—though perhaps a very small one—at the beginning of a case to
shift the dynamics of a business dispute from contentious to constructive. What I see in my cases in New York seemed not so different from what the judges, lawyers, business people, and government officials see in their cases in Uganda.

Somewhat unexpectedly, three additional reflections also resonated throughout our work together. As I related them, I acknowledged that they came both from my head and from my heart, and perhaps also from my gut. The first is that it may be one of the greatest privileges of judicial office, and one of the best case management tools, to treat every lawyer and every party—no matter who they are or how they conduct themselves—absolutely as well as you can, and absolutely as well as they have ever been treated. The second is simply that a rising tide raises all boats—I pointed to Lake Victoria as I offered this observation. And the third, to which we returned over and over again, is that in reorganizing an enterprise, large, small, or in between, it is helpful to think about the idea that nobody wins unless everyone wins, at least a little bit.

So, is it a long way from New York to Uganda? Maybe so, by most conventional metrics. And it sure looks far on the map in my chambers. But what I learned from the judges and lawyers in Kampala is that we share common goals, opportunities, and challenges. Our courts and bar come from different traditions, and have different caseloads, but we do much of the same work, in the same ways, with the same objectives. Our good days are good for many of the same reasons, and our hardest days are difficult because of many of the same obstacles. As I look back, and hope to return to Kampala someday to continue the work that we started, I wonder whether maybe New York and Uganda aren’t so far apart after all.
This paper addresses some of the basics of examining a witness on direct. Each case and witness present different issues, but the fundamentals remain the same: preparation, theme, claim elements, and protecting the witness from attack.

**Preparation**

In a document intensive case, it may take days if not weeks to prepare a key witness. It takes time to learn the strengths and weaknesses of a witness, even in the simplest of cases. You need to prepare witnesses in-person, and you need to allot sufficient time for each witness.²

Most witnesses can tell a more compelling and complete story if they do it chronologically. Organize the documents for preparation from oldest to most recent and work with the witness initially from this vantage point. If you deviate from a chronologic presentation at trial, make sure it is for a good reason. Juries also can understand a chronologic presentation easier than one that is organized by topics over multiple time periods. This rule of thumb is merely the default position, however, as there will be instances where there will be compelling reasons to ask questions by event or topic that deviate from chronologic order.

Once you have an understanding of who the witness is (background information, how the witness fits into your case, gut sense issues such as to how the witness comes across to twelve strangers), then think in terms of theme, claim elements, how best to structure the direct examination, and how best to insulate the witness from attack.

**A. The Box Method³**

Most people think in visual terms. Therefore, on a blank piece of paper draw a box. The box represents where you want your witness to stay. The rest of the page represents where you believe adverse counsel will want to put the witness. Within the box, outline what you need from the witness. The theme of your case should be the top item. Other terms should relate directly to the elements of your claims and the emotion you want to generate within the jury. Then spend time with the witness using whatever materials are helpful to structure and elicit testimony that will tell the story the witness has to advance your theme and to prove elements of your claims.

Typical areas outside the box where your adversary wants to take your witness will be: confusion, lack of credibility, bias, exaggeration, and greed. Whether your witness actually possesses any of the negative traits is not the point; rather, it is the avenue of attack likely to come from adverse counsel that matters. Every witness has areas of vulnerability. Some areas outside the box will be remote and unlikely to arise; however, some will be likely, if not certain, to be at the forefront of adverse counsel’s cross-examination strategy.

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¹ Steve LaBriola is a partner with Fellows LaBriola LLP in Atlanta, Georgia. His full biography may be found [here](#).
² While this paper focuses on the trial setting, the preparation must begin before the witness’ deposition.
³ Issues of privilege may arise in using this method of preparation so make sure to maintain control over your work product, particularly when preparing the non-client witness.
Prepare for the probable areas of attack first. A good way to prepare the witness is to have another attorney within the office play the role of adverse counsel and try to move the witness from within the box, where you want the witness to stay, to outside the box. Often witnesses will not realize that your fellow partner pushed them outside the box. When it happens, make sure to stop at an appropriate point, show the witness precisely what happened, and offer suggestions on how to answer the question truthfully while remaining within the box. Using another attorney for this mock cross-examination will help the witness continue to view you as a friend, and it will allow you to better observe the ability of your witness to withstand cross-examination. It will not take long for you to assess whether you have a problem witness. For the problem witness, one preparation meeting will not be enough. Preparing a written mock question and answer outline, basing the answers on the interviews and materials you have reviewed, frequently assists in showing the witness precisely what it is that you want. Great care must be taken, however, in sharing such an outline with the witness to protect work product and not to turn the witness into a stilted and robotic individual.

B. Bad Facts

With the frequent lack of thought used before sending emails and text messages, witnesses’ words often come back to haunt them. Many times the bad facts can be put in context and explained. Sometimes, however, the bad facts are unavoidable and not capable of intelligent explanation. When it is apparent to you that the bad facts will come out, bring them out on direct. Studies show that bringing out bad facts after you have first brought out good facts helps to shield the witness from the negative implications arising from the bad facts. Ignoring the bad facts on direct can be disastrous. Even when they cannot be explained, still bring them out and deal with them in a way that shows they do not take away from the theme of your client’s case or eliminate one of the elements of your claims. If the witness is going to be gutted, you do the gutting. It is the case you must preserve, not the witness.

Theme

Keep it simple. Every case should have one overarching theme and only one overarching theme. Otherwise the case gets muddled, and this leads to jury confusion. Every witness on direct examination should present testimony and evidence that supports the one theme and helps advance the elements of the claims. If you cannot think of how that witness supports the theme of the case and advances claim elements, do not call the witness.

Duration of Examination

Keep it short. This is a relative term as some witnesses may be on the stand for a day or longer. Courts and jurors lose patience fast. “Move on counselor” is never a term you want to hear from the judge. If the judge is not saying it, the jury is likely thinking it. If, for example, you have thirty emails that methodically tell the same story, use the best one or two with your witness, then have the witness authenticate the others and admit them as a composite exhibit. Use charts and summaries to aid the witness and to shorten the amount of time you have the witness on the stand. The jury will appreciate it.
Claim Elements

Other than attempting to establish credibility and a desire for the jury to want to root for your side, your witness is there to present evidence on the elements necessary to prove asserted claims. Never forget that basic point.

For each witness outline, include a section noting the claim elements the witness establishes for your side and the rules of evidence needed to introduce the evidence. This is a good practice to make sure you do not overlook evidence you must establish to carry your burden. For example, one witness may be necessary to establish something as mundane as venue. When that happens, let the jury know what you are doing through your questions to the witness. You are not allowed to speak to the jury during direct, but you can phrase your question with a short predicate along the lines of, “Mr. Smith, one of the elements pleaded in this case requires I show proper venue, so can you tell me in what county is your business at xyz located?”

When the Witness Gets it Wrong

All the preparation in the world will still not insulate your case from incorrect testimony from a witness. Witnesses are often extremely nervous when coming into a courtroom and presenting testimony. They often will not answer questions in the same manner they did when you prepared them. Listen. Listen carefully to what the witness is saying. Your outline is not to be used to read mechanically the next question. You need to have a conversation with the witness. Even though you are limited to non-leading questions on material parts of your case, you do not have to let stand testimony you know not to be accurate. When the information is important, slow down the examination and tell the witness you want to take the event and discuss it in detail. Then come back to the area where the witness overlooked something he stated to you previously or that is set forth in admissible documents. Rather than ask the witness if he/she is mistaken on a point, attempt to reach the issue indirectly by turning to a document or event that will naturally correct the error. Jurors will side with most witnesses and appreciate the stage fright they are under, so take advantage of it. When it is apparent, ask the witness if he or she is nervous. Have the witness note that the nervousness is due to the formal setting and the importance of the event.

Role of the Lawyer on Direct

Unless the defendant is being called as if on cross-examination in your case in chief, you want to showcase the witness you call on direct examination and not yourself. Some lawyers will move to a location in the courtroom that is out of eyeshot of the juror’s view of the witness. If the court allows movement of the podium or you are able to stand at the juror box railing outside the jurors’ comfort zone, this location change often helps them focus on the witness. The witness can more easily talk to the jury in this manner.

On issues that are in material dispute, lawyers on direct are not to ask leading questions. Using words such as “describe,” “how,” “what,” “where,” “why,” and “who” at the beginning of a sentence will help avoid objections being sustained based on leading. When the answer does not elicit from the witness all the helpful testimony you know the witness knows, ask the witness to tell you more. Emphasize key testimony by getting the witness to tell the event in multiple ways.
Returning to the event in question by use of diagrams, emails, or other documents are often excellent vehicles to highlight helpful evidence.

**Know When to Sit Down**

End strong. Structure your direct examination so that you end on a fact of importance to your theme. Ideally, you want to force adverse counsel to spend time on the defensive, asking questions designed merely to mitigate the damaging testimony from your witness rather than being able to spend time on the areas outside the box of core elements and the theme of your case.

If the cross-examination is ineffective, ask no further questions on redirect. If you believe it is necessary to ask questions on redirect, make it short and do not repeat testimony already part of the record.
The Separation of Powers Dilemma Facing the CFPB

By Allison F. Jacobsen

The status of the Consumer Financial Protection Bureau (CFPB), and the executive authority to terminate Director Richard Cordray without cause has been the subject of litigation before the election of President Donald Trump, but now the issue has gained immediate attention. The Wall Street Journal recently reported that a memo issued Jan. 20—Inauguration Day—ordered “executive departments and agencies” to temporarily suspend filing new regulations and delay the implementation of pending rules to give President Trump’s appointees the chance to study them. . . . The White House has made clear that the order doesn’t apply to financial regulators that are classified as “independent agencies,” such as the Federal Reserve and the Securities and Exchange Commission. Independent agencies are defined, however, as those established by Congress outside of the executive branch, where the President’s authority to dismiss the head of the agency is limited. Another executive order signed on Monday directs at least two existing regulations to be repealed for each new one introduced. Neither the White House nor the CFPB has clarified its position regarding whether the two memos apply to the agency, leaving the future uncertain for some major regulations affecting areas such as mortgage disclosure and servicing as well as prepaid cards.

On the following Friday, February 3, 2017, President Trump signed an executive order requiring the heads of regulatory agencies to report back to him within 120 days with suggestions to change existing financial regulation. CNN further reported that: “The White House also signaled a possible shake-up of the structure of financial regulators, especially the [CFPB]. Trump wrote that regulation must ‘restore public accountability,’ a backhand reference to the CFPB, which some Republicans have painted as a rogue regulator that lacks oversight.” Earlier that same day, CNN reported that “Sean Spicer, the White House press secretary, echoed these sentiments by saying Dodd-Frank created an ‘unaccountable and unconstitutional new agency that does not adequately protect consumers.’”

Under Article II of the U.S. Constitution, the President alone is vested with all executive power (i.e., the power to enforce the law). In 1935, however, the Supreme Court ruled that, notwithstanding Article II, Congress has the power to create independent agencies that exercise executive power. Because independent agency directors are removable by the President only for cause, they are not accountable to or checked by the President. While there is judicial review to ensure the legality of the agency’s decisions, the courts do not have the authority to review discretionary decisions that are within the legal boundaries of the agency’s authority.

While the CFPB has previously been considered an “independent agency” (because the President’s authority to terminate the director was limited), an October 11, 2016 ruling from the D.C. Circuit recently called that characterization into question. See PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1 (D.C. Cir. 2016). By way of background, the Dodd-Frank Act of 2011 established the CFPB as a new independent agency headed by a single director who can only be removed for cause. The CFPB director has a five-year term and Director

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1 With special thanks to Gregory G. Hesse for his insight and effort.
Cordray’s term expires in July 2018. President Obama appointed Richard Cordray as director while Congress was in recess. Title X of the Dodd-Frank Act provides for the creation of the single-director of the CFPB giving the Bureau the authority to “administer, enforce, and otherwise implement federal consumer financial laws, which includes the power to make rules, issue orders, and issue guidance.” Prior to the D.C. Circuit’s *PHH* decision, Republicans introduced legislation to put a commission in charge of the CFPB and to have Congress appropriate its funding. Currently, the Federal Reserve backs the agency.

In 2014, the CFPB brought enforcement proceedings against PHH Corp., a large mortgage lender, alleging it had violated the anti-kickback provisions of the Real Estate Settlement Practices Act (RESPA). Concluding that it had, the CFPB ordered PHH to pay $109 million in disgorgement, and PHH petitioned the D.C. Circuit for review.

PHH argued that, as structured, the CFPB was unconstitutional because it was headed by a single director who could only be removed for cause. Historically, independent agencies exercising substantial executive power have been headed by a multiple-member board or commission. Thus, each individual board member or commissioner is accountable to and checked by their fellow board members or commissioners. In contrast, the CFPB is headed by a single director, who has unilateral authority to enforce the 19 federal consumer protection statutes under its purview. In a 110-page split opinion authored by Judge Brett Kavanaugh, the D.C. Circuit agreed.

Leaning heavily on the Supreme Court’s decision in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 497–52 (2010), the court began its analysis by saying that “in order to maintain control over the exercise of executive power and take care that the laws are faithfully executed, the President must be able to supervise and direct . . . subordinate executive officers.” *PHH*, 839 F.3d at 12. Nevertheless, the court noted, the Supreme Court in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) upheld the constitutionality of the for-cause restriction on removal for members of the Federal Trade Commission. In characterizing that case, the D.C. Circuit said that “the *Humphrey’s Executor* Court found it significant that the Federal Trade Commission was intended ‘to be non-partisan,’ to ‘act with entire impartiality,’ and ‘to exercise the trained judgment of a body of experts appointed by law and informed by experience.’” *PHH*, 839 F.3d at 9 (*quoting Humphrey’s Executor*, 295 U.S. at 624). However, the court noted that the so-called independent agencies like the Federal Trade Commission “have traditionally operated—and continue to operate—as multi-member ‘bod[ies] of experts appointed by law and informed by experience.’” *Id.* at 10.

Turning to the CFPB, the court noted that, “[b]ecause the Director alone heads the agency without Presidential supervision, and in light of the CFPB’s broad authority over the U.S. economy, the Director enjoys significantly more unilateral power than any single member of any other independent agency.” *Id.* at 11. That is, the Director is constrained neither by the President nor by other colleagues, as would be the case in the traditional independent agency. In short, the court opined that the Director of CFPB “is the single most powerful official in the entire U.S. Government, other than the President. Indeed, within his jurisdiction, the Director of the CFPB can be considered even more powerful than the President. It is the Director’s view of consumer protection law that prevails over all others. In essence, the Director is the President of Consumer...
Finance.” \textit{Id.} at 11. In coming to this conclusion, the court was persuaded not only by prior precedent, but also by the facts of the case. Director Cordray, in his singular and unchecked discretion, chose to boost the original disgorgement penalty on PHH of $6.4 million by more than seventeen times to $109 million.

Although the CFPB director’s decisions are subject to judicial review, the court held that this review does not remedy a separation of powers violation posed by the single-director structure of an independent agency like the CFPB. Likewise, there is no historical precedent for a single director, independent agency. The court found that the unique structure of the CFPB creates a “greater risk for arbitrary decision making and abuse of power, and a far greater threat to individual liberty,” as opposed to the traditional commissioner structure. Because the CFPB’s director may only be removed by the President “for cause,” the structure provides no check on his powers and he remains unaccountable to the President or any other person. \textit{Id.} at 9.

Rather than strike down the entire CFPB, the court struck down the provision requiring cause for removal of the agency’s director. “With the for-cause provision severed, the President now will have the power to remove the director at will, and to supervise and direct the director.” The court further ordered that “[t]he CFPB therefore will continue to operate and to perform its many duties, but will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury.” \textit{Id.} at 10. In other words, the court held that the restriction on the removal of the director would be inapplicable—essentially stripping the CFPB of its independent status. In this way, the director, now able to be removed at will by the President, would be subject to the President’s direct supervision and control, like so many other principal officers.

The \textit{PHH} decision calls into question the prior rulings of the CFPB—particularly those that smack of abuse of discretion. In \textit{PHH}, the court, for example, overruled the $109 million disgorgement penalty, dismissed claims brought outside of the limitations period, and refused to apply the RESPA anti-kickback provisions retroactively. The precedent is so far-reaching, that there may be litigation about the validity of consent decrees based on prior arguably unconstitutional Bureau rulings.

The \textit{PHH} decision caused a swift reaction by the CFPB. The Bureau filed a petition with the D.C. Circuit Court to have its case reheard before the entire court instead of just the three-judge panel that dismissed the case. In its petition, the CFPB asked the court to rehear the case \textit{en banc}, not just because it does not agree with the court’s ruling with regard to its constitutionality, but also because it claims the court misinterpreted key sections of RESPA as part of its ruling that the enforcement action against the lender should be dismissed. The three-judge panel, the Bureau asserts, “misinterpreted [RESPA] in a manner that so fundamentally defeats the statutory purpose as to warrant rehearing \textit{en banc}.” Additionally, concerned that President Trump would terminate Director Cordray (effectively removing his standing to appeal), seventeen Attorneys General intervened to represent the CFPB in the event that its single director was removed from office. In the meantime, the precedential value of the CFPB’s regulations—past and future—remains in question. On February 16, 2017, the D.C. Circuit granted the request for a full panel rehearing of the issue of whether the structure of the CFPB is unconstitutional.
Amidst all this indecision, one thing is clear—the PHH decision is likely to lead more companies to challenge the CFPB’s enforcement actions in the future, and perhaps even those from the past. This issue is the current subject of heated legislative debate. Republican Jeb Hensarling, who chairs the House Financial Services Committee, called CFPB “the most powerful and least accountable Washington bureaucracy in American history.” Massachusetts Senator Elizabeth Warren (who originally championed the CFPB) said “the ruling makes a small, technical tweak to Dodd-Frank and does not question the legality of any other past, present, or future actions of the CFPB.” She called Republican reorganization efforts “attempts fostered by big banks to cripple an agency.” PHH said in a statement that it hoped “the court’s opinion will provide greater certainty to the entire mortgage industry.”

It is unlikely that the D.C. Circuit will have the final say on the matters discussed in PHH, as the issue likely will be considered by the Supreme Court. In the meantime—what likely will be a long time—before the Supreme Court rules on the PHH case, the CFPB will have to proceed carefully, and those caught up in investigations or enforcement actions in the near-term would do well to politely, but firmly, remind the CFPB of its new constraints.
Business Law Section Advisors

The Honorable Henry duPont Ridgely is Senior Counsel at the global law firm DLA Piper and a retired Justice of the Supreme Court of Delaware. At DLA Piper, Justice Ridgely focuses his practice on advising corporations, boards, special committees and individual directors and officers on transaction structure, fiduciary duties, managing and defending litigation at the trial and appellate level, and serving as a mediator or arbitrator. Justice Ridgely served more than thirty years as a jurist in the Delaware Judiciary before joining DLA Piper. During his tenure of more than a decade on the Supreme Court of Delaware, he participated in more than 700 published opinions, including every major decision issued during his tenure involving directors’ and officers’ liability, merger and acquisition disputes, contests for corporate control, and other issues impacting corporate law and commercial law. Before his appointment as a Justice, he was Chair-Elect of the National Conference of State Trial Judges. He served as a Judge on the Superior Court of Delaware from 1984 until 2004, including fourteen years as President Judge of the Court. During that period, the Delaware courts earned a number one ranking from the United States Chamber of Commerce, which Delaware has maintained since 2002. In 2015, the Governor of Delaware awarded Justice Ridgely the Order of the First State, the highest recognition the Governor can give, for outstanding efforts, knowledge, integrity, prudence, and ability in serving the State of Delaware. Justice Ridgely is a Business Law Advisor to the American Bar Association’s Business Law Section, a Member of the American Law Institute, a Fellow of the National Conference of State Trial Judges, a Life Fellow of the American Bar Foundation, a former Member of the American Bar Association’s House of Delegates, a former Member of the Executive Committee of the Appellate Judges Conference of the Judicial Division of the American Bar Association, and a Member of the American Inns of Court Leadership Council. He has taught as an Adjunct Professor of Law at The George Washington University Law School in Washington, D.C., and serves on the Law School’s Business and Finance Law Advisory Board. He has authored law review articles and lectured throughout the world on corporate and business law topics. Justice Ridgely is a Panel Member of the American Arbitration Association. Justice Ridgely received his B.S. in Business Administration from Syracuse University in 1971, his J.D. from The Catholic University of America Columbus School of Law in 1973, and his LL.M. in Corporation Law from The George Washington University Law School in 1974.

Business Law Section Continuing Advisors

The Honorable Donald F. Parsons, Jr., is senior counsel at Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Delaware, consulting on various corporate and intellectual property matters. He served on the Delaware Court of Chancery from 2003 to 2015. Before joining the Court of Chancery, he spent twenty-four years at Morris Nichols specializing in intellectual property litigation. His current practice focuses on alternative dispute resolution and draws on his experience mediating various business and intellectual property disputes for the Court of Chancery as well as the Federal Circuit. He also serves as an arbitrator and advises on matters of corporate governance and alternative entities. In his twelve-year judicial tenure on the renowned business court, Don issued hundreds of decisions and rulings addressing significant questions concerning corporation law, alternative entities, trademark and intellectual property law, and other complex commercial matters. In 2016, former Vice Chancellor Parsons completed the Joint Columbia Law School Chartered Institute of Arbitrators Course on International Commercial Arbitration. In August 2013, he began a four-year term as a member of the Governing Council of the American Bar Association’s Business Law Section. From 2009 to 2010, he served as president of the American College of Business Court Judges. In 2009, he also became a fellow of ASTAR (Advanced Science and Technology Adjudication Resource Center), completing several in-depth science, technology and forensics courses. As past-president of the Delaware State Bar Association, Don helped create Delaware’s award-winning Combined Campaign for Justice to provide legal services for those in need.
The Honorable Joseph R. Slights III was sworn in as a Vice Chancellor of the Court of Chancery on March 28, 2016. Before his appointment, Vice Chancellor Slights was a partner in the Delaware law firm Morris James LLP where he practiced corporate and business litigation and chaired the firm’s Alternative Dispute Resolution practice group. Before that, he served a twelve-year term as a Judge on the Superior Court of Delaware where, among other assignments, he was instrumental in forming the Court’s Complex Commercial Litigation Division. Prior to his appointment to the Superior Court, Vice Chancellor Slights worked as a litigator in the Delaware law firms Sidney Balick PA and Richards, Layton & Finger PA. Vice Chancellor Slights received his J.D. from Washington & Lee University School of Law in 1988, and his B.S. in Political Science from James Madison University in 1985. He is a member of the American Law Institute, the American Bar Association, and the Delaware Bar Association. He is a Fellow of the American Bar Foundation and past-President of the Richard S. Rodney Inn of Court.

Business Court Representatives

2014–16 Term

The Honorable Jerome B. Abrams came to the Minnesota State District Court Bench in 2008 after twenty-seven years of a busy civil trial practice, much of it handling a wide variety of civil litigation. As a lawyer, he tried numerous cases, some enormous, some large, and not so large in a number of state and federal courts. Judge Abrams is a member of the American Board of Trial Advocates. He is also on the Board of Directors of the National Center for State Courts and the American College of Business Court Judges. Judge Abrams serves as a regular adjunct faculty at the University of Minnesota Law School and William Mitchell College of Law where he has taught courses on Complex Litigation. He has served on the Minnesota Civil Justice Reform Task Force and its predecessor group which recommended major changes in the civil justice system recently adopted. At present, Judge Abrams chairs a subcommittee for the National Center for State Courts Conference of Chief Justices looking at recommendations for reducing cost and delay in civil litigation. Judge Abrams is a frequent speaker at state and national continuing education programs on Complex Case Management, Civil Justice Reform, ESI, and related topics. In the past, Judge Abrams has presided over several major state multidistrict litigations, including the statewide challenge to alcohol breath testing equipment which involved over 4,000 cases, failed real estate developer litigation, and large-scale condemnation proceedings arising from major urban development.

The Honorable Timothy S. Driscoll is a Justice of the Supreme Court of the State of New York. Elected to a fourteen-year term in November 2007, Judge Driscoll serves in the Nassau County Commercial Division. He is also the co-chairman of the Chief Administrative Judge’s working group on electronic discovery. He is a member of the Chief Judge’s Advisory Council on Commercial Litigation in New York State, and serves as co-chair of the Subcommittee on Alternative Dispute Resolution. In addition to his judicial responsibilities, Judge Driscoll is an adjunct professor at Brooklyn Law School and Nassau Community College, and a teaching team member at the Harvard Law School’s Trial Advocacy Workshop. Prior to beginning his term on January 1, 2008, Judge Driscoll held a number of posts in the public and private sector. He served as Deputy Nassau County Executive for Law Enforcement and Public Safety from July 2004 to December 2007. In that position, Judge Driscoll oversaw all of the public safety and law enforcement agencies in the County, including the Police, Fire Marshal, Probation, Sheriff, Office of Consumer Affairs, Traffic and Parking Violations Agency, Medical Examiner, and Office of Emergency Management. Judge Driscoll was an Assistant United States Attorney in the Eastern District of New York from
November 2000 to July 2004. His case load included violent crime matters including racketeering, murder, gun possession and trafficking, and narcotics distribution, as well as white collar matters including mail fraud, wire fraud, and health care fraud. His work as a federal prosecutor was recognized by the FBI, Nassau County Police Department, Old Brookville Police Department, and the Drug Enforcement Administration. As an Assistant District Attorney in Nassau County from September 1996 through November 2000, Judge Driscoll’s docket included cases involving burglary, robbery, narcotics, and driving while intoxicated, as well as investigations into official corruption. Prior to beginning his service as a prosecutor, Judge Driscoll was associated with Williams & Connolly in Washington, D.C., from November 1992 through July 1996. Before joining the law firm, Judge Driscoll served as a law clerk to the Honorable Joseph M. McLaughlin, United States Court of Appeals for the Second Circuit. Judge Driscoll is a graduate of Harvard Law School (cum laude 1991), Hofstra University (summa cum laude 1988), and Holy Trinity High School in Hicksville, which inducted him into its Hall of Fame in 2005. He is the President of the Irish Americans in Government of Nassau County, and the President of the Catholic Lawyers Guild of Nassau County.

The Honorable Denise Owens was elected in 1989 as a Chancellor for the Fifth Judicial District, State of Mississippi, and is presently Senior Judge. Judge Owens is a graduate of Tougaloo College and George Washington University Law School and she has completed advanced studies at the American Business Court Judges Law and Economics Institute. Judge Owens was an Attorney with Legal Services from 1979 to 1982. From 1983 to 1989, she was Partner and Managing Attorney for Owens & Owens law firm. She is and has been an Adjunct Professor at Tougaloo College, Hinds Community College, and Jackson State University. Judge Owens is past Secretary, Vice Chair, and Chairperson of the Mississippi Conference of Chancery Judges. She is a member of the Mississippi Bar; Mississippi Bar Foundation Board; National Association of Women Judges; Magnolia Bar; and American Bar Association where she served as a Business Court Representative. She was appointed as Co-Chairperson of the Mississippi Access to Justice Commission in 2006. She was the recipient of the 2016 Mississippi Bar Association Women in the Profession Award, 2010 Mississippi Supreme Court Chief Justice Award, 2009 Mississippi Volunteer Lawyers Pioneer Award, the 2010 Tougaloo College Meritorious Leadership Award, 2006 Hinds County Bar Judicial Innovation Award, 2003 Mississippi Bar Fellow, and the 2002 Magnolia Bar Government Service Award. Currently she serves as the Business and Corporate Litigation Committee Diversity Director.

2016–18 Term

The Honorable Mary Miller Johnston was appointed to the Superior Court of Delaware on September 25, 2003. Judge Johnston received her J.D. cum laude from Washington & Lee University School of Law where she served as Lead Articles Editor of the Law Review. She also has a B.A. magna cum laude in music from Wittenberg University, and an M.A. in music from Northwestern University. Before coming to the bench, Judge Johnston served as Chief Counsel of the Delaware Supreme Court’s Office of Disciplinary Counsel, prosecuting attorney discipline cases and unauthorized practice of law matters. She formerly was a partner with Morris James LLP practicing primarily in the areas of corporate and commercial litigation. She currently is assigned as a member of the Court’s Complex Commercial Litigation Division. Judge Johnston is past chair of the Delaware State Bar Association’s Women and the Law Section; a recipient of the Bar Association’s Women’s Leadership Award; and was a member of the Pro Se Litigation Assistance Committee. She is a member of the Delaware Supreme Court’s Permanent Advisory Committee on the Delaware Lawyers’ Rules of Professional Conduct, the Professionalism Committee, the Court’s Commission on Continuing Legal Education, and the Richard S. Rodney Inn of Court. Her past service includes the Judicial Ethics Advisory Committee and Judicial Liaison to the Executive Committee of the Delaware State Bar Association. Judge Johnston serves as a member of the Washington & Lee School of Law Council and a member of the Board of Governors of Wesley Theological Seminary. She is past president of the Board of Children & Families First. Judge Johnston’s present term on the bench ends October 28, 2027.
The Honorable Christopher P. Yates was appointed to the Kent County (MI) Circuit Court on April 22, 2008. He has served in both the Criminal/Civil Division and the Family Division of that court. On March 1, 2012, he was assigned to run the specialized business docket for the court. Judge Yates received a B.A. from Kalamazoo College in 1983, and a J.D. and M.B.A. from the University of Illinois in 1987. As an attorney, Judge Yates served as a law clerk to Chief Judge James P. Churchill of the U.S. District Court for the Eastern District of Michigan and to Judge Ralph B. Guy, Jr., of the U.S. Court of Appeals for the Sixth Circuit. Judge Yates also has worked as a federal prosecutor in Detroit, as an attorney-advisor in the Office of Legal Counsel at the U.S. Department of Justice in Washington, D.C., as Chief Federal Public Defender for the Western District of Michigan, and as a partner in two private law firms.

The Honorable James L. “Jim” Gale is currently Chief Business Court Judge for the North Carolina Business Court, with Chambers in Greensboro, North Carolina. He joined the bench in 2011, following a thirty-five-year litigation career with the firm of Smith Moore Leatherwood, resident in its Greensboro, North Carolina; Raleigh, North Carolina and Tampa, Florida offices. Judge Gale clerked for Hon. Franklin T. Dupree, Jr., Eastern District of North Carolina. He received his J.D. magna cum laude from the University of Georgia School of Law, and his B.A. from Eckerd College.

Business Law Fellows

For 17 years, the Fellows Program has represented the ABA Business Law Section’s commitment to encouraging the participation of diverse lawyers in Section activities. Through the Fellows Program, young lawyers, lawyers of color, lawyers with disabilities, and LGBT lawyers are provided a springboard to substantive leadership roles within the Section through unique leadership roles, mentorships and subsidized attendance at Business Law Section Meetings. Each spring, the Section selects Fellows to participate in a two-year term in the program. The next application deadline is May 1, 2017. Please encourage anyone who may benefit from this program to apply. Click here for more information on the program and how to apply.

“I applied to the ABA Business Law Section Fellows Program because I wanted to get more involved in the Business Law Section. At the time I applied, I was involved with the ABA Young Lawyers Division, but I was close to aging out and I wanted to find a forum that would allow me to stay an active member of the ABA but also allow me to focus more on my substantive practice area. The Fellows Program was wonderful because it got me immediately involved with the Business Law Section, introduced me to its leadership, and placed me in a committee that covers my practice area. The Fellows Program also assisted me financially with attending meetings, which gave me the ability to attend three Business Law Section meetings in one year. I recently finished the two-year program, and because of my involvement through the Fellows Program, I was recently appointed as a vice chair of a subcommittee in the Business Law Section. Applying to the Fellows Program was one of the best decisions I’ve made in my professional career, and I encourage anyone that is interested in the Business Law Section and who wants to enhance their career to apply.”

Edward Fitzgerald, Fellow, 2014–2016; Senior Counsel, Holland & Knight LLP, Orlando, FL
Join Us in New Orleans for the 2017 Spring Meeting—great food, music, fun and—of course—CLE and Programs!

The ABA Business Law Section (BLS) will present more than ninety CLE programs at its Spring Meeting in New Orleans this April 6–8, 2017. Almost 2,000 registrants are expected to attend. Each registrant may choose from hundreds of substantive sessions that are open to all attendees.

Plan to attend our committee dinner at Arnaud’s Restaurant on Thursday, April 6, as well as the Women’s Business & Commercial Advocates Reception immediately preceding the dinner. We will honor prominent members of the legal community. Buy a ticket to the dinner here.

Below are our Committee’s substantive programs at the Spring Meeting:

- Annual Review: Recent Developments in Business Litigation with Perspectives from the Bench
- Legal Snarls in the World Wide Web
- Litigating the Disaster Case
- Persuasion in the Technological and Media Age: Effective Use of Technology, Media, and Graphics at Trial and on Appeal
- Data Driven Risk Assessment for Litigators and Transactional Lawyers
- Tips from the Trial Bench Breakfast

Spring Meeting receptions are another opportunity to connect. The Diversity Networking Reception will then kick off the meeting on Wednesday, April 5 at the Hyatt Regency. The Section Connection Reception is on Thursday, April 6 at the Hyatt Regency, featuring New Orleans music and cuisine.

New Orleans Mayor Mitchell Joseph “Mitch” Landrieu is scheduled to be the keynote speaker for the Friday, April 7 Section Luncheon. Mardi Gras World will be the venue for the BLS dinner on Friday, April 7.

Program titles and panels are listed in the online schedule. Advanced registration is open through March 17. On-site registration opens at the Hyatt on Wednesday, April 5 from 3:00 p.m. to 7:00 p.m. and continues during meeting hours Thursday through Saturday.
The Business and Corporate Litigation Committee presented three CLE programs at the Business Law Section Fall Meeting in Washington, D.C. on Friday, November 18, 2016.

Continuing a longstanding tradition, the day kicked off at 8:30 a.m. with “Bankruptcy for Breakfast,” (pdf / audio) a ninety-minute program that looked at recent developments in insolvency law. On the panel were three bankruptcy judges: Hon. Elizabeth Stong of the Eastern District of New York; Hon. Frank Bailey of the District of Massachusetts; and Hon. Philip Brandt of the Western District of Washington. Also on the panel were Michael Rubinstein of Liskow & Lewis in Houston, and L. Katherine Good of Whiteford, Taylor & Preston LLP in Wilmington, Delaware. Sarah Cave of Hughes, Hubbard & Reed, LLP in New York chaired and moderated the program.

“Bulletproofing Your Expert Report” (pdf / audio) was presented at 10:30 a.m. Hon. Clifton Newman, judge of the South Carolina Circuit Court moderated and co-chaired the program. The panelists were: Howard Brod Brownstein of The Brownstein Corporation, who also co-chaired the program; Professor David Faigman of the University of California Hastings College of the Law and Jurillytics, Inc.; and Daniel Lewis of Shearman & Sterling in New York. The panel looked at various techniques for making expert reports more effective and less subject to challenge.

In the afternoon, at 2:30 p.m., the Committee presented its annual Supreme Court roundup, titled “Tour of the Ivory Tower: U.S. Supreme Court Developments for Business Lawyers & Clients” (audio). Kendyl Hanks and Brigid Cech Samole of Greenberg Traurig LLP co-chaired and moderated. On the panel were Robert Barnes of The Washington Post, Brianne Gorod of the Constitutional Accountability Center, and Donald B. Ayer of Jones Day. The discussion looked at the full spectrum of Supreme Court cases decided in the October 2015 term that could affect businesses, and also previewed several high-profile cases on the Court’s docket for the October 2016 term.

The Business Law Section’s Spring Meeting will be in New Orleans, April 6–8, 2017, at the Hyatt Regency. The Business and Corporate Litigation Committee will once again join the Judges Initiative for dinner on Thursday evening, April 6, at Arnaud’s with a pre-dinner awards reception sponsored by the BCLC Women’s Business and Commercial Advocates Subcommittee where prominent members of the Louisiana legal community will be honored.

The BCLC will present four CLE programs at the Spring Meeting. On the docket are timely topics and high-profile speakers. Lesli Harris of Stone, Pigman in New Orleans will chair and moderate “Litigating the Disaster Case,” a ninety-minute program on Thursday from 10:30 a.m. to noon. The program will examine litigations arising from disasters, such as Hurricane Katrina and the Deepwater Horizon spill. Attorneys and a federal judge with experience in these mass claim cases will discuss the various issues these cases present.

Thursday afternoon, from 2:30 p.m. to 4:30 p.m., will be the Annual Review of Recent Developments in Business Litigation With Perspectives from the Bench. Bradford Newman of
Paul Hastings in Palo Alto will moderate the program, which will present some of the recent cases discussed in this year’s Annual Review book published by the Committee. This year’s Annual Review program will include two subpanels that will focus on recent litigation updates in the following substantive areas: (1) do recent Delaware decisions spell the death of stockholder litigation?; (2) has the Defend Trade Secrets Act of 2016 really changed anything?; and (3) Federal Court discovery one year after the new amendments. Panelists will include private practitioners, corporate general counsels, a Vice Chancellor of the Delaware Chancery Court, and a federal district judge.

Friday morning will feature “Persuasion in the Technological and Media Age: Effective Use of Technology, Media, and Graphics at Trial and on Appeal.” Mark Trachtenberg of Haynes & Boone in Houston and Victor Vital of Barnes & Thornburg in Dallas will co-chair and moderate the panel, which will include a U.S. Court of Appeals judge, private practitioner, and litigation consultant. The panel will discuss: how to make effective use of technology, media, and graphics to enhance your presentation at trial; what different tools are available and what are the pros and cons of each; and how, in the trial court and on appeal, attorneys should employ technology and adapt their brief-writing strategies to address the fact that increasing numbers of judges are reviewing briefs on screens (computers or tablets). The discussion will include use of graphics and animations in briefs and strategies for formatting brief to hold the reader’s attention. The program will run from 10:30 a.m. to noon.

“Legal Snarls in the World Wide Web,” which will be presented on Friday afternoon from 2:30 p.m. to 4:30 p.m., will look at the issues companies face when creating, updating or overhauling their websites. Emily Burton of Young Conaway Stargatt & Taylor in Delaware will chair and moderate the program. On the panel are senior intellectual property litigators and a federal judge.
Committee Meeting led by BCLC Chair Heidi Staudenaier

“Bankruptcy for Breakfast” Panel: Hon. Frank Bailey of the District of Massachusetts; Hon. Philip Brandt of the Western District of Washington; Michael Rubinstein of Liskow & Lewis in Houston; and L. Katherine Good of Whiteford, Taylor & Preston LLP in Wilmington, Delaware. Sarah Cave of Hughes, Hubbard & Reed, LLP in New York chaired and moderated the program.
“Bulletproofing Your Expert Report” Panel: Hon. Clifton Newman, who also moderated and co-chaired the program; Howard Brod Brownstein of The Brownstein Corporation, who also co-chaired the program; Professor David Faigman of the University of California Hastings College of the Law and Jurilytics, Inc.; and Daniel Lewis of Shearman & Sterling in New York.


BCLC Dinner