

Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

To the members of the Corporate Counsel Section:

I trust you have been enjoying your summer.

We are busy planning our Fall Meeting, which again will be *Ethics For Corporate Counsel*. Our speakers will be Prof. Ellen Yaroshefsky of Cardozo Law School; Mike Ross, Esq., of LaRossa and Ross, New York City; and Rick Supple, Esq., of Edwards and Angell, New York City. We expect that they will present an interesting and informative program. Mark your calendars for Thursday, October 25th. The program will run from 9:00 a.m. to 1:00 p.m. in New York City, and will provide four MCLE credits in Ethics. Registration forms will be mailed to all members in the early Fall.



Our Spring Meeting was held May 18-20 at the Sagamore Resort in Bolton Landing, N.Y. in conjunction with the Commercial & Federal Litigation Section. It featured a panel discussion on the Bush-Gore election litigation in Florida, with some of the key counsel who were involved, as well as a panel on arbitration vs. litigation, from the perspectives of corporate counsel, outside attorneys and the judiciary. As you will read in Jeff Futter's report in this issue, the meeting was extremely enjoyable and the location magnificent. I wish more of you had been able to attend.

The Section's Executive Committee is in the midst of assessing how it can better serve its membership in ways that will attract you to our programs. We hope we can find topics of interest that will serve to bring our members together in both educational and social environments. If you have any suggestions for future events, feel free to contact me at groth@bmi.com.

Gary F. Roth

Save the Date!

Be sure to save the morning of
Thursday, October 25, 2001

for the Corporate Counsel Section's
half-day program in New York City on
Ethics For Corporate Counsel

The program will feature a distinguished
panel of speakers and will be eligible for
CLE credit (4 hours in Ethics)

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Public Trust in the Legal System— A Role for Corporate Counsel

By Ellen Lieberman and Jack C. Auspitz

Public trust and confidence in the legal system is a fundamental and overriding concern. Our legal system underlies the operation of our democratic government, the protection of our civil rights and liberties, and the effective functioning of our entire economic system. If those who should be using the legal system as litigants, defendants, jurors, witnesses, or just plain law-abiding citizens, lack confidence in its fairness, in its ability to deliver justice in a timely way or in their ability to have access to that system, then voluntary obedience to the law and the appropriate and effective operation of the system are clearly undermined.

With this premise, New York's Chief Judge Judith S. Kaye named a broadly based and distinguished committee in 1999 to study the issue of public trust and confidence in the legal system. After that committee issued its report, the New York State Bar Association then named a Special Committee to review the Kaye Committee's report and to formulate recommendations for action. The report of the Association's Special Committee was approved by the Association's House of Delegates in January 2001. The task of the Special Committee now is to begin the process of implementing its approximately 70 recommendations. (One recommendation, on publicizing grievance proceedings, is being circulated for additional comments.)

The Special Committee's report identifies five particular public trust concerns and recommends specific and detailed strategies to address each area: (1) bias and prejudice and access to justice; (2) reducing delays in justice and the need for a comprehensible user-friendly court system; (3) the jury system experience and the need for adequate funding for court facilities; (4) legal and judicial ethics, and (5) public understanding and media portrayal of the legal system.

The Special Committee's full report is available on the Association's Web site at <http://www.nysba.org/pubtrust.pdf>. We commend the entire report to you, but would like to make particular note of some of the recommendations that may be most relevant to the activities of the Association's Corporate Counsel Section. We are asking the members of the Section for help in turning the recommendations into reality.

Perhaps the public trust concern that has most relevance to members of the Section is the need for a comprehensible user-friendly court system and reducing

delays in justice. The recommendations included in this section include our strong support for a state Constitutional amendment which would unify the various courts so that litigants would not have to have their disputes resolved in different or even conflicting courtrooms. For example, matrimonial matters may now get split between the Supreme Court and the Family Court. The Special Committee also seeks to expedite discovery in civil cases in a variety of ways, including making it simpler for non-parties to submit business records in response to a subpoena without having to produce a witness to testify as to their authenticity, cutting down on "speaking" objections at depositions in order to eliminate time consuming statements that may be intended more to coach the witness than to clarify the record, and so on. This section of the Special Committee's report also strongly encourages more efforts to resolve disputes by settlement rather than by lengthy and extremely expensive trials. Voluntary mediation and earlier and greater involvement by the judge are among the techniques urged to promote settlement.

"If those who should be using the legal system as litigants, defendants, jurors, witnesses, or just plain law-abiding citizens, lack confidence in its fairness, in its ability to deliver justice in a timely way or in their ability to have access to that system, then voluntary obedience to the law and the appropriate and effective operation of the system are clearly undermined."

To help carry out the Special Committee's recommendations on bias and prejudice, we think the Corporate Counsel Section can be instrumental in providing enhanced opportunities for minorities and women and enhanced diversity in the legal profession, which of course includes in-house legal offices and any outside counsel your companies employ. The importance of attracting and retaining a diverse workforce has received heightened visibility and more law offices are assessing their procedures and workplace environment. Nonetheless, there is considerable opportunity to do more in terms of recruitment and career development.

We believe that as a Section you can help develop programs and resources and help institute office procedures that promote diversity in the hiring and retention of a workforce.

As to access to justice, we urge corporate law departments to make a formal commitment to encourage *pro bono* service among their legal staffs and to pass the message on to their outside counsel as well. Offices can and should devise procedures, guidelines and programs so that volunteer service can be performed and encouraged without conflict with workplace responsibilities. The Corporate Counsel Section could also make a practice of recognizing exemplary efforts by those companies that encourage and provide *pro bono* service. We understand the Section has long advocated *pro bono* service, but we urge you to revisit and reissue model procedures and guidelines, renew your efforts, and spread the word so that your efforts can assist and inspire others.

In the area of legal ethics, we urge law offices, including legal departments of corporations, to review their educational and mentoring programs and their general corporate culture to ensure that there is an adequate consideration of professionalism and civility, and recognition of the distinction between incivility and zealous advocacy. And you should let your outside counsel know that your interests should be represented zealously but with civil conduct. In-house corporate counsel have the authority to, and they should, set a civil tone and set standards of professionalism.

The Administrative Board of the Courts is in process of passing a rule requiring written engagement letters for all matters where fees are expected to exceed \$1,000 and which set out the scope of representation, the fee and expense arrangement and the right to arbitrate fee disputes. The Special Committee recommends as a matter of good practice that there be written retainer agreements, regardless of the amount involved, to help ensure that the client understands the legal services to be provided and the compensation arrangements. To address situations where attorneys provide counsel on a continuing basis to the same client, we also recommend as good practice written retainer agreements when the legal work to be accomplished is significantly different than that involved in prior representation. With respect

to conflicts of interest, we suggest that attorneys seek a written statement signed by any client who waives a conflict of interest. As the client or potential client, your company can, and should, require that retainer agreements and waivers of conflicts be in writing.

"We understand that the concerns identified in our report are huge in scope and not simple in their resolution. Our report, however, provides a constructive and comprehensive long-term agenda for addressing these issues."

As to public understanding of the legal system, we encourage all lawyers individually and through bar associations to engage in community volunteer efforts and education to help break down stereotyping and to let the public become acquainted with members of the bar on a less formal level. To help accomplish this, we urge lawyers to participate in community outreach programs by speaking in local schools and addressing community groups.

We understand that the concerns identified in our report are huge in scope and not simple in their resolution. Our report, however, provides a constructive and comprehensive long-term agenda for addressing these issues. The Special Committee is asking for your help to turn our recommendations into reality, through your actions as Section members, in your everyday practice of law, and through the influence that members of the Corporate Counsel Section have, as in-house counsel, on the policies and procedures of their outside attorneys. As John F. Kennedy said 40 years ago in addressing the challenges of his time: "This will not be finished in the first 100 days." He concluded, "But let us begin."

Ellen Lieberman is Counsel at Debevoise & Plimpton and Chair of the New York State Bar Association's Special Committee on Public Trust and Confidence in the Legal System. Jack Auspitz is a partner at Morrison & Foerster LLP and a former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association.



Paul Michael Hassett



Walter Schackman



Harry Lee Anstead

Section Co-Sponsors Spring C the Bush-Gore Election Litigat

By Jeffrey L. Futter

Over the weekend of May 18-20, the Corporate Counsel Section and Federal Litigation Section (C&FL) at The Sagamore Hotel, Bol discussed a discussion by attorneys involved in the Bush-Gore election litigation. The discussion was moderated by a correspondent, and Eliot Spitzer, Attorney General of the State of New York, provided candid insights into the strengths and weaknesses of their cases, the federal court rulings that ultimately (after 36 days) determined the outcome. Gore's lawyers explained that, due to the severe time constraints of the court to hear his decision, when it went against them they simply changed a single word. (The discussion, in fact, was so compelling that many attorneys were getting CLE credit for being there.) The moderator for this fascinating discussion was Sharon Porcellio, a partner at the law firm of McRae LLP, New York City. The Saturday program was preceded by a presentation by Harry Lee Anstead, one of the Justices on the Florida Supreme Court.

The Sunday morning panels addressed the desirability of selecting a mediator. First, several corporate counsel and arbitration experts discussed the pros and cons of pursuing negotiation, mediation and arbitration over litigation, and the role of the mediator in arbitration. The moderators for these two panels, respectively, were Sharon Porcellio from New York City and Hon. Walter Schackman from Davis & Gilbert, New York City.



Sharon Porcellio and Gary Roth

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CLE Program Featuring tion

n co-sponsored a CLE Program with the State Bar's Commercial
ton Landing, N.Y. that featured a lively Saturday morning panel
on plus Linda Greenhouse, *The New York Times'* Supreme Court
New York. The lawyers for each presidential candidate offered
their legal strategies and their reactions to the various Florida and
e outcome of the election. For example, one of Vice President
of the situation, on the day they went to Judge Saul's Florida trial
walked across the hall and turned in their appellate brief without
g that one attendee was heard to remark that he almost felt guilty
ting program was Jay G. Safer from LeBoeuf Lamb Greene &
by a passionate address on judicial ethics on Friday evening by
urt.

eting arbitration or litigation for resolving commercial disputes.
differing viewpoints as to the advantages and disadvantages of
and then four federal and state court judges discussed the judicial
ely, were John Nonna from LeBoeuf Lamb Greene & McRae LLP,
, LLP, New York City.

in all, lawyers who attended the May Spring Meeting that was
ized by the Chairs of the Corporate Counsel and the C&FL Sec-
Gary F. Roth and Sharon M. Porcellio, respectively, were treated
excellent CLE program, numerous occasions for friendly interac-
with colleagues and the amenities of a top resort on beautiful Lake
e.

Jeffrey L. Futter is a regulatory attorney currently with Con Edi-
New York City and a member of the Corporate Counsel Sec-
Executive Committee. He is a past Chair of the Section and
ntly acts as Delegate to the House of Delegates.



Eliot Spitzer



Linda Greenhouse



Jeff Futter

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Legal Experience

Barbara began her legal career in 1979 as a Special Assistant Attorney General for the state of New York, specializing in the investigation and prosecution of white collar crime. In 1981 Barbara joined the legal department of Elizabeth Arden, which was then a subsidiary of Eli Lilly & Co., as a Staff Attorney and was promoted to the position of Assistant General Counsel in 1987. In 1989 Elizabeth Arden was acquired by Unilever. Barbara was subsequently promoted to the position of Associate General Counsel of Elizabeth Arden and its Parfums International fragrance division. As an in-house generalist her practice included all issues associated with the worldwide manufacture, sale and distribution of prestige cosmetic, skincare and fragrance goods.

In January, 2001 Elizabeth Arden was sold, and upon completion of the sale Barbara joined the corporate practice group of the Unilever U.S. Law Department.

Business/Corporate Law and Practice*

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This monograph, organized into three parts, includes coverage of corporate and partnership law, buying and selling a small business and the tax implications of forming a corporation.

The corporate and partnership section offers advice to the general practitioner or new attorney on the basics of forming a business for a client. The more popular types of business entities are discussed, along with the advantages and disadvantages of each. The chapter also examines considerations relative to the different forms of doing business, including domestic and foreign corporations and limited liability companies.

Part two, on buying and selling a small business, guides practitioners through the necessary procedures and corresponding responsibilities as a transaction passes from proposal to completion. It covers the pre-contract, contract, pre-closing, closing and post-closing stages.

Whether the corporate form of business organization is appropriate is a preliminary question you must answer after meeting with your client and determining the particular facts and relevant circumstances. The tax implications of such a decision are the focus of the third part. Alternative business organizational forms are discussed, including the general partnership, limited partnership, sole proprietorship, S corporation and the limited liability company.

This last part addresses important questions that should be considered when advising a client on forming a corporation: What is the *desirable* tax treatment to the client—that gain or loss on the exchange of his or her property for stock of the corporation be taxed in the tax year in which the transfer occurs or that it be deferred? Is deferral of gain or loss on the exchange *feasible*? What are the *consequences* of the client's deferring to a later year the reporting of gain or loss realized by the client on the exchange?

The updated case and statutory references and the numerous forms following each section, along with the practice guides and table of authorities, make this latest edition of *Business/Corporate Law and Practice* a must-have introductory reference.

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Professor Leona Beane

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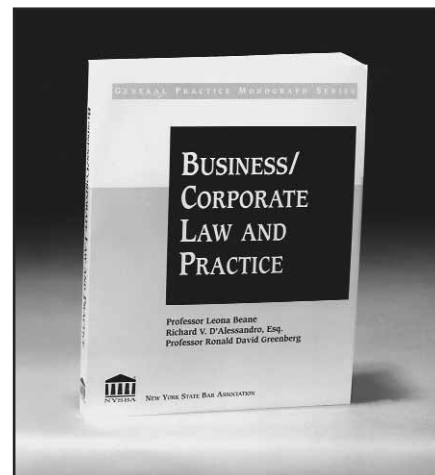
Richard V. D'Alessandro, Esq.

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Professor Ronald David Greenberg

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Inside welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original. Please submit articles to Thomas A. Reed, BT North America, Inc., 350 Madison Avenue, 6th Floor, New York, NY 10017.

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