The Commercial Law Connection

The National Bar Association
Commercial Law Section

VOLUME 3, ISSUE 2

Summer 2006

CONNECTING PEOPLE, IDEAS AND OPPORTUNITIES

INSIDE THIS ISSUE:

Karol Corbin Walker's Chair Message

Karol Corbin Walker, Chair

Greetings to my fellow members of the National Bar Association's Commercial Law Section ("NBACLS" or "Section") and to our Section's many friends and sponsors. This has been an excellent year for our Section, and I take this opportunity to share the good news with you. Through the tireless efforts of our Section's Executive Committee and with the support of Section member volunteers, and our Section's friends and sponsors, we continue to take significant strides toward fulfilling our Section's mission to increase the professional opportunities available to our members and to use our member's talents to better our communities.

With respect to increasing our members' professional opportunities, we hosted the 19th Annual NBACLS Corporate Counsel Conference in Birmingham, Alabama at the end of February, 2006. It was a very successful conference as some of our members explain in several articles in this newsletter. In keeping with the recent emphasis that some corporations have put on increasing the diversity of their legal service providers, the Conference enjoyed more sponsors than any of our eighteen previous Corporate Counsel Conferences. Inside this issue of the newsletter, we acknowledge the many corporations and law firms that sponsored the Conference and helped us increase our members' opportunities to meet corporate representatives who are serious about retaining minority outside counsel.

Following up on our 19th Annual Corporate Counsel Conference, our Section is co-sponsoring the Career Networking Conference with the NBA's Corporate Law Section. The Career Networking Conference will be held on Friday, August 11, 2006, in conjunctin with the NBA's 81st Annual Convention in Detroit, Michigan. The Career Networking Conference will feature individual one-on-one interviews for Commercial Law and Corporate Law section members who are interested in new opportunities as in-house counsel or with selected AV-Rated law firms. The Career Networking Conference also will include a reception on Thursday evening, August 10th, for conference partici-

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A More Perfect Union: Creating a Strong Relationship Between In-House and Outside Counsel

By John Lewis, Jr., Esq. and Samuel S. Woodhouse III, Esq.

Corporations are not in the business of filing or defending lawsuits. The primary purpose of any for-profit company is to further its business objectives, which are principally to maximize the sales of its products or services and thereby maximize shareowner value. Therefore, a corporate legal department's overriding goal should be to proactively manage legal matters in ways that minimize business disruption; to contain costs; and to leverage the law to further the company's business objectives. Thus, consistent with the corporation's profit-motive, a corporate law department's objective is not always to "win" but to craft and ultimately execute those legal strategies that drive favorable business outcomes.

Successful "go-to" outside lawyers understand this. They become true partners with in-house counsel, not only by demonstrating substantive legal proficiency, but also by showing that they understand the legal issues presented in the context of larger business drivers. They understand that, in companies, "Legal" is just another cost center to be managed by the inside lawyer. They understand that the "inside counsel" must manage a variety of internal expectations, anxieties and sometimes conflicting notions of "success." Finally, they understand and anticipate the issues that keep inside counsel up at night, and they focus relentlessly on bringing forward solutions.

While a strong relationship cannot exist without the commitment of both parties, the onus is on outside counsel to make the effort to develop, build, and strengthen the in-house/outside counsel rela-

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The National Bar Association Mourns the Passing of Cora T. Walker

On Thursday, July, 13, 2006, Ms. Cora T. Walker, a highly-esteemed New York attorney and former Chair of the NBA Commercial Law Section passed away. Ms. Walker, who earned her law degree at St. John's University in 1946, was one of the first African-American women to practice law in New York. Unwelcome at the time at New York law firms, she ran a private practice in Harlem for decades. In 1976, she and her son, Lawrence R. Bailey, Jr., Esq., established the law firm, Walker & Bailey, which was one of New York City's few black law firms. She practiced there until her retirement in 1999.

During her distinguished legal career, Ms. Walker, among other things, worked hard to persuade large corporations to retain African-American law firms as outside counsel. As the Chair of the NBA Commercial Law Section, she was one of the NBA members whose vision led to our Section's Annual Corporate Counsel Conference. Although her firm eventually represented large corporations, such as Ford Motor Company and Texas Instruments, Ms. Walker also continued to represent the members of her Harlem community. In 2005, the NBA created the Cora T. Walker Corporate Partnership Award in her honor. Ms. Walker's funeral was held at Abyssinian Baptist Church on July 18, 2006, in New York City. She will be sorely missed. Her example, however, forever will continue to inspire attorneys of color who follow in her footsteps.

2006 NBA's Commercial Law Section's Corporate Counsel Conference

By Tony Richardson, Esq.

In 2005, I parachuted into the NBA's Commercial Law Section's Corporate Counsel Conference in Rancho Mirage, California to give a presentation on "The Anatomy of a Toxic Tort Trial." Michael Jones, one of my partners at Kirkland & Ellis, was scheduled to do so, but he was trying a case at the time. Through that limited exposure, I saw the value of the Conference and vowed to participate more fully the following year. I did so this year and was not disappointed.

Karol Corbin Walker, Kim Phillips, Don Johnson and Blonde Grayson Hall, among others I am sure, are to be commended for what was a very successful Conference. By far, it was one of the best I have attended, legal or otherwise. I was particularly impressed with how well organized the Conference was. The Roundtable discussions, networking receptions, CLE seminars, corporate/attorney interviews, discussions in the hospitality suite and wide-ranging social events provided ample opportunities for all attorneys to comfortably meet and mingle. Certainly, the most gratifying feature was the opportunity to meet, in one place, such a substantial number of talented and accomplished attorneys of color from across the country. I was reminded that, even though our numbers remain small, whether as in-house counsel, government attorneys or private practitioners, we are accomplishing much within our own spheres, and we can benefit from our shared experiences.

To be sure, the Conference facilitated making deep connections. For example, I had the pleasure of moderating the legislative updates and governmental affairs panel, which Thomas Cox coordinated. The panelists (Cari Dawson, John Moore, Chris Lewis, Brian Parker and Randle Pollard) expertly covered topics, and fielded questions from a knowledgeable audience, ranging from the Class Action Fairness Act to reforms in the eminent domain area. The golf tournament was canceled because of inclement weather. Nonetheless, I met and played with hardy souls such as Clarence Davis, Jason Phillips, Tommy Shi, Victor Vital and Cornelius Hare, who braved the elements. Despite playing in a steady downpour for more than four hours, I had as much fun golfing as I have ever had thanks to them. Through other events, I met and had wonderful conversations with a number of other attorneys with whom I am keeping in contact.

The site for the Conference was excellent as well. Given this year's theme -- "Raising the Bar: Advancing Justice and Equality" -- the Birmingham area was a fitting location. Birmingham had much to offer, from the Civil Rights Institute to the Museum of Art where the closing reception took place. Also, the Renaissance Ross Bridge Resort was a warm and welcoming facility. If I were to return to Birmingham, I would certainly consider staying there again. Everything about the resort, from its meeting facilities and guest rooms to its well-maintained golf course, was exceptional.

I am already looking forward to participating in the Conference next year and for years to come.

Tony Richardson is a partner at Kirkland & Ellis' Los Angeles office. He is a trial attorney who handles class action, product liability, mass torts, contract, unfair business practices and antitrust matters. His email address is: trichardson@kirkland.com.

Corporate Counsel Roundtable: "Diversity Efforts – Is It Just Lip Service?"

By Tamika Tremaglio, Esq., MBA

This year's Corporate Counsel Roundtable discussion was entitled "Diversity Efforts – Is it Just Lip Service?" and featured the following in-house and outside counsel panelists:

- Tracey Matura, General Counsel, Mercedes Benz
- John Page, General Counsel, Golden State Foods
- James Potter, General Counsel, Del Monte Foods
- Alex Vasquez, Associate General Counsel, Wal-Mart Stores, Inc.
- Andy Zopp, Former General Counsel, Sears Holdings Corporation
- Joe Caldwell, Partner, Baker Botts LLP
- Weldon Latham, Partner, Davis Wright Tremaine LLP
- Nancy Jessen, Director – Legal Business Consulting, Huron Consulting Group

Before the panelists offered their experiences and other comments, the moderator, Nancy Jessen, provided some overall statistics about minorities within the legal profession. Of the 1.2 million attorneys in the United States, less than 10% are minorities. At the largest law firms, women hold just 17% of the positions, minorities only 5%, and minority women only 1%.[1] Furthermore, 43% of U.S. law firms do not have a minority partner. These statistics are quite astounding considering that 30% of the U.S. population was comprised of minority groups in 2000 and, by the year 2050, minority groups are expected to represent 50% of the U.S. population.[2]

Ms. Jessen then provided general counsel demographics that reflected signs of progress. In 1996, there were 3 minority general counsels in Fortune 500 companies; there were 6 in 1998; and there were 15 in 2000. As for numbers in 2005, the MCCA reported that there were 28 minority GCs in Fortune 500 companies – 19 African-American, 5 Hispanic, 3 Asian/Pacific Islander, and 1 Native American. Five of the 28 minorities were women.[3] In comparison, in the Fortune 1000, 47 companies have a minority general counsel – 29 African-American, 9 Hispanic, 8 Asian/Pacific Islander, 1 Native American, and 13 of the minority general counsel are women.[4]
In light of, and likely because of, these changing demographics, many law departments are using diversity as a relevant factor in business decisions, including decisions about the hiring

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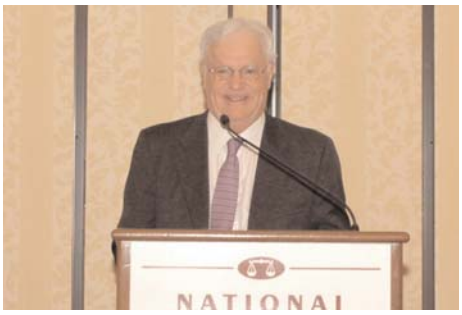

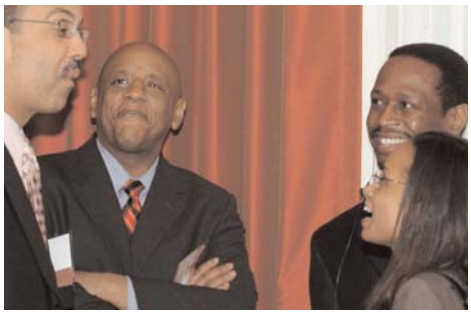

AN EVENING OF ELEGANCE AND NETWORKING IN THE CITY OF CIVIL RIGHTS

The Opening of the Corporate Counsel Conference

By Daryl K. Washington, Esq.

We were greeted at the "Welcome to Birmingham Reception" by our lovely Chair of the Commercial Law Section, Karol Corbin Walker, who gave the first timers and old timers a bit of history on the Commercial Law Section and how it came to be that Birmingham, Alabama was chosen as the host city for the Corporate Counsel Conference. What was amazing about the selection process was that the Renaissance Ross Bridge Golf Resort and Spa, the venue for the Conference, was still under construction when Karol and Kim Phillips initially visited the site. To make matters worse, Karol and Kim were forced to shorten their visit due to the threat of Hurricane Katrina. They, however, left the Resort with a sense of confidence that they had selected the perfect venue to host the conference. Everyone in attendance shared the same sentiments; the location was absolutely fabulous. I would highly recommend a visit to the Ross Bridge Renaissance Resort. Great job Kim and Karol!

The evening continued with plenty of networking with corporate representatives, friends being reunited with each other, and storytelling by some of the founding members of the Commercial Law Section. The food was awesome, the music -- courtesy of a local jazz ensemble -- was outstanding, and the atmosphere was to die for. However, the evening would not have been complete without a planned tour of Birmingham. You could hear the whispers at each table as groups planned the remainder of the evening. This night was definitely the beginning of a GREAT conference. I would provide more details, but you know the rule, "What goes on in Birmingham, stays in Birmingham." So, if you want to get more scoop on the wonderful opportunities that are made available at the Corporate Counsel Conference, I would suggest you make plans to join us next year in Florida.

Daryl K. Washington is an attorney in the Dallas office of the law firm of Godwin Pappas Langley Ronquillo LLP. He can be contacted at dwashington@godwinpappas.com.

The NBA Commercial Law Section would like to thank our Corporate Counsel Conference sponsors for their support.

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Our Conference Sponsors and Participants Made the 2006 Conference A Great Success

Take Five: Asserting the 5th Amendment's Protections In Commercial Litigation

By Brian A. Jackson, Esq.

Today, virtually any regulatory infraction can result in a criminal investigation, and counsel should assume the worst when preparing for the representation. For civil and commercial litigators who must defend lawsuits brought against businesses or who must respond to administrative enforcement proceedings initiated by regulatory agencies, a critical determination that must be made early in the representation is whether the matter has or will raise the specter of a criminal investigation. If so, all the customary precautions that protect companies and corporate officials must be engaged.

One of the most fundamental precautions is a strategy to prevent the client from providing compelled testimony during a parallel civil or administrative proceeding. Often, aggressive plaintiffs' lawyers will move to serve deposition notices seeking to draw out critical facts long before a criminal investigator can convince a prosecutor to issue grand jury subpoenas to flesh out the very same information.

Such parallel proceedings present the lawyer and client with a weighty dilemma, the import of which could yield far-reaching implications: should a person who is deemed a witness in civil litigation, but who may also be the subject of a criminal investigation, submit to a deposition or trial subpoena to testify in a civil proceeding? This undesirable convergence of civil liability and criminal culpability must be carefully considered by counsel, especially when compliance with the deposition notice or trial subpoenas may create a risk of disclosing information that may be deemed incriminatory by criminal investigators.

The fundamental constitutional protection available to those who find themselves in this unfortunate dilemma is the Fifth Amendment of the U.S. Constitution, which provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself." *U.S. Constitution amend. V*. Courts have consistently interpreted this provision to be a means to "protect a person…against being incriminated by his own compelled testimonial communications." *Fisher v. United States*, 425 U.S. 391, 409 (1976). To be afforded the amendment's protections, the statement offered by the witness must be: (1) compelled, (2) testimonial in nature, and (3) must serve to incriminate the witness in a criminal proceeding. If these elements are met, the protection affords the witness the right "not to answer questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

Despite the protections, the invocation of the 5th Amendment in a civil proceeding or deposition should not be casual or without careful analysis of the assorted practical implications. The mere assertion of the provision often raises the interests of prosecutors and judges who preside over civil cases and who must necessarily make credibility findings. Who among us does not pause to wonder, upon learning that a witness has invoked the Fifth in response to questioning, whether the witness actually has something to hide? Judges and prosecutors also ponder the issue. Accordingly, when considering whether to abide by the commands of the deposition notice or trial subpoena, or whether to temporarily abate or stay the civil proceedings, the lawyer should consider the following:

1. *Has a Criminal Investigation Been Opened?* This is a fundamental inquiry, yet one that often is not easy to ascertain. Most state and federal prosecutors are prohibited from disclosing the existence of an investigation during the early stages. Occasionally, investigators or prosecutors are remarkably candid about their activities. More often than not, however, even in response to direct inquiries from counsel, no official confirmation of the opening of an investigation will be provided. Consequently, counsel is left to seek the answer to this question through indirect sources, such as newspaper accounts of the incident underlying the litigation and other public sources that may suggest the existence of an investigation. In any case, if the assertion of the Fifth is challenged at any time, usually by plaintiff's counsel, the attorney for the corporation or corporate witness may cite these sources, albeit unofficial, as one of the bases for the assertion.

2. *Is the Witness a Subject or Target of the Criminal Investigation?* This is a critically important question that can only be answered by the investigators or prosecutors. If counsel learns that the client is a subject or target of the investigation, the client must not submit to a deposition or testify at a civil trial. Any such testimony will later be obtained by investigators and could be used by the prosecution in a criminal proceeding, including, any statements that may incriminate the witness.

3. *Should Counsel Attempt to Negotiate an Immunity Agreement?* This question is almost always answered in the affirmative if it is reasonable to believe that the client is a subject of the investigation. Counsel must make the procurement of an immunity agreement a priority in the representation. Unfortunately, prosecutors are usually unwilling to lock themselves into a commitment regarding the status of an individual (e.g., whether the client is merely a witness to a suspected crime or if the government believes the client is deemed a subject or target of the criminal investigation).

4. *Who May Assert the Fifth?* Remember: corporate entities are not entitled to Fifth Amendment protections; the privilege is only available to natural persons. *See generally, Doe v. United States*, 465 U.S. 605 (1988). Moreover, an attorney cannot assert the privilege on behalf of the client, whether a corporation or a natural person. The law requires the person to actually appear at the deposition, trial or other proceeding and to invoke the Fifth in response to each question. *U.S. v. Gibbs*, 182 F.2d 408, 431 (6th Cir. 1999).

5. *May a Witness Who Professes to be Completely Innocent Assert the Privilege, or is the Privilege Available Only to Persons Who May Have Committed Wrongdoing?* The Supreme Court put the issue to rest in the case of *Ohio v Reiner*, 121 S.Ct. 1252 (2001), when it ruled that the privilege is available even to those persons who claim innocence. Arguably, the only testimony over which the witness may not assert the privilege is testimony that cannot possibly incriminate the witness. Caution should be exercised here, as the scope of potentially incriminating information is very broad

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NBA 81st Annual Convention – Detroit, Michigan

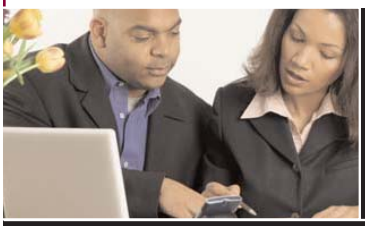
By: Victor D. Vital, Esq.

The National Bar Association will host its 81st Annual Convention this year in Detroit, Michigan—Motor City, the home of Motown—at the Detroit Marriott at the Renaissance Center. The convention will be held on August 5 – 12, 2006, and the convention's theme will be "Raising the Bar – Advancing Justice and Equality."

As NBACLS members know, Annual Conventions feature many high quality speakers on a broad range of cutting-edge and timely topics and the 81st annual convention will be no different. Indeed, consistent with the convention's theme, this year's Presidential Showcase Seminar will present a debate of Michigan's so-called Civil Rights Initiative. For those unaware of it, the deceptively named Michigan Civil Rights Initiative is a voter-based initiative that seeks a Michigan constitutional amendment in November 2006 that would prohibit the use of race-based remedies and initiatives, such as affirmative action, that further diversity and equal opportunity in the areas of public employment, public contracting and public education. Hopefully, NBACLS members will be on hand for the debate on this critical issue that will affect Michigan residents for years to come.

The NBACLS meeting will take place on August 11, 2006, from 2:30 p.m. to 3:30 p.m. and, as always, all section members are invited and encouraged to attend that meeting. In addition, the NBACLS will host a reception at the convention on August 10th. Finally, the NBACLS and the NBA Corporate Law Section jointly will host the Career Networking Conference on August 11th. This Career Networking Conference will provide representatives of corporations and law firms with the opportunity to meet talented African-American attorneys who are interested in working as in-house counsel for corporations or as members of law firms that want to diversify the racial make-up of the attorneys whom they employ.

See you in Detroit!



National Bar Association Commercial Law Section

National Bar Association 81st Annual Convention

August 5 - 12, 2006

Date: Thursday, August 10, 2006
6:00 p.m. - 8:00 p.m.

Event: NBA Commercial Law Section and NBA Career Networking Reception
(Co-sponsored by Schering-Plough Corporation and Dykema)

Location: Dykema
400 Renaissance Center,
23rd Floor
Detroit, MI
For NBA Commercial and Corporate Law Section Members and Invited Guests Only

Date: Friday, August 11, 2006
9:00 a.m. - 5:00 p.m.

Event: NBA Career Networking Conference
(Co-sponsored by the NBA Commercial and Corporate Law Sections)

Location: General Motors University
Renaissance Center Complex,
between Towers 200 and 300

Date: Friday, August 11, 2006
2:30 p.m. - 3:30 p.m.

Event: NBA Commercial Law Section Annual Meeting

Location: The Detroit Marriott at Renaissance Center
Michaelangelo Room,
4th Floor
Detroit, MI

www.nbacls.com

Ready or Not, Detroit Here We Come!

Detroit is certainly a place for car enthusiasts, with GM World at the Renaissance Center, where you can see a variety of new and classic cars and trucks, all made in America! Shoppers and foodies will also be awed by other parts of the Renaissance Center, which has many high-end shops and the famous revolving Summit Steak House and Lounge on the 71st floor. There you can enjoy spectacular views of the city. Of course, Detroit has a rich culture and history; so before you leave, you should visit the Charles Wright Museum of African-American History, the Detroit Historical Museum, and the Greystone International Hall of Fame/Jazz Museum, all located in downtown Detroit.

If you just made partner or got a huge bonus, Detroit has places for you too! The MGM Grand Detroit Casino and the MotorCity Casino, both located in downtown Detroit, are great venues for gaming enthusiasts.

If you want to walk around and just enjoy the sites, visit Bricktown, home to many restaurants, popular nightspots, and trendy boutique shops. You won't want to miss Greektown & Trapper's Alley, Detroit's most well known ethnic neighborhood, which boasts a hearty nightlife and its own casino. Do you want to venture outside the downtown area? Visit Belle Isle and see the famous Scott Fountain, or take a quick visit to Windsor, Canada, which is right across the bridge and which also has a casino.

For more information about things to do in and around Detroit after the Convention activities have ended for the day, visit http://www.visitdetroit.com. We look forward to seeing you all and to having a great time together!

Chair's Message . . . *continued from page 1*

pants and other specially invited guests. We are confident that the Career Networking Conference will enjoy the same success that our Section's Corporate Counsel Conference has garnered over the years.

This year also has been a success because our Section has been able to continue to help others. Among other things, we enthusiastically continued our Section's support of the NBA Crump Law Camp in Washington, D.C., which exposes African-American teenagers between the ages of fourteen and seventeen to the American judicial system for two weeks in the summer. John L. Crump, the Executive Director of the NBA and the Board of the Crump Law Camp, has organized and hosted this law camp at Howard University School of Law for six years. The law camp provides an invaluable service to the African-American teenagers who attend it, sparking an appetite for the law in our next generation of lawyers.

Based in part on the success of the Crump Law Camp, this year our Section also sponsored a Pipeline Development Program, which is a new program that, in its inaugural year, provided pre-law training, clerkships and career development courses to African-American, Latino, Native-American and Asian-American law students in Arizona. NBACLS member, Jo Ana Saint-George, organized the program, which is aimed at: (1) increasing the number of ethnically diverse lawyers graduating from law schools, and (2) demonstrating the legal community's determination to ensuring the success of lawyers of color. This program proved to be a success this year. We believe it will continue to provide a valuable service to students in Arizona for many years to come and will spread to many other states through the hard work of Ms. Saint-George and other Section members and friends. More information about this program can be obtained at www.nbapipeline.org.

This year we also offered on-line registration for the Corporate Counsel Conference on the Section's website — www.nbacls.com. We are in the process of redesigning the website now to increase its usefulness to our members. We expect to unveil the redesigned website by the fall of this year.

In addition, throughout the remainder of this year, we will plan our Section's 20th Annual Corporate Counsel Conference, which will take place in Florida in late February or in the beginning of March 2007. Our goal is to make this conference the best one the Section has ever hosted. We will provide you with more information about this conference by the early fall 2006.

Finally, this issue of the newsletter marks the third consecutive year that our Section has published its newsletter, which provides our members with a forum for publishing articles and news items that inform our readers about what's on our members' minds and evidences the high-quality of our Section members' legal analyses and our ever-present commitment to justice and equal opportunity for all.

Together we have accomplished a great deal this year. I am sure that we will continue to progress together throughout the remainder of the year. I hope to see you at the NBA's 81st Annual Convention in Detroit and at the NBACLS's 20th Annual Corporate Counsel Conference in Florida.

Post-Acquisition Disputes: A Financial Perspective

By: Marc B. Sherman, CPA, Esq. and Laura Connor, MBA

INTRODUCTION

The execution and closing of every purchase agreement has a reasonable risk of ending in a future post-acquisition dispute. These disputes commonly relate to failures of representations and warranties, questions about the existence of purchased assets or liabilities and, most commonly, post-contract "financial true up." Given these potential disputes, during contract negotiation and due diligence, buyers and sellers unfortunately pay too little attention to the contract provisions relating to the contract's dispute resolution provisions and pre- and post-closing responsibilities.

PURCHASE AGREEMENT PROVISIONS & AREAS THAT AID IN AVOIDING DISPUTES

Every purchase agreement should contain provisions to provide for a potential post-acquisition dispute. In addition, when entering into a purchase agreement, both parties should take steps to avoid potential disputes by (1) providing for (and ultimately performing) adequate due diligence[1] and (2) carefully considering certain aspects of other contract provisions.

Due Diligence

Pre-acquisition "due diligence" commonly entails a somewhat detailed but relatively simple verification of the seller's accounting balances. The buyer, through its own accounting department or a third-party firm, generally performs a "numbers verification" of the account balances in the accounting ledgers to verify that the numbers on the financial statements are supported. However, should the buyer perform a more in-depth, non-accounting due diligence? Should a buyer's due diligence probe what the seller's business is about? Should a buyer engage in continuing due diligence after the purchase agreement's execution, or even have a continuing responsibility to do so? Do the reps and warranties attach responsibility for post-execution changes in the business, its customer base, market conditions or other factors that degrade historical performance?

Further to the last question, an important issue for consideration is the effect of a heightened form of pre-acquisition due diligence? Should the seller's representations be impacted by the scope and adequacy of the due diligence? Should the buyer's ability to detect issues and problems supersede the seller's reps and warranties and absolve the seller of responsibility for the rep and warranty failures? In *Great Lakes Chemical Corporation v. Pharmacia Corporation*,[2] the Delaware Court of Chancery found that the *availability* of experts and advisers to perform due diligence weighed heavily in the conclusion that the seller was not responsible for acquisition-related misrepresentations.

In *Great Lakes*, after the buyer decided to negotiate for the purchase of the seller's business, the business was impacted by price-cutting and the entry of new competitors into the market, both of which permanently affected the seller's customer base and revenue stream. The seller's management had detailed knowledge of these developments and the related performance impact. In addition, the seller held patents that they allegedly knew were being infringed by a competitor. One of the buyer's due diligence experts received unverified information of the infringement. When the buyer's expert asked the seller's representatives if they knew of the alleged interference, the buyer was told "no." During its due diligence, the buyer made several inquiries to the seller about the business, intellectual property, product markets, and its actual sales and sales forecasts. However, having very little experience in the industry, the buyer claimed to have relied on the seller's experience in that business and, particularly, on the seller's representations concerning the events that affected revenue. As a result, the buyer alleged fraud and misrepresentation on the part of the seller.

The court found that the buyer was put on notice of impending problems through the seller's revisions of the forecasts, negating the buyer's claim of reliance on the seller's representations. The court also found its conclusion to be strengthened by the buyer's retaining industry experts and legal advisors. According to the court, the buyer knew that price-cutting was occurring in the market, and the buyer "*had available as resources, experts capable of understanding and communicating how that fact was significant to [the business's] future sales prospects*." (emphasis added). In essence, the court found that the seller was not obligated to correct misrepresentations or omissions when the due diligence should have discovered the issues.

Situations like those in cases like *Great Lakes* and others raise obvious questions about who should take the responsibility for the future performance of the business, the buyer or seller? Because full due diligence possibly shifts an acquisition's risks to the buyer, whether such a due diligence should be conducted needs to be carefully considered. Whether mandated by the seller, or considered prudent by the buyer, substantive due diligence, and the contractual provisions mandating and defining it, could avert many post-acquisition disputes.

In arranging for adequate due diligence, a buyer needs the purchase agreement to specifically set out the documents and personnel that will be available to it during due diligence as well as the timing of their availability. The due diligence process should include the buyer's meeting with the seller's personnel. However, this can present problems to the seller because, for various business reasons, a seller often will not notify employees of a potential or intended sale.

Closing Price & Closing Procedures

The preliminary selling price in most purchase and sale agreements is based on the facts and financial data available at the time of contract execution. The price is then finalized (or "trued up") on the closing date once the final financial data and other relevant information is known. This purchase price "true up" is usually determined by reference to some balance sheet items,[3] which are typically measured using Generally Accepted Accounting Principles (GAAP), consistently applied. The contract provision relating to the "closing date balance sheet adjustment" usually sets out the procedures for determining the adjustment, including which party will be responsible for the preparation of the closing balance sheet ("CBS"). Key items important to this post-closing true up and the contract provisions leading up to the process are whether the CBS will be audited, whether the CBS will be prepared in accordance with GAAP or in accordance with past practices, and the relevance of consistent application of accounting treatment and the timing of the delivery of the CBS. The decisions made and outlined in this provision can help prevent some types of potential disputes by providing a clear true up process.

Unfortunately, not all disputes can be so easily avoided. Often disputes arise despite carefully drafted contract provisions, particularly concerning the use of GAAP (which is often judgmental and subject to estimates) and its consistent application. A buyer and seller

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Member Spotlights

Darren P. Riley Co-Founds an International Trade Firm in Washington, D.C. — Huffman Riley Kao, PLLC

On May 1, 2006, NBA Commercial Law Section member, Darren P. Riley, along with two colleagues, began the law firm of Huffman Riley Kao, PLLC. The Firm specializes in the practice area of international trade, with a particular focus on export compliance. Darren and his partners, Suzanne Kao and Jeremy Huffman, have extensive experience handling export compliance matters and various other issues involving international trade regulations. Prior to starting Huffman Riley Kao, the three attorneys worked at a large Washington, D.C. law firm serving an international clientele. Darren and his partners started Huffman Riley Kao recognizing that there is a need for quality export compliance legal services to be offered at rates below that of the larger law firms.

Huffman Riley Kao has extensive experience in export matters including: (1) compliance with the International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR) and the Office of Foreign Asset Controls (OFAC) Regulations; (2) export licensing; (3) auditing and structuring compliance programs; (4) investigating potential export violations and implementing remedial measures; and (5) conducting due diligence related to mergers, acquisitions and divestitures.

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Charlene Usher Celebrated Her Law Firm's Fifth Anniversary by Giving Back to Her Community

NBA Commercial Law Section member Charlene L. Usher celebrated the fifth anniversary of the founding of her firm, Usher Law Group, P.C., by hosting an awards dinner that honored two outstanding legal professionals in California and raised money to help select African-American law school students fund their legal education. Charlene founded Usher Law Group Professional Corporation in 2001. It is a nationally certified minority- and woman-owned law firm that specializes in the defense of workers' compensation claims on the behalf of California employers and in related employment matters. Charlene has more than 15 years of workers' compensation experience in California, which includes work as a claim examiner during her pre-law career.

The fifth anniversary dinner event was titled "A Time for Celebration and Giving Back." At the dinner, Ms. Usher presented Usher Law Group's "Inspiration Award" to Mary Kay Kane, who recently stepped down as Dean and Chancellor of the University of California, Hastings College of Law after thirteen years of service to the school. Ms. Usher presented the firm's "Corporate Trailblazer Award" to at&t and William R. Drexel, at&t West's General Counsel. Usher Law Group gave these awards to honor individuals and companies that demonstrate a commitment to diversity in the legal profession and to leveling the playing field for women and minority law firms and attorneys.

In addition to honoring Dean Kane and Mr. Drexel, Charlene's event raised funds for the Black Women Lawyers of Los Angeles Foundation ("BWL"), which is a non-profit organization dedicated to addressing the needs and concerns of African-American women in the legal profession. Charlene has announced that Usher Law Group will donate $10,000.00 to BWL. These funds will be used for the benefit of deserving minority law school students. Charlene chose to donate the funds to the BWL because she has a long history with that organization and believes in its mission. In fact, in 1996, Charlene was herself a BWL scholarship recipient, which assisted her in realizing her dream of becoming an attorney. "By connecting my colleagues, clients, friends and associates, I hope to create a pipeline to fund and support our educational opportunities for our community. To that end, I plan to establish Usher Law Group Charitable Foundation to develop programs and fund scholarships for deserving students of color," says Charlene. The National Bar Association's Commercial Law Section salutes Charlene's commitment to excellence and to supporting our next generation of minority attorneys.

Charlene Usher, Esq. can be contacted at 909-865-8359 and at clusher@usherlawgroup.com or www.usherlawgroup.com

Don Johnson Helps Gain a Nearly $10 Million Reduction in a Client's Liability Under an Employers Liability Insurance Policy

After another insurance carrier defense firm had lost a summary judgment motion on an employers liability insurance coverage issue and after the trial court had entered a $15.1 million final judgment against the carrier, a small team of attorneys from McKenna Long & Aldridge LLP, which included NBACLS member Donald O. Johnson, took over the defense of the insurance carrier. Don and his colleagues had the summary judgment ruling reversed and the final judgment vacated on appeal and had the co-defendant insurance broker that had been dismissed from the case reinstated in the case as a co-defendant. After some additional discovery and amendments of the pleadings, the parties entered mediation and settled the case, agreeing that the insurance carrier's payment to the claimant would be reduced by nearly $10 million and that the insurance broker would pay almost $3 million. *Carlos Manuel Chomat v. Northern Insurance Co. of New York, et al.* (Fla. 11th Jud. Cir.).

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Sharon F. Bridges Wins Major Verdict Against Prudential Insurance Company

In February 2006, a Hinds County, Mississippi, jury sided with a south Mississippi physician's family, awarding NBACLS member Sharon Bridges's clients $36.4 million dollars in compensatory and punitive damages against Prudential Life Insurance Company. The lawsuit was filed before the State of Mississippi put a cap on jury awards beginning in January 2003.

Edsel F. Stewart's family alleged that Mr.

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Call for Action, Not Mere Words

By: Andrea M. Buford, Esq.
and Blonde Grayson Hall, Esq.

Should corporations retain African-American owned firms or African-Americans in majority firms? Therein lies the split in our ranks. Those of us who own or practice in African-American owned firms believe that Corporate America feels "safer" by retaining black attorneys in majority firms. Corporate America gets "credit" by using black attorneys as the contact person for legal matters. We have participated in session after session, listening to many corporate representatives talk about their retention of black attorneys and their plans to increase black participation. You don't have to listen closely to hear that the push is towards retaining majority-owned firms. Oh sure, corporations may request or even insist that blacks and/or other minority groups work on their files and that they be identified as the contact person; however, realistically, the money and power is still being retained with the owners of majority-firms. How many times has a majority firm shown up for an interview with a minority partner, or, if none exists, a minority associate to make a presentation because they know that is what Corporate America expects?

African-American attorneys do not get a fair share of the work. To have a case or two assigned sporadically does not help the attorney or the corporation. In fact, it can serve to set one up to fail. Corporations want attorneys who are familiar with their guidelines, their corporate climate and the many nuances that may exist in their companies. African-American firms cannot develop that knowledge, that expertise, or that comfort level by handling a case or two every so often.

African-American firms are forced to compete against each other for 5% of the pie. It is as if companies have decided to retain a finite number of African-American firms (or other minority firms). If a company has decided to hire two firms, that means that African-American firm have to compete with every other similarly situated firm in a given city or maybe nationwide for a small universe of work. Why are we forced to compete against each other?

African-Americans are big consumers of Corporate America's products and services. We should be on the receiving end of at least that percentage of Corporate America's legal work.

Many of our Section members want to start a dialogue on this issue. What is your perspective? Please e-mail Andrea M. Buford at ambuford@bufordlaw.net or Blonde Grayson Hall at bhallassociates@aol.com. Let us know whether you are with a minority or majority firm or are a corporate representative and give us your thoughts. We may also reach out to you. We would like to continue this dialogue in future issues of the NBACLS newsletter.

Andrea M. Buford is the owner of an African-American firm in Chicago. She serves as a Vice Chair of this Section, as Chair of the Cook County program and is a Past President of the Cook County Bar Association.

Blonde Grayson Hall is the owner of an African American firm in Philadelphia and New York City. She serves as the Program Chair of this Section.

NBACLS's 19th Annual Conference

Take Five . . . continued from page 5

and could encompass a much wider universe of information than the attorney may know. Very often, despite a rigorous analysis of the facts, counsel is often unaware of the complete facts and allegations that may otherwise be available to criminal investigators handling the case.

6. *Does the 5th Amendment Privilege Cover Documents?* Although the privilege normally extends only to *testimonial* information, it may extend to the compelled production of *documents* when the act of producing such items by an individual is testimonial in nature. *Doe*, 465 U.S. at 612. The Court reasoned that by producing documents in compliance with a subpoena, the witness must necessarily admit that the documents exists, that such items are in the possession and/or control of the witness and are authentic. These admissions could well prove to be incriminatory. Under these circumstances, the records of a sole proprietorship are treated as the records of an individual and often are protected from disclosure.

7. *Should Counsel Seek a Stay?* Although courts are reluctant to intervene in civil discovery and on going investigations, it has been recognized that a witness should not be required "to choose between his silence and his lawsuit." *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir. 1979). Accordingly, many courts are sympathetic to the plight of witnesses in such circumstances and rule favorably on requests to stay proceedings when it is clear that the movant is the target of a criminal investigation. *Id.* at 1086. It remains an open question, however, whether what is stayed is the entire case or merely the discovery portion of the proceeding.

8. *Does the Assertion Result in an Adverse Inference?* Counsel should beware of one of the risks of asserting the Fifth at civil trials: the adverse inference that a party opponent may be entitled to claim. There is no constitutional bar to the admission of evidence that a witness has invoked the Fifth; in fact, it is otherwise admissible evidence. However, counsel for the witness should argue that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. *See also Farace v. Independent Fire Insurance Co.*, 699 F.2d 204 (5th Cir. 1983) (where the court found that the admission of evidence that the witness asserted the Fifth was unduly prejudicial and should have been excluded).

Counsel for corporate officials faced with the unenviable prospect of submitting to trial or deposition testimony while a parallel criminal investigation is ongoing should vigorously resist all attempts to compel the client to testify. If efforts to win immunity from prosecutors fail, the 5th Amendment should be liberally invoked at all civil or administrative proceeding.

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Post-Acquisition Disputes . . . continued from page 8

may disagree with each others' method of adjustments to the CBS, even though each method is acceptable under GAAP.

The "Purchase Price Adjustment" clause usually provides for the post-closing adjustments. These adjustments frequently include a working capital adjustment or an earn-out calculation, both of which often require analysis of post-closing results. When drafting and executing this clause of a purchase agreement, both parties should consider some key items, including the time period allowed for objections, access to records and people, the right to take copies of records, limits on objections (e.g. materiality), and the existence of a holdback or escrow arrangement.

Dispute Resolution

The preferred dispute resolution provision used today in purchase and sale agreements is some form of alternative dispute resolution ("ADR"). When drafting the ADR clause, it is extremely important to clearly define the dispute resolution terms and conditions. One important factor to define is the claims over which the arbitrator will have authority. Other details to consider in ADR clauses include the decision of binding v. non-binding arbitration, the structure of the arbitration (single arbitrator v. arbitration panel), the arbitrator selection process, the responsibility for payment of expenses of the arbitration, the time period allowed for notice of filing for arbitration, discovery procedures, and the timing and form of arbitrator's decision.[4]

CONCLUSION

When entering into a purchase agreement, a party is wise to consider the possibility that the agreement will result in a post-acquisition dispute. Given this possibility, both buyers and sellers should enter into the agreement fully aware of the type of provisions that often result in disputes and what steps can be taken to help protect their interests. Be aware of what level of due diligence you perform and whether you are open to risks in a potential dispute if it is not thorough enough or even too thorough. When drafting and executing the purchase agreement, carefully consider the purchase price "true up" provisions and the representations and warranties and the method for resolving post-acquisition disputes.

[1] The meaning of "due diligence" is subject to interpretation. The extent and scope of due diligence could have a significant impact on a party's success in a dispute and more importantly understanding what they are buying.

[2] *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 555-556 (Del. Ch. 2001).

[3] Common measures for the true up are "working capital" and "tangible net worth" and are often referred to as the closing date balance sheet adjustment.

[4] *See, e.g.*, "Model Asset Purchase Agreement with Commentary", *American Bar Association*, pp. 257-258.

Marc B. Sherman is the Office Managing Director of Huron Consulting Group's Washington, DC office. Laura Connor is a Manager in Huron Consulting Group's Washington, DC office. Marc and Laura actively help clients with due diligence as well as post-acquisition dispute matters. Marc has also served as an arbitrator on dozens of matters.

A More Perfect Union ... *continued from page 1*

tionship. It is easy to understand why outside counsel bears this burden: in-house counsel is the buyer of legal services, and outside counsel is the seller of those services. One of the ways for outside counsel to grow the relationship is to change the mindset of simply being a good legal technician while paying little or no attention to the client's needs. Outside counsel too often are anxious to improve their client base but are unwilling to improve themselves by responding to the needs of their clients. To provide meaningful and value-adding legal services, outside counsel must give things that cannot be bought or measured with money: empathy, intellectual curiosity, sincerity and understanding.

The first step toward cultivating a strong relationship is correcting the erroneous belief of outside counsel and others that in-house lawyers simply review, revise and edit documents all day. In fact, most corporate counsel have days filled with constituency reporting, briefings, strategizing with business clients and advancing projects and other business-critical initiatives (e.g., cost containment). Whether the in-house counsel's agenda includes litigation, transactions, or preparation for a meeting of the board of directors, outside counsel can and should play a complementary role. Because of the many things they are responsible for, in-house counsel must know a little bit about a lot of things. It is difficult for in-house counsel to keep abreast of all the changes in the law, particularly rapidly evolving areas of law. These challenges, however, present an opportunity for outside counsel to take the lead in augmenting in-house counsel's understanding of the legal landscape so that the two of them can collaboratively provide thoughtful, creative and value-added advice and counseling. Here are five things that can be done to achieve this strong relationship.

First, outside counsel should endeavor to understand the company's business. Since corporations are not in the business of filing or defending lawsuits, you should immediately ask yourself, when you are first retained to handle a matter or even while making a pitch for business, how the issues raised in a lawsuit might impact the company's business objectives. As difficult as it might be to imagine, it could be that winning the lawsuit at trial would be detrimental to the company's business goals (e.g., it destroys a key supplier or customer relationship or generates bad publicity). You will not be able to provide your client with this type of case analysis unless you understand the company's business objectives. Lawyers who are serious about representing a company regularly pour over its public filings, press releases and those of its key competitors. Knowing the law is simply not enough. Your competence alone will not sustain the client relationship.

Second, in-house counsel should manage the business unit's expectations about the litigation process. Since the financial impact of litigation may be chargeable to a particular business unit within the company, a leader in the business unit, and not the in-house counsel, may have ultimate decision-making authority over the direction and outcome of the matter. When this is so, outside counsel must fully inform in-house counsel of all factors involved with litigating the case in the jurisdiction where the case is pending. These things include, but are not limited to: (1) estimating how many depositions your opponent could force them to endure; (2) identifying the type of information they could be compelled to reveal during discovery; (3) assessing whether it is possible that the CEO, or other high level executives, could be forced to give a deposition; (4) forecasting how long discovery will or could last; (5) analyzing whether the company's business partner in a particular venture may be dragged into the litigation as a defendant; (6) estimating how long it will take for the case to get to trial; and (7) calculating the anticipated cost of the litigation. In-house counsel must then communicate this information to the business unit so that the decision-maker can consider all of the factors involved when deciding how to proceed with the litigation.

Third, outside counsel should properly assess the risk of the litigation. Is there a possibility of similar lawsuits being filed depending on the outcome of the case? Is there a possibility of punitive damages being awarded? Could this litigation spawn a government investigation into the company? Is this the type of claim that could "open the floodgates" for similar claims? Is there a class-action risk? These are just a few questions that outside counsel must consider and address with in-house counsel in assessing the risk of the litigation. Outside counsel would be derelict in their duties, not to mention having a very upset in-house counsel, if the risk of the litigation is not thoroughly assessed.

Fourth, there can be no surprises. This is perhaps the single most common reason why outside lawyers and firms get fired during the pendency of a matter. Even if the offending lawyer or firm manages to survive until the conclusion of the matter, the prospect of future engagements is slim to none. Lest it bears repeating, it is imperative that in-house counsel be informed immediately of all significant developments, especially negative developments. The fastest way to permanently ruin a relationship with in-house counsel is to blindside the person with negative information. When the in-house lawyer is blindsided, they must, in turn, blindside someone else, who must then blindside someone else. This leaves a string of very upset people. In the worse case, the in-house lawyer's career and credibility has been damaged. Business colleagues lose confidence that their in-house colleague is really on top of the case. Trust and confidence are shaken if not irretrievably broken. Although mistakes are inevitable, outside counsel should remember that it is not just their careers and reputation that are at stake. As such, err on the side of over-communication with the client.

Fifth, and finally, share the success. Successful outside lawyers know that one of the real secrets to success is collaboration, teambuilding and leveraging the talents of others.

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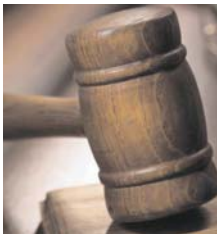

YOUR VOICE

If you have comments concerning the NBACLS newsletter, the Commercial Law Connection, or if you are a NBACLS member who wants to submit an article to us for publication consideration, please contact us at nbanews@nbacls.com.

A More Perfect Union... *continued from page 12*

These lawyers nurture, mentor and develop young lawyers in their firms. They bring associates to marketing conferences and let them sit in on trials for experience (without charging the client). They do these things, not just because of altruism, but to deliver the best trained and prepared team to the client's problem. These lawyers are ultimately rewarded with loyal team members who are skilled in helping to meet client needs and delivering outstanding results in matters. (They are also rewarded occasionally with a loyal young protégé who moves in-house and becomes a prospective client.) Moreover, a lawyer with an instinct to develop and nurture his or her own team is more likely to be attuned to an in-house client's needs.

These five suggestions will not guarantee the perfect relationship between in-house and outside counsel. They, however, will go a long way in establishing a more perfect union and creating a strong relationship between in-house and outside counsel.

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Samuel S. Woodhouse, III is the Managing Partner of the Atlanta office of Cozen O'Connor, a full service law firm with over 500 attorneys practicing in 23 offices throughout the United States. He is a trial attorney who represents his clients in business and contract disputes, commercial litigation, and products liability cases. Sam has an LL.M. in Trial Advocacy and is a Registered Mediator in Georgia.

Corporate Counsel Roundtable: ... *continued from page 3*

and selection of outside counsel and other service providers and vendors. In 1999, a group of Chief Legal Officers from 500 major corporations expressed their commitment to promoting diversity within the legal profession by signing a pledge entitled "Diversity in the Workplace – A Statement of Principle." Additionally, law departments are using various means to measure the strides made by minority outside counsel, such as considering the number/percentage of minority lawyers in the firm; the assignment of minority lawyers on projects; the number of minority lawyers taking the lead on projects; and the number of minorities promoted to partner.[5] Ms. Jessen further noted that the ABA encourages both in-house and outside counsel to use women and minority-owned law firms and vendors.

Ms. Jessen also noted that the MCCA reports that only 25% of women in corporate law departments are satisfied with advancement opportunities within the firm versus 50% of women employed at law firms. The in-house women lawyers cited the following reasons for their dissatisfaction: exclusion from internal networks; the leadership's lack of accountability for women's advancement; and stereotypes about women's roles and capabilities.[6]

After presenting these facts and statistics, the panelists were asked to give their thoughts and perspectives on how to improve diversity in the profession. Questions addressed by the panel included:

- How does outside counsel maintain standards set forth by in-house counsel?
- How is your firm responding to the demands of in-house counsel?
- What are your biggest challenges in meeting the demands of in-house counsel?
- Has your legal department's diversity initiatives impacted other departments within your company?
- Would your company prefer to see outside law firms partnering with minority firms or hiring more minority lawyers inside their firms?

The panelists emphasized that diversity must be an initiative embraced by all within the organization, particularly management. Diversity programs, including those focusing on recruitment and retention, are key components to the process and must become part of the organization's culture.

Diversity in the workplace is a goal that each firm continues to strive towards, but it is clear from the statistics presented by Ms. Jessen that, although progress is being made, there is still a large gap between where we are currently and where we need to be.

1 MCCA 2005 Fortune 1-1000 General Counsel Survey Results, 2005. http://mcca.com/site/data/magazine/2005-09/fortune500women0905.shtml.

2 U.S. Census Bureau, 2000, "Population by Race and Hispanic or Latino Origin for the United States: 2000," www.census.gov/population/www/cen2000/tablist.html .

3 MCCA 2005 Fortune 1-1000 General Counsel Survey Results, 2005. http://mcca.com/site/data/magazine/2005-09/fortune500women0905.shtml.

4 Ibid.

5 Minority Corporate Counsel Association (MCCA), 2005, "MCCA Annual Survey of Fortune 500 Women General Counsel".

6 Ibid.

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Member Spotlights... *continued from page 9*

Stewart died in 1999 believing he had purchased a $1 million life insurance policy from Prudential Life Insurance Company. Prudential, on the other hand, contended that the policy never existed. The children of the decedent physician sued Prudential Insurance Company, Prudential Life Insurance Company, Pruco Life Insurance Company and James Bateman, claiming breach of contract for not honoring the policy.

Plaintiffs alleged that during July and August 1999, Mr. Stewart applied for, was offered, and ultimately accepted a $1,000,000 life insurance policy to be issued by the Prudential Defendants. Mr. Stewart underwent thorough and detailed medical underwriting during July and August of 1999, as required by the Prudential Defendants. On or before August 31, 1999, the Prudential Defendants accepted Mr. Stewart as an insurable risk under their Class H. Mr. Stewart paid the initial premium for the policy on August 31, 1999, and coverage under the policy began on that date. He informed friends and family, both before and after the meeting at which he paid the premium, that he was going to – and afterward that he had – "taken care of" the life insurance by paying the initial premium.

As alleged in the Complaint, Mr. Stewart paid a $20,000 premium for the insurance policy to Prudential agent James M. Bateman, doing business as JMB Financial Group, Inc., on August 31, 1999 at the Stewarts' home in McComb, Mississippi. The Prudential Defendants accepted that premium through their agents, the Bateman Defendants. The Prudential Defendants issued the policy of insurance with a death benefit of $1,000,000. The Prudential Defendants caused the policy to be delivered to the Bateman Defendants, but it was never physically delivered to Mr. Stewart.

The policy application specifically informed him that because he was paying his premium with the application, changes in his health after the payment of the premium did not effect his insurability. The application, which became a part of the contract, informed Mr. Stewart that he would be covered on the effective date, so long as his health status as described in the application did not change before the premium was paid. In fact, when Mr. Stewart paid the premium on August 31, 1999, his health remained as he had described it when he filled out the application. Therefore, Prudential was prohibited, by the terms of their own application and contract, from considering changes in health that occurred after the premium was paid on August 31, 1999.

The Plaintiffs further alleged that on August 31, 1999, Prudential's underwriting of this policy ended, by virtue of the agreement between Prudential and Mr. Stewart to the effect that underwriting would end on the day the premium was paid. Moreover, the policy went into effect on August 31, 1999.

On September 1, 1999, the day after underwriting ended and the insurance policy went into effect but before the hard copy of the policy had been given to him, Edsel Stewart suffered a stroke and fell into a coma. He remained in the hospital and in a coma until his death on October 19, 1999. Plaintiffs alleged that even though their own underwriting guidelines specified that underwriting ended August 31, and even though Prudential had issued the policy with an effective date of August 31, 1999, Prudential immediately began trying to conceal the fact that they had issued the policy.

The Plaintiffs' trial evidence showed that the Predential Defendants secretly rushed the policy from Mississippi back to the Prudential Defendant's corporate headquarters in New Jersey. Plaintiffs' also adduced evidence that the Prudential Defendants issued a directive that, contrary to Prudential's own rules requiring a letter to the trust and the family, no letters would be sent to the family and the trust explaining why the policy had been taken away after it was issued. Further the Plaintiffs' proof indicated that the Prudential Defendants changed the policy in their computer system from a status of "Issued" to a status of "Withdrawn." Although the Stewart family corresponded with Prudential numerous times, they never received a response to the claim they had filed, and, in fact, they never received anything but form letters, shifting the file from one person to another.

Prudential ultimately denied the claim without any arguable reason and without conducting an adequate investigation. Prudential has indicated that it will appeal the verdict.

Sharon F. Bridges, RN, J.D. is a Partner in the law firm of Brunini Grantham Grower & Hewes in Jackson, MS. Attorney Bridges practices in the areas of product liability, commercial litigation and medical malpractice, typically representing major corporations who are sued in Louisiana and Mississippi. Sharon can be reached at 601-973-8736 or sbridges@brunini.com.

NBACLS's 19th Annual Corporate Counsel Conference

COMING EVENTS

August 5 - 12, 2006
National Bar Association 81st Annual Convention & Exhibits
The Detroit Marriott at Renaissance Center
Detroit, Michigan

November 1 - 5, 2006
NBA Board of Governors Meeting & Wiley Branton Issues Symposium
Little Rock, Arkansas

January 2007
NBA Judicial Council & Board of Governors Mid-Winter Meeting

February 22 - 24, 2007
20th Annual Corporate Counsel Conference Sponsored by the NBA Commercial Law Section

March 2007
NBA Small Firms/Solo Practitioners Division 12th Annual Conference

April 2007
NBA Mid-Year Conference & Gertrude E. Rush Award Dinner

July 25 - August 5, 2007
National Bar Association 82nd Annual Convention & Exhibits

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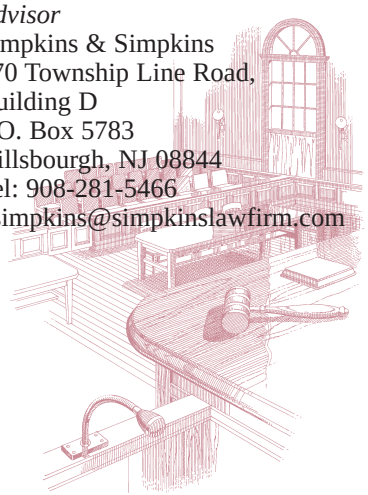

The National Bar Association

Commercial Law Section

Newsletter

The Commercial Law Connection

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