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Uphill Climb

NOLHGA's Legal Seminar in San Francisco reveals an industry with no shortage of challenges—or opportunities

By Sean M. McKenna

Any industry meeting comes with its own set of challenges—finding the time to attend, booking flights, not getting caught playing games on your phone during the meeting—but the biggest challenge facing attendees of NOLHGA's 2015 Legal Seminar in July was one of elevation. To get to the meeting, they had to ascend to the top of San Francisco's Nob Hill, which is no easy feat for a pedestrian, automobile, trolley car, or Sherpa. The theme song for the meeting should have been "Running Up That Hill" by Kate Bush.

More than 200 people made it, and they were treated to yet another high-quality (not to mention high-altitude) seminar. Over two days, more than 30 presenters discussed insurance regulation of all sorts, continuing changes in the health-care market, the challenges of health insurer receiverships in the post–Affordable Care Act world, new developments in insurance litigation, and even cybersecurity.

Regulators Here, There & Everywhere

The first session on regulation, *Regulatory Modernization: The Changing Shape of U.S. Insurer Regulation*, was moderated by Charles Richardson (Faegre Baker Daniels), who set the stage for the discussion of regulation five years after the passage of the Dodd-Frank Act (DFA) while also flattering and mocking the three panelists brave enough to share the stage with him.

Commissioner Peter Hartt (New Jersey Department of Banking and Insurance) noted that "it's a brave new world, but it's really not shaping up to be the world everyone expected." After the financial crisis, he explained, "there was a perception that no one could mon-

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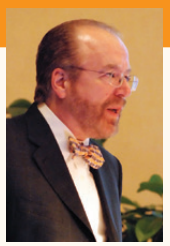


Jim Mumford & the NOLHGA Legal Seminar

I had every intention of devoting this issue's column to a technical review of international regulatory developments in the tri-party repo market. Then real life intervened.

We all learned recently the tragic news of the untimely passing of a dear friend of most of our readers, Jim Mumford. We got that news at the end of a week in which many of us were already doing some serious reflection. Several days earlier marked the anniversary of the September 11, 2001, terrorist attacks that killed thousands of innocent people and changed—seemingly irrevocably—how we think about our world and our places in it. And of course, everyday responsibilities continue to bear on all of us. For me, one of those responsibilities is reviewing the accounts of our recent NOLHGA Legal Seminar that appear elsewhere in this issue.

Jim Mumford

Jim Mumford did a lot of things in his very consequential life before he left us last week, as the youngest 78-year-old any of us has ever known. Many of his achievements were in the insurance world. Most recently he concluded a term as Chief Deputy Commissioner of the Iowa Department of Insurance. (He was also Iowa's Securities Commissioner.) Before that, Jim was deeply involved in critically important insurance issues, both as an attorney in private practice and as a lead attorney inside some of the world's great insurance companies. Jim was a thought leader both within the NAIC, where senior staff and preeminent regulators across the country listened carefully to his advice, and at ACLI, where his insights were deeply valued. He was a giant in our field.

The guaranty system benefited enormously from Jim's wisdom and hard work over the years. Jim served on and led the boards of more than a half dozen guaranty associations in states all over the country. He also served on the NOLHGA Board for six years, including a year as Chair. In addition, Jim chaired the NOLHGA Legal Committee and was deeply involved in many of our prior Legal Seminars, both as a presenter and as one of the event's planners.

No one was a bigger believer than Jim in the fundamental value proposition of the U.S. insurance guaranty system. He believed passionately—as did, for example, another giant, former Wyoming GA Chair Ron Long[1], whose own tragic passing preceded Jim's by eight years, and whose legacy reminds me so much of Jim's—that meeting the reasonable protection expectations of American consumers when an insurer fails is the core mission of the guaranty system and of the regulators and insurance companies who stand with our system.

We will always miss people like Jim and Ron and others who worked with them to get this job done, but we take solace from the knowledge that we stand on the shoulders of giants like them as we face our current responsibilities.

Among other things, Jim believed that the Legal Seminar was one of NOLHGA's most important activities, both for its value in providing information to our membership, and as a way to build bridges to people outside our system who are important to us.

Jim also helped me to appreciate the fact that, while putting together a Legal Seminar is a huge amount of work, one small reward is the different kind of education provided through the very activity of planning and preparing the Seminar. He always urged Seminar planners to take full advantage of the opportunities for learning provided by the planning activities themselves. By focusing on the major things they learn from panelists and presenters during the planning and preparation process, the event planners can help ensure that the most valuable lessons are brought to the fore during the Seminar program.

So if you'll forgive a little stream-of-consciousness musing, this column will note some of the things that our planners learned (or re-learned) while preparing for the 2015 Seminar. I hope that these lessons learned during the planning process came through in the event itself; we all tried our best to make that happen.

Innovation & Regulation

First, all across the life and health insurance industry, innovation and creativity are more important than they have ever been before. As major changes continue to affect the general economy and the financial sector; as the portion of the population retiring (or contemplating retirement) increases; as regulatory priorities change at various levels of government

and internationally; as the health care system and the health insurance marketplace rapidly evolve—insurers have had to change and adapt.

Insurers must invent and re-invent products, internal corporate practices and processes, and their orientation toward consumers and regulators. Distribution channels must be re-examined. Legal, regulatory, and financial exposures must be re-evaluated, and strategies accordingly adjusted. And so we have seen new categories of products evolve and grow in market share, and we have also seen insurers adjust accounting, reporting, investment portfolios, and capital structures in light of product developments and regulatory requirements.

As the flip side of the same coin, these developments have required regulators (and rating agencies) to turn their focus to the implications of new products and practices in the industry and how they align with regulatory priorities regarding solvency preservation, consumer protection, and fair disclosure.

Preparations for the Seminar involved numerous discussions both of the more material innovations that we have been seeing in the industry and regulatory responses to those developments.

The panel discussions at the 2015 Seminar on the post-ACA health insurance marketplace and on principles-based reserving and captive reinsurance developments were designed, after much discussion with panelists, to explore both those industry developments and the regulatory responses.

No one was a bigger believer than Jim in the fundamental value proposition of the U.S. insurance guaranty system.

Multi-Level Regulation

Over a decade ago, some insurers advocated optional federal chartering, with the hope that being able to select a single national regulator could avoid regulatory burdens from compliance with the rules of multiple jurisdictions. Facts—particularly responses to the 2008 financial crisis—drove the shape of regulation in a very different direction. Now insurers (even mid-sized and smaller companies) increasingly are subject to or materially affected by some level of regulation not only at the state level, but also at the federal and international levels. Our planning discussions with the outstanding panelists on both the (domestic) regulatory modernization panel and the international regulatory panel helped shape robust Seminar discussions of how federal regulatory initiatives (e.g., FSOC and SIFIs, Federal Reserve oversight of holding companies, and the DOL fiduciary standard proposal) and international initiatives (e.g., group supervision and capital standards) are affecting the industry.

New Resolution Challenges

Driven in part by some of the developments discussed above, resolution strategies and the role of the guaranty associations have also had to evolve. The ACA has affected significantly the health insurance marketplace (e.g., the creation of health-care cooperatives under ACA), and our planners worked extensively with the panelists on today's health receiverships to develop a presentation of the principal contemporary receivership challenges. Similarly, the Dodd-Frank Act created a new SIFI receivership role for the FDIC, and we worked with the FDIC's Arthur Murton to prepare a discussion tailored to the interests of our expert Seminar audience. (The interview with Mr. Murton will appear in the next issue of the *Journal*.)

Changing Circumstances Require Creative, Insightful Lawyers

The Legal Seminar is directed at an audience of lawyers and people who employ lawyers. Not coincidentally, many of the segments focused on lawyers' perspectives of and insights on our developing landscape, and on how lawyering has evolved to meet contemporary needs. Some segments involved reports "from the front lines" on substantive areas of law, such as the tax law update by Professors Fleischer and Welsh, and the major litigation trend update from Mr. Stano. Others had more to do with insights about processes and relationships in insolvency litigation (the Lincoln Memorial case study) and the ways in which lawyers have had to develop their systems, standards, and processes to respond to the needs of 2015 clients (Bob Dell's commentary).

Jim Mumford was such an unassuming personality that one sometimes forgot that he was in fact a superb, Harvard-trained lawyer. He taught us a lot over the years, and one of the things he taught us was how to put together a Legal Seminar program that is rewarding to our audience and equally rewarding for the planning group that puts the program together. ✯

Peter G. Gallanis is President of NOLHGA.

End Note

1. Chairman Long was once was so committed to delivering coverage for a consumer who was otherwise facing a large loss from an insurer failure that he and the Wyoming association determined that the consumer was a Wyoming resident—and therefore would be covered—solely on the evidence that the consumer and his wife held Wyoming fishing licenses. See *Harry Potter, Popular Culture, and Real Heroes*, NOLHGA Journal, August 2007 at pp. 2–3.

October

NOLHGA's 2015 Annual Meeting comes to Baltimore

NOLHGA's Annual Meeting heads east in 2015, taking up residence in Charm City (aka Baltimore). With a setting so close to the corridors of power—both political (Washington, D.C.) and financial (New York City)—it's no surprise that the program will address issues such as federal and international regulation; the continuing adaptation of the health insurance marketplace to the Affordable Care Act; the economic outlook for the insurance industry; and key issues facing the guaranty system, including concerns raised by federal entities about the "resolvability" of a large insurance company.

The speaker lineup includes former New York State Insurance Superintendent Eric Dinallo, who played a major role in the restructuring of AIG during the financial crisis; Michael T. McRaith, Director of the Federal Insurance Office; John Huff, Director of the Missouri Department of Insurance, Financial Institutions & Professional Registration and NAIC President-Elect; Karen Shaw Petrou, Co-Founder and Managing Partner with Federal Financial Analytics, who has been called the "sharpest mind analyzing bank-

Classic

ing policy today—maybe ever" by *American Banker*; Justine Handelman, Vice President of Legislative & Regulatory Policy with the Blue Cross Blue Shield Association; former NAIC President William H. McCartney, Managing Director of Regulatory Advice & Consulting and Co-Chair of the Bipartisan Policy Center's Insurance Regulatory Reform Task Force; and Dr. Laurence M. Ball, Chair of the Department of Economics at the Johns Hopkins Krieger School of Arts & Sciences.

But that's not all the meeting has to offer:

MPC Meeting & Major Receiverships Briefing

An MPC meeting will be held on October 27. Attendance is free, but some sessions may be restricted to guaranty association members only.

The morning of October 28 will feature two educational sessions—a Major Receiverships Briefing and a session on Consumer-Operated and Oriented Plans (CO-OPs). Members are encouraged to attend both sessions before joining us for the Welcome Luncheon.

Lunch with a Reporting Legend

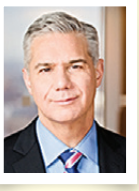
Our Welcome Luncheon speaker will be Pulitzer Prize–winning journalist Bob Woodward, co-author (with Carl Bernstein) of *All the President's Men*. Gene Roberts, the former Managing Editor of *The New York Times*, has called the Woodward-Bernstein Watergate coverage "maybe the single greatest reporting effort of all time." In its listing of the all-time 100 best non-fiction books, *TIME* magazine called *All the President's Men* "perhaps the most influential piece of journalism in history."

Join us on October 28 for Woodward's insights from decades covering the most powerful people in our Nation's Capital.

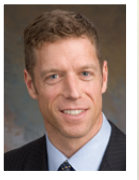
Dinner at PAZO

NOLHGA's Annual Meeting Dinner will be held on October 28 at PAZO (www.pazorestaurant.com), one of Baltimore's most popular restaurants.

Confirmed Speakers Include...

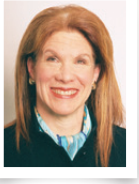


Eric Dinallo
- Partner, Debevoise & Plimpton
- Former New York State Superintendent of Insurance



Michael T. McRaith
Director, Federal Insurance Office

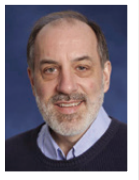
John M. Huff
- Director, Missouri Department of Insurance, Financial Institutions & Professional Registration
- NAIC President-Elect



Karen Shaw Petrou
Co-Founder & Managing Partner, Federal Financial Analytics

Justine Handelman
Vice President of Legislative & Regulatory Policy, Blue Cross Blue Shield Association

William H. McCartney
- Managing Director, Regulatory Advice & Consulting, LLC
- Co-Chair, Bipartisan Policy Center Insurance Regulatory Reform Task Force
- Former NAIC President



Dr. Laurence M. Ball
Chair, Department of Economics, Johns Hopkins Krieger School of Arts & Sciences

Bob Woodward
Pulitzer Prize–Winning Journalist & Author

Housed in a former machine shop, PAZO's stunning décor is complemented by a menu that offers the bright and lively tastes of southern Italy and an extensive Italian wine list. We guarantee it will be a night to remember.

Register Now!

Please visit the Annual Meeting website (www.nolhga.com/2015AnnualMeeting.cfm) to learn more about the meeting. More information will be added to the site as it becomes available, but you can already use the site to register and make your hotel reservations online. In the meantime, if you have any questions about the meeting, please contact Holly Wilding at hwilding@nolhga.com.

We'll see you in Baltimore! ★

Meeting at a Glance

NOLHGA's 2015 Annual Meeting

Where: Four Seasons Hotel Baltimore
When: October 28–29 (MPC meeting on October 27)
Website: www.nolhga.com/2015AnnualMeeting.cfm
Registration: $650 for Members | $775 for Non-Members | $125 for Guests

32nd nolhga® annual meeting
October 28–29, 2015 | Baltimore, MD

Preliminary Program*

October 27

9:00 a.m. – 1:30 p.m.	MPC Meeting
2:00 p.m. – 5:00 p.m.	NOLHGA Board of Directors Meeting
5:30 p.m. – 7:00 p.m.	Welcome Reception

October 28

8:00 a.m. – 11:15 a.m.	Major Receivership Briefing, CO-OP Presentation & GABC Annual Meeting
11:30 a.m. – 1:45 p.m.	Welcome Luncheon
2:00 p.m. – 4:45 p.m.	Annual Meeting First General Session & Business Session
6:00 p.m. – 9:00 p.m.	Dinner at PAZO

October 29

7:00 a.m. – 7:45 a.m.	Breakfast
8:00 a.m. – 11:45 a.m.	Annual Meeting Second General Session

** Subject to Change*

"There Almost Can't Be Too Much Communication"

Robert Dell, former Chair and Managing Partner of Latham & Watkins, talks about the changing nature of the legal profession, the importance of pro bono work, and how a firm's culture has to be the top priority when considering expansion

Robert Dell served as the Global Chair and Managing Partner of Latham & Watkins and chaired the firm's Executive Committee for 20 years before retiring at the end of 2014. During Mr. Dell's tenure as Chair and Managing Partner, Latham experienced tremendous success, growing from nearly 600 lawyers practicing in 11 offices to its current size of more than 2,000 lawyers in 33 offices, including 600 lawyers in Europe, the Middle East, and Asia. During his tenure, the firm's pro bono program grew by leaps and bounds as well.

Mr. Dell started his law practice in Chicago at a litigation boutique firm which Latham acquired in 1982. In 1990, he relocated to San Francisco to launch a new office for Latham and serve as its first office managing partner. In 1994, Latham's partners elected Mr. Dell—only 42 at the time—as Latham's firm-wide Chair and Managing Partner. He was subsequently reelected to a second, third, and fourth five-year term.

The following is an edited transcript of our conversation at NOLHGA's 2015 Legal Seminar on July 23.—Peter G. Gallanis.

Gallanis: *I'd like to start with one of those old guy, "March of Time" questions. When we first began practicing, back in the late 1970s, lawyers still sent clients letters through the U.S. Mail; secretaries made cc's with real carbon paper; lawyers went home at night and listened to Burns and Allen on the radio; and law firms had libraries with books in them—real books, with paper and everything. Now we've gotten to a point where faxes are passé; some young lawyers wouldn't know a law book from a doorstop; and nobody seems to stop working, ever. So here's my question: Is what lawyers do today essentially the same thing that lawyers were doing when we started out?*

Dell: The answer to your question is "somewhat yes." The basic core skills of lawyers haven't changed. We still look for those core skills in great lawyers.

But I do think the way lawyers practice, at least—and I come from a perspective of a large law firm—has changed dramatically over the past number of decades. I think, for the most part, for the better. Certainly, in terms of delivering value to clients, we've gotten much more efficient.

I've enjoyed and embraced the changes. I think it's been interesting to be in the profession over these decades. There are so many trends that have impacted law firms and law firm relations with clients over those decades that it's just made it fascinating.

But in terms of what lawyers do, I guess I would focus on one thing that has changed quite a bit, and that is when we started practicing (and even for a decade or so after that, or even a couple decades), you tended to practice, even in a large law firm, in a small group. You worked on a project, and there was one partner and maybe two associates. Oftentimes, you tended to work with the same group over time, maybe with the same clients. But it was a rather contained environment.

That has changed, particularly for large and global law firms, dramatically. Again, I think for the better. Now lawyers work in teams that are often 15 to 20 lawyers, 5 to 6 partners, numerous outside experts working more in tandem with clients. I think that's a much more fun way to practice. You interact with different people all the time, but it also calls on a somewhat different skill set to succeed.

Our goal wasn't to be bigger; it was to be premier in key practice areas. So a lot of our expansion was to pick up talent in certain practice areas, to give us depth and more specialization in those areas.

In the early years, if you were a high-quality lawyer, you did your work and you put out good work product—that was enough to succeed in many respects. Today, at least in our experience, you have be a team player; you have to be a good team leader; and you have to know how to interact with people you don't work with every day, maybe some people you've never worked with. You need to understand how to work cross-culturally, how to understand other cultures. It's a very different skill set. The lawyers in our firm, those who've succeeded over the last decade, are different. They have different qualities.

Gallanis: *Going back 40 or 50 years, the law used to be spoken of as a "noble profession"—which is a description I don't tend to hear very much today. But starting a few decades ago, people in senior positions in big law firms began talking about the need to run law firms more like a business. Are the two notions—the notion of lawyers being in a "noble profession" and the idea of running a law office like a business—compatible?*

Dell: Oh, I think they are compatible. If it's done right, running a law practice like a business is in the best interests of the client. In the past, the reference to a "noble profession" was one where the lawyer cared about the client. You know, that was the number one goal. But at the same time, during those same periods, law firms were run pretty inefficiently.

While it might be noble, I'm not sure it was in the best interests of the client. That might be a rogue view. But that was an era when lawyers sent out bills for services rendered, and the bills were whatever they thought made sense. Not to say that it was not fair, but it was not terribly rational sometimes. Today clients are much more sophisticated, and that's a good thing. They understand value better, and they demand value. In that sense, they get service and quality that in my view are better than they were in the past. So we can quibble about the word "noble," but I don't think they're mutually exclusive.

Gallanis: *Let's talk specifically about law firms as entities and some of the ways in which they've changed. Not that long ago, even most of the largest law firms in the United States were thought of as being rooted in a single city. Some of them didn't have any "satellite" offices, or if they did, they had only one or two that were often established for the convenience of a major client. Now we see your firm, Latham & Watkins, as one of a number of firms with many offices all around the world. Why did this development take place?*

We were looking for people who embraced our culture.

Dell: I think there were a few dynamics. You're right that initially it was driven by clients. The client was expanding, the client had more legal work in another city, and the client said, "You know, if you had an office here, we could give you more work." That was the enticement. So it was a little bit random, in terms of how firms expanded.

There was a little bit of a belief, at some point during the 1980s and 1990s, that bigger is better, so maybe we should expand, even if we don't have a client in this other city. But there is good legal work there, and we can probably succeed. I think a lot of firms made mistakes in that way. We did, for sure.

Then, as the firms got larger, often through consolidation, different firms had different strategies and expanded for different reasons. I know, having spoken with the leaders of some firms, that they felt their route was to get bigger. They thought there were economies of scale, which is questionable with law firms. But they thought there was reason to just be bigger, and so they expanded, essentially by merger—by picking up other firms in other cities. That was one approach.

We did it a little differently; well, in some ways, quite differently. Our goal wasn't to be bigger; it was to be premier in key practice areas. So a lot of our expansion was to pick up talent in certain practice areas, to give us depth and more specialization in those areas. So we saw expansion in the United States sort of in the first mode, the client-driven one. When we opened in Chicago, we had a couple of clients that were pushing that. But as we got to be a large, national firm and started thinking globally, our strategy shifted to, "How can we be a premier firm, a top-three firm in these practice areas? What do we need to get there, and then in what jurisdictions?" That drove our expansion to the next level, certainly in how we globalized, but even further expansion within the United States was driven by a desire to get deeper in specific practice areas.

So different firms did it differently, and some of the consolidation has been unbelievable! I mean, it won't go the route of the accounting firms; we won't reach that level of concentration. But I think a lot of the consolidation is driven by "bigger is better."

Gallanis: *So one day, you wake up and you realize you're running a large firm with about 600 lawyers in 11 offices that happens to be on its way to becoming a firm with over 2,000 lawyers in 33 offices around the whole world. Today you have 600 lawyers, just in Europe, the Middle East, and Asia. Forgetting, for the moment, that those people are lawyers (with all the management challenges that may present), what types of structures or systems are required to manage a firm in which so many different professionals are in so many separate offices?*

Dell: Again, it depends on what you're trying to achieve. Some firms expanded and globalized, and their goal was simply to be in key cities around the world. They looked for firms to

acquire, and it didn't matter much what those firms were doing; if they were good, credible firms, they would just tack them on. They set up systems which were essentially profit centers. As long as that entity was profitable, then it was a good decision, and if it wasn't, it was a bad decision, and they looked to change it.

We took a different approach again, which was to say, "Wherever we open, we want it to be to deepen our expertise in these key practice areas." And, importantly, and probably what made it more challenging, we want these people in Milan, and Madrid, and London, and Brussels, and Tokyo, and Abu Dhabi to conform to our systems and to meet the performance standards of our systems. We weren't looking at a profit center there. In fact, we had no profit centers.

We were looking for people who embraced our culture and who were willing to give up the independence they had. A lot of firms don't care about that, but we said, as we hired people in those jurisdictions, "Don't join us if you think you're going to decide who your partners are going to be. Don't join us if you think you're going to be compensated based on your individual billings. Join us if you want to be part of our systems." And we'd describe the systems and how we'd assess performance, how we make partners.

So that was critically important to our success—but also a hindrance to our ability to move quickly. A lot of countries come from a law firm culture that is dramatically different than that in the United States, even more dramatically different than the Latham & Watkins culture. I remember spending five years trying to find lawyers in Italy. The reason was, the best lawyers were at firms where they were the king. They would say, "You know, I decide who makes partner, I decide what associates get paid, I decide…" Everything was "I, I, I."

We said, "No, it's not going to work with us. Here is what we're going to ask of you." We went through, and I went through, months of meeting with different people. And I almost said, "It's not going to happen in Italy." We finally found some younger partners at the top firm in Italy who wanted to embrace what we were doing—thought it was the future, thought globalization was the future, etc. We brought them in, even though they didn't have a big business base, because their senior people held tightly to that. But we thought, "This will eventually work, because they will embrace our culture." It might not be too profitable for even a decade, but it will eventually work. The other route—we don't want to do something that is contrary to our culture, corrosive to our culture. It wouldn't work that way.

A lot of countries come from a law firm culture that is dramatically different than that in the United States, even more dramatically different than the Latham & Watkins culture.

Gallanis: *Lawyers tend to be, by nature, assertive, ambitious, and competitive. There is a good side to that, but there are potential bad sides as well. It would seem that one of the challenges of managing any organization, but particularly a law firm, is finding a way to harness those tendencies and turn them into positives in some sort of culture of promotion, where you promote a sense of teamwork or shared values. It sounds like what you're describing in your search for the lawyers in Italy was somewhat of a case study in that.*

Dell: Yes, and your point about lawyers being competitive—we tried to sort of re-direct that competitiveness to achieve the goals we wanted to achieve in a culture we wanted to work in. I think what worked was being able to communicate effectively with lawyers to say, "This is how you will succeed in our law firm, and this is how you will fail."

For example, we would hire a lawyer, say, with a large relationship with a particular investment bank. We'd say, "If you just continue to do what you're doing, even though you're generating tens of millions of dollars of business every year—if that's all you do going forward, you will fail in our system. You will not be compensated at the highest level, and you will probably not last here. So here is what we want you to do to succeed. We want you to introduce the following four partners to this account. We want you to try to expand this account in the following ways with these experts that we have. And we want you to push the billings down to the younger partners."

All these things were inconsistent with their prior environment, but if we approached it by saying, "This is how you succeed," it drew on that competitive spirit you mentioned. Now, did we find people who said, "Yes, I get it," and then just kept doing what they were doing in their prior firm? Absolutely.

So we'd counsel with them and counsel with them. Some of them changed, and those who didn't, we just said, "It's not the right place for you. You have to move on." Part of managing is making sure the person understands what it takes to succeed. Even if they find it different than the way they've practiced before, or even somewhat inconsistent with how they defined success previously, if you communicate effectively and constantly on that theme, it usually works.

Gallanis: *I was going to ask how you can take so many people in so many different places and somehow get them motivated by the sense that they're part of a single firm, with some sort of unifying theme. It sounds like your unifying theme is that you have a paradigm for what success in a law firm is that's not the same as how success in a law firm is viewed at other places.*

Dell: That, and you can't let an operation operate essentially independently as a silo, no matter how successful it is. We would have lots of meetings to bring people from our offices together: practice group–related meetings, other types for the associate ranks, training academies of all sorts. Everyone gets to know people from other offices. But the key is bringing them into teams where they work with people from other offices.

When you get people working together, that is enormously beneficial. Which is why, coming back to my first point about deepening certain practice areas, instead of having a far-flung group of various practice areas that practice independently—if you have a smaller subset of very strong practice areas that work across offices and across firms, you have a depth there that allows you to bring people in from other countries to work on those matters together. That is critically important to keeping the culture together.

If you have a smaller subset of very strong practice areas that work across offices and across firms, you have a depth there that allows you to bring people in from other countries to work on those matters together. That is critically important to keeping the culture together.

Gallanis: *I know that many lawyers really hate to turn away clients who have interesting cases, or interesting deals, or the prospect of a long-term relationship with a particular business. But attorneys aren't widget manufacturers. They're bound by ethical rules, and in particular by rules relating to conflicts of interest. In a firm with so many lawyers and offices around the world, to what extent do conflict concerns prevent the law from ending up like, say, accounting, where you have the Big Four, or the actuarial field, which is also highly concentrated? More generally, how does management of a firm keep conflict issues from spinning out of control when your footprint is global?*

Dell: Conflicts is a major issue with very large law firms. At a basic level, the most important thing that a big firm can do, which we did, is to: (1) take the client intake decision away from individual lawyers (no individual lawyer can accept a client, even if they clear conflicts), and (2) have an independent conflicts department. We have an independent Client Intake Committee, because the legal conflicts, the true legal conflicts, are a small percentage of the difficult issues in big law firms. Business conflicts are the big issue.

If we're doing all of this work for Client X, how can we take on Client Y, even though there is not a formal legal conflict? What will it do to our relationship with Client X? Those decisions have to be made independently. You have to empower, as we did, our Client Intake Committee with complete authority, with no concern about retribution. And you have to convey to the partners, "You're going to lose opportunities. It may be a great opportunity." This is most difficult with the younger partners, who get their first big opportunity and there is no legal conflict, but the firm says, "No, we really don't want to take that."

But you have to convey to the partners that over time, the value of the law firm and the firm's reputation are going to provide more opportunities for you than you're going to lose by way of conflicts. Last year, we had more revenue than any firm in the world, more profits than any firm in the world. We did not have that many legal conflicts that prevented us from taking on work. A few dozen here and there, but nothing major. We had massive numbers of business conflicts.

You couldn't calculate how many millions of dollars of work those conflicts lost us. But those are short-term losses.

In terms of management time, we spend enormous amounts of time on strategy: "Where do we want to go? In this industry, are we riding the right horses?" And sometimes we want to make a change. It's very hard to go to a big client and say, "We don't have a conflict, but we don't see the future here is the right one for us." That is not a decision that gets made in 10 minutes. It's a process with lots of people. But that particular area is a huge time sink for management, if it's done right.

Gallanis: *You've already talked a little bit about this, but could you tell us a little more about what the firm did to establish, to maintain, and to elevate the standards that Latham lawyers were expected to meet and to surpass?*

Dell: That's something that I spent an enormous amount of time on early in my tenure as Chair, thinking, "How good could we be? What should our aspirations be, and how do we get there?" It essentially involved getting the partnership to accept one of our core values being, "We should be doing high-value work exclusively." There is always going to be something that doesn't fit that, but that ought to be 90% of what we do.

By my crude analysis at the time, back in the late 1990s, we were doing about 50% or 40%. So how do you move that up gradually? Because you don't do it overnight. You convey that the firm's values and strategy are going to be to build high-value practice areas, to step away from low-value practice areas, to make our partnership standards such that we can compete at the highest level. The goal I set out was to say, "We should be ranked among the top three firms in every major practice."

Again, not overnight, but over time. In the last several years, on the American Lawyer Scorecard, with all the different transactional practice areas, we had more number 1, 2, and 3 rankings than any firm in the world. That was through building slowly with that aspiration, and losing partners along the way who either couldn't embrace it or felt they couldn't take their practice to that level. It was, "If you choose not to go in this direction, this is not the right firm for you."

Gallanis: *How do you view the need for professional growth and development for lawyers? Is that something that should be thought about differently for a lawyer at a big law firm than it is for a lawyer who works in a corporation or in a small office?*

Dell: That's one of the changes. If we look back at how training was done when we started practicing, it was all on-the-job training. Starting in the late 1990s, part of our strategic vision was to say, "We need to make sure that a lawyer in Los Angeles can trust that a lawyer in Abu Dhabi meets the same standards, so that they feel free to involve them in a client relationship. So how do we get there?"

There was no way to get there by on-the-job training, so we made a big effort to put in place a formal training system that just grew, and grew, and grew. We concluded that this was necessary to deliver value to clients, to be able to provide the confidence in our partners to use people anywhere. So we instituted these multi-day First-Year Academy, Third-Year Academy, Fifth-Year Academy, Seventh-Year Academy, New-Partner Academy, etc., bringing everyone together from all of the offices. Again, partly for cultural reasons, but partly for consistency of training. Then, in addition to that, as you got more senior, we had Practice Area training. Every Practice Area retreat had a training session. Half the retreat was train-

ing issues.

I think the quality of lawyering has improved dramatically as a result of that. And as I said, the importance of consistency across the board is critical, which then links to the question, "How do you evaluate performance?" Again, our view was, you don't do it on a jurisdictional basis—you do it across the firm. We have an Associates' Committee that is made up of 60 lawyers across the firm. They have standards that they utilize for lawyers in every office. They evaluate their performance in that way. So it ties into training and performance evaluation. But again, it has to be done consistently and not on a Practice Group basis or a jurisdictional basis. It has to be firm-wide.

The goal I set out was to say, "We should be ranked among the top three firms in every major practice."

Gallanis: *What would you say to someone who is trying to keep their skill levels as high as they possibly can be for their own sake and for the sake of their clients, but who doesn't have the benefit of a program like the one you've developed within your firm? Do you have some observations about professional development and how you think people can pursue it?*

Dell: I don't think you can do it alone. I don't think you can do it in a small setting. If you're in that setting, you have to reach out and look for other opportunities for training, whether it's external programs and things like that. MCLE requirements are minimal, but if you want to be a good lawyer today, you have to do more than that. Many people do, but it's very difficult to do it internally within a small firm.

Gallanis: *You've been very active in the affairs of your community, setting aside the law firm work that you've obviously done so well for so long. I suspect that a number of your colleagues have also been active in community issues and affairs. Has it been the institutional view of your firm that lawyers have a special responsibility to their community? If so, how should firms promote and support that sense of community responsibility?*

Dell: This is an area I felt very strongly about when I first became Chair. Our firm at the time had a pro bono program. It was cutting edge in the sense that we gave people full client credit for pro bono work. But there was clearly sort of a laissez faire approach to it. If you want to do pro bono work, that's great; we'll give you credit for it. But if you don't, that's quite okay.

The result was, when I looked at the data, less than 50% of our lawyers were doing any significant pro bono work whatsoever. This is the kind of thing you think about as a leader of an institution: "Where do you want to spend your capital?" I decided that this is where I wanted to spend some capital. So I proclaimed to the partnership, basically, "We suck! We're so good at everything else, but this is pathetic!"

I wasn't going to say, "You must do this." I said, "I expect our partners to be leaders in this area. I expect you to do the following." It didn't take a lot of encouragement to get the associates on board, even though some of them at the time weren't. But I just said, "I think this ought to be part of our core values. This is an honorable profession, and we do owe our community. We have particular talents that other professionals don't have to give back to our community. I expect us to be as good at this as everything else we do. So I want to be among the top firms in this area."

At the time, I got some resistance from some partners—a small minority. I did a lot of jawboning, and I got my Executive Committee on board and everything. I think to do that, to get an institution to buy into that, takes a lot of pressure from the top. If the top people don't feel strongly about it and don't talk about it on a regular basis, there is going be a significant segment of lawyers who just don't bother.

But anyway, I feel very strongly about that. We've subsequently done very, very well in terms of our contributions on the pro bono side. We had more hours than any other firm. And I think that is part of our obligation. I think the other thing that's developing (which is difficult, but I hope continues) is involving clients with these projects, having clients working together with law firms on pro bono work. It's been a bit of a struggle to make it work, and there are some complications, but I think that's the next area where I can see some very positive things happening.

Gallanis: *I think I'm safe in saying that every single person in this room has either been a lawyer representing a client or a client being represented by a lawyer. A fair number of people have been in both roles. Based on your experience, could you offer us any observations about some of the elements that are characteristic of a really effective, productive working relationship between a client and her lawyer?*

Dell: Well, the simple answer is communication. Obviously, that goes deeper in many different ways. But the relationships that function by far the best are the ones where the lawyer is in constant regular communication with the client on ongoing projects and prospective new projects, even doing sort of a debriefing on prior projects. There almost can't be too much communication.

Almost every time I've seen a client relationship go sour, which they do periodically, it's poor communication. It wouldn't have happened had the people in the law firm communicated more effectively with the client. That sounds simplistic, but that covers most of what a good client/law firm/lawyer relationship is about.

This is an honorable profession, and we do owe our community. We have particular talents that other professionals don't have to give back to our community.

There are some more formal things you can do. We invite our clients in for training sessions of one sort or another. We try to have events to get clients to know the broader client team. But that's all sort of in an effort to facilitate communications.

Audience Question: *There is one word that I haven't really heard yet, and that is ethics. You mentioned "cross-cultural professional conduct" earlier. What kinds of standards are imposed upon the entire global firm? How do you hold them to those standards?*

Dell: That's a good question, because it's very complicated. As we grew globally, our Ethics Committee was charged with understanding the ethical rules of various countries. We'd bring in people from different offices in those countries to be our ethics person on the committee. You find that there are, in some instances, very dramatic differences. For example, you're representing a client from the United States who has an issue in Germany. We could conclude, "What's happening here is ethical in Germany," and the matter is not a cross-border matter, but rather a German-centric matter. Do we comply with the German rules and go forward, or do we say we should be held to a higher standard, to the U.S. rules?

We didn't struggle with it, but we spent a lot of time trying to sort out, in individual cases, "What do we follow here?" Our Ethics Committee would make recommendations, ultimately to the Executive Committee, because it wasn't a matter of acting ethically, it was a matter of determining to what ethical standard we should act.

We do a lot of work for financial institutions, and a lot of that work is outside the United States. We concluded that it's just not worth it to go below the highest standard. We may lose a little bit here and there, but we consult with a client and say, "Our inclination is to abide by this standard. We could, under these circumstances, legally abide by this lower standard. We don't think we should, but we want to involve

you in the process."

It's really complicated—far more complicated than I would have anticipated. And we ended up spending an enormous amount of lawyer time learning the rules of some of these jurisdictions where we didn't have lots of lawyers, but we had business. Our Ethics Chair, bless his soul, just spent an enormous amount of time working with his team on exactly that issue.

Audience Question: *Do you have any thoughts on lawyers struggling to balance work and family life?*

Dell: I think it's a very difficult issue, because you have a desire to retain the best talent, and those people are often the ones who struggle even more with work/life balance—whether it's women earlier in their careers, who are of childbearing age, or if it's a man with a medically challenged child. People go through all sorts of issues.

Our approach has been to try to be as accommodating as possible, particularly where medical issues are pervading. We give people long paid leaves of absence and such to deal with it. But the more difficult issue is just the general demands of the profession competing with the desire/need to have a balanced personal family life. I think we have been historically tilted toward, "If the client needs this, you have to be there for the client. You can take some time off later, but if it means you're going to work the next three days, 20 hours a day, that's what you need to do." Even if a better work/life balance would dictate a different result.

Almost every time I've seen a client relationship go sour, which they do periodically, it's poor communication.

We've tried all sorts of things with teaming people up—instead of putting one person on this matter, let's put two, and they can share. So that if one needs to be home more for a period of time, the other person can fill in. I would say it was, at best, a mixed success, and probably a failure. It just didn't work. It wasn't juggled right.

On the positive side, I would say that clients are more understanding today than they were 20 years ago. We've had many situations where an associate or partner needs to be home with their family for one reason or another, and we explained to the client, "We're bringing someone else in." Years ago, clients tended to say, "Well, wait a minute. That's our lawyer! You know, she has all the expertise on this project. She needs to be there!" Whereas today, I think more clients are willing to say, "Okay, we get it. We have that issue in our organization." There is more understanding of it.

It's still a very demanding profession, particularly on a lot of the work we do. They're large projects, they're fast moving—much faster moving than they used to be years ago. It's 24/7, you're in different time zones. Those demands are daunting! To say you can exist in that environment and have a good work/life balance? I think it's very hard. We haven't solved it, and I don't know that it can be solved. I think those issues can be mitigated a bit, and I think client understanding is an important part of it. But it's hard. I wish I had a better answer. ✯

["Uphill Climb" continues from page 1]

itor everything at once." This led to the DFA and the role of the Federal Reserve in regulating large multinational companies, including some insurers. Likening regulation to a "regulatory superhighway" with prescribed lanes for various regulators, he added that expectations changed because "the states started to drive on all the lanes, and the feds stayed in their lane." Which is how we have state regulators, along with their federal counterparts, developing group-wide regulations and delving into living wills.

This is happening, Hartt explained, because even after the DFA, state regulatory power remained in force. In addition, the states had more authority than many people realized ("there was less of a regulatory gap than everybody perceived," he said). And finally, "the states didn't stand still." State regulators are developing new regulatory structures to deal with the post–financial crisis world. "Increasingly, you're seeing state and federal regulators sharing a lane," he added. "Could there be a collision? You bet."

As a systemically important financial institution (SIFI), Prudential Financial resides right next to Hartt's superhighway. From what Prudential's Deborah Bello said, the view isn't all that great. "Welcome to Camp Over-Regulation," Bello said, noting that Prudential deals with state, federal, and international regulators, as well as bodies like the SEC and FINRA. Dealing with this level of regulation, she added, "is really transforming the fabric of our company." The company has even created a Federal Regulator Liaison Office to handle requests from various federal regulators.

It's difficult to put a price tag on all the time spent dealing with regulators, Bello said, and that might not even be the main point. "It's not the dollars—it's the diversion of human resources," she explained. "You don't really know what the lost opportunities are." She admitted that there are some benefits to the added regulatory burden. As a SIFI, the company must file a resolution plan with federal regulators. "The resolution plan forces you to look at your company the way the feds do," she said. Even this is a mixed blessing, though, since federal regulators are still coming to grips with the insurance industry. "They're clearly troubled by our very structure," Bello said. "They just can't get over it."

George Nichols III (New York Life), a former Kentucky Insurance Commissioner and NAIC President, can't get over how quickly insurance regulation has changed, and how large a role the federal government now plays in it. "Federal oversight of insurance regulation is the number one challenge I have seen in our industry," he said. And it's not just a challenge for SIFIs and other large companies. "All companies will be impacted by this discussion of how we will be regulated in the future," he added, predicting that SIFI regulations "will become the gold standard" for the industry.

Unfortunately, Nichols said, the guaranty system hasn't had much of a say in the regulatory discussion. "The federal government has offered us a very limited role in the dialogue," he said, while

Moderator Sara Powell (left) and Diana Marchesi, James Kennedy, and Christina Urias discussed the growing importance of international insurance regulation and the challenges it can pose for U.S. insurers and regulators.

The panel on captives and principles-based reserving featured (from left to right) moderator Peter Gallanis, Li Cheng, Neil Rector, and John Finston.

state regulators have been "much more collaborative." Despite this, he remains optimistic that the insurance industry and guaranty system can work with regulators—new and old—to create an effective system. "As long as we can honor the promises we make," he said, "that's how we will define success."

One of the issues regulators have been discussing lately is the increasing use of captives and their potential impact on the solvency of insurance companies. In his introduction to the panel *Captive Reinsurers, Principles-Based Reserving & Solvency Regulation of Insurers Today*, moderator Peter Gallanis (NOLHGA) called the issue "one of the hottest topics for regulators for several years now."

It's also been on the minds of ratings agencies, according to Standard & Poor's Ratings Services's Li Cheng, and they have some concerns. "The key issue is not solvency, but the lack of consistency and the lack of transparency," Cheng said. "There's very little information in the public domain" about these structures, which makes it difficult for investors or ratings agencies to evaluate the financial stability of companies that use them. There's also no consistency in how reserves are calculated from company to company. Even worse, "in many cases, there really is no risk transferred in these transactions," Cheng said.

Regulators weren't pleased by the lack of consistency or transparency either, according to John Finston (California Department of Insurance). "In California, we were very taken aback by some of these transactions," he said, adding that the department was "very concerned by the lack of transparency to determine if the reinsurer actually had assets to cover the risk." In response, the department fast-tracked a resolution to enhance disclosure of how reserves are funded in these transactions.

Neil Rector (Rector & Associates) agreed that the lack of consistency and

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disclosure in the past was bad for the industry. "It was like the Wild West out there," he said. "Everybody was scared that somebody was doing something horrible or was gaining a huge advantage." In his work with the NAIC on Actuarial Guideline 48 (AG-48), which deals with captive reinsurers, he added, "we focused on ceding company regulations, not on captive regulations." Otherwise, he said, the captives would simply move off shore.

Will new regulations and the move toward principles-based reserving (PBR) tame the Wild West? Cheng thinks so. "We definitely think the new regulatory requirements will benefit the industry and analysts," she said. She added that her agency has been monitoring captive arrangements for years, and the success of older arrangements "gives us some comfort" that these structures are safe. There's still concern, however, over what she called "black box" deals that are high on complexity and low on transparency.

Finston feels the shift to PBR won't put an end to captives. "The industry has said that PBR will not eliminate the incentive to create captives because the principles are still too conservative," he said. He added that while it's reassuring to hear that older captive structures have proven stable, "as a regulator, I'm still somewhat skeptical."

Rector admitted that he hopes Finston is wrong about the impact of PBR. "The hope is that the deals will basically go away once PBR is enacted," he said, while acknowledging that even with PBR, there's still some incentive to form captives. With AG-48, he added, "I think we've at least erected a difficult playing field" for companies that want to do so.

The international playing field was on the minds of the panelists for *The World Cup of Insurance Regulation: Resolution Schemes, Capital Standards & More… Can the U.S. Come Out on Top?* (winner of the "Longest Title Award," and it wasn't even close). Moderator Sara Powell (Faegre Baker Daniels) began the session by noting that even two or three years ago, no one paid much attention to international regulation. "For many people," she said, "the predominant question is, 'so what?'"

Diana Marchesi (Transamerica Life Insurance Company) answered that question by noting that companies dealing with international regulation face a host of challenges, not the least of which is that these regulators are unfamiliar with the U.S. regulatory structure. For one thing, they're accustomed to dealing with one regulator for each country. They're also not familiar with popular U.S. products such as variable annuities, to the point where these products can be designated as nontraditional products in some markets.

James Kennedy (Texas Department of Insurance), who represents the NAIC on the International Association of Insurance Supervisors (IAIS) Resolution Working Group, noted that the IMF's recent Financial Sector Assessment Program (FSAP) evaluation of U.S. insurance regulation was not very favorable, in part because of different philosophies. The Financial Stability Board's Key Attributes for Effective Resolution Regimes, which the IMF uses to grade a country's resolution processes, focus on policyholder protection and providing financial stability. "There's a tension there," he said, since the U.S. resolution scheme focuses solely on policyholder protection (with other regulators providing oversight of financial stability). The IMF even noted these attributes might not work with insurance, he added. "They actually used the term 'square peg in a round hole.'"

Christina Urias (the NAIC's Managing Director of International Insurance Regulatory Affairs) took issue with the Key Attributes and how the FSAP was administered. "The methodology and Key Attributes were in draft form," she said. "They're not right for insurance. They're bank-centric." She added that while the NAIC had demonstrated to the FSAP representatives the broad powers and adaptability of state regulators, "the assessors were looking for explicit rules." The assessors misunderstood U.S. processes, she added, which was why "the report was met with a yawn" in the United States.

Marchesi also took issue with the FSAP evaluation. "The FSAP acted as if protecting policyholders was at the expense of financial stability," she said. "One enhances the other. They are not mutually exclusive." Unfortunately, because the FSAP evaluation cast doubt on the guaranty system's ability to handle a large insolvency, "our whole system is now in play." Kennedy remarked on the oddity of the situation. "We have more experience dealing with insolvencies and protecting policyholders than anybody," he said. "I really think they should be looking to us."

On the topic of the international capital standard being worked on by the IAIS, all three panelists warned that regulators may be moving too fast. "To my mind, the timeframe is still too ambitious," Urias said. Marchesi said that "we look at this as a long-term,

In the Next *Journal*

The Legal Seminar interview with Arthur Murton, Director of the FDIC's Office of Complex Financial Institutions, will appear in the next issue of the *NOLHGA Journal*.

The panel on regulatory modernization (from left to right, moderator Charles Richardson, Peter Hartt, Deborah Bello, and George Nichols III) squeezed more than a few laughs into their discussion of the challenges facing U.S. insurer regulation.

huge lift," and one that needs more input from U.S. regulators "to temper and help shape that international perspective." Kennedy added that the issue is too important to rush. "This is going to be the standard down the road. You have to get it right."

Health Insurance: Successes & Failures

In the health insurance arena, there's been very little discussion about whether the drafters of the Affordable Care Act (ACA) managed to "get it right."

That was a joke.

In *Post-ACA Health Insurance: Where've We Been, Where're We Going?*, moderated by Lee Douglas (Arkansas Blue Cross and Blue Shield), Washington Insurance Commissioner Mike Kreidler said that he's been a proponent of health-care reform since the Nixon Administration, so he was thrilled when the ACA passed, even if the passage wasn't very pretty. He added that in his opinion, it's here to stay. "There is no alternative to the ACA," Commissioner Kreidler said. "No matter how poorly they enacted the legislation, it's the law of the land." He went on to praise the effects of the ACA, noting that the uninsured rate in America is at an all-time low and that the health insurance exchanges "make the market much more level than it's been in the past." Despite this, difficulties remain. "One challenge will be to make the exchanges a lot more transparent for consumers," he said. "We're going to focus a lot on transparency and on making sure our exchange is financially stable."

Washington runs its own state exchange, but Michael Adelberg (Faegre Baker Daniels), who previously worked on the formation of the exchanges, pointed out that two-thirds of the states have opted to have the federal government run their exchange. The exchanges are now in their second year, and Adelberg said that for many parts of the ACA, "the year two experiences have been better than year one." That's the hope for the exchanges, although he cautioned that some exchange functions are still in year one.

Consumer Operated and Oriented Plans (CO-OPs), set up by the ACA for high-risk pools, are also in their second year, but their prognosis isn't as good. "A number of CO-OPs are struggling," Adelberg said. "Two have already failed. It's certainly possible and even probable that more will fail in the coming years."

Adelberg predicted that states will continue to experiment with how they're financing their exchanges. "I think you'll see states being very clever about this, exploring ways to bring new revenue into their exchanges," he said. "You'll also see more and more states coming back onto the federal 'chassis,'" he added, though he warned that the federal exchange is too inflexible to adapt to state-specific alterations. "Right now, the system does not have the capabilities to accommodate what the states want."

Looking to the future, Commissioner Kreidler said one focus of his department would be what he called "discriminatory benefits"—plans that offer benefits meant to exclude certain patient

populations. "That's something we're going to spend a lot of time on," he said, mentioning one plan his department had reviewed that didn't cover antiviral medications and so would exclude people with HIV or AIDS. "You can't allow a carrier to be rewarded for bad behavior."

Both participants agreed that the ACA does little to slow or reverse rising health-care costs, with Commissioner Kreidler calling this "the biggest flaw in the ACA." Adelberg suggested that some cost savings might be seen in a few years, but he acknowledged that "the ACA is principally focused on access, not costs." Despite this, he suggested that the ACA's prospects are good, if perhaps only because of inertia. "Each year, it will get harder to repeal," he said. "That's the nature of programs. At some point, you can't pull them out by the roots."

Washington Insurance Commissioner Mike Kreidler discussed his long-time interest in health-care reform and his support for the Affordable Care Act.

Adelberg mentioned that two CO-OPs have already failed, and the session *Health Insurer Receiverships in 2015*, moderated by Joel Glover (Lewis Roca Rothgerber) dealt in part with one of those failures: CoOportunity, an Iowa-domiciled CO-OP that failed in late 2014. Pamela Olsen (Nebraska guaranty association), who chairs NOLHGA's CoOportunity Task Force, explained that the regulatory environment has brought about major changes in health receiverships. "The first thing that's new about the ACA is there's a new player—the CMS [Centers for Medicare and Medicaid Services]," she said. That organization's decisions—and the time it takes to reach them—affect the progress of the receivership.

The ACA also plays a huge role if, as in this case, the failed company was a CO-OP. CoOportunity's policyholders were receiving premium subsidies under the ACA, and those subsidies ended at liquidation. "We had a lot of educating to do with our policyholders," Olsen said, and that process had to be coordinated among the CMS, special deputy receiver, Iowa and Nebraska insurance departments, and the task force. It also had to be coordinated between the Iowa and Nebraska guaranty associations—a process made easier because both states have the same provisions in their guaranty association statutes.

The education worked. "A month after liquidation, we were down to 1% of policies pre-liquidation," Olsen said. Remaining policyholders will be able to find new insurance through a Special Enrollment Period (SEP) granted by the CMS. There was no opportunity to move the business, she added, because the ACA specifies that only another CO-OP can assume a CO-OP. "We had no market."

Dan Watkins (The Law Offices of Daniel L. Watkins) serves as the special deputy receiver for CoOportunity, so he's had the best seat in the house from which to observe the interplay between the ACA and state receivership statutes. "We've gotten into interesting discussions with the CMS on the relationship between the resolution statutes and the ACA," he said. The estate is still trying to come to an agreement with CMS on various issues. "We're trying to see if a negotiated solution can be reached," he explained. "Overall, the discussions have been positive."

David Wilson (California Conservation and Liquidation Office) is less positive. His office is overseeing the liquidation of SeeChange Health Insurance Company. SeeChange is not an ACA-created insurer, but the presence of the federal government is still being felt in the receivership. For one thing, Wilson said, "it's highly likely that for health insolvencies, there will not be any early access." The government contacted him soon after liquidation to inform him that "you can't make a distribution without the receiver being liable if you should have held back more funds." This, he said, will make receivers exceedingly cautious about releasing funds before an estate closes.

I'll See You in Court

Phil Stano (Sutherland Asbill & Brennan) returned to the Legal Seminar for a lightning-round update on recent litigation involving the insurance industry. On the unclaimed property front,

a recent ruling in a West Virginia case could mean trouble. While the state lost on its argument that the insurer had a duty to search the Social Security Death Master File, the court held that the dormancy period begins at death, not when a claim is filed. "This is a land, air, and sea change," Stano said. "You're going to have an argument made that money is due in a reasonable amount of time after death, even without a claim."

Touching on the captives issue explored by an earlier panel, Stano said that at least 10 insurance companies have been sued for using captives, with plaintiffs arguing that they have no need to show any damage, only a violation of statute. In a recent ruling, "the federal court didn't buy the plaintiff's argument at all," but the ruling did open the door to re-filing the suit in state court.

Stano also cited the dangers of a data breach (more on that later in the article), noting that "everyone will have a data breach" at some point. He even showed a screen capture of a website purporting to sell confidential personal information stolen from an insurance company. "The costs are enormous, and they come from every direction," he explained. "You should consider buying cyber-risk coverage."

Luncheon speaker Sara Solovitch, author of Playing Scared: A History and Memoir of Stage Fright, *described how a fear of playing piano in public prompted her to study the causes and effects of stage fright as well as ways to overcome it. After a year of investigating and trying to tame her stage fright through approaches such as exposure therapy ("doing the thing you hate the most") and even pharmaceuticals, she performed a piano recital before a large crowd. "I'll always have stage fright when I play the piano," she said. "The difference is that I do it anyway."*

Two Things That Scare Everyone

The Legal Seminar luncheon speaker spoke about stage fright, saying that public speaking is most people's greatest fear. But it's likely that taxes and being hacked scare people almost as much. Fortunately, the Legal Seminar tackled both subjects.

In *What's New in Taxes: Tax Reform or Just More Tax Legislation?*, moderated by Charles Gullickson (South Dakota guaranty association), Professor Victor Fleischer (University of San Diego School of Law) told attendees not to hold their breath waiting for tax reform. Which is not to say that reform isn't needed. "We have a lot of symptoms of a sick patient, so to speak," Fleischer said. "The problem is that while we need to do something, we're not likely to get there." The last major tax reform was signed by President Reagan in 1986, but "what we're observing is weaker tax institutions and different political institutions than we had then."

The old-style politics of 1986—such as vote trading and strong party leadership—don't exist today, Fleischer explained. As a result, "we're seeing less and less tax legislation and more rifle-shot provisions for specific industries," he said. "It's tax legislation by Band-Aid." And while the insurance

industry has for the most part avoided these Band-Aids, that may no longer be the case. The tax treatment of insurance is what is known as a "revenue offset," which means that if Congress can figure out a way to get that money, it can spend it in other areas.

Fleischer, however, doesn't see any major changes to the tax code, though he said there's a chance the interest deduction for corporate-owned life insurance could be disallowed. The most we can expect from Congress on the tax front, he concluded, is "very small, carefully targeted, imperfectly written, and inexpertly applied legislation."

Professor Walter Welsh (University of Connecticut School of Law) shared Fleischer's skepticism about tax reform, but he cautioned that the insurance industry could still be in trouble. The reason, he explained, is that tax reform proposals championed by the Obama Administration and the former Chair of the House Ways and Means Committee, former Rep. Dave Camp (R-MI), both targeted insurance deductions. And when Democrats and Republicans agree on something like that, it's best to be concerned.

"The insurance industry really lobbied Congress hard not to touch insurance contracts," Welsh said, but Rep. Camp left the contracts alone and instead focused on the companies themselves, proposing new taxes on reserves, acquisition costs, and proration—what Welsh called "the Holy Trinity of life insurers." Rep. Camp also proposed an excise tax on SIFIs. "It's not on income, it's on assets," Welsh said. "You can increase the number to raise more money. Insurers are really worried about that."

Rep. Camp's 2014 bill was not passed, but there's danger in the bill existing at all. "Once you have these revenue offsets on the table, they can be pulled at any time," Fleischer said. So if Congress needs money for a particular project, they could turn to Rep. Camp's bill for ideas.

Attacks on the insurance industry aren't coming solely from Washington,

Federal oversight of insurance regulation is the number one challenge I have seen in our industry.
— George Nichols III

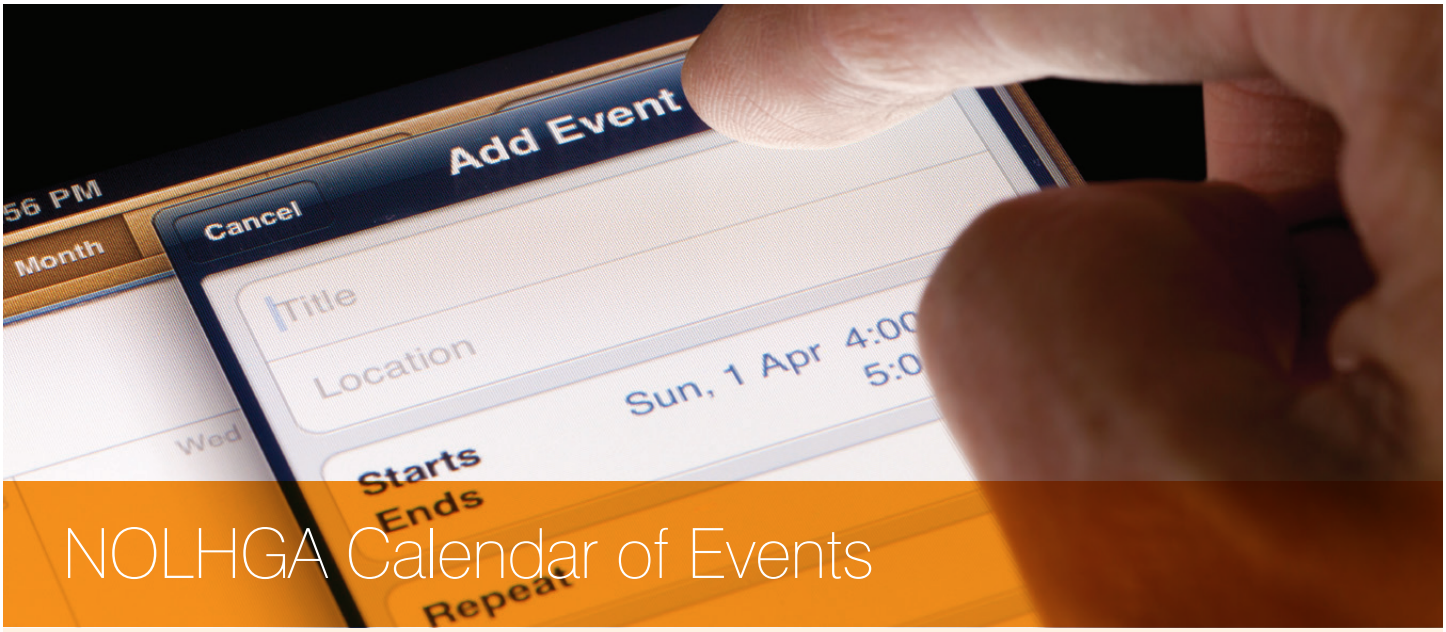
which was made abundantly clear in the session *Cybersecurity: What Does Security Really Mean?*, moderated by Ted Lewis (Utah guaranty association). Computer attacks from overseas and the United States are a constant threat. "Small, medium, and large companies are being attacked on a daily basis," said Gordon Matlock (Signal Lift). "You will be hacked." And while the media are filled with tales of sophisticated cyberattacks, Matlock said that 90% of such attacks are accomplished through simple phishing e-mails (phony e-mails that carry viruses or attempt to trick users into entering confidential information). Needless to say, phishing e-mails don't work unless someone in your company opens them. "That's just user error," Matlock said, adding that proper security procedures can safeguard against these attacks, but only if they're followed.

Matlock noted that since it's impossible to become "bulletproof" against attacks, companies should strive to have procedures in place to respond quickly. "The key is how quickly you can mitigate after an attack," he said. It also helps to have security procedures that make your company even a little harder to hack than the next one down the line. "Hackers are wicked smart, but they're lazy," he explained. "It's very opportunistic. Can you make their job a little more difficult?" If so, they'll go after someone else.

Kathleen Rice (Faegre Baker Daniels) suggested that companies stop thinking about the issue in terms of "cybersecurity." "I don't like the term 'cyber,'" she said. "I prefer the term 'data security.'" Companies need to think about the data they have on hand and who might want to get their hands on it—foreign governments, hackers, organized crime, etc. Once a company has a handle on where attacks might be coming from, it needs to evaluate potential risks inside and outside the organization. "You are only as secure as the person who is accessing your network or sharing information with you," she said, explaining that outside vendors are frequently used to hack into companies.

When asked what the federal government is doing about cybersecurity, Rice noted that there's an ongoing debate about whether the government should offer guidance for companies or enact laws about security. "The only way to keep it as guidance is for everyone to be proactive," she said. "Because I guarantee you, if we don't, the federal government will step in and they will muck it up." She added that some of the best guidance on cybersecurity procedures can be found on the websites of the FCC and NIST (National Institute of Standards and Technology). ★

Sean M. McKenna is NOLHGA's Director of Communications. All meeting photos by Kenneth L. Bullock.



NOLHGA Calendar of Events

2015

October 11–13	ACLI Annual Conference Chicago, Illinois
October 27	**MPC Meeting** **Baltimore, Maryland**
October 28–29	**NOLHGA's 32nd Annual Meeting** **Baltimore, Maryland**
November 19–22	NAIC Fall National Meeting Washington, D.C.

2016

January 20–22	**MPC Meeting** **Clearwater, Florida**
April 19–20	**MPC Meeting** **Newport Beach, California**
July 19–20	**MPC Meeting** **Washington, D.C.**
July 21–22	**NOLHGA's 24th Legal Seminar** **Washington, D.C.**
October 25	**MPC Meeting** **Dallas, Texas**
October 26–27	**NOLHGA's 33rd Annual Meeting** **Dallas, Texas**

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