

ARE YOU ENGAGED?  
President's Message

THE DEI COMMISSION  
Moving Forward

NEW COLUMNS  
Bench Notes and  
Consultant's Corner



# COLLEGE COLUMNS

A MAGAZINE FOR AMERICAN COLLEGE OF BANKRUPTCY FELLOWS | DEC. 2021



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# From the Chair

## From Indianapolis to Denver, Sixteen Columns, and Gratitude for the Opportunity to Serve

*Mark D. Bloom, Baker & McKenzie  
Chair, American College of Bankruptcy*



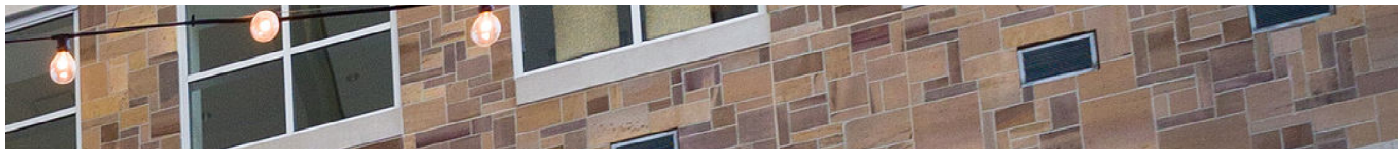
Well, we did it. Our extended Fall Meeting in Indianapolis attracted 217 Fellows in person -- vaccinated, mostly masked, and all seemingly thrilled to be in each other's company once again.

Every event and program I attended made me realize even more how much I had missed the enthusiasm and camaraderie that make the College so special to so many of us. First on tap was a hybrid, live-and-Zoom meeting of the Foundation Board that came off without a hitch, and demonstrated once again the fierce commitment of so many of our Fellows to the many pro bono legal services programs we support all over the country. Then it was on to the Leadership Dinner -- a lively and festive evening attended by more than 50 College leaders, at which we recognized the many contributions of one of our illustrious past Chairs, Michael Cook.

We broke tradition a bit at this Fall Meeting, especially for new incoming Fellows in Classes XXXI and XXXII. In place of the usual crack-of-dawn, pre-breakfast meeting, the New Fellows Orientation was conducted at a bit more leisurely pace over lunch. And at that evening's Induction Ceremony we dispensed with black tie and formal wear in favor of business attire, welcomed 52 new Fellows with fist bumps and applause, and offered a standing ovation to celebrate the presentation of our Distinguished Service Award to Judge Barbara J. Houser.

As usual the educational programs were first-rate -- focusing on health care bankruptcies, independent directors, and developments in the always-changing consumer bankruptcy area. The Fellows' Luncheon was a particular highlight, both moving and engaging, as the Co-Chairs of our Commission on Diversity, Equity and Inclusion moderated a live video presentation and Q&A session with Pulitzer Prize-winning author Isabel Wilkerson focusing on her must-read new book, *Caste: The Origins of our Discontents*. The inspirational

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# From the Column-ist: Over and Out

Steven N. Berger, Engelman Berger  
Co-Editor, College Columns



For my last column as co-editor of Columns, I couldn't help but be inspired by Judge Houser's words in her acceptance speech after receiving the College's Distinguished Service Award. From my remote location in front of my computer in Scottsdale, I watched and listened to our awardee, the esteemed Judge,

discuss her journey in the profession. She thanked many of her mentors and colleagues from whom she had learned over the years. And, of course, she thanked her wife for years of support and encouragement.

Wait, her wife? These simple words were delivered without extra explanation, emphasis, fanfare or attention. From my vantage point, I observed no gasps, no shuffling, no fidgeting. My head swirled with thoughts about the College's current initiatives on Diversity, Inclusion and Equity, but also with my own personal journey as an openly gay man in the legal profession. I really had to stop and smile and recognize the moment and what it exemplified in progress toward equal rights and changes in our profession and our broader society.

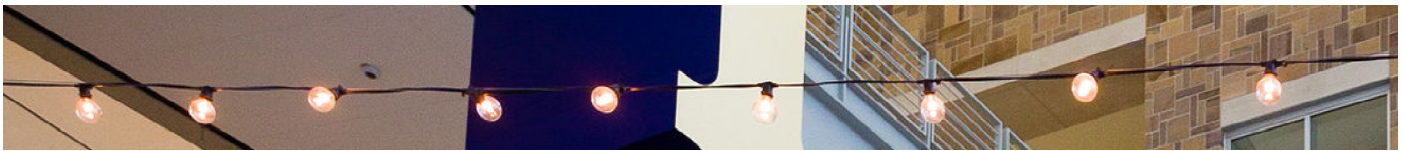
In the spirit of the DEI Commission's request that Fellows share their personal stories, I am taking the liberty to do so in this column. Hopefully others will continue to come forward and tell their own stories so we may all learn from one another. It's hard to know what it's like to walk in someone else's shoes if they are well worn but invisible.

In 1984 I graduated law school, started a Ninth Circuit Clerkship, and continued with the wrestling about my own sexuality that I had done during my law school years. Like many of my contemporaries that came to

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# President's Message: Are You Engaged?

Melissa S. Kibler, Mackinac, an Accordion Company  
President, American College of Bankruptcy



We are all trying to find our places in the new world order, after the COVID-19 pandemic has turned so much of what we knew on its head. How, when and where do we work? On one hand, the realization

that we can efficiently conduct remote meetings, events or hearings has broadened participation, facilitated scheduling, and reduced travel, all while providing greater personal flexibility. Some of us have begun to re-enter the realm of in-person meetings, conferences and social events; some remain more comfortable (from a health standpoint or otherwise) with virtual options. Almost universally, however, this pandemic has (1) reminded us of the importance of human interaction to our relationships and our well-being, and (2) highlighted a basic social need to belong, to be part of worthy efforts or institutions that are bigger than ourselves. Said differently, we need to be engaged: to be involved in activity, to be greatly interested, committed. So I will ask – are you engaged with the College?

Induction into the College not only recognizes the notable contributions that each of our Fellows has made to the profession and his or her community but offers a collective opportunity to continue making a meaningful impact. The College's many committees provide those opportunities to be involved and foster relationships with Fellows at both a circuit and national level. If you are interested

## engaged

adjective

en-gəjd | \ in- gājɪd , en- \

Definition of engaged

1: involved in activity: OCCUPIED, BUSY

2: pledged to be married: BETROTHED

3: greatly interested: COMMITTED

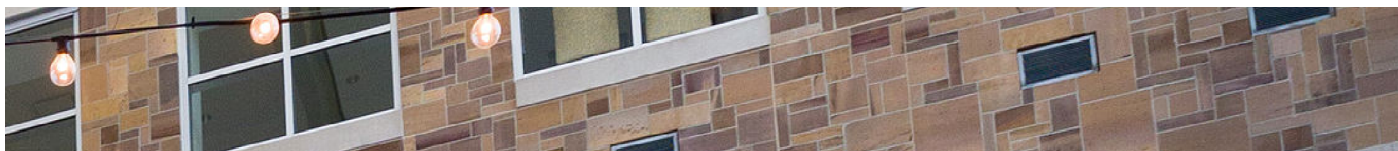
4: involved especially in a hostile encounter

5: partly embedded in a wall // an engaged column

6: being in gear: MESHED

Source: Merriam-Webster


in planning circuit educational and social events, each circuit has an Educational Programs Committee chair or subcommittee, which often collaborates with the Meetings and Events Committee to plan joint events. Our Bankruptcy History Committee looks backward and seeks to memorialize the foundation of bankruptcy and insolvency practice, while our Bankruptcy Policy Committee looks forward to chart the course for the future of our profession. In the area of outreach, the College Columns Committee oversees publication of our internal newsletter; externally, the Visibility Committee enhances public awareness of the activities and achievements of the College and its Fellows, while the Liaisons Committee interfaces and collaborates with other insolvency organizations. Several committees channel the efforts and enhance the involvement of valuable affinity

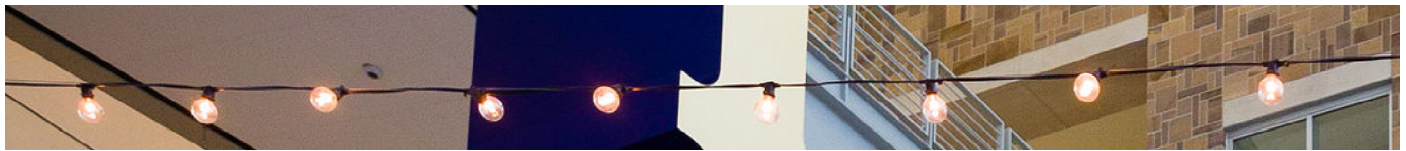


groups of Fellows – our Judicial Outreach Committee, International Committee and Senior Fellows Committee. Two committees are dedicated to honorary recognition – the Distinguished Service Award Committee selects award recipients from among our Fellows, while the Distinguished Law and Business Students Committee identifies prospective leaders in the insolvency and bankruptcy profession. From a governance perspective, the Finance Committee oversees all financial aspects of the College and Foundation, while the Nominating Committee recommends Fellows for leadership roles, and the Executive Committee, which includes officers and senior leadership, acts on behalf of the board of directors in certain circumstances. The Foundation has a Pro Bono Committee to identify grant recipients. Finally, the process of nominating prospective Fellows to be considered by the Board of Regents for admission to the College is the province of Circuit Admissions Councils, as well as the Judicial Nominating Committee and the International Fellows Nominating Committee.

Whew! Just listing and briefly describing each of these committees required a fair amount of space in this column. There is mutual benefit to serving on committees – the College relies on the talents and efforts dedicated by its many Fellows to remain active and vital, while these committees represent the best way for our Fellows to become more involved and find opportunities to interact with other Fellows. Like any organization, what you get out of being a Fellow of the College will be directly proportional to what you put into it. When you step back and think about the professional organizations that are a priority in your career, I hope the College

and Foundation will rank at the top of that list. If you have been sitting back hoping for an opportunity to connect (or reconnect) with the College or waiting for something to change, I encourage you to make that change happen and to make a commitment to being active in the College. Go to the Committees' section of the website to learn more, and reach out to the Committee Chairs, the Regents or others in leadership to learn how you can contribute to – and benefit from – their efforts. Get engaged!

You may also ask, how do we fund these activities? The Patrons & Sponsors Program provides approximately 50% of the College's core receipts each year, with dues and induction fees comprising the remainder. As such, this Program is critical to the continuation and expansion of the committee activities described above, as well as the College's financial support of pro bono grants through the American College of Bankruptcy Foundation and the ongoing work of our Select Commission on Diversity, Equity & Inclusion. Now more than ever, we hope that supporting the College's important work will remain a priority for your firm. All Fellows should have received letters from me in August and September soliciting your firms' contributions. Our Patrons & Sponsors Committee is making follow-up calls and sending emails to Fellows who have yet to pledge. We are working hard to conclude the solicitation efforts and are happy to report that we have exceeded our budget! Thank you to the over 150 firms that have already committed more than \$400,000 to our 2022 Patrons & Sponsors Program. You can find a link to pledge, and lists of 2021 Program participants, on the website under the "About/Patrons and Sponsors" menu item. Thank you for your support. 



# A Proud History of Giving – and Tradition of Generosity

*Paul E. Harner, Sheppard Mullin  
Chair, American College of Bankruptcy Foundation*



*“How did you go bankrupt?  
Two ways. Gradually, then suddenly.”  
Ernest Hemingway, The Sun Also Rises*

Such is the sad story in so many of the cases we all see in our professional lives, whether as advisors, judges or scholars. The struggling single parent, already living paycheck-to-paycheck while working two (or three) minimum wage jobs, now presented with an eviction notice. The young recent graduate, saddled with tens of thousands of dollars in student loans and unable to find the job for which she was trained, unexpectedly hospitalized with COVID-19 complications and incapable of paying massive medical bills. The mom-and-pop diner, a local delight for years, suddenly destroyed by fire – and the aging proprietors left with nothing because they couldn’t quite scrape together enough to pay for insurance. Or even the mega-retailer, a household name for generations, left bereft of customers by a paralyzing and tragic pandemic that emptied the streets – and the stores.

It has been accepted public policy for generations that individuals and businesses in these desperate financial circumstances need and deserve a fresh start; and our bankruptcy system, despite its conceded flaws, theoretically provides that opportunity. Yet there is a cruel irony: some are in such dire straits, and so intractably destitute, that they cannot afford even to enter and navigate the bankruptcy process.

Enter the pro bono legal services providers that are the grantees of the American College of Bankruptcy Foundation – hence the beneficiaries of your generosity, through individual contributions to the Foundation, each and every year. By now, you hopefully are keenly aware of the good work those providers do each day; of their particularly acute needs in the current social and economic environment; and of the hard work our Pro Bono Committee does, in allocating the funds you donate, to support

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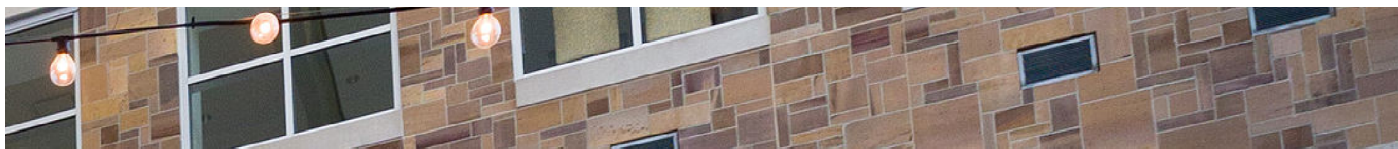
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## From the Pro Bono Committee

*Hon. Janet E. Bostwick, U.S. Bankruptcy Court  
Co-Chair, Pro Bono Committee*

As the song says, it is “The Most Wonderful Time of Year.” For me, it is not just the holidays that make this time special. I am again reminded of the power of the College and Foundation to change lives across the country. Because once again, the College and Foundation was able to award grants to pro bono legal service programs that provide assistance to the most vulnerable. Because of the generosity of the Fellows, the College and Foundation awarded \$456,200 to 46 organizations, funding programs in 25 states plus the District of Columbia. The grantees include organizations in large metropolitan areas such as New York, NY and Miami, FL, as well as grantees in smaller cities such as Rogers, AR and Bloomington, IN. The grantees seek funds to assist with volunteer trainings, pro se clinics, self help desks, and technology or equipment, often to assist in remote communications with clients and volunteers. Many of the grantees have partnered with local bar associations or bankruptcy professionals to maximize their reach.

Among the grants this year, the Foundation awarded the Michael L. Cook Extraordinary Grant to Her Justice, based in New York, NY, to support its Marital Debt Project. The Marital Debt Project provides assistance to low-income women dealing with consumer debt issues caused by divorce. The majority of the clients are women of color and survivors of intimate partner violence or other gender-based violence. The domestic

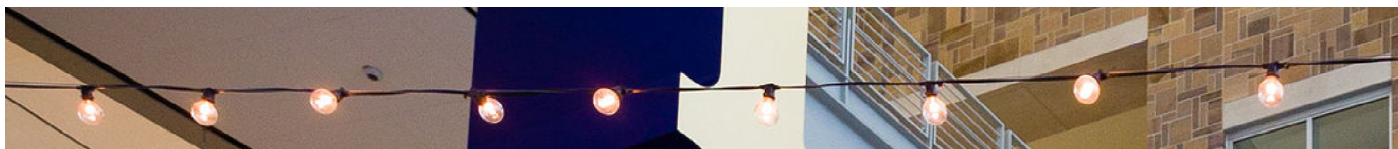
abuse often includes financial abuse, such as identity theft, withholding of income, requiring an individual to incur debt, or saddling the individual with debt incurred unknowingly through the actions of their spouses. Through the Marital Debt Project, volunteer attorneys provide information, brief advice or full representation to women who seek to file divorce and have accrued consumer debt. The attorneys are trained to recognize the particular issues arising as a result of the debt and can assist their clients in resolving them.

Although Her Justice is a first-time grantee, the organization is very familiar to bankruptcy professionals in the area, with several bankruptcy professionals on its Board of Directors. Its Marital Debt Project is a worthy recipient of the special recognition provided by the Cook grant, because the program focuses on an underserved need, women who are dealing with divorce and related financial distress. The Michael L. Cook Extraordinary Grant was created in 2016 to honor Michael Cook for his contributions to the College and the Foundation, including as Chair and President of the College and Chair of the Pro Bono Committee. It is awarded to a legal services organization that offers an innovative and exemplary approach to a previously under-served area of need.

Other grantees will also use grant funds to leverage the reach of their programs:

- Veterans Legal Services in Boston MA will use the grant funds to educate volunteer attorneys regarding the special issues facing veterans in financial distress, and to recruit more volunteer attorneys.

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## Class 33 is Classic!

*Charles A. Beckham, Jr., Haynes and Boone, LLP  
Chair, Board of Regents*



The Board of Regents met on October 6, 2021 in Indianapolis to consider the election of Class 33 of the College. The meeting was the culmination of more than seven month's work by 200+

is comprised of twenty-three lawyers, four judges, five financial advisors, and three international professionals. Class 33 also includes our first Fellow from Puerto Rico. Our new international invitees are from Italy, Brazil and India. Our new Fellow from India is the first Fellow from that nation. You may access the complete list of invitees by [clicking here](#).

Fellows led by our Regents and the Chairs of the Judicial Nominating Committee and the International Nominating Committee. The nominating process began in March 2021. I am delighted to report that the process resulted in invitations being offered to thirty-seven professionals to enter the College as our 33rd Class of Fellows. Our new Fellows will be inducted at the Annual Meeting on April 1, 2022 in Denver, Colorado.

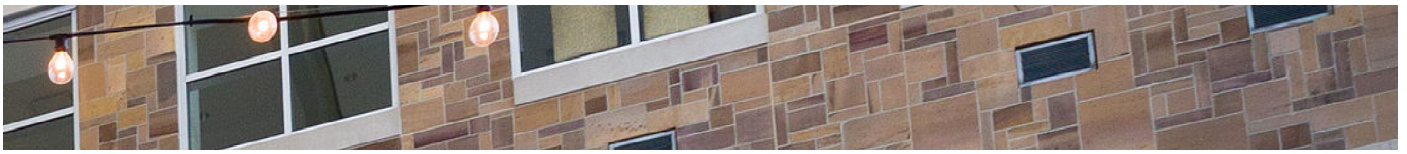
**DIVERSE CLASS:** The Board of Regents, the Circuit Admissions Councils, the Judicial Nominating Committee and the International Nominating Committee were keenly focused on diversity, equity and inclusion in the College and adding youth to our ranks. I am happy to report that our new Fellows will improve the diversity of the College (an effort that I hope will be continued for many years to come). Women represent approximately twenty-two percent of Class 33; not including our new International Fellows, approximately twenty-two percent of our new Fellows have diverse backgrounds. A majority of the Class is under the age of 52. Class 33 also includes a high percentage of consumer-focused professionals. The Class

**THE PROCESS:** The nominations process is demanding and is designed to ensure that our new Fellows are of the highest caliber and more than satisfy the rigorous standards mandated by our bylaws and traditions. We require excellence in their professional service, the utmost in professionalism and integrity and a strong commitment to supporting their professional, civic, religious and/or charitable communities. This year's invitees clearly represent the best and brightest within the bankruptcy and restructuring profession. They are a classic example of the excellence of the membership of the College.

Every year, there is rigorous discussion about each nominee by the Board of Regents. Our day-long discussion is thoughtful and thorough, focused on a healthy exchange of views about each candidate. As I complete my term as Chair of the Board of Regents, I observe that the level of diligence and care taken by the Regents and Nominating Committee chairs was exceptionally high which has led to greater diversity and an extremely well-qualified group of new Fellows. When I assumed the role as Chair of the Board of Regents, I thought it was

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# Doing the Splits

## Doing the Splits: Waiving Sovereign Immunity— “Unambiguous” Code Provisions Yield Opposite Results

*Annette W. Jarvis, Greenberg Traurig, LLP  
Secretary, American College of Bankruptcy*



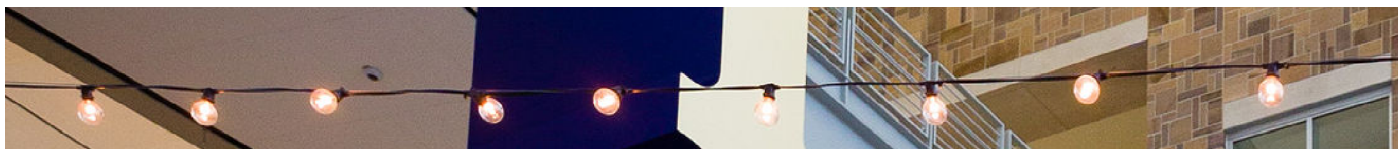
Section 544(b) of the Bankruptcy Code allows a trustee to step into the shoes of a creditor to avoid certain transfers for the benefit of the bankruptcy estate. When the transferee is the federal government, the Seventh and Ninth Circuits have reached antithetical conclusions on whether the federal government has waived its sovereign immunity to permit the trustee to sue it. Both Circuits rely on “unambiguous” readings of the plain language of Sections 544(b)(1) and 106(a)(1) but reach opposite results. How plain is the plain language, and how does the concept of “the tie goes to the government” fit into these contradictory conclusions?

With a recent appeal to the Tenth Circuit on this issue, we will soon see which Circuit’s unambiguous view will prevail as the majority view.

The Seventh Circuit in *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743 (7th Cir. 2014) found “the substantive requirements of § 544(b)(1) unambiguous” and determined that Section 106(a)(1) did not waive sovereign immunity in meeting those statutory requirements. *Id.* at 746. However, the Ninth Circuit in *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004 (9th Cir. 2017), considered the Seventh Circuit’s conclusion and ruled the opposite. It stated: “In sum, we conclude that the text of Section 106(a)(1) is unambiguous and clearly abrogates sovereign immunity as to Section 544(b)(1), including the underlying state law cause of action.” *Id.* at 1013.

The differences focus on the requirement of Section 544(b)(1) that a trustee may avoid a “transfer of an interest of the debtor in property” that is “voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 . . . .” As in both of these Circuit decisions, this avoidance power is typically used to access the greater reach back of state fraudulent transfer statutes—four years in each of these cases—as compared to the two-year reach back in Section 548. However, to use Section 544(b)(1), one must meet the requirement of establishing that an actual creditor existed at the time of the transfer. Unlike statutory avoidance actions established in the Bankruptcy Code where the trustee is given independent statutory standing, Section 544(b)(1) allows a trustee to “stand in the shoes” of an actual creditor existing at the time of the transfer to assert avoidance rights under state law. In both of these decisions, the avoidance actions were brought by trustees against a federal agency, the Internal Revenue Service (the “IRS”), thus raising the issue of sovereign immunity. In both cases, there was no dispute that an actual creditor existed at the time of the challenged transfer, nor was there any dispute

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# The DEI Commission: Moving Forward

*Hon. Laurel Isicoff and Hon. Jeffery Hopkins*



On October 6, 2021, as co-chairs of the Commission on Diversity, Equity and Inclusion, and on behalf of all the Commissioners, we delivered the Interim Report of the Commission. The Interim Report reflects the great work the Commission has accomplished through our mid-way point of October, and includes a list of Recommendations and Proposals for

consideration by the Board, and comment and input by all of you.

The Commission has been charged with a purpose – to show the College a pathway to systemic change so that our process for choosing and fostering our membership and our leadership reflects the College’s intent to improve in the areas of diversity, equity and inclusion, and ultimately to promote those ideals more broadly and advance our profession’s evolution to better reflect the world in which we live and work.

The Commission still has a great deal to accomplish, including working with our leadership on implementing the Commission’s recommendations, as modified and improved by input from all stakeholders.

Here are some excerpts from opening remarks of co-chair Judge Jeffery Hopkins

to the Board:

*We come to the proverbial fork in the road. We can and should take the road well-travelled. And, we can, as the great American poet, Robert Frost, stated, also, “take the road less travelled”—and as the poem closes—that decision can “make all the difference.”*

*The well-travelled road, we know, will produce beneficial results—funding for and creating of life-altering exposures to persons, places, and events for individuals who are normally foreclosed from such opportunities—because of the zip code they grew-up in, their skin color, nationality, gender, sexual orientation or, sense of “other-ness,” based on some defined immutable human characteristic—unrelated to intelligence, ability, hard work, skill or tenacity.*

*Facing the question which road the College should take—with apologies to Red Sox fans and injecting a bit of humor into this discussion—let us follow the advice of a well-known philosopher, who also moonlighted as a HOF catcher for the NY Yankees, named, Yogi Berra. Mr. Berra was often quoted as saying: “If you come to a fork in the road, take it.”*

*In all seriousness, I believe there is capacity in this College for us to do just as Yogi encouraged, to “take the fork in the road.”*

*We can and we should take the path that promotes programs that will provide for sponsorship and mentorship opportunities predicated on principles of DEI. That is the easier path. We are working towards those solutions in the Proposals section of the Report.*

*However, by that same token, we can and*



*we should also “take the road less travelled.” This is the harder path. Yet that decision, as the traveler in Frost’s epic poem discovered, can “make all the difference.”*

*The “road less travelled” asks our beloved College and its talented Fellows (industry game-changers--all) to boldly embrace structural change. It asks us to embrace our role as industry leaders, trend-setters, and market influencers to whom everyone in this field looks for leadership.*

*The “path less taken” asks our beloved College to (not wait), but to step boldly into the future of what America and the rest of the world thinks like and looks like—one that is more diverse, more inclusive, and that fosters equity—lest we risk falling into disfavor among young talent coming into the profession whose views on DEI more progressively align with modern thought.*

*Indeed, “the road less travelled,” if we choose it, will alter beneficially the trajectory of the bankruptcy profession in a manner I, my co-chair, and every one of the Commissioners*

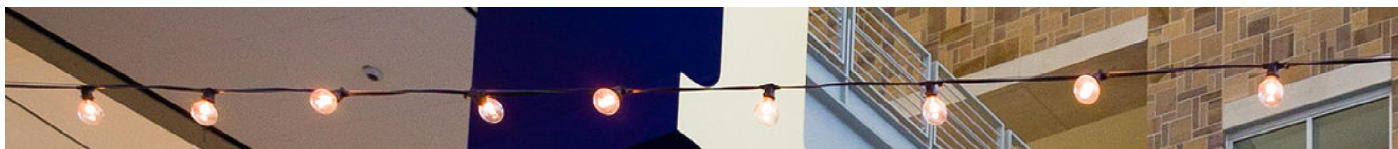
*submits, that will be immediate, meaningful, and enduring.*

*Taking “the road less travelled,” would be in keeping with our calling as debt restructuring professionals— to rehabilitate broken systems, to prioritize interests, to create solutions in the face of improbability, and to provide for fair and equitable treatment.*

We hope that you will take the time to read our Interim Report. It is available on the DEI webpage after you log in. Alternatively, you can request a copy using the special DEI Commission email, or by emailing Shari Bedker or one of us for a copy. We invite you to share your comments with any one of the Commissioners. The process works when we all take the path together. Please either email or call any of us directly or please feel free to use the special Commission email ([diversity@amercol.org](mailto:diversity@amercol.org)) to submit your comments as well. We look forward to hearing from you and seeing you all in Denver.

Thank you. **I**





## Bench Notes: Comments from a Judicial Fellow Impressions of the College — Old & New

*Hon. Daniel P. Collins*

*Editor's Note: The Editors thank Judge Collins for agreeing to kick off this new Column within the Columns – a place where Judicial Fellows may share their point of view*



The Cool Kids Club. That was my outsider's (very distant) view of the American College of Bankruptcy. I did not know what the College did or how one came to be admitted to

the College, but I did know several people in Arizona who were in the College. They were all at the very highest echelon of the bankruptcy practice in my home state and beyond. Jerry Smith, Lowell Rothschild, Susan Freeman, Rob Charles, Steve Berger, Tom Salerno, Jordan Kroop, Mike McGrath, Susan Boswell and Judges Brenda Whinery, Randy Haines, and Chuck Case. The best of the best. And, yes, they were/are cool.

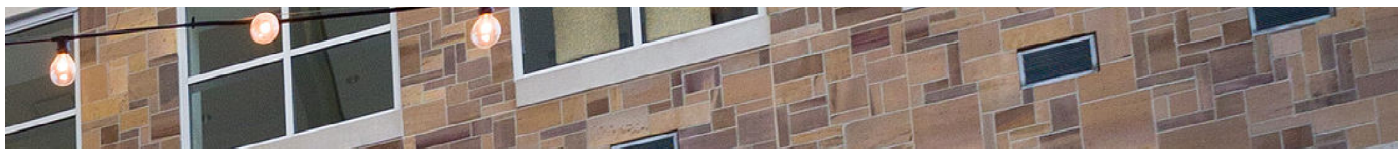
When I was told I was to be accepted into the College I told my wife and five children that, I was not quite sure, but it seemed like this was a big deal. I told my family they should try to attend the induction ceremony, whenever that might occur. Fresh out of their own colleges, my five kids wanted to know about my upcoming tuition bills, exams, term papers and the College's team mascot. I tried to explain that I was hoping ACB was not quite like that. I told them to think about ACB as the Bankruptcy Hall of Fame. They seemed to like that one but wanted to see my new ring and yellow blazer.

Of course, I later learned the College is not the Bankruptcy Hall of Fame nor is it

an assemblage of the cool ones among us. However, a quick scan through the 33 class rosters certainly includes many of the biggest names and brightest stars in the insolvency world. I now understand ACB is not a gang of the ultimate insiders. I now see the College as a group of industry leaders dedicated to elevating the national bankruptcy practice to the highest standards through educational programs, public service, and scholarship. I now see the College also as leading mentorship through programs directed towards law students and diverse and young lawyers. I now know ACB hopes its Fellows will carry the College's torch to our Bars, to our local law schools, to our courtrooms and to our communities. This is what most impresses me about ACB and why I am thrilled to have that torch placed in my hand.

As instructed, I brought most of my family to Indianapolis for the induction of my Class (XXXII) and the Class of 2020. My family members were duly impressed, and not just because of the open bar and endless dessert table. They were dazzled by Judge Barbara Houser's talk, they marveled at the interesting and lively dinner conversation (especially with Keith and Marla Wofford and Stephen Moeller-Sally). They were also struck by the range of talents and backgrounds among the Fellows, from geography to ethnicity to, age range, work experience and community involvement. My

*[continued on page 29](#)*



## Consultant's Corner

# At the Intersection of Real Estate and COVID: What I Learned During the Pandemic about Restructuring

Cynthia Nelson, Senior Managing Director, FTI Consulting

*Editors' Note: We are grateful to our Fellow Cynthia Nelson for agreeing to be our inaugural voice for our new Consultant's Corner column, where we look forward to featuring voices of Fellows that come from disciplines other than law.*



After mulling over the Column's gracious invitation to contribute to this column, I decided I'd share some highlights of my "pandemic practice" and offer some observations about this experience--the "what I learned" part.<sup>1</sup> To put a finer point on it, I'll be sharing my experiences about real estate restructuring as this is the area in which I primarily focus.

This "cycle" (which, for obvious reasons, really wasn't a cycle in the conventional sense) is unlike any other most of us have experienced during our professional careers. Mine began with the '81--'82 recession and crazy-by-today sky-high interest rates.

During the last twenty or so months, I've been actively advising stakeholders having interests in the kind of real estate and companies most detrimentally affected by the pandemic. These have included retail real estate and shopping centers, movie theaters, lodging and flexible office space, all of which have suffered devastating and sometimes existential harm on account of the pandemic.

The circumstances are hardly uniform across these property types and enterprises.

**Retail: Disruptive and persistent sector trends kick into overdrive**

The pandemic served to hasten trends already well underway prior to March 2020. The shift to e-commerce and changes in consumer demographics and preferences have diminished the role of brick and mortar as retailers' primary sales channel. The brute force of the pandemic forced retailers and their lenders and landlords to reckon with reality if they hadn't done so already.

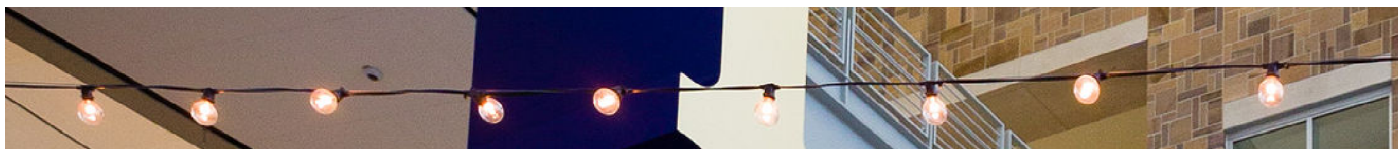
This dynamic was particularly acute for regional shopping malls and the retailers who lease space in them. During 2020 more retailers filed for bankruptcy than in any of the last ten years. In roughly the last twelve months several regional mall REITs which had been teetering pre-pandemic were forced to file for Chapter 11 bankruptcy protection (PREIT, CBL and Washington Prime Group). Bankruptcies of regional mall REITs are by no means routine (as retailer bankruptcies arguably had become) given that these enterprises had traditionally boasted high quality, performing assets and relatively low leverage. The last major bankruptcy of a regional mall REIT was in 2009 with GGP.

We may have reached something of a stasis in the storm as the retail recovery strengthens and regional mall stock prices

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<sup>1</sup> And just to manage expectations, I've no eureka moments or otherwise profound insights to share. A more apt title of this piece would be "What I didn't want to admit but finally came to understand more fully."

*[continued on page 31](#)*



# Report on the Pittsburgh Educational Forum "After the Pandemic"

*Eric Schaffer*



Led by Fellows in Pittsburgh, Pennsylvania, the American College of Bankruptcy and the University of Pittsburgh School of Law jointly

presented an educational forum exploring how bankruptcy law and practice will be changed by the pandemic. The November 4, 2021 program, with the hopeful title "After the Pandemic," received a warm reception online and in person at Pitt Law.

The program kicked off with a Report from Capitol Hill by Judge Gregory L. Taddonio from the Western District of Pennsylvania, the co-chair of the legislative committee of the National Conference of Bankruptcy Judges. He was followed by a panel discussing commercial practice after the pandemic, featuring Judge Marvin P. Isgur from the Southern District of Texas, Chief Judge Frank J. Santoro from the Eastern District of Virginia, Heather Lennox from Jones Day in Cleveland, and Kurt L. Gwynne from Reed Smith in Wilmington.

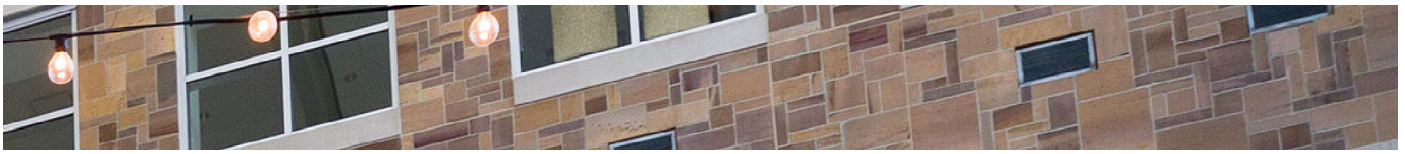
The second panel, discussing consumer practice after the pandemic, featured Chief Judge Michael B. Kaplan from the District of New Jersey, Alane A. Becket from Malvern, Pennsylvania, and Ronda J. Winnecour from Pittsburgh,

Pennsylvania. The third panel, looking at the economic landscape after the pandemic, included Mohsin Meghji from M3 Partners in New York, Professor David J. Denis from the Katz Graduate School of Business at the University of Pittsburgh, and Eric A. Schaffer from the Stonecipher Law Firm in Pittsburgh.

Lively discussions continued at a reception hosted by Pitt Law, after which the Third Circuit Fellows adjourned to a nearby restaurant to welcome their newest colleagues.

The local organizing committee comprised Eric Schaffer, Judge Jeffrey A. Deller and Retired Judge Judith K. Fitzgerald, both from the Western District of Pennsylvania, and Ronda Winnecour. Pitt Law provided a wonderful venue and outstanding support, with students and faculty joining College members and others, and the University looks forward to hosting future College events. ¶





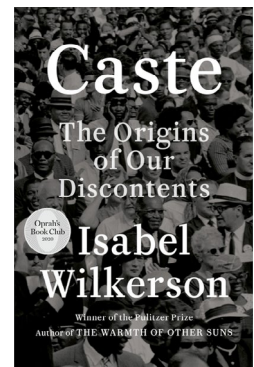
## Fall Luncheon Donors

Thank you and congratulations to the ten Fellows below who donated quickly (and generously!) at the Fall Luncheon and were rewarded with an autographed copy of keynote speaker Isabel Wilkerson's thought provoking book, *Caste: The Origins of Our Discontent*. For those of you who have not read the book yet, Connie Lahn shared her review "A book everyone must read. How is it that I could be educated at amazing schools, colleges, and law school and yet be learning so much of this for the first time?"

These ten Fellows, along with several other generous donors, raised over \$28,000

for the Foundation during the All-Fellows Luncheon. Thank you everyone for your support and happy reading.

- Eric Anderson
- Michael Baxter
- Jacob Brown
- Deborah Caruso
- Teresa Kohl
- Natasha Labovitz
- Connie Lahn
- Demetra Liggins
- David Warfield
- Deborah Williamson



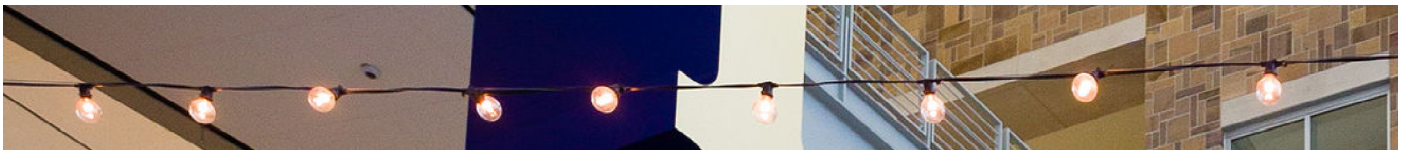
## Seventh Circuit Education Committee's Twelfth Annual Bankruptcy Seminar

The College's Seventh Circuit Education Committee held its Twelfth Annual Bankruptcy Seminar on September 24, 2021. Over 150 attorneys, judges, law professors, and financial advisors from every Circuit attended the event via Zoom. Members of four panels engaged in lively discussions of (1) business issues affecting practice in the Seventh Circuit, such as equitable mootness, pre-filing investigation responsibilities before filing avoidance actions, use of avoidance action proceeds to pay chapter 11 administrative expenses, and good faith defenses to fraudulent transfer claims; (2) consumer issues such as the effects of the Supreme Court's decisions in the *Fulton* and *Taggart* cases and administration of LLC interests;

(3) commercial case issues such as third-party releases, valuation, section 363 sales, and rights offerings; and (4) ethics issues such as attorneys' duty of candor, ex parte communications, and the definition of "disinterestedness."

The panelists' written materials, as well as a recording of the program, are available on the College's website.





# October 2021 Indianapolis Highlights

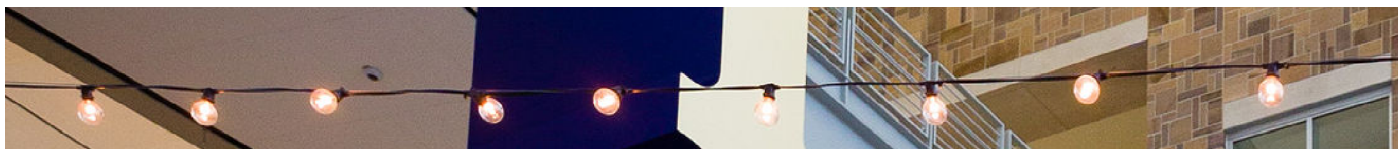






**Distinguished Bankruptcy Law Student Award Winners**





# Introduction on the Presentation of the Distinguished Service Award by the American College of Bankruptcy to The Honorable Barbara J. Houser

*Hon. Thomas L. Ambro*

Colleagues, College inductees, ladies and gentlemen, especially family and friends of Barbara Houser:

It is a privilege to be with you this evening. It is where we can collectively assemble and acknowledge the truth: that Article I judges are every bit as good as their Article III cousins.

Watching almost anyone do almost anything well is a great good. Seeing someone perform at the top of her craft is special. Barbara Houser is special.

Whether sitting first-chair in major Chapter 11s, as a judge in command of every nuance in a bankruptcy case (and hence expecting you to be as prepared as she), as a named plaintiff heading the charge for bankruptcy judges' pay, or in her most recent challenge as the lead mediator in the Puerto Rico

insolvencies, Barbara is a professional in full: fully in command, fully understanding the issues and the players, fully willing to thread new ideas with the old, and, when appropriate, to commit to them and carry them through.

I focus on where I have observed Barbara most closely and personally – the Puerto Rico cases that, by my recollection, are among the three largest in American history. You had not only the Commonwealth and its then roughly 3.3 million people (though now much less), but also its several instrumentalities, ranging from a special purpose entity known as COFINA to its Aqueduct and Sewer Authority and numerous others. Their reorganization is under an insolvency law that, while it borrows much from the Bankruptcy Code,

contains many provisions and constructs unique to the Commonwealth entities.

In the late Spring of 2017, Barbara came new to these insolvencies containing disputes that had been brewing for decades. She was the lead mediator on a team where only one of its mediators, Judge Nancy Atlas, had significant experience in mediation. (I had next to none.)

*[continued online](#)*





# Judge Houser's Remarks

*Hon. Barbara J. Houser*



Good evening. Thank you Tom for such a wonderful introduction; if you ever decide to leave your current Circuit Judge gig, perhaps you should consider fiction writing as you have quite the gift of embellishment.

And, of course, thank you to the College and its leadership. I am truly honored to have been chosen as this year's recipient of the Distinguished Service Award. Being recognized for your contributions by your peers is high praise.

For me, tonight is about three things. First, reflecting on the many years that I have been fortunate enough to be a member of this community; second, thanking all that have shown me the way; and third, expressing the hope I feel for the future of our practice area.

First, reflections— when Lisa, now Judge, Beckerman called me with the news that I had been selected to receive this year's Distinguished Service Award, I was surprised. My immediate reaction was to

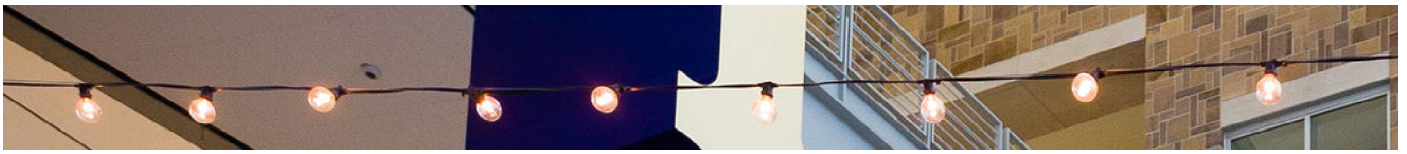
think she had dialed the wrong number, as I felt there were a number of other College fellows who could have been chosen in my stead. I then wondered how I had gotten so old, as awards like this do not usually come to a youngster.

But, over the course of the next day or so, it became clear to me that if I am deserving of this award it is because of all of the people in my life who guided me to become the person I am, and who helped shape the lawyer and judge I became. After all, lawyering is an intense people-oriented business, whether those people are clients, colleagues or adversaries.

And, of course, reflections cannot be had tonight without including the impact the coronavirus has had on so many throughout the world over the last eighteen months or so. I'm sure those of us here tonight are grateful for our health and the opportunity to be together again. Others have not been so fortunate. I ask that we take a moment of silence as we remember friends, family members and others who have been lost to the virus or continue to struggle to regain good health.

My thank you list tonight is quite lengthy (although I will move quickly) and starts with my parents, who died in the mid-1990s, but who would be so proud tonight. To say that my parents shaped my older brother Mark and me is a significant understatement. Neither of my parents completed college, but it was clear to Mark and me that we certainly would, along with professional schools if we so chose, from a relatively early age.

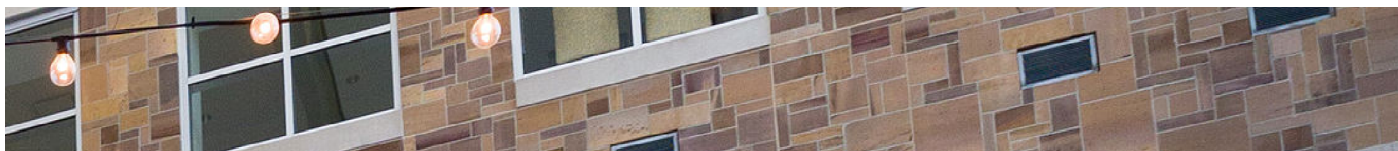
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## Fifth Circuit All-Fellows Luncheon

On November 17th, the Fifth Circuit resumed its traditional all-Fellows dinner in Austin, Texas, held the night before the Jay L. Westbrook University of Texas Bankruptcy Conference. Twenty-two Fellows attended this year's event, including the three Fifth Circuit insolvency professionals who will be inducted in March 2022 - Jay Ong, Travis Torrence, and David Rush.





*From the Chair continued from page 2*

session with Ms. Wilkerson marked a giant step forward in the key Commission goal to create mindfulness on issues of diversity, equity and inclusion in the College, our profession, and the country as a whole.

Getting the chance to greet and spend time with so many of our Fellows and their family members, live and in person -- after two full years and three abbreviated virtual meetings -- was among the most gratifying experiences of my 23 years in the College. So as I write my 16th -- and final -- Column as a member of College senior leadership, and look both back and ahead at where the College has been and is headed, I enter this holiday season with a feeling of profound GRATITUDE for the opportunity I've had to be a part of this special organization. Indulge me just a bit if you will, as I reminisce about my time in College leadership by offering special thanks to several people who educated me, inspired me, and offered me the chance to advance through the ranks over the last 15 years or more:

- To Michael Cook, who taught me how the College worked and how we could make it work better, took me in as his collaborator to create more -- and more meaningful -- "touch points" with our Fellows as we tinkered with the format of our meetings and programs, and then stunned me with the offer of a chance to serve as Chair of the Foundation.

- To Judge Laurel Isicoff, who gave me the confidence to take on that role for the Foundation, walked me through its programs and potential as we served together on its Board, and now continues her inspired service to the College as Co-Chair with Judge Jeffery Hopkins of our Commission on Diversity, Equity and Inclusion.

- To Marc Levinson and Chris Meyer, my two immediate predecessors as President

and Chair of the College, who not only put up with me and promoted me to succeed them but gave me the important opportunity to highlight the good work of the Foundation at our College meetings and programs to drive the Foundation Campaign into high gear.

- To Pat Vance, who made my service to the College so much easier with his wise guidance as my predecessor Foundation Chair, and especially over the past four years as College Counsel.

- To Bill Perlstein, Pat's long-time predecessor as College Counsel, who embodies everything that a lawyer, mentor and friend should be, and whose good humor is surpassed only by his flawless judgment and guidance.

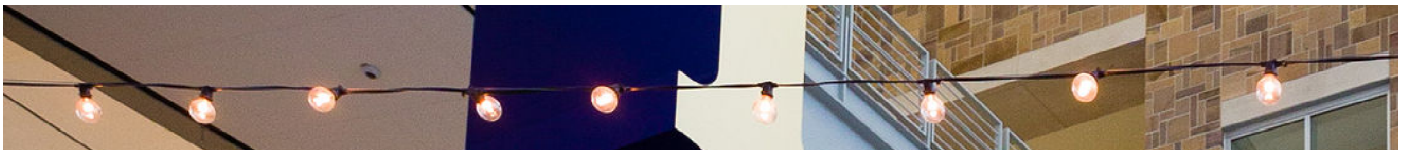
- To Jan Baker, whose wisdom, class and gentility make all of us aspire to be the lawyer, leader and person that he is, for always stepping forward to serve, promote and reaffirm the best interests of the College and its Fellows.

- To David Heiman and Paul Singer, who gave me my first opportunities in College leadership, instilled in me their own visions of the College as a dynamic organization of industry and community leaders, and taught me the value of opening up leadership opportunities to younger Fellows.

- To Paul Harner, my successor as Foundation Chair, who so tirelessly and even cheerfully took the Foundation to new and greater heights as the largest source of funding for pro bono consumer bankruptcy legal services anywhere.

- To Larry Coppel, Jim Baillie and Judge Janet Bostwick, and to all of the Fellows who served on the Pro Bono Committee that those three leaders so ably chaired over the past 12 years, for their unceasing dedication to identifying and rewarding scores of pro

*continued on page 22*



**From the Chair continued from page 21**

bono legal service organizations all over the country with the grants funded each year through the growing generosity of our Fellows.

- To Richard Carmody, who never seems to run out of new and innovative ways (and did I mention persistence?) to energize the fundraising efforts that help the Foundation provide those grants.

- To Marti Kopacz, who for the past six years has served as Treasurer, first of the Foundation and then of the College, and helped keep me on task and both of those organizations on -- and usually way ahead of -- budget.

- To Shari Bedker, who remembers everything, forgets nothing, and time and again demonstrates the uncanny ability to rescue me even before I can realize I'm about to forget something or get myself in trouble with someone.

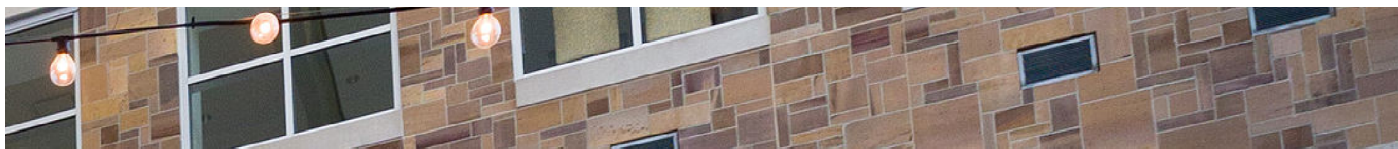
- And lastly, to Melissa Kibler, my long-time friend and for the past two years my partner in her role as President, who will succeed me as Chair at our Denver meeting this Spring, continue her tireless pursuit of diversity, equity and inclusion in the College and our profession, and make us all wonder why it took so long to elevate only the second woman -- and first non-lawyer --

to the position of Chair.

I look forward to turning over the joys and challenges of the Chair to Melissa in Denver, and hopefully to seeing even more of you in person at that meeting. If you've not been there lately, Denver has become one of America's great cities (and a great restaurant city), with a bustling but pedestrian-friendly downtown linked by light rail to its magnificent world-class airport that's only one flight from almost anywhere. And just last month The New York Times devoted a lengthy article to the "responsive, interactive and fashion-conscious" new headquarters of the Denver Art Museum -- "the institution that current-day curators dream of" -- where we will induct our new Class XXXIII Fellows (and holdover Class XXXI and XXXII Fellows who were unable to join us in Indianapolis) on the evening of March 31, 2022. Shari and her team will be sending the registration materials along before you know it, so please mark your calendars to join us March 30-April 1, 2022 in Denver.

Wishing all of you, your families and loved ones a joyous holiday season and a happy and healthy New Year. Oh, and a safe and smooth trip to Denver where we look for a great turnout in March! 🏛️





**Columnist continued from page 3**

terms with their own gay identities in that era, I had dated women throughout high school and college. In essence, the first part of my journey was to “come out” to myself, and to give myself the permission to explore what I knew longed for – a primary relationship with another man. Me? A nice Jewish boy that was blessed with external and internal expectations of a wife, 2.5 kids, and an active life in synagogue and community? How could I accept the reality of a life that was going to differ from my assumed future path?

As I made my way through the maze of “coming out” (reading, therapy, coming out support group, family drama, exploring a new world in the most secretive way I could – all fodder for another column), I was cognizant of what I might face in my personal life with friends and family. Most looming, though, was what would happen with my professional life. I was then working at a large local firm. I had met other gay lawyers in the Arizona legal community that had experienced discrimination on account of coming out of the closet or simply exhibiting traits that stereotypically were assumed to exhibit the appearance of being gay. One friend lost his job when a client’s complaint about the firmness of his handshake led a partner at his firm to investigate his sexual orientation and cause his firing. Later, a young (and more brash) summer clerk placed a photo of his male partner in his private office on his desk. The photo was no less decent than any other lawyer’s spousal photo. He was instructed to remove the photo. Another friend lost a new client relationship when identified as a gay man – not self-identified mind you but assumed and questioned about it. Conversations at legal and business lunches, golf games, happy hours and pre-meeting chatter often included off-color jokes,

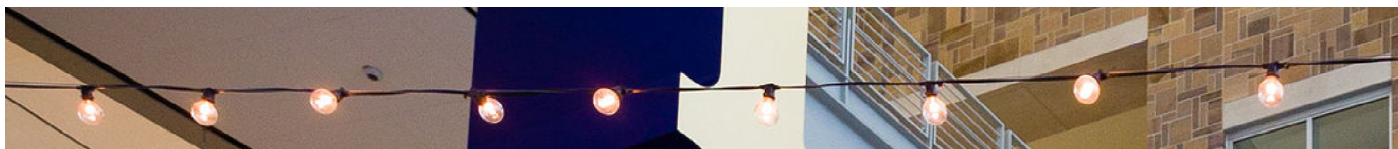
insults, and malicious comments regarding gay sexual orientation. No one seemed to even consider whether anyone present was gay. Either they didn’t care, or they didn’t have any consciousness that they might be in “mixed” company.

Which leads to the next career related dilemma – when and to whom do I disclose? What is the appropriate business situation to correct assumptions like: “tell me about your wife” or “I happened to see two men kissing at the SF Airport last week – isn’t that nauseating?” Sounds obvious today, but in 1980’s Phoenix, the gay lawyers informal happy hour was still held in a remote location without any identifying sign, and the gay lawyers at my firm (about 4-5 of us out of 80) were still having secret breakfasts. In the progression from in to out, reliance on discretion from friends or colleagues with whom I shared my orientation meant a hard to accept loss of control over the information – a growing up lesson that perhaps I might have learned earlier in life. Because of my personal nature and the natural progression of things, my secrecy slowly gave way to openness.

A lot was going on in the background. The AIDS crisis kept the subject of sexuality in the news. Many were confronted with illness of family members, friends and business colleagues whose gay identity was not previously known to them. The health crisis ripped off the closet doors in certain circumstances, and of course the reactions were as varied as the identities of those affected – spanning from complete rejection and alienation to acceptance and transformation.

My journey was interesting in that my colleagues at the first law firm I had worked at in college, as a law clerk, and then as an associate, knew me before I came out and after a while I realized I had no idea

**continued on page 24**



*Columnist continued from page 23*

who “knew” and who didn’t. I learned to gain the strength not to worry about it too much but it created many socially awkward moments, for example, as friends tried to fix me up with very eligible women.

As part of my community activities, I had taken on the role of a “Big Brother” in the Big Brothers program. In the extensive interview process, the staffer told that my Meyers Briggs test indicated a probability that I was gay. The staffer asked me point blank, and I said no, because the rule at the time was gays were not eligible to be participate. Most of the time if participating in something where my sexual orientation would have been an issue, I simply could avoid the issue and “pass” as straight. In this situation, I had to pay dishonesty as the price of admission to something I wanted to do. I knew that I had the time, resources, and skills to help a fatherless boy and refused to let the rules preclude me from doing so. Secrecy forced these choices where few of us wanted to be dishonest.

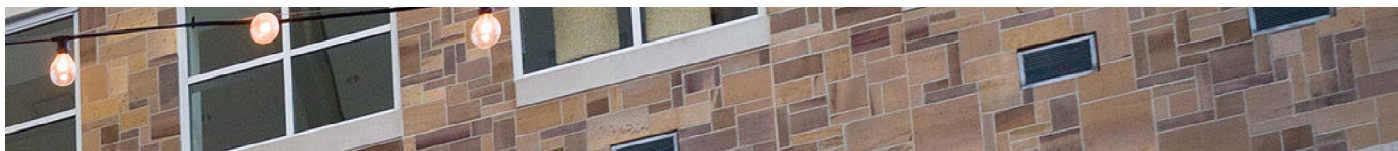
However, six months into a great pairing with a teenage boy that really needed a role model, I decided that I could not continue to participate and not be honest about my identity in the formal status evaluation meeting with the staffer. My decision was painful, but I had to do it. The staffer was terrific about it. She explained that if we told the boy’s mother, the agency would be required to terminate the formal match, but if his mom agreed, we could continue informally. We had a meeting in the agency office with mom and staffer, in which the staffer went through the developments and consequences. Mom was polite but said she needed time to think about things. That weekend she invited me to their home – where I was grilled by her with questions and then a tirade of anger and rage – all in



front of my Little Brother. Not only was I never to contact him again she threatened to “out” me to the Chair of the Board of the Big Brothers organization, who just happened to be (as she knew) a partner in my law firm. I left the house shaking and in tears, sorry for the loss of the relationship I had developed with her son, humiliated, and fearful for my job. Who knows what she would tell the partner in her quest for somewhere to place her anger? I preempted that from happening by finding the partner and explaining the whole situation. He asked me, “did you ever touch this boy in an inappropriate way?” to which I answered a simple “no”. He then said not to worry about it. But, of course, I did worry, and carried the hurt connected with these events for many years.

In 1989 I interviewed with another large firm in Phoenix to join a former colleague in developing a bankruptcy and reorganization practice. The new firm’s “macho” culture was renowned. It was known for its cadre of excellent and aggressive lawyers, many of whom were former college and semi-pro athletes. In considering the move, I decided to make a fresh start as an “out” lawyer or





*Columnist continued from page 24*

not to go. So, after I received an offer, I did a Colombo-like coda...“Um, there’s just one more thing...” After revealing my orientation to the named senior partner (a former baseball player and cantankerous plain talker) and him spitting his chewing tobacco into his spittoon, he informed me that it wouldn’t make a d[arn] bit of difference to him or the firm, but he reminded me that it didn’t mean I was going to get any special treatment. I didn’t want special treatment. I wanted to not have to worry about discrimination in the workplace. His offer seemed like a decent deal. Of course, he smiled wisely and noted, “I can’t guarantee what others’ personal reactions will be, but I suspect you are equipped to deal with that yourself.” And so, I enjoyed 10 successful years at that firm, and had many colleagues as guests at the “celebration” of what was to be a 12-year primary relationship (well before marriage was contemplated by us as a possibility or of course, legal).

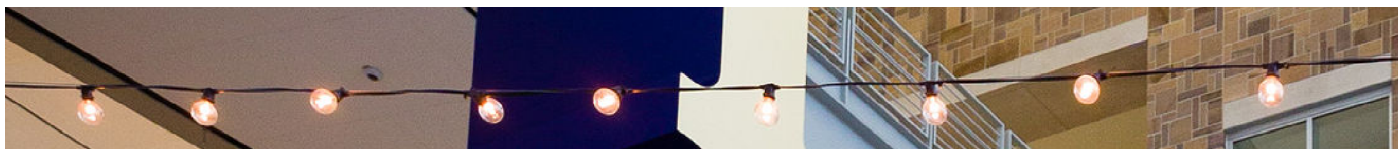
As friends and acquaintances were struck and killed by the AIDS virus, my desire to work in the community became front and center. The public nature of joining an AIDS agency board, fundraising and trying to bring new people from different parts of the community (for example, the Jewish community within which I had been active from my teens onward) was going to be make my identity more public. But by then I had enough confidence gained from my own self-acceptance to overcome fears and move forward. All in all, I found that the clearer I was able to be about myself and my goals, the less resistance and more respect I received in the professional realm.

Ultimately, in 1999, I left the large firm practice behind and started a new firm with a close friend in the practice who had been on his own for 25 years. We were a bit of an

“odd couple,” but things turned out great. He liked to be introduced as my “law partner” to avoid any confusion (but a bit of humor never hurt). We forged a practice together and built the boutique firm at which I still practice.

During the 35-year timespan encapsulated above, monumental progress has been made in the community at large, the legal community and within the LGBT(QI) community. I have been told that my case was a catalyst for a change several years later in the Big Brothers policy, and that the ban on participation was terminated. The Bar Association has a LGBTQ section, as do many legal organizations. Lambda Legal and other excellent legal and advocacy groups abound and have the financial support of mainstream businesses and prominent law firms, support that was unheard of years ago. Most importantly to me, young gay and lesbian lawyers have many more choices today than before. The right to privacy and to marry currently are protected. And as is the evolution of such things, I and other white, cisgender males that have occupied many of the leadership roles in the gay community of yesterday are now learning to embrace and promote the rights, voices, needs and leadership of women, people of color, the transgender and gender-non-conforming individuals. I am thankful that being involved in one era of progress has given me a historical perspective to help me understand the nature of change. Today I am blessed with a 19-year relationship, an accepting family, colleagues and friends, and a sense of optimism (even in the very difficult times in which we live).

It’s been a great honor to co-edit this publication for the last 4 years and to write this column. For now, it’s over and out! Thanks for your readership and participation. ¶



### *The Splits continued from page 9*

that, absent the application of the sovereign immunity waiver of Section 106(b)(1), the actual existing creditor could not have sued the government at the time of the transfer to have the transfer avoided. Accordingly, both Circuits addressed only a single, narrow issue: whether Section 106(b)(1) applied to waive sovereign immunity when the trustee “stood in the shoes of an actual creditor” to recover transfers under Section 544(b)(1).

Both courts noted the tortured history of the waiver of sovereign immunity under Section 106. While Congress thought it had been clear in enacting a broad waiver in the 1978 Bankruptcy Code, the Supreme Court disagreed in *Hoffman v. Conn. Dep’t of Income Maint.*, 492 U.S. 96,101 (1989) (explaining that Congress must make its intention to waive sovereign immunity “unmistakably clear in the language of the statute”) and *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 39 (1992) (requiring an “unequivocal textual waiver of the Government’s immunity”). To clarify what it tried to say in 1978, Congress rewrote Section 106 in its entirety in the Bankruptcy Reform Act of 1994. As explained by the Utah Bankruptcy Court in its recent decision on this question:

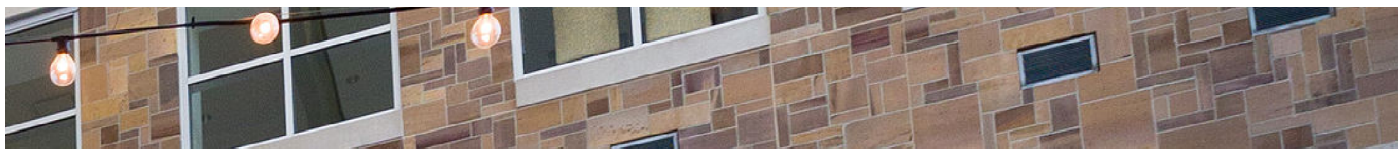
Importantly, Congress thought it had already achieved [the standard set by the Supreme Court] in 1978, noting in floor statements that former § 106(c) was “included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effect.”

*In re All Resort Grp., Inc.*, 617 B.R. 375, 384 (Bankr. D. Utah 2020), *aff’d* U.S. v. Miller, 2:20-CV-00248-BSJ (D. Utah Sep. 8, 2021) (footnote omitted).

In rewriting Section 106 in 1994, Congress

added references to fifty-nine other Bankruptcy Code sections, including Section 544. So, was this rewrite “unmistakably clear” and “unequivocal” when it comes to effecting a waiver of sovereign immunity under Section 544(b)(1)? Depending on the way the statute is analyzed, maybe or maybe not.

The Seventh Circuit in *In re Equip. Acquisition Res. Inc.* analyzed the question in two steps to reach the conclusion that Section 106(a)(1) did not waive sovereign immunity under Section 544(b)(1), or, as the Circuit stated it, “that Section 106 does not displace the actual-creditor requirement in Section 544(b)(1).” 742 F.3d at 744. The first question was “whether there has been a waiver of sovereign immunity,” which both parties in the case agreed had been done under Section 106(a)(1). *Id.* at 746–47. The second question was stated to be “whether the source of substantive law upon which the claimant relies provides an avenue for relief.” *Id.* at 747. The Seventh Circuit interpreted this question to require that a trustee must demonstrate that “a creditor exists who could use a state’s ‘applicable law’ [in this case the Illinois Uniform Fraudulent Transfer Act] to recover the payment from the IRS.” *Id.* In phrasing the test this way, based on the “unambiguous text” of Section 544(b)(1) that the trustee can only recover transfers that are “voidable under applicable law by a creditor holding an unsecured claim,” then since Section 106(a)(1) only comes into play when a bankruptcy is filed and would not provide a waiver of sovereign immunity to a creditor with an unsecured claim at the time of the pre-petition transfer, no recovery was allowed against the IRS. Thus, the “actual creditor” requirement of Section 544(b)(1) was interpreted to temper the broad sovereign immunity



### [The Splits continued from page 26](#)

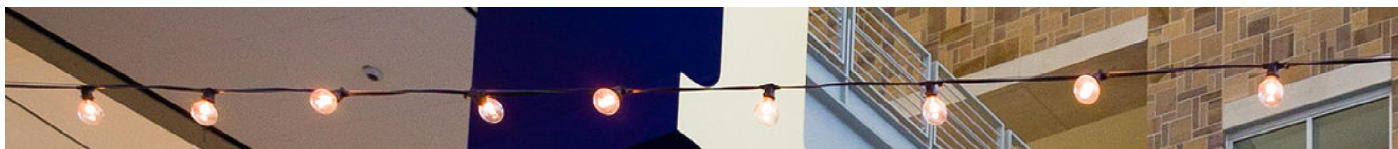
waiver of Section 106(a)(1). While the Seventh Circuit acknowledged the policy arguments furthering an equitable distribution to creditors, it stated that it “cannot credit arguments about congressional intent when they run counter to a provision’s unambiguous text,” *id.* at 747, and found its conclusion to be “consistent with the judicial presumption that when it comes to sovereign immunity ties go to the government.” *Id.* at 750. Further, in acknowledging that the ruling left Section 106(a)(1) to apply to Section 544(a), but not Section 544(b)(1), the Seventh Circuit concluded that “Congress simply listed undivided Code sections if any part of that section included something for which sovereign immunity should be waived.” *Id.* at 749.

The Ninth Circuit in *Zazzali* addressed the issue under the Idaho Uniform Fraudulent Transfer Act. In reaching an opposite result, the Ninth Circuit focused on reading Section 544(b)(1) “in concert with other sections of the Bankruptcy Code” and providing a “holistic” approach to reconciling these two sections with each other and with other sections of the Bankruptcy Code. *Zazzali*, 869 F.3d at 1010. The Ninth Circuit noted that even the government agreed that Section 106(a)(1) “unambiguously abrogates the federal government’s sovereign immunity ‘with respect to Section 544,’” *id.* at 1010, and concluded that “a trustee need only identify an unsecured



creditor, who, but for sovereign immunity, could bring an avoidance action against the IRS.” *Id.* Countering the arguments of the Seventh Circuit, the Ninth Circuit emphasized that if Congress had intended to limit the application of Section 106(a)(1) to only Section 544(a) and not Section 544(b)(1), it knew how to do so as demonstrated in Sections 546(c)(1) and 541(b)(4), *id.* at 1012, and focused both on the definition of “person” in the Bankruptcy Code that clearly contemplated suits against the government, which worked to put the government on “equal footing with all other creditors” in a bankruptcy case consistent with the policy of equal distributions to creditors. *Id.* at 1016. Thus, the Ninth Circuit determined that because “Congress’ waiver of sovereign immunity is unequivocal under Section 106(a)(1)” and because “Section 106(a)(1) was enacted after Section 544(b)(1)” with an

[continued on page 28](#)



### [The Splits continued from page 27](#)

established history, *id.* at 1011, “Congress unambiguously and unequivocally waived sovereign immunity for causes of action brought under Section 544(b)(1).” *Id.* at 1013.

The majority of lower courts have adopted the reasoning of the Ninth Circuit, and while the Tenth Circuit has yet to weigh into the debate, a recent decision in the Utah Bankruptcy Court, affirmed by the Utah District Court, previews a possible addition of another Circuit to the Ninth Circuit’s camp. *In re All Resort Grp., Inc.*, 617 B.R. at 375, *aff’d* U.S. v. Miller, 2:20-CV-00248-BSJ (D. Utah Sep. 8, 2021). To the arguments already articulated in the two Circuit decisions, the Utah Bankruptcy Court added its own interpretation of the unequivocal and unambiguous language of Sections 106(a)(1) and 544(b)(1). Noting that the “nature of the dispute has to do with the peculiar characteristics of a Section 544(b) claim,” *In re All Resort Grp., Inc.*, 617 B.R. at 385–86, the question then became “whether § 106(a)(1) ‘abrogates sovereign immunity as to § 544(b)(1), including the underlying state law cause of action,’ or whether the waiver does not apply to that underlying law.” *Id.* at 386 (quoting Zazzali, 869 F.3d at 1013). The court then concluded:

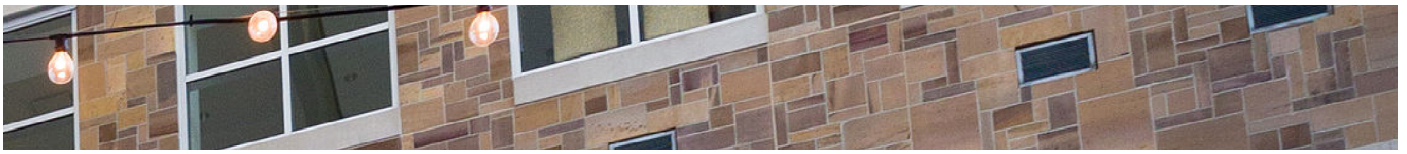
[T]he plain text of § 106(a)(1) unequivocally abrogates sovereign immunity as to the underlying state law cause of action. The statute contains no exceptions, qualifiers, or carve-outs in its language, “indicating a clear legislative intent to be as broad as possible in abrogating sovereign immunity in the bankruptcy context.”

*Id.* (quoting Jamestown S’Klallam Tribe

v. McFarland , 579 B.R. 853, 857 (E.D. Cal. 2017)).

The Court emphasized that “Congress placed marked emphasis on the breadth of the statute by choosing the critical phrase ‘with respect to,’” citing to the Supreme Court’s past construction of “with respect to” as expansive. *Id.* Arguing for a consistent application of both Sections 106(a)(1) and 106(a)(3) to Section 544(b), the Court found that, in order to achieve “the most harmonious result” between the two subsections, based on the “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant,” both subsections of Section 106 must apply equally to Section 544(b). *Id.* at 388 (internal quotation marks and citation omitted). This interpretation ended any conclusion that there was a “sovereign immunity ‘tie’” in the case that favored the government’s position. *Id.* Finally, the Court pointed out that, if Congress had intended to preempt state law fraudulent transfer claims incorporated through Section 544(b), it knew how to do so as demonstrated by Section 544(b)(2) and had not done so. *Id.* at 393.

If the Utah Bankruptcy and District Court views are adopted by the Tenth Circuit, the Ninth Circuit will become the majority view. But if the Seventh Circuit’s reading of the statute prevails as the majority view and if Congress meant what it said on its broad view of the waiver of sovereign immunity in bankruptcy, then Congress may, once again, have to rewrite Section 106 with the hope that the “third time’s the charm.” ¶



**Class 33 continued from page 8**

the best job in the College. My experience over my two-year term as Chair, in building Classes 32 and 33 and working with the Regents and Committee Chairs, affirms that belief.

**COLLECTIVE EFFORT:** I want to extend my sincere gratitude to Mark Bloom, Melissa Kibler, Pat Vance and all of the Regents and Nominating Committee Chairs (and the members of the Circuit Councils and Nominating Committees) for their tireless efforts and commitment to this process. The Regents and Committee Chairs presented an exceptional list of candidates for consideration. The Regents are: John Monaghan (1st), James Bromley (2nd), Natalie Ramsey (3rd), Douglas Foley (4th), Lisa Futrell (5th), Michael Coury (6th), Jamie Sprayregen (7th), Michael Stewart (8th), Jennifer Hagle (9th), Mark Craige (10th) and

Patricia Redmond (11th). Our Regents-at-Large are Professor Robert Lawless, Judge Clifton Jessup and Cynthia Nelson. The Chairs of the Judicial and International Nominating Committees are Jan Baker and Steven Kargman, respectively.

My thanks, as well, to the many other Fellows who participated as nominators, sponsors and supporting letter writers. Each of you can take pride in knowing that you contributed to perpetuate the highest ideals of the College by ensuring that we admit Fellows worthy of our lofty standards. It has been an honor and pleasure to help guide this process. I am thankful for and appreciate the opportunity to serve the College in this capacity. I certainly hope you are planning to attend the Induction Weekend in April, 2022 when you will have the opportunity to welcome our new Fellows personally. ¶

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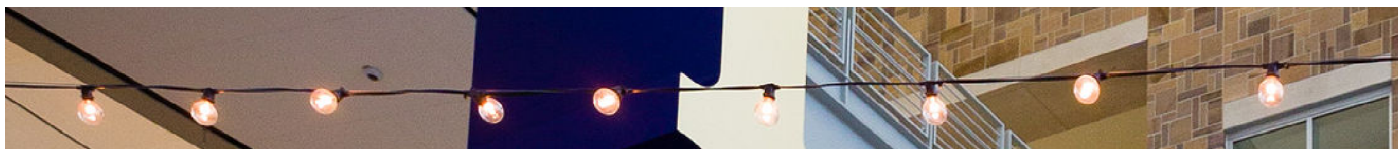
**Bench Notes continued from page 12**

kids (and I) thought it was especially wonderful that my law clerk, Hannah-Kaye Fleming, was awarded ACB's Distinguished Law Student Award for the 9th Circuit. My family left the College's induction ceremony clearly understanding that admission to the

College is a high honor.

Armed with a better understanding of the College's mission, I am looking forward to working with its many scholars, thought leaders and insolvency experts to carry on ACB's rich tradition. It is indeed cool to once again be in college. ¶





### *History of Giving continued from page 6*

that work and meet those needs. If not, please take the time to read Judge Janet Bostwick's periodic reports (including in this newsletter) and to visit the Foundation's website for more information regarding our grantees and their essential work.

Against that background, and as we now are in the midst of our annual Foundation fundraising campaign, I thought it worthwhile to review a bit of history. The College has a proud and longstanding tradition, tracing to its early days, of supporting pro bono legal services providers through the Foundation – and what all of you have done is truly remarkable.

- The College created the Foundation in 2002, formally establishing a philanthropic arm duly qualified as a non-profit charity under section 501(c)(3) of the Internal Revenue Code.

- In its first full year of operation, the Foundation raised \$27,670 – all in direct contributions from Fellows of the College – and made a total of \$38,973 in grants to 17 providers of bankruptcy-related pro bono legal services.

- Over the course of the succeeding 19 years, the Foundation raised more than \$3 million and awarded more than 535 grants, totaling more than \$4 million, to over 500 organizations.

- In 2020, the Foundation raised more than \$389,000. With those funds (together with additional direct assistance from the College), the Foundation will make a total of \$456,200 in grants to 46 pro bono services providers, based on recommendations by the Pro Bono Committee.

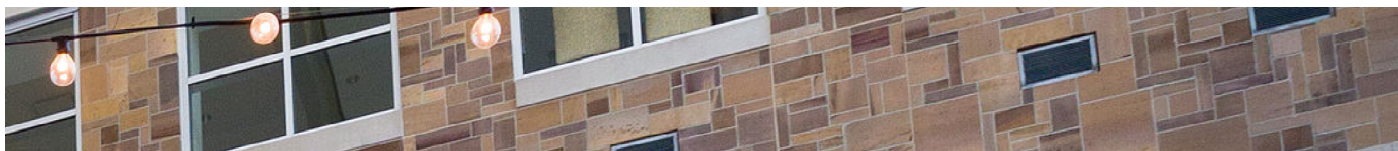
The numbers tell a compelling story. Since the inception of the Foundation, your giving has increased over 1300

percent. And on the eve of its twentieth anniversary, the Foundation is in stronger financial shape than ever before. Its annual administrative expenses remain extremely low, at approximately eight percent of total charitable outlays. Likewise, as did the College itself, the Foundation recently established a “quasi-endowment” to conservatively and prudently invest for the future – a long-term (and growing) fund that now holds only slightly less than \$2 million.

There is, in short, much in our history of which we can be tremendously proud. Yet there remains, perhaps now more than ever before, compelling need, and a great deal more that can and should be done. Whatever you might have heard, the pandemic is not over, and its long-term economic effects on the neediest in our midst are yet unknown. Even on the other side, there will remain, for the foreseeable future, a deep and ever-unmet need for the services our grantees provide.

We thus enter the heart of our 2021 campaign with profound gratitude for all you have done – but also with a request that you consider doing even more by making a tax-deductible gift to the Foundation before year-end. Please renew your support now or, better yet, if willing and able, increase your prior gift. Best of all, if you have not given in the past, make it a point to do so this year. Our longstanding goal has been to achieve 100 percent participation among our Fellows. We're not there yet, but are getting ever closer, and I know we can narrow the gap even further as the Foundation enters its third decade of service.

It's all quickly and easily done by [clicking here](#). THANK YOU for 20 wonderful years of generosity, and HAPPY HOLIDAYS. 🎄



### **Consultant's Corner continued from page 13**

have rebounded and are now above pre-pandemic levels. Everybody gets it now and recognizes that creativity and plenty of capital and patience are required to reposition and realize value from the malls which have played such vital economic and cultural roles in our communities.

#### **Movie Theatres: The jury's still out (even for those saved by a meme)**

When exhibitors faced an existential threat, they did what they needed to do with landlords and lenders. Recognizing that their collective futures depended on finding a solution—even if temporary--landlords provided massive rent deferrals and lenders forbore. Even though "tentpole" movies are now back in theatres and Oscar buzz abounds, attendance is still well below 2019 levels, albeit increasing. Audiences have gotten used to the convenience, comfort and affordability of streaming movies at home. Now concerns about the Omicron COVID-19 variant will further slow the return of moviegoers to theatres.

#### **Hospitality – Stark differences in recovery by market segment**

Recovery in the hospitality sector varies tremendously by property and market segmentation with those catering to the group meeting segment and business traveler in non-resort destinations still struggling. Industry participants point to 2024 as the year that properties will stabilize but this masks extremely stark differences in how individual properties are faring. It's the one property type for which I continue to provide guidance and expert testimony, usually in the context of single asset real estate cases.

#### **Co-working – The pandemic as silver lining**

COVID-19 also dealt a near fatal blow to co-working and flexible office space providers forcing several Chapter 11 filings, the most

notable and high profile of which included certain affiliates of IWG Plc operating as Regus in the U.S. The immediate effect of the pandemic was devastating as co-working/flexible office space users stayed away in droves and stopped paying licensing and user fees to their flexible office space provider.

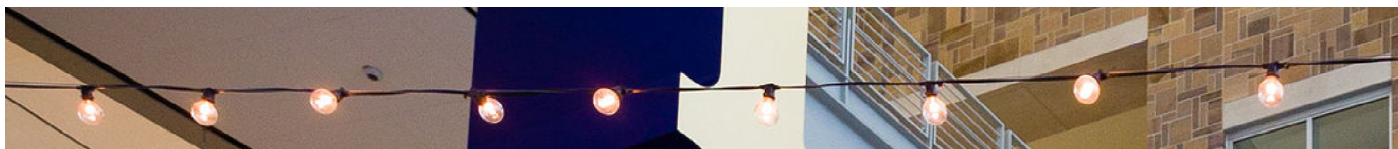
But oddly, the pandemic might have been the best thing to have happened to this industry. It cast a spotlight on a fundamental weakness -- the huge risk of short-term assets (user contracts) mismatched with long-term lease liabilities. Exposed to the very real risk of this model, companies increasingly pivoted to one more like the hospitality industry, adopting an "asset-light," management approach.

Co-working also offers users a real alternative to traditional long-term leases in urban centers, something many might not have seriously considered pre-COVID. The flexible office space model is just that: companies commit for shorter periods and use a fraction of the capital otherwise needed. Co-working affords users a way to provide workspace for their employees in a manner which is consistent with the hybrid model many are adopting.

#### **So, what exactly did I learn?**

With the seeming prospect of free money forever, we're all wondering about the future. Massive amounts of capital flooded the market before 2020 and the situation only has intensified. Although federal stimulus dollars and monetary policy have shielded many individuals, organizations and businesses from COVID's worst ravages, governments' largesse has, in many situations, supported and sustained weak and inefficient enterprises. I still believe the day of reckoning is inevitable, albeit impossible (at least for me) to predict.

*continued on page 32*



### [Consultant's Corner continued from page 31](#)

Which leads me to my final thought: We never really know what's going to happen. Yes, we do our best to anticipate change and its consequences. But we inevitably come up short. After nearly three decades in the restructuring business and having

worked through four real estate cycles plus a pandemic, I'll readily admit I haven't a clue about where we go from here. Rather, our time may be best spent helping our clients and constituents prepare for multiple scenarios and create more resilient and flexible organizations. ¶

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### [Pro Bono continued from page 7](#)

- The Pro Bono Project in New Orleans, LA will use the grant funds to expand its clinics on consumer debt and bankruptcy to new neighborhoods, as well as continue its legal education seminars to grow its volunteer attorney base.

- California Western School of Law Community Law Project in San Diego, CA will use the grant funds for its law school clinic program in which student volunteers assist clients in evaluating bankruptcy options. In the past year, the program has seen a 98% increase in individuals identifying with a consumer debt or bankruptcy problem.

- Legal Aid of Nebraska of Omaha, NE will use the grant funds to purchase equipment to expand its pro se bankruptcy clinics across the state. In the program, pro se debtors prepare their petition and pleadings on the computer with guidance from an attorney or paralegal. The grant will enable computer labs to be placed in other offices across the state.

These are just a few of this year's grantees and demonstrate the types of programs the College and Foundation support. On a separate page, you will find all the grantees listed, organized by Circuit. For each grant, members of the Pro Bono Committee spent considerable time reviewing the application, talking with the grantee, and evaluating the request considering the criteria developed by the Committee. The goal is to maximize the impact of our funds, focusing on programs that seek to recruit

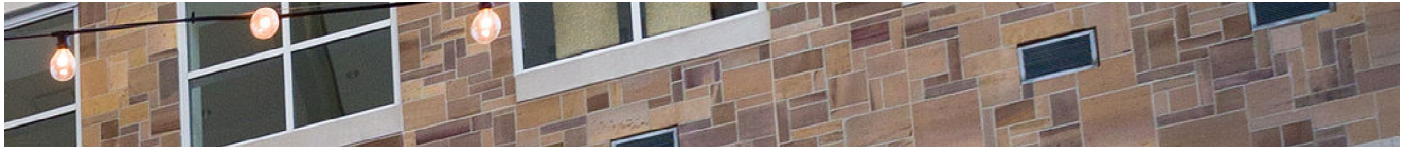
and train volunteers or assist pro se debtors through help desks and clinics.

This marks my final year as Pro Bono Chair, and I thank you for the opportunity. It has been a pleasure to see first-hand the results of the grants, through the thank you letters and reports from our grantees. My thanks to the Fellows, whose generosity make the grants possible. As bankruptcy professionals, you understand the severe trauma caused by financial distress for individuals, no matter which side of the bench you are on, or whether you deal with business or individual clients, debtors or creditors. For the most vulnerable populations our grantees serve, the grants from the College and Foundation provide a lifeline. The College and the Foundation continue to demonstrate their leadership through the support for the needs of the least among us. I am grateful for having been a small part of that support by chairing the Committee.

I also thank the members of the Pro Bono Committee, who spend significant time and effort on their review and evaluation of the grants. And without the dedicated assistance of Jenny Cudahy and Shari Bedker, the Committee could not do its work. My personal thanks as well to the Foundation Chair, Paul Harner, and the Committee's vice chair, Norm Pernick, for their invaluable support and advice.

Best wishes to everyone for the holidays and a Happy New Year. ¶





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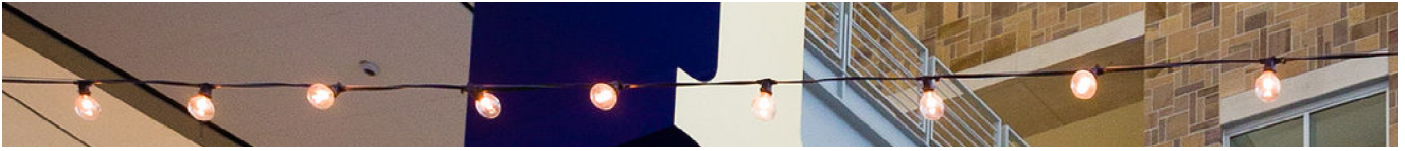


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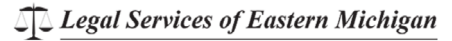


## 5TH CIRCUIT





## 6TH CIRCUIT



## 7TH CIRCUIT



Fund For Justice and Education



## 8TH CIRCUIT



## 9TH CIRCUIT

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LEGAL ACCESS  
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STEP UP TO  
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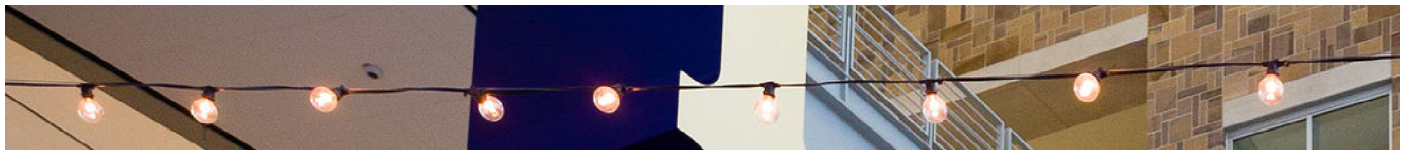
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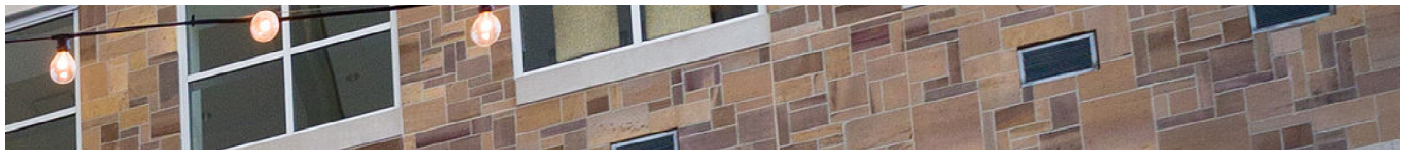
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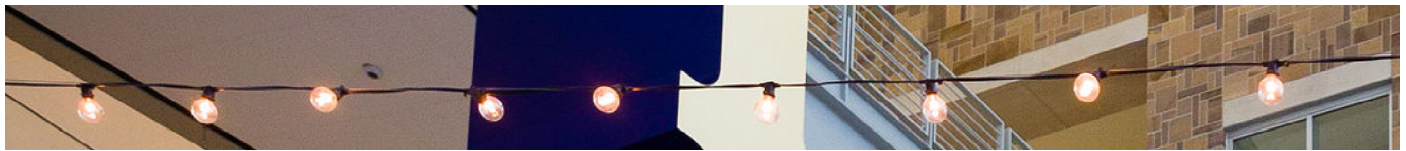


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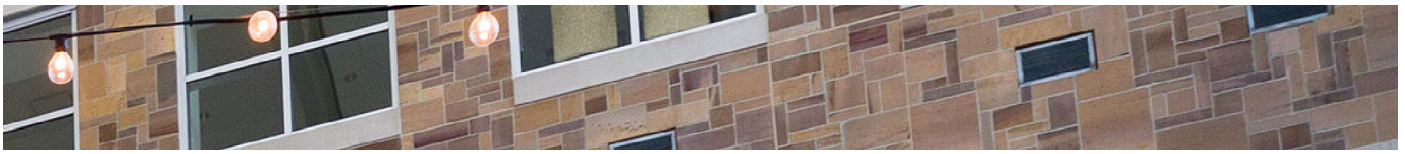
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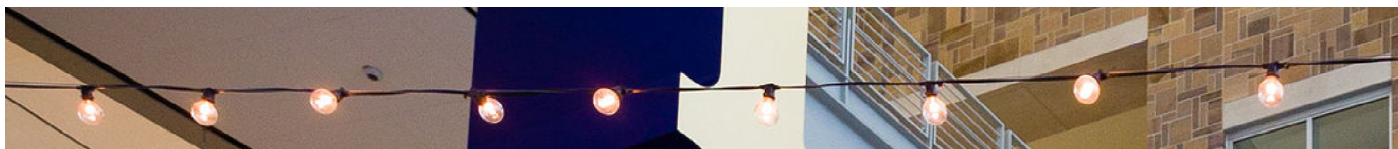
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## Focus on Fellows

We invite all Fellows to submit information about awards, news, and/or recent publications. Member highlights will be published on a bi-monthly basis to all Fellows through email or the College Columns as appropriate. If you have news about yourself or a colleague, please send announcements to Michelle Foster, ACB Communications Director, at [focus@amercol.org](mailto:focus@amercol.org).

**Bob Fishman** wrote an [article on bankruptcy mediation](#) for the American Bankruptcy Trustee Journal, the official publication of the National Association of Bankruptcy Trustees.

**Leonard Gilbert**, partner at Holland & Knight, was elected to the American Bar Association (ABA) Board of Governors.

**Stuart A. Gold** received the Barbara J. Rom Award for Bankruptcy Excellence from the Federal Bar Association, Eastern District of Michigan. He also published an article for the State Bar of Michigan Bar Journal, entitled – Best Practices for Consumer Bankruptcy Practitioners.

Retired Bankruptcy Judge **Randolph J. Haines** was presented the Judge William L. Norton, Jr. Judicial Excellence Award at the ABI luncheon during the NCBJ annual meeting in Indianapolis on Oct. 8. The Norton Award honors a retired or current bankruptcy judge who has been an outstanding educator, writer and scholar.

**Judge Harlin D. "Cooter" Hale** was selected to receive the 2021 American Inns of Court Bankruptcy Inn Alliance Distinguished Service Award, which recognizes a judge or attorney specializing in bankruptcy law who has exhibited ongoing dedication to the highest standards of the legal profession, the rule of law, and personal ethics and integrity.

**Robbin Itkin** was recognized as a visionary in Business of Law: Trends, Updates & Visionaries, a special feature published this week by L.A. Times B2B Publishing.

**Judge Robert J. Kressel** retired on June 30, 2021 after over 38 years as United States Bankruptcy Judge for the District in Minnesota, including 21 years on the Eighth Circuit Bankruptcy Appellate Panel.

**Connie Lahn**, has been selected as one of Minnesota Lawyer's Diversity and Inclusion honorees for 2021. The award honors individuals and groups that have made a significant impact with respect to diversity and inclusion in the community and within their organizations.

**Demetra Liggins** joined McGuireWoods in Houston.

**Brian Resnick**, partner at Davis Polk, was presented with WhyHunger's Harry Chapin Humanitarian Award at the organization's "Come Together" event. Brian was honored in recognition of his longtime support of WhyHunger and his contributions to its Drum Together campaign.

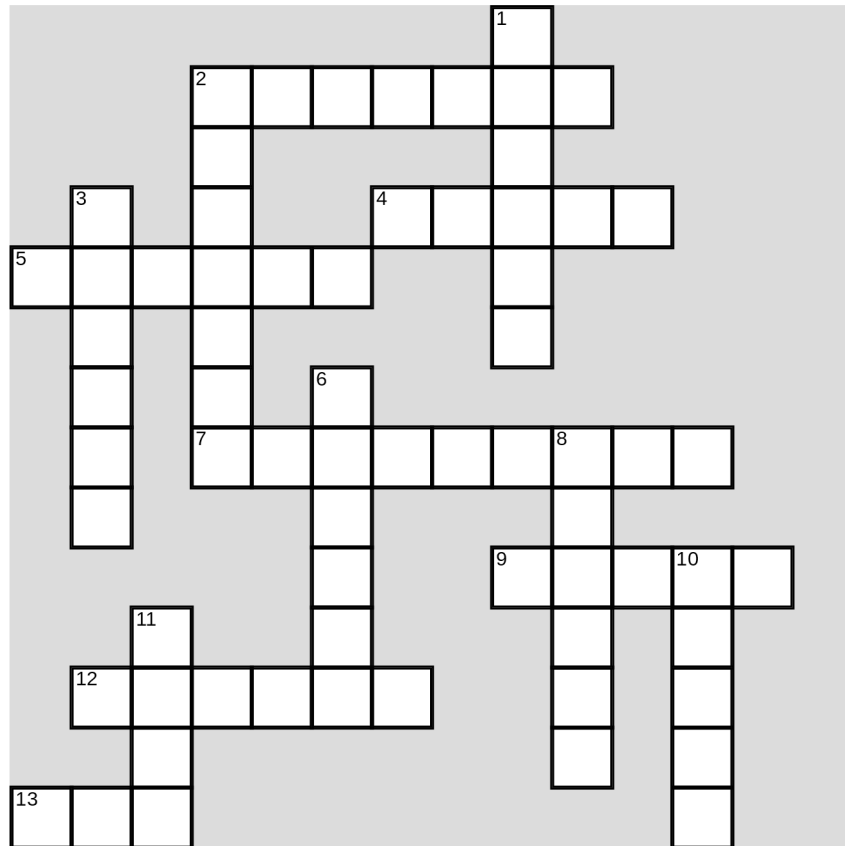
Former English Court of Appeal **Judge Sir David Richards** has joined One Essex Court in London with plans to take appointments as an arbitrator.

**Robert van Galen**, partner at NautaDutilh, published his book: An Introduction to European Insolvency Law. The book provides an introduction to the European legislation concerning insolvency and deals within the European Insolvency Regulation and three directives.



## Columns XWords

# 2022 Cometh!



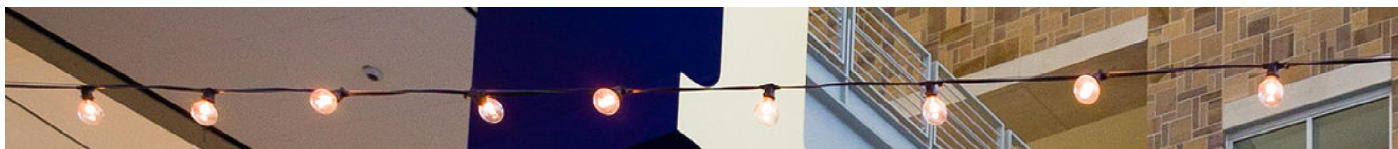
### Across

- 2 Latest Covid Worry
- 4 \_\_\_\_\_ Notes (new column)
- 5 Brown Denver Hotel
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- 9 Book Title by Wilkerson
- 12 College Pres.
- 13 Ch. 11 plan with limited fund for unsecureds

### Down

- 1 Consultants' new Column
- 2 NCBJ 2022 city
- 3 Our Foundation Chair
- 6 Newer Work Locale
- 8 \_\_\_\_\_ Smiles
- 10 2022 Inductees Class Thirty-\_\_\_\_\_.
- 11 Make your year-end Foundation \_\_\_\_\_.

*Answer Key on page 45*



## Upcoming Events

### **ACB Fourth Circuit Moot Court February 21, 2022**

The Education Committee of the DC and Fourth Circuits is pleased to announce a 2021 American College of Bankruptcy Fourth Circuit Moot Court. [Please download an application packet here.](#)

We expect to hold the moot in-person at the Prettyman Courthouse, 333 Constitution Avenue N.W., Washington D.C., 20001. (No surprise that all in-person events are accompanied by warnings—should it be unwise to proceed in-person, we will advise all involved.)

The day promises to be a great opportunity for the talented students who compete, as they gain experience and get valuable feedback from the six bankruptcy judges who will serve as moot court judges.

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### **Class 33 Induction and Events (2022) Thursday, March 31, 2022 – Friday, April 1, 2022**

The Class 33 Induction Ceremony and Events will be held at the Denver Art Museum on Friday, April 1, 2022 (no fooling!)

A more complete schedule will be provided in late December when the registration is available, but for your planning:

On March 31 the Foundation Board meeting and the President's Reception will be held in the afternoon.

On April 1, the College Board meeting will be in the morning, followed by circuit luncheons, educational sessions and the Induction Ceremony.

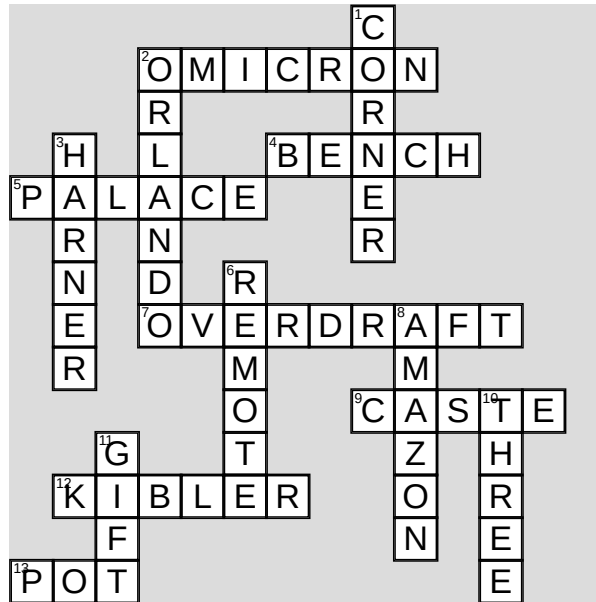
On April 2, there will be morning educational sessions and All Fellows luncheon with various committee meetings in the afternoon.

All the meetings and educational sessions will be held at the Brown Palace Hotel, 17TH Street, Denver, Colorado 80202.

[Learn more about the event plans here.](#)



## Columns XWord Puzzle Key



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### Email the Editors

We are constantly adding content to the Columns and making other updates. If you have input on what you would like to see here, please email us at:

Steven N. Berger, [snb@eblawyers.com](mailto:snb@eblawyers.com)  
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We value your input. Thank you!

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