



CLASS 30 INDUCTION
THE CROWN ROOM
HOTEL DEL CORONADO

COLLEGE COLUMNS

A MAGAZINE FOR AMERICAN COLLEGE OF BANKRUPTCY FELLOWS | MAY 2019



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College Columns Dec 2018 Issue

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From the Chair

Marc A. Levinson, *Orrick, Herrington & Sutcliffe LLP*



A word about the College’s and Foundation’s privacy policy, which can be accessed by clicking on [Privacy Policy](#) at the very bottom of the College website home page. It was last revised in May of 2018. The College does not sell personal data (such as email addresses). It uses personal data only for the purposes enumerated in the Policy; importantly, the use of the data does not include solicitations for educational events or charitable events, no matter how worthy, if they are not sponsored by the College. Needless to say, it doesn’t include job change or law firm merger announcements. That’s not to say that Fellows cannot create their own email address list using addresses already in their personal email folders or those gleaned from the College online directory. But in part because Fellows have the opportunity to opt out from including their email addresses (and other data) in the directory, the use of a College email list you may have on account of a College or Foundation leadership role is verboten. So is hitting **REPLY TO ALL** to an email sent to you by, for example, a Circuit Regent or committee chair. For that reason, leadership encourages widely distributed emails to be addressed to Shari Bedker and that all other recipients (all Fellows in a Circuit, for example) be bcc’s. Thank you in advance for your compliance with the Policy. ¶





From the Colum...nist.....

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




Ahh, refreshing! That was the prevalent sentiment on the tip of everyone’s tongue at our Spring Coronado meetings. The atmosphere seemed lighter, brighter, and enhanced by fresh ocean air and an upbeat vibe that permeated a very collegial weekend. The majestic Hotel Del Coronado made an appropriate backdrop for the festivities, including the regal

Crown Room as the setting for the Induction Ceremony and awards. For an interesting footnote to the history of the Del, see the article about some early visitors to the hotel by Ken Cannon, *infra*.

Our College leadership conducted succinct business meetings and College staff worked hard to keep us all moving in the right direction... whether to a beachside reception or the upstairs meeting room and final luncheon.

In this issue of the *Columns*, we express our appreciation to outgoing editor **Lynnette Warman**, who shepherded this publication for several years. We welcome our new Co-Editor **Deborah Langehennig** of Austin, Texas to this, her first edition.

Our continued goal is to reach out to all Fellows to encourage your participation in the *Columns* as an open forum for substantive bankruptcy material, ideas for the College, reports from leadership, and items reflective of the collegiality between our Fellows and the efforts to enhance the good works of the College. Our items in “Focus on Fellows,” “Beyond the Columns,” “Between the Columns,” oral history teasers, and plentiful reports and other submissions in this issue underscore an increasing participation for which we are grateful. See you in the fall in D.C.! 



In This Issue

- To Coronado...And Beyond!!!.....4
- Class 31 Nominations.....5
- Foundation Update.....6
- From the Pro Bono Committee.....7
- More From The Chair.....8
- College and Foundation Investment and Reserve Policies.....10
- International Committee Update.....11
- Doing The Splits: Passive Aggressive?.....13
- Columns XWords.....17
- ACB Helps Law Students Prepare for National Moot Court.....18
- Focus on Fellows.....20
- Say What? National Bankruptcy Archives Quotes.....21
- A Polygamist at the Hotel Del Coronado in 1896.....22
- Beyond the Columns.....23
- 2019 Patrons & Sponsors.....25
- In Memoriam.....27
- 2019 Foundation Donations.....28
- 2019 Fall All-Fellows.....30

To Coronado... And Beyond!!! (But Not Without Our Patrons and Sponsors)

Mark D. Bloom, Greenberg Traurig, LLP
President, American College of Bankruptcy



One of the many great things about working so closely with our Chair Marc Levinson is that he's not the kind of leader who hogs all the good stuff for himself. And so it is with appreciation and excitement that I get the pleasure to devote the first part of my Column to a report

on the College's first-ever Annual Meeting and Induction Ceremony held outside of Washington, D.C.

The venue for the March 14-16 meeting was the iconic Hotel del Coronado, located across the beautiful bay from San Diego, California. For some of the 204 Fellows who attended (and brought 203 guests!) the festivities began early, with a separate international program co-sponsored with the USA/Canada Regional Committee of the International Insolvency Institute on Thursday afternoon. By all accounts, both the international program – and the College's first-ever Clambake on the Beach -- were a great success, and the College is grateful to Ninth Circuit Fellow Robbin Itkin for organizing the joint event with the III.

Taking full advantage of San Diego's reliably magnificent Spring weather (bright sunshine after a full week of rain, the locals told us), we held as many of our traditional events as possible outdoors. Highlights included the Distinguished Law Students Reception on Thursday evening, where we welcomed this year's impressive crop of future bankruptcy practitioners from the First, Third, Fourth, Ninth and Eleventh Circuits; the Champagne Reception for our new International Fellows on Friday afternoon; and the Grand Reception in the Del's lovely courtyard honoring our diverse and talented new Class XXX Fellows on Friday evening.

We moved indoors for the Induction Ceremony for those Class XXX Fellows, and for presentation of the Distinguished Service Award to our esteemed past Chair and President Jan Baker. The special venue for this crowning event was the Del's legendary Crown Room, named for the crown chandeliers designed by Wizard of Oz author L. Frank Baum. The Del boasts that this special venue seats up to 450 guests, and the 443 Fellows, inductees and guests (exceeding our 2018 turnout in Washington!) filled it to joyous capacity. As Stephen Lerner, Chair of our Board of Regents, discusses the Induction Ceremony in his Column, I will focus on the Distinguished Service Award.

The difficult task of selecting each year's recipient from among so many Fellows of the College falls to the Distinguished Service Award Committee, chaired for the past four years by Ninth Circuit Fellow Howard Weg. As modified by the Board in October of 2018, the rigorous criteria for the Award bear repeating here:

The recipient must have made significant accomplishments in improving the administration of justice in the insolvency and bankruptcy field:

1. The recipient must have provided distinguished service consistently rendered over a considerable period of time or a single outstanding achievement in a particular year. (The fact that a single achievement may have occurred before the year of recognition is not material.);
2. The accomplishments must arise from voluntary activities rather than for services rendered to a client as a paid professional. (This is not intended to exclude members of the judiciary, Congress, or the academic community.);
3. The recipient shall be a member of the American College of Bankruptcy;

continued on page 16



Class 31 Nominations

*Stephen D. Lerner, Squire Patton Boggs (US) LLP
Chair, Board of Regents*



It was wonderful to see such a fabulous turnout for the Annual Induction Weekend in sunny San Diego in March. We welcomed 36 new Fellows to the College and advanced our goal of enhancing the diversity of our ranks. As we now embark on the process to

nominate the 31st Class of Fellows, I ask that you thoughtfully consider how you will contribute meaningfully to our efforts to make the College even more reflective and representative of the diverse dimensions within our professional circles, including with reference to race, ethnicity, gender, sexual orientation, physical ability, type of practice and geography.

The Board of Regents will be meeting this October during NCBJ in Washington, D.C. to nominate the Class 31 Fellows who will be inducted next March in Washington, D.C. We admit only the most worthy candidates – truly the best and brightest insolvency professionals and academics. I hope that many of you already are in the process of working on a nominating package, the deadline for completion of which is June 11th. Completing the nominations materials takes a lot of work and the process is strictly confidential -- candidates must not know that they are being considered.

As is our custom, before you begin work on a nomination, we ask that you reach out to the relevant Regent or Chair of the Judicial Nominating Committee or International Fellows Nominating Committee to preview your proposed nominee. After nomination packages are submitted to the Regent or Nominating Committee, the members of each Circuit Admissions Council and the two Nominating Committees undertake the important and arduous task of reviewing and vetting the nominations. They will be contacting many of

you on a strictly confidential basis for your input about potential nominees. Each year, more than 100 College Fellows are involved in the nominations process. The list of Regents, members of the Circuit Admissions Councils and the Chairs and members of the two Nominating Committees can be accessed on the College website at:

[https://
www.americancollegeofbankruptcy.com/
about/membership-information/](https://www.americancollegeofbankruptcy.com/about/membership-information/).

We enthusiastically welcome your active participation in the nominating process. Nominees must possess a number of qualities to meet the exacting standards of the College. These are discussed below and are set out in the bylaws of the College (found in the About section of the College website at the URL noted above).

Per the bylaws, the College honors those professionals whose sustained performance in the practice of their profession exemplify the highest standards of professionalism among bankruptcy specialists by granting them membership as Fellows. Fellows consist of bankruptcy professionals, including lawyers, judges, law professors, accountants, appraisers, auctioneers, officers of the government, officers of lending institutions, reorganization, workout and liquidation specialists and others who are dedicated to the improvement of the bankruptcy process and the enhancement of the professional quality of and public respect for the insolvency and bankruptcy practice.

Membership is by invitation to honor those individuals who have proven to their peers, and to the bar, bench and public, through long, continuous performance in their bankruptcy specialty that they possess:

- the highest professional qualifications and ethical standards
- that high level of character, integrity, professional expertise and leadership which demonstrates the likelihood that they will

[continued on page 12](#)

Foundation Update

Paul E. Harner, Ballard Spahr LLP
Chair, ACB Foundation

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Those of you who were able to attend our wonderful meeting in San Diego – and our all-Fellows luncheon – will have heard these highlights. But I am so pleased to now share with all of you that the 2018 Foundation fundraising campaign produced exciting results in a number of significant respects. They include, most importantly, its ultimate grand total.

Total giving for 2018 was \$328,489 – representing the third consecutive year that the campaign broke the magic \$300,000 barrier, and surpassing our 2017 result by \$28,234 (an improvement of 9.4%). The 2018 result also was an all-time Foundation record, outpacing the previous high, achieved in 2016, by approximately \$15,000.


Importantly, we also substantially exceeded our lofty goals for the 2018 campaign. Those were a conservatively budgeted goal of \$275,000, and an announced target of \$315,000. And perhaps the best news – other than the grand total – is that donor participation increased substantially in 2018, to approximately 70%, versus 60% in 2017.

Average giving also has been increasing – although only slightly. And not at the pace we had hoped.

Along those lines, we also continue to pursue other fundraising opportunities, including retirement fund donations (which were significant last year) and bequests.

We nonetheless are facing a challenge. Our giving levels still fall substantially short of our total *pro bono* grants. As a result, the Foundation remains dependent on funding from the College above and beyond your contributions, to fund the grants awarded by Janet Bostwick's hardworking Pro Bono Committee.

You have been so generous. The Foundation board and our other circuit fundraisers will be asking you to be equally generous yet again this year. The work of the Foundation is so very critical, and I urge you to read Janet's great accompanying column for details.

I am so looking forward to seeing all of you this Fall! 



AMERICAN COLLEGE of BANKRUPTCY

Foundation



From the Pro Bono Committee

Janet E. Bostwick, Janet E. Bostwick, PC
Chair, Pro Bono Committee



Last November, as Chair of the Pro Bono Committee, I had the privilege to send the Foundation's grant checks. The Foundation funded grants totaling \$448,000 to 48 organizations in 27 different states (including the District of Columbia.) I

soon learned that the real pleasure was the numerous thank you letters and press releases I received from our grantees. Our grantees truly appreciate the support of the College and Foundation to enable them to continue their work.

But, the Committee is only able to do its work because of the generosity of the Fellows by their donations to the Foundation. (And the support of the College, which provides the Foundation with additional funding for grants.) So, let me share with you a few thank you notes from our grantees, in appreciation of the difference you make through your support:

From Conejo Free Clinic, Thousand Oaks, California:

"On behalf of the Conejo Free Clinic Legal Clinic, our Board of Directors and our Legal Team, we thank you for your letter of November 9 regarding our first grant from the American College of Bankruptcy Foundation. We are truly thrilled to be selected. To receive your \$10,000 grant honors our program and the extraordinary bankruptcy lawyers who give their personal and professional time here, some for over ten years, to help low income people without legal care access."

(The grant to Conejo will support the volunteer bankruptcy clinics run by Conejo and their efforts to recruit new volunteers. At the bankruptcy clinics, pro bono volunteer attorneys meet with clients and assist pro se filers navigating bankruptcy and individuals facing debt.)

From the Southeast Louisiana Legal Services, New Orleans, Louisiana:

"Your investment in justice at SLLS will make a real difference. A recent study on the economic impact of civil legal aid was completed by the Louisiana Bar Foundation. It found that for every dollar invested in civil legal aid, there was an \$8.73 social return on investment. The leverage from pro bono lawyers in projects like the one just funded by the Foundation brings in additional leverage to our community."

(The 2018 grant will underwrite a new initiative by SLLS to coordinate with a prosperity program operated by United Way and the City of New Orleans. The prosperity center program connects low income individuals with employment and financial capability programs. The existing program did not address consumer debt, which is often a barrier to economic opportunities. The grant by the Foundation will enable SLLS to provide consumer law clinics and community legal education in coordination with the prosperity program.)

From the Catholic Charities of the Archdiocese of Chicago, Chicago, Illinois:

"We are honored to be selected as a grantee organization this year, and are deeply appreciative of the generous award of \$7,500. This grant will help Catholic Charities Legal Assistance Department (CCLA) to provide legal education seminars on bankruptcy law and debtor's rights. In the coming year, CCLA will present at least 12 seminars on Chapters 7 and 13 bankruptcy protection to disadvantaged communities in Chicago, as well as provide individual consultations and legal services for the seminar participants. CCLA will also offer four seminars to volunteer attorneys seeking to provide pro bono assistance in the bankruptcy/debtor's rights areas, two of which will focus on credit report analysis. We are privileged to have the American College of Bankruptcy and the

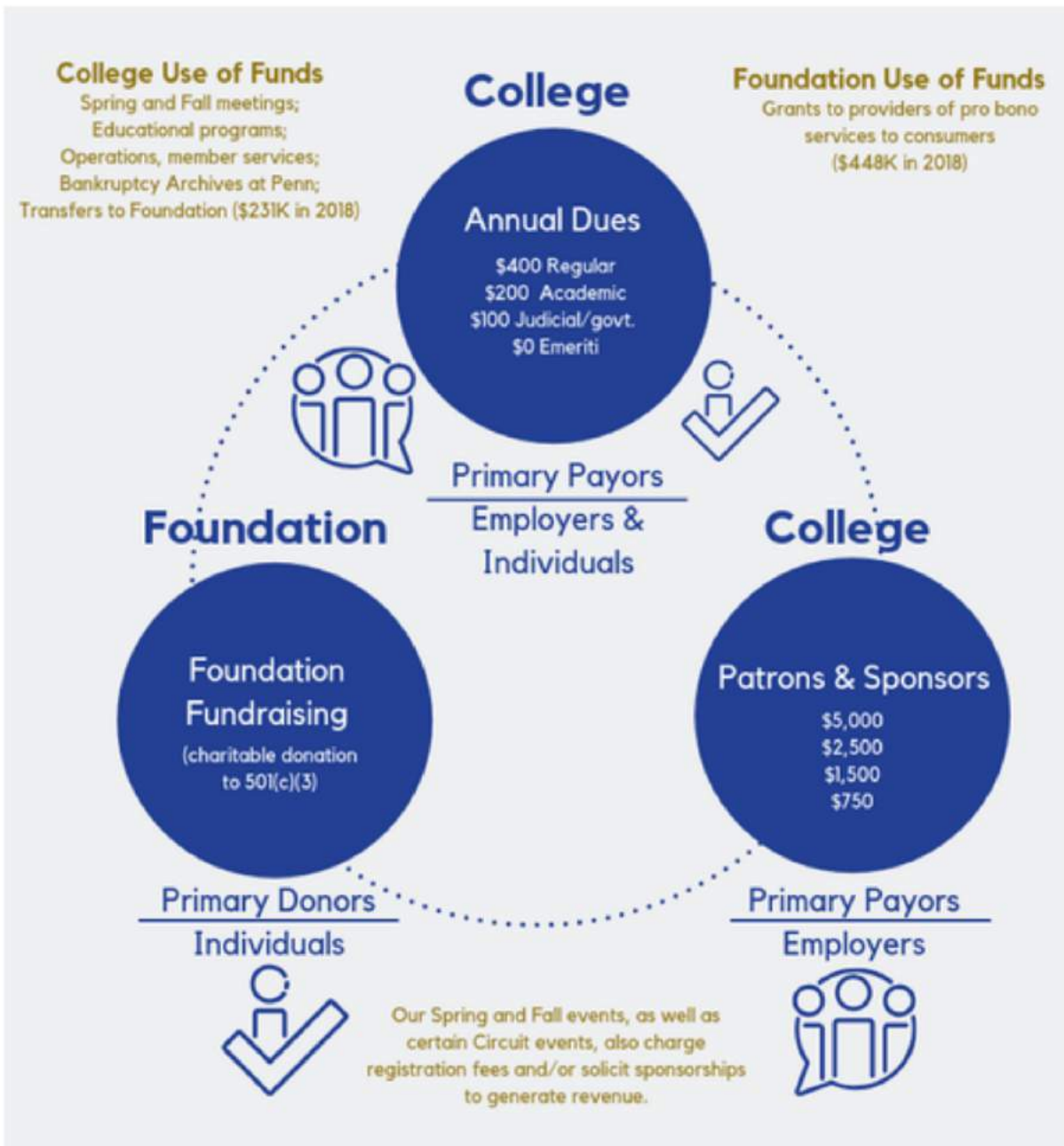
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More from the Chair...

Marc A. Levinson, Orrick, Herrington & Sutcliffe LLP

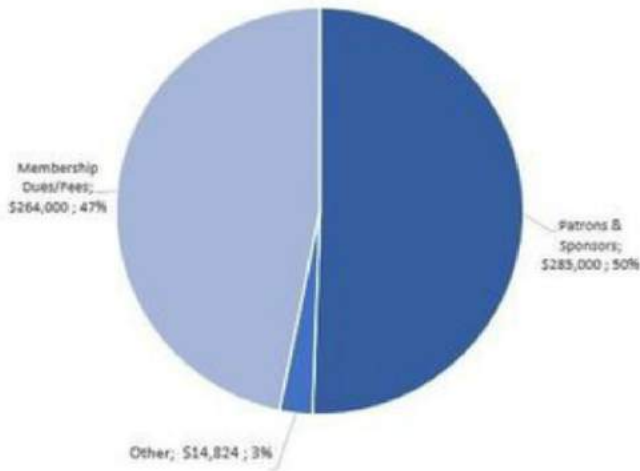
There is confusion among some Fellows about how the College and the ACB Foundation are funded and how they spend the funds that they collect. For example, I was told by one Fellow that he didn't intend to contribute to the Foundation because his big law firm did. Wrong. While the Foundation does receive funds from the College (which receives significant funding from employers), the bulk of the Foundation's funding comes from tax-deductible contributions from individual Fellows. Indeed, almost 70% of the Fellows contributed in 2018. The following charts show the funding sources as well as the use of those funds by the College and by the Foundation. I hope that they shed some light on the finances of both. 🏛️



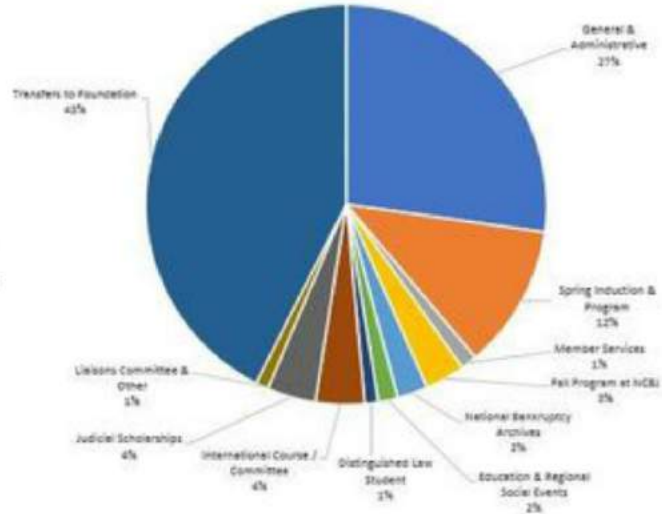


American College of Bankruptcy

2018 Core Receipts ⁽¹⁾



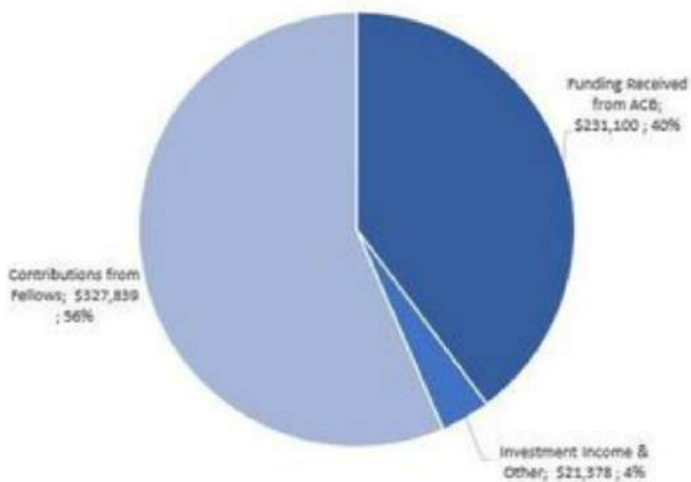
2018 Expenses



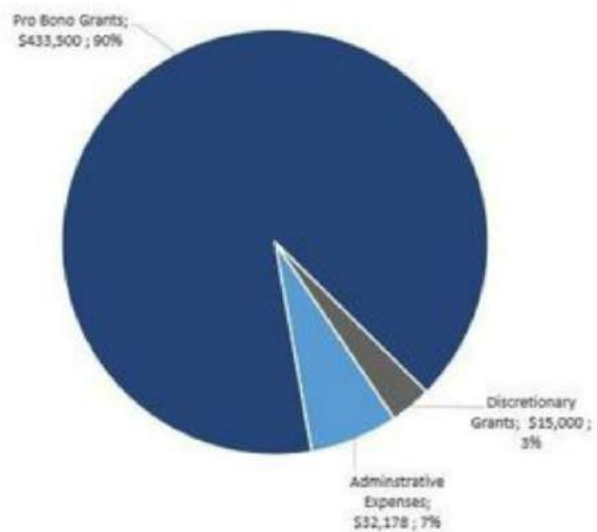
(1) Excludes program and event revenue and sponsorship, which are offset against related expenses.

American College of Bankruptcy Foundation

2018 Receipts



2018 Expenses





College and Foundation Investment and Reserve Policies

*Melissa Kibler, Mackinac Partners
Treasurer, American College of Bankruptcy*



Over the past year, in response to the work of the Ad Hoc Endowment Task Force, the joint College/Foundation Finance Committee has undertaken a project to develop and implement

investment and reserve policies. The group first explored various options for the retention of an advisor to assist in decisions on investment of College and Foundation funds. In March 2019, the College and Foundation Boards approved the engagement of Vanguard Institutional Advisory Services, which offers discretionary investment management services specifically directed to the needs of nonprofits.

Developing investment objectives necessarily required assessment of recommended reserves for the College and the Foundation. Based on the Finance Committee's consideration of best practices and the organizational circumstances and risk factors of the College and the Foundation, their respective Boards agreed to establish the following funds and reserves:

- i. Undesignated operating funds intended to meet day-to-day working capital needs.
- ii. Board designated operating reserves intended for use in unusual circumstances or for unforeseen financial needs.
- iii. Board designated special purpose operating reserves intended to fund budgeted grants to be made by the Foundation.
- iv. Board designated quasi-endowment funds intended to produce income, rather than to fund operations or grants.

The anticipated level of reserves results in an initial operating reserve ratio as a percentage of annual budgeted expenses of approximately

70% for the College and 99% for the Foundation, both well within recommended benchmarks.

The Finance Committee and Executive Committees of the College and the Foundation are currently analyzing recommended asset allocations and investments and completing the process of opening accounts and transferring funds from the certificates of deposit in which they have historically been invested. Consistent with the goal of maintaining organizational and fiscal stability, the board designated operating reserves will be invested in short-term or money market funds that emphasize limited volatility and current income. The board designated quasi-endowment funds will be invested in long-term investments with the objective of growing Foundation resources available for pro bono grants through increased investment returns and increased College contributions to compliment ongoing efforts to increase donations to the Foundation.

The investments will be overseen by an Investment Subcommittee of the Finance Committee, based on direction from the College and Foundation Boards and Executive Committees, which will receive regular investment reporting. The Finance Committee is working with Vanguard to document the investment policy and is drafting a reserve policy, each of which also will be subject to annual review by the College and Foundation Boards. ¶





International Committee Update

*Robert B. Millner, Dentons LLP
Chair, International Committee*



The ACB International Committee will meet on Saturday, June 15, during the 2019 International Insolvency Institute Conference in Barcelona. At 2:00 p.m. (GMT+2), the committee will discuss integration of international Fellows and future efforts at joint programming with the International Insolvency Institute. At 3:00 p.m. (GMT+2), they will discuss the work of their subcommittee as to proposals by the National Bankruptcy Conference regarding Chapter 15 of the Bankruptcy Code. The meetings will be at the Hotel Majestic in the Alboran and Tierreno Rooms.

Interested in attending? [Click here](#) for more information and to register. ¶



USA/Canada Regional Program

On Thursday, March 14th, the International Insolvency Institute (III), in partnership with the College, offered programming at the Hotel del Coronado in sunny California. The afternoon sessions included several College Fellow panelists who discussed Chapter 15 cross-border issues and judicial communication and cooperation. Upon conclusion of the programming, registrants and their guests were invited to a clambake on the beach, featuring live music from two of bankruptcy's best musicians, George Kelakos and Mitch Ryan.

In addition, III Members were invited to the College's afternoon education session and champagne reception on Friday, March 15th. ¶





**Class 31 Nominations
continued from page 5**

continue to contribute to the enhancement of bankruptcy scholarship, continuing education, and the bankruptcy process

- a commitment to fostering and furthering the objectives of the College
- sustained, exceptionally high quality professional services to clients, bar, bench, and public
- significant evidence of scholarship, teaching, lecturing, and/or distinguished published writings on bankruptcy practice, procedure, philosophy, improvements and reforms which demonstrates a consistent contribution to the enhancement of bankruptcy literature, education, practice and process.

Nomination applications will be reviewed and thoroughly vetted by the relevant Circuit Admissions Councils and Nominating Committees between June 11th and August 19th. They will then vote to determine their recommended candidates after which additional due diligence will be conducted. The substantial vetting is an important check and balance to ensure that all relevant information on nominees is obtained and available to the Board of Regents. The Board of Regents will then meet on October 30th during the NCBJ to make final decisions on the admissions of new Fellows for the 31st Class of the College.

On behalf of all the Regents, the Chairs of the Nominating Committees and the members of the Circuit Admissions Councils and Nominating Committees, I want to thank you in advance for your participation in this critically important process. It is among the most important functions of the College, and your participation will help guarantee that the College continues to be the preeminent organization that it is. ¶

**From the Pro Bono Committee
continued from page 7**

American College of Bankruptcy Foundation as vital partners.”

(With funds from the 2018 grant, CCLA will offer bilingual educational materials and present workshops on bankruptcy for Spanish and English speakers in low-income areas of Chicago and neighboring suburbs.)

This year’s grant process has already begun, with applications due June 1, 2019. The Committee will again take on the difficult task of choosing from the many worthy programs that seek funds, as requests typically exceed the amount of our grant budget. I thank in advance the members of the Committee for the significant time and effort they will spend reviewing grants and doing the work of the Committee. And I look forward to sharing with you more stories from our grantees, as well as the results of our work this year. ¶





Doing the Splits: Circuit Splits Under the Bankruptcy Code

Annette W. Jarvis, Dorsey & Whitney LLP

Passive Aggressive?

"Exercising Control" -- Does Section 362(a)(3) Require an Affirmative Act or is Passively Holding an Asset Enough to Violate the Stay?

For nearly thirty years, courts have been divided on the question of whether a creditor's passive holding of an asset that is property of the estate can, in and of itself, constitute a violation of the automatic stay pursuant to Section 362(a)(3) of the Bankruptcy Code. With a number of recent decisions from both camps, this split appears likely to persist unless and until the Supreme Court takes up the issue.

Section 362(a)(3) of the Bankruptcy Code provides in part that the filing of a bankruptcy petition operates as a stay to "any act to obtain possession of property of the estate or of property from the estate *or to exercise control over property of the estate.*" The question dividing the courts is whether the prohibition against exercising control over property of the estate includes not only overt acts but also a party's inaction, such as failing to return a repossessed automobile upon notice of the owner's bankruptcy filing.

The phrase "or to exercise control over property of the estate" was added into Section 362(a)(3) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, but without any Congressional explanation. This has led to a debate among the circuits both as to how to interpret the plain language of the statute and the legislative intent behind this statutory revision.

continued on page 14



Doing the Splits ***continued from page 13***

The Eighth Circuit started the debate in 1989 in *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989). The pre-petition seizure of property under a writ of execution with an intervening bankruptcy filing prior to disposition of the property to pay the judgment creditor framed the issue. When the judgment creditor refused to return the property upon the filing of bankruptcy, the debtor instituted a turnover proceeding and alleged a violation of the stay. Meshing the language of Section 542 with Section 362(a)(3), the Eighth Circuit held that—in the light of a duty to turnover estate property under Section 542—the passive retention of such property by a judgment creditor constituted “a prohibited attempt to ‘exercise control over property of the estate’ in violation of the stay.” *Id.* at 775. The Eighth Circuit also upheld punitive damages in the case, noting that “the efforts by creditor’s controlling officer to have the debtor excommunicated from his church . . . [as the creditor] brazenly attempted to punish the debtor for pursuing his rights given by the code” was sufficient to prove “appropriate circumstances” required for punitive damages. *Id.*

The D.C. Circuit answered and created the circuit split in *U.S. v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991). The property at issue was a software system, and the alleged violator of the automatic stay was the Department of Justice itself. Reasoning that the words of the statute did not create an affirmative duty to remedy acts taken prior to the filing of the bankruptcy petition, and reinforcing this conclusion by a discussion of the limits of bankruptcy court jurisdiction and the turnover provisions of Section 542, the D.C. Circuit concluded that because the Department had taken no affirmative acts since the filing of the bankruptcy petition, no stay violation occurred. The Circuit concluded on a memorable note: “Offensive as lawless conduct by one branch of government may be, however . . . it does not justify another’s lawlessness.” *Id.* at 1475.

The Eighth Circuit’s position soon became the

majority opinion as the Ninth, Seventh and Second Circuits followed its lead in decisions rendered in 1996, 2009, and 2013. *Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. GMAC, LLC*, 566 F.3d 699 (7th Cir. 2009); *Cal. Empl. Dev. Dep’t. v. Taxel (In re Del Mission)*, 98 F.3d 1147 (9th Cir. 1996). These Circuits not only relied on the plain meaning of “exercise control” and the interaction of Section 542 with Section 362(a)(3), but looked also to the policies and practicalities of the Supreme Court’s decision in *Whiting Pools* to reach the conclusion that the statute should be read expansively to protect all interests of a debtor or estate in order to fulfill the rehabilitative purposes of bankruptcy law. *See, e.g., In re Weber*, 719 F.3d at 75 and *Thompson v. GMAC, LLC*, 566 F.3d at 701, citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983).

Just as it began to look as if the circuits were coalescing around this majority view, more recent decisions in 2017 and 2018 have revived the minority view and the circuit debate. The Tenth Circuit weighed in to follow the D.C. Circuit’s position that passive retention of property of the estate does not violate Section 362(a)(3) in *Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 740 Fed. Appx. 163, 2018 U.S. App. LEXIS 29152, 2018 WL 5045613 (10th Cir. Oct. 17, 2018) and *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017). In the Cowan case, the Tenth Circuit criticized the majority view as being driving by “practical considerations” and “policy considerations.” *In re Cowen*, 849 F.3d at 948. It noted that the plain language of the statute requires a court not only to consider the plain meaning of “exercise control,” but the grammatical context of the phrase, which prohibits “any act . . . to exercise control over property of the estate” with the plain meaning of “act” requiring the party to “take action” or “do something.” *Id.* at 949. As summarized succinctly, the Tenth Circuit stated: “Stay means stay, not go.” *Id.* However, while this reaffirmed the minority view, this was not the end of the story in this case. The Tenth Circuit explained that while the pre-petition acts of luring the debtor “under false pretenses” to

continued on page 14



repossess the trucks at issue and threatening the debtor and his young son with a gang of men and a can of mace to accomplish that repossession in violation of Colorado law did not violate the stay just because the creditors refused to return the trucks post-petition, there could still be a violation of the stay based on post-petition acts taken by the creditors in an “attempt to convince the Court that [the debtor’s] rights in the Trucks had been terminated pre-bankruptcy.” *Id.* at 945-46. The Circuit noted that the bankruptcy court found that the creditors “manufactured the paperwork . . . after the bankruptcy filing,” produced “likely forged documents and . . . perjured testimony” in the court, and “coached their witnesses on what to testify to during [...] breaks,” and remanded the case for the bankruptcy court to determine whether these “would qualify as post-petition acts to exercise control over the debtor’s property in violation of the automatic stay.” *Id.* at 951.

The Third Circuit has yet to weigh in on this split, but a district court in the Third Circuit revisited the issue in a case involving a 2008 Chevrolet Corvette that had been purchased under a retail installment contract and repossessed prior to its owner’s bankruptcy filing. *Denby-Peterson v. Nu2u Auto World*, 595 B.R. 184 (D.N.J. 2018). While the U.S. District Court for the District of New Jersey reviewed the issue as one of first impression in the Third Circuit, it noted that “[t]his District, according to the Bankruptcy Court, has followed the minority position for the past twenty years.” *Id.* at 190. Unable to find reported cases to back up the lower court’s finding, the Court nonetheless adopted the minority position, finding it to be “more persuasive,” following the Tenth Circuit’s statutory construction in *Cowen* that Section 362(a)(3) only prohibits “any act . . . to exercise control over property of the estate.” *Id.* At 190 (emphasis in original).

Even within the Seventh Circuit, which came down on the side of passively holding property of the estate as violative of the stay, decisions rendered in this past year are still addressing this hot issue. *In re Scott*, 584 B.R.

252 (Bankr. N.D. Ill. 2018); *In re Peake*, 588 B.R. 811 (Bankr. N.D. Ill. 2018); *Cross v. City of Chicago*, 584 B.R. 833 (Bankr. N.D. Ill. 2018). A recent decision by the Bankruptcy Court for the Northern District of Illinois involved a debtor’s vehicle, which had been seized and impounded pre-petition by the City of Chicago. *In re Fulton*, 2018 Bankr. LEXIS 1555, 2018 WL 2392854 (Bankr. N.D. Ill. 2018); The City argued, among other things, that “the City’s passive possession of the Debtor’s vehicle is its means of maintaining perfection of its possessory lien, and thus, excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(3).” *Id.* at 2018 Bankr. LEXIS 1555 *10. The court rejected the City’s arguments, stating, “The City is attempting to destroy a basic bankruptcy protection. It has no basis [...] to continue to hold vehicles of the debtor, seized prepetition, once the debtor made the request for turnover. The City does not have a possessory lien pursuant to Illinois law, and even if it did, such lien would not be excepted from the automatic stay.” *Id.* at 2018 Bankr. LEXIS 1555 *9-10.

With the proliferation of decisions in the past two years, and the recent reemergence of the minority view, this circuit split is ripe for Supreme Court intervention. 🏛️



Annette represents banks, financial institutions, and numerous other parties nationwide in resolving concerns related to Chapter 11 bankruptcy cases and out-of-court

workouts. She is a member of her firm’s Management Committee and the Partner-in-Charge of the Transactions Practice Groups at Dorsey.



***To Coronado... And Beyond
continued from page 4***

4. The recipient must distinguish himself or herself or his or her institution in a manner and in matters that are consistent with the goals and purposes of the College; and

5. Participation in or service to the College will be considered when reviewing candidates for the award.

Jan Baker does not merely check all these boxes; his life and career are a testimony to public service to the bar and to the Houston and New York communities in which he chose to live and practice -- after graduation from college and work at a camp in East Africa aiding refugees who fled from genocide in Rwanda.

In a fittingly emotional role reversal, Jan elected to be introduced by his dear friend Judge Thomas L. Ambro, who had selected Jan to introduce him when Judge Ambro received the same Award back in 2017. Judge Ambro's introduction captured the essence of Jan Baker as role model, teacher, mentor and friend, and the humility with which he fulfills all of these roles.

After that memorable Friday evening, we were treated on Saturday morning to yet another outstanding educational program organized by our Scholar in Residence, Professor Ralph Brubaker. Ralph concluded his three-year term in that position at the San Diego meeting, and we are all indebted to him for maintaining so ably the College's longstanding tradition of thoughtful, provocative and topical programs on a wide variety of issues. We are confident that his successor, Professor Susan Block-Lieb, will continue the tradition of great educational programs.

By every measure, the San Diego Annual Meeting was a great success, as confirmed by a survey distributed to all Fellows in the following week. Almost 98% of the 143 respondents who attended the meeting were highly satisfied or satisfied with San Diego.

While we will return to Washington, D.C. for 2020 and 2021, almost 77% of the 248 Fellows who responded to the survey expressed interest in looking outside of Washington for our 2022 Annual Meeting. College leadership is considering at least two such venues, and will make a recommendation to the Board at the Fall Meeting in Washington DC in October.

And finally a word about the College's Patrons and Sponsors Program. On pages 8-9 in this edition of College Columns, you will find beautifully designed charts by the wonderful Carole McNamara of Shari's staff and the College's great Treasurer, Melissa Kibler, graphically depicting the sources and uses of funds by the College and Foundation. In the bottom right quadrant of that chart you will see the Patrons & Sponsors Program, which for years has been the financial backbone of the College. The Patrons & Sponsors Program each year funds almost half of our annual operating budget—including the educational programs, international law course and national bankruptcy archives projects that distinguish the College in the bankruptcy and insolvency community.

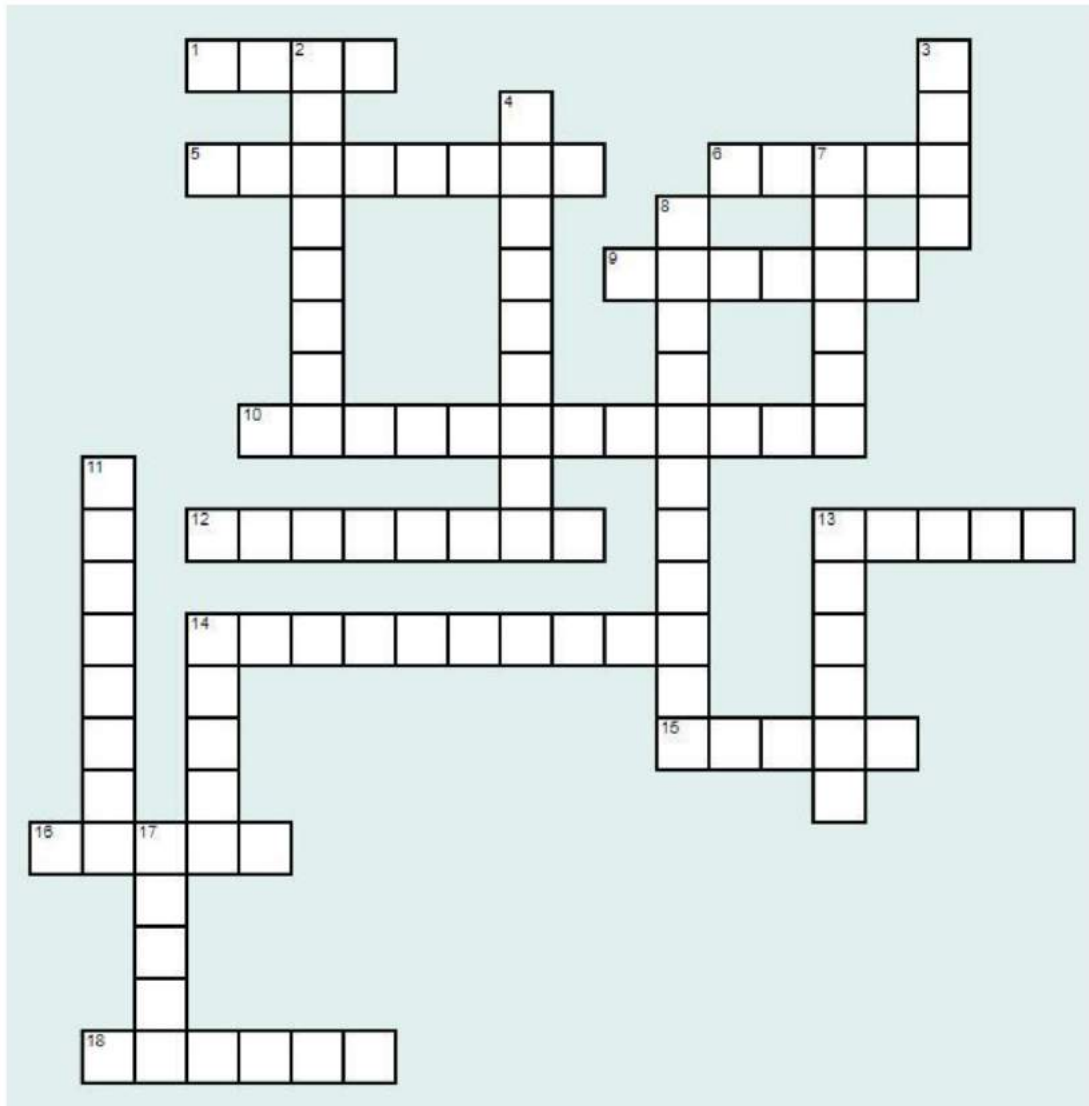
Generously funded by the firms/employers of our Fellows, the Patrons & Sponsors Program for 2019 raised **\$281,500** in contributions and pledges that we are in the process of collecting. As with every issue of College Columns the contributing firms are listed on the back pages, but as a quick summary I can report participation at the following levels:

Sustaining Patrons (\$5000) 29 firms, \$145,000
Patrons (\$2500) - 21 firms, \$52,500
Sponsors (\$1500) - 55 firms, \$82,500
Supporters (\$750) - 4 firms, \$3,000

While we are grateful to those firms and their Fellows for pushing past our 2018 participation of \$272,500, we fell slightly short of our 2019 goal of \$294,000. We intend to keep pushing in 2020, and hope that all of our Fellows will ask their firms to participate at one of the available levels. ¶



Columns XWords



Across

- 1 Bankruptcy Island Puerto _____
- 5 Type of payment recognized as adequate
- 6 Case of Supremes down on jurisdiction
- 9 Chapter 12 occupation
- 10 Quest of the dip
- 12 Senator Charles of bankruptcy interest
- 13 First names in College leadership
- 14 Second part of secured creditor quest
- 15 Priority for dip lender
- 16 Case of Supremes down on dismissal
- 18 Jolly good College member

Down

- 2 Site of College Induction 2019
- 3 Number for Municipality
- 4 Quest of the chapter 7 debtor
- 7 Yo, reorganization chapter
- 8 Distinguished visitors to annual meeting
- 11 First part of secured creditor quest
- 13 Bankruptcy's Renowned Harvey
- 14 Financial scheme namesake
- 17 Presumptively Delaware?

Answer key found on page 29 or [click here to play online.](#)



ACB Helps Law Students Prepare for National Moot Court

Samuel J. Gerdano, ABI Executive Director




College Fellows in the 4th, 5th, 6th, 7th, 11th and 1st Circuits assisted students preparing to compete in the 27th annual Judge Conrad B. Duberstein National Memorial Moot Court Competition. The

Competition is sponsored each year by the American Bankruptcy Institute (ABI) and St. John's University School of Law. This year, some 60 teams competed in one of the largest competitions ever. The 2019 event was held over three days in early March in New York City.

College Fellows served as regional event organizers, judges, coaches and financial supporters for the teams of students. Regional competitions help students prepare for the rigorous national event. This year, two new regional competitions were established, for law schools in the 7th Circuit (held in Chicago) and the 6th Circuit (held in Detroit).

A team from the SMU Dedman School of Law took top honors in New York, while a team from the University of Miami (coached by Fellow Trish Redmond) was the runner up. A student from the University of Alabama won the top prize for best oral advocate. The awards, including cash prizes, were funded by ABI and presented at a gala attended by 600 professionals at Manhattan's Gotham Hall. Each of the winners and finalists were a product of regional competitions, including the Elliott Cup in the 5th Circuit (sponsored by the Bankruptcy Section of the Texas State Bar).

College Fellows assisting in the 1st Circuit were Mark Berman, Michael Goldberg, Rick Mikels, Christopher Panos, Lynne Riley (organizer) and Jim Wilton. College Fellows in the 4th Circuit were Michael Bernstein, Hon. Patrick Flatley, Doug Foley, Sam Gerdano, Craig

Goldblatt, Judge Michelle Harner, Denise Neary (organizer), Lynn Tavenner and Beth Wiggins. College Fellows assisting in the 5th Circuit regional were Hon. Harlin D. Hale and Deborah Langehennig. College Fellows in the new 6th Circuit regional were Joel Appelbaum, Susan Cook, Richardo Kilpatrick, Hon. Steven Rhodes and Hon. Phillip Shefferly (organizer). Fellows in the new 7th Circuit regional were Howard Adelman, Richard Bendix, Tim Nixon, Felicia Perlman, Ron Peterson, Nancy Peterman, Brian Shaw, Cathy Steege and Hon. Deborah Thorne (organizer). Fellows in the 11th Circuit were Eric Brunstad, Hon. Jay Cristol, Hon. Mary Grace Diehl, Hon. Laurel Isicoff and Trish Redmond (organizer). 



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All of those involved in the regionals owe huge thanks to Fellow Sam Gerdano and his colleagues at the ABI for their inspiration and support.



Fourth Circuit teams



Sixth Circuit team



Seventh Circuit team



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 Carole McNamara, ACB Communications Director, at focus@amercol.org.

The Bankruptcy Law Section of the State Bar of Texas presented its "Banco Rotto" Award, the section's highest honor, to recently-retired Haynes and Boone, LLP Senior Counsel **Robert D. Albergotti** on April 17, 2019. The Bankruptcy Law Section presents the award to a Texas bankruptcy legend who has had a lasting impact on the development of the Texas bankruptcy practice. It is the section's highest and most distinguished award.

On May 22, 2019, **Jeanne P. Darcey** received the Charles P. Normandin Lifetime Achievement Award from the Boston Bar Association's Bankruptcy Section. The award recognizes an attorney who has made an outstanding contribution throughout her career to improving the quality of the practice of bankruptcy law, through mentoring, pro bono or BBA activities. The award is named after the late Charles P. Normandin, who was also a Fellow in the American College of Bankruptcy.

Cecily A. Dumas joined BakerHostetler as a partner on April 17, 2019, adding to the firm's West Coast presence.

Hon. Patrick M. Flatley (US Bankruptcy Court) has been named as a West Virginia Bar Foundation Fellow. He was honored at a recent Bar Foundation Fellows Dinner in Charleston, WV. The Bar Foundation selects lawyers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and honorable service to the legal profession.

Jennifer C. Hagle (Sidley Austin LLP) was named as one of the Top 100 Women Lawyers in California by the *Los Angeles/San Francisco Daily*

Journal. She is recognized for her exceptional legal skill across the full spectrum of responsibility; exemplary leadership, as evidenced by the highest professional and ethical standards; and for contributions to the Los Angeles community at large.

Christopher Andrew Jarvinen (Berger Singerman LLP) served as a Discussant at The Jimen Insolvency and Restructuring Dialogue hosted by the Bankruptcy Law and Restructuring Research Center of the Chinese University of Political Science and Law in Beijing, China on April 20, 2019.


Gordon Brothers announced the appointment of **Martha E.M. Kopacz** as Chief Development Officer on May 1, 2019. Marti will be based out of Gordon Brothers' Boston headquarters.

Kay Standridge Kress (Pepper Hamilton) was named a Fellow of the American College of Commercial Finance Lawyers (ACCFL) at its annual meeting on March 30. ACCFL Fellows are selected based on their preeminence in the field of commercial finance law and their substantial and repeated contributions to the promotion of learning and scholarship in commercial finance law.

Prof. Robert M. Lawless (University of Illinois College of Law - Champaign) received the American Bankruptcy Institute (ABI) Annual Service Award at ABI's 2019 Annual Spring Meeting on April 12, 2019. The Service Award is presented to an ABI member whose contributions over the past year have been extraordinary, as determined by ABI's Advisory Board of past presidents.



Luis Manuel C. Méjan (Instituto Tecnológico Autónomo de México) released his 14th book, *Piercing The Corporate Veil and Insolvency*. It was written in collaboration with Dr. Gonzalo García Velasco and is available in Spanish only.

Jeffrey M. Reisner's representation of the official unsecured creditors' committee in the 2018 sale of Orexigen Therapeutics, Inc. earned Irell & Manella LLP the "Healthcare/Life Sciences Deal of the Year" award for deals under \$500 million at The M&A Advisor's Turnaround Awards. The honors are given annually to the leading transactions, firms and individuals in the distressed investing and reorganization industry. 

Of Note

The following Fellows were elected to leadership positions with the American Bankruptcy Institute (ABI) during ABI's 2019 Annual Spring Meeting:

- **Hon. Barbara J. Houser** (N.D. Tex., Dallas), formerly ABI's Vice President-Research Grants, was named President-Elect and will become President in April 2020.
- Retired Bankruptcy Judge **Eugene R. Wedoff** (Chicago) succeeds Jeffrey N. Pomerantz of Pachulski Stang Ziehl & Jones LLP (Los Angeles) as Chairman of the Board for a one-year term.
- **Hon. Michelle Harner** (D. Md.; Baltimore) was elected to serve a two-year term succeeding Hon. Barbara Houser as ABI Vice President-Research Grants.
- **Hon. Bruce A. Harwood** (D. N.H.; Concord) was elected to serve as Secretary.
- **Soneet R. Kapila** of KapilaMukamal, LLP (Fort Lauderdale, Fla.) was elected as an at-large member of the Executive Committee.

Say What? The National Bankruptcy Archives "Quotes"

*Francis X. Buckley, Jr., Thompson Coburn LLP
Bankruptcy History Committee Chair*



In October 2000, the Biddle Law Library and the American College of Bankruptcy collaborated to create a special collection entitled the National Bankruptcy Archives (NBA), a national repository of materials relating to the history of debtor-creditor relations, bankruptcy and the reorganization of debt. The NBA collects records from the College as well as from other organizations whose activities have been relevant to the history of bankruptcy and insolvency legislation, regulation, and administrative and judicial determination. The NBA also houses papers of individuals who have influenced the field, and other collections documenting the history of bankruptcy law. Test your knowledge of the history of some bankruptcy law's giants below.

1. In his oral history interview, Gerald F. Munitz recalled advocating to a bankruptcy referee in 1962, "Your Honor, if anyone is entitled to an hourly rate of one hundred dollars, it is ____." Was he referring to: (a) Harvey Miller; (b) Norman Nachman; or (c) Charles Seligson?
2. What bankruptcy judge quipped at the beginning of his oral history interview, "There is so much flattery going on around here, I am intimidated." Was it: (a) Judge A. Jay Cristol; (b) Judge William Norton, Jr.; or (c) Judge Arthur Votolano?

[Click here to see the answers](#)



A Polygamist at the Hotel Del Coronado in 1896

*Kenneth L. Cannon II, Durham, Jones & Pinegar P.C.
10th Circuit Regent*

Recently, I found an 1896 photograph of my great-great grandfather, George Q. Cannon, sitting with one of his wives on a wharf in front of the Hotel Del Coronado. With thoughts of the College's induction ceremony there this year in mind, it was fun to find the old photo. George Q., as his descendants call him, was a prominent Mormon church leader, editor, politician, and businessman who had six wives and 34 children. In the image, he is seated second from the right with his sixth wife, Caroline Young (a daughter of Brigham Young).

In 1896, Mormons' practice of "plural marriage" was still very much in the public eye. George Q. Cannon was probably the most powerful man in Utah after Brigham Young's death. The Eastern press called him the "Mormon premier" and the "Mormon Richelieu." He was Utah's territorial delegate to Congress for ten years, president of numerous businesses, including banks, mining companies, railroads, utilities, and a publishing house.

George Q. came to the attention of Brigham Young in the 1850s and by 1860 he was made one of the Mormon church's twelve "apostles."

In 1862, Brigham Young sent Cannon to Washington to lead Utah's efforts for statehood. George Q. lobbied Congress and spent a pleasant afternoon with Abraham Lincoln, who, not surprisingly, was more focused on the Civil War than statehood for Utah. About the same time, however, Lincoln signed the Morrill Anti-Bigamy Act. Lincoln knew that his party's 1856 platform had called slavery and polygamy the "twin relics of barbarism."

Brigham Young brought his young protégé home to Salt Lake City to be a principal advisor, edit the church-owned newspaper, and run businesses. In 1872, he was elected Utah's delegate to Congress. He spent ten years in Congress and, although reelected again by a landslide in 1882, the federally-appointed territorial governor refused to certify the election based on Cannon's multiple marriages.

The Edmunds Act and Edmunds-Tucker Act in 1887 made "cohabitation" between a man and his polygamous wives illegal, deprived Mormon men of the right to vote, rescinded women's right to vote in Utah, disincorporated the church, and escheated most of the church's liquid assets to the federal government.

Mormon leaders went into hiding as they (and other polygamists) were pursued by federal deputies ("Deps") under these laws. Someone recognized George Q. on a train headed for California as he tried to flee the state and he was arrested in Humboldt, Nevada. The Salt Lake marshal and fifteen Army troops traveled to Humboldt to take charge of Cannon. The court released him on a \$45,000 bond (about \$1.2 million in today's dollars) on a misdemeanor charge punishable by a six-month prison sentence and a \$250 fine. He jumped bail but eventually surrendered to authorities and served almost six months in federal prison for unlawful cohabitation.

After the Supreme Court found the Edmunds and Edmunds-Tucker Acts constitutional in *Late Church of Jesus Christ of Latter-day Saints v. U.S.* in 1890, Cannon helped negotiate the cessation of polygamy and church President Wilford Woodruff formally announced the end of the practice.

By the time the Hotel Del photo of George Q. Cannon was taken in 1896, Utah had been made a state and Congress had returned (depleted) escheated property to the Mormon church and the forfeited \$45,000 bond. ¶



Seated from left to right: Wilford Woodruff, his 7th wife, Emma, George Q. Cannon and his 6th wife, Carlie (c. 1896)



Beyond the Columns

Shari A. Bedker, American College of Bankruptcy Executive Director

It is always very interesting to hear what Fellows are doing outside of their professional lives, whether it is an unusual hobby, exotic trip or other volunteer activity. We would like to highlight something different in each edition of the *Columns* going forward so that you can learn a bit more about our Fellows. If you have something that you would like to share, please send to the editors, Steven Berger and Debbie Langehennig.

To kick off this new feature, we highlight Judge Laurel Isicoff's, Judge Mary Grace Diehl's and

Shari Bedker's trips to Antarctica in January 2019 (within 3 weeks of each other, on three different cruise lines!). There was some debate as to whose photos were the best. Although to be fair, it was hard to take a bad photo as the landscape is so spectacular. To settle the debate, they have each submitted a penguin, a whale and a general scenic photo. We need your help to see who gets bragging rights. **Please [click here to vote for one photo from each category below](#).** The winning photos will be announced in the next Focus on Fellows. May the best penguin win! 🐧

Best Penguin Photo Candidates





Best Whale Photo Candidates



Best General Scenic Photo Candidates





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Class 2

January 29, 2019

George M. Treister

Class 9

April 16, 2019

Say What?

Answers to the Oral History Quiz

Questions found on page 21

1. **(b) Norman Nachman**

2. **(b) Judge William Norton, Jr.**

To view other collections in the National Bankruptcy Archives, visit <https://www.law.upenn.edu/library/archives/bankruptcy/index.php#digicoll>. 

2019 Foundation Donations

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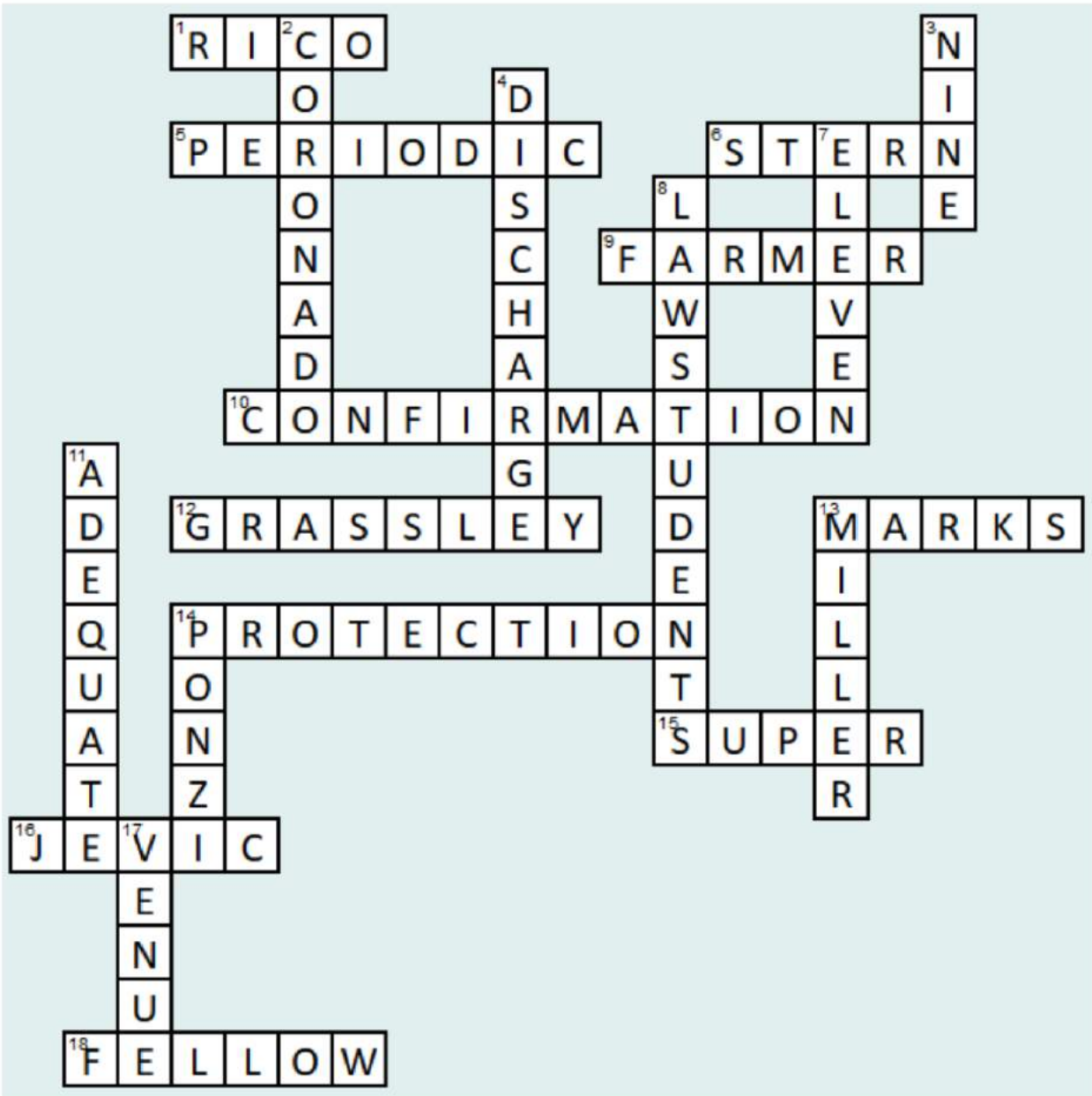
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Columns X Words
Answer Key from page 17





Save the Date!

Join us for the American College of Bankruptcy Fall All-Fellows Luncheon to be held in Washington, DC at the Marriott Marquis on October 30, 2019 in conjunction with the Annual National Conference of Bankruptcy Judges. Registration will be available soon!

NCBJ has graciously offered to share its block of rooms with ACB Fellows who plan to attend the NCBJ conference. The \$323/night room rate at the Marriott Marquis expires on September 30th, or when the block is full, whichever is first. [Click here](#) for more details about accommodations.

We hope to see you in DC!

Email the Editors

We are considering 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:

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We value your input. Thank you!

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