

nolhga journal

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CENTER STAGE



NOLHGA's 2018 Legal Seminar stars on Broadway

By Sean M. McKenna

Shows like *Hamilton*, *My Fair Lady*, and *Spider-Man: Turn Off the Dark* can run on Broadway for years or even decades, but the truly special productions run for a limited time, leaving those who missed the show with a nagging regret that haunts them for the rest of their lives. NOLHGA's 2018 Legal Seminar was just such a production. Its two-night run in July attracted almost 200 people to the Marriott Marquis, and those lucky enough to score a ticket (which cost less than a good seat to *Hamilton*, I might add) were treated to wide-ranging discussions of insurance regulation, troubles in the long-term-care (LTC) market, the always-changing health insurance landscape, advances in medical technology, and more.

Reviews were, not surprisingly, glowing, with people praising the seminar as the best yet. In a word, NOLHGA's 2018 Legal Seminar was boffo.

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Remembering Ellen Robinson

For the Fall *Journal*, normally I would write about something having to do with the Legal Seminar. But Sean covers that territory well elsewhere in this issue. Besides, my heart is someplace else now.

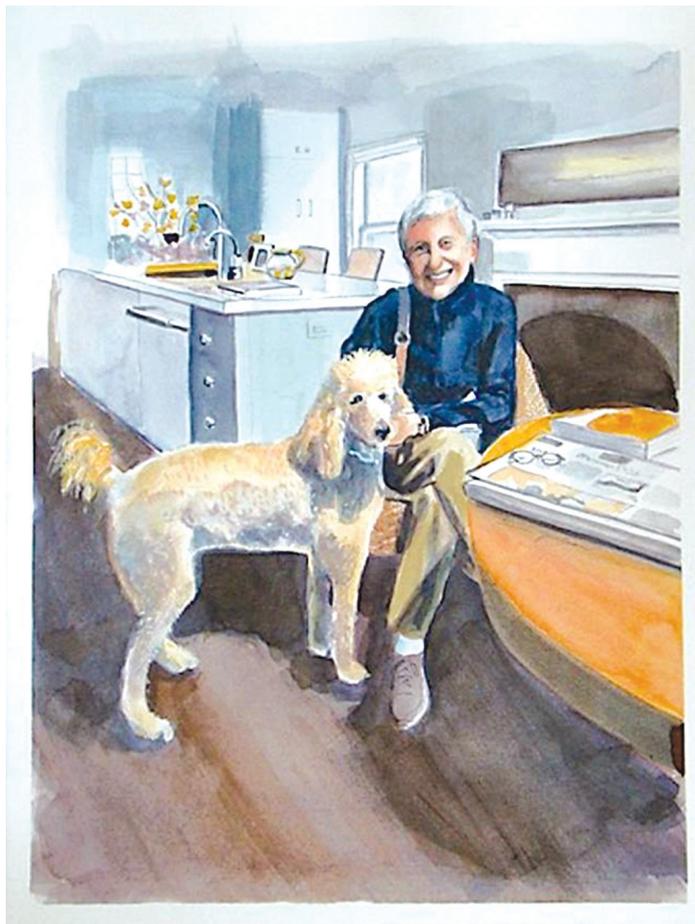
A sad fact about getting older is that, with increasing frequency, we must say goodbye to people who matter in our lives. It happens to all of us: family members, friends, and professional colleagues pass on. It's always too soon.

Within the guaranty system, we've had to say goodbye to far too many good people. In my time at NOLHGA, I was touched particularly by the passing of (among so many others) Texas GA Administrator Chuck LaShelle; Wyoming GA Board Chair Ron Long; Nevada GA Administrator Ben Dasher; Louisiana Board Chair Virginia Shehee; former NOLHGA Board Chair and senior Iowa regulator Jim Mumford; and, most recently, Arkansas GA Administrator Dick Horne. All were well known within the system and left behind many friends and admirers.

Within the last few weeks, we lost another key contributor whom I was honored to consider a dear friend: Ellen Robinson. Among many other accomplishments in a life well lived, Ellen served as a member of the Board of the Illinois Life and Health Insurance Guaranty Association.

All cancers are, of course, bad cancers. Ellen was diagnosed with one of the really bad ones some time back. She fought it for an astonishing eight or nine years. She finally passed on in August. Ellen lived her life in full until the very end.

Her passing caused me to reflect not so much on her death, but rather on the precious life that she led, and the example that she set.



The top line in obituaries often involves professional achievements. Ellen had so many.

After raising three small children and launching them into their school years, she began studying law. There weren't many female lawyers at that time. Ellen had a brilliant law school career and went on to become a Cook County, Illinois, prosecutor (where she argued a case before the U.S. Supreme Court); then a criminal defense attorney (with some rather famous clients); and finally a founding partner of the outstanding Chicago litigation boutique firm, Robinson, Curley & Clayton (RCC).

Most of us in the guaranty system first met Ellen during her law firm years. She and her RCC colleagues developed a highly successful

specialty practice representing state insurance commissioners, particularly in receivership asset recovery litigation. Ellen won some major cases that benefited receivers, policyholders, and guaranty associations (who are usually major receivership creditors). Along the way she helped make important new law on questions involving director and officer liability, reinsurer obligations to insolvent insurers, how to quantify damages, and a host of other important topics.

Her accomplishments won her recognition as a Director of the International Association of Insurance Receivers. She was a captivating speaker at a NOLHGA Legal Seminar in New York some years back.

In our field, she was simply preeminent. How good was she? I will offer this opinion: In 40 years spent around literally thousands of good lawyers from all over the country, I can identify only a tiny number of attorneys I've ever known whom I would have entrusted with any type of critical case—regardless of sub-

ject matter, degree of difficulty, or the stakes at risk. Ellen was one of those lawyers.

Beyond that top-line professional legacy, Ellen was an even better human being than she was a lawyer.

First there is her family, which was much more important to her than practicing law. Ellen was married for 51 years to Marty Robinson—himself one of the best lawyers in Chicago, and one of the best people anywhere. Ellen and Marty had the warmest, strongest marriage I've ever known. They raised three wonderful children, each a good person and all successful in their own professional careers.

Ellen and Marty lived to see seven grandchildren—seven wonderful girls. The oldest, Emilia, has just begun her freshman year at a premier Ivy League college. If you want some measure of how those girls loved their grandmother, take a look at this short speech that Emilia made about Ellen last year (you might want to have a handkerchief nearby; just sayin'): <https://drive.google.com/open?id=0B189jYQWrERMaE5ZczI3WG5MTmM>

Since retiring a half dozen or so years back, Ellen threw herself into a number of other passions: Hiking; traveling; gardening; music; serious reading; the study of history and philosophy in an adult education program at the University of Chicago; and raising her beloved poodle, Pal (pictured nearby with Ellen from a painting done a couple of years ago by Therese Masters Jacobson).

Life isn't always beer and skittles. During the same stretch of her life in which Ellen fought her long war with cancer, Marty was diagnosed with Alzheimer's disease, and his decline was rapid. Ellen battled not only for herself, but also for Marty's quality of life, up until his death last year.

Several weeks ago, along with a hundred or so other people from around the country, I sat in a synagogue in suburban Chicago where a memorial service was held for Ellen. Several of her friends and family members shared memories celebrating her life.

Although I considered Ellen one of my four best friends in the world, it was clear to me that at least half the congregation saw her in exactly the same way: Ellen was a "best friend" of literally dozens of people. What a gift—to be able to maintain so many close and active friendships!

Ellen approached friendship as she did her law practice: She was all in, all the time. If she decided you were her friend, she pursued the friendship relentlessly.

"Relentless" is an odd word to use regarding friendship. For Ellen, friendship was something actively practiced, just like a profession. There was nothing passive about it.

Some inkling of that came through in the comments made about her at the service. Memorial services often tend to paint the deceased in soft, gauzy, pleasant terms. No one talked that way about Ellen.

There was always an edge about Ellen, and every speaker not only recognized, but cherished that edge. She was focused and blunt. She shot straight with people, all the time, whether she liked them or not; whether she agreed with

them or not; and whether or not they were close friends. You got the real Ellen all the time, and she wanted to connect with the real you, whoever you were.

Whether it was a question of law, politics, or friendship, Ellen's focus was always: What are the real facts here? And by what rules or standards should a question be decided? To Ellen, life untethered to a realistic assessment of objective reality didn't work. Truth *is* truth. Similarly, Ellen couldn't conceive of making important decisions that were *not* moored tightly to defensible principles.

One of those present at the service kept glancing down at a hand-written note that Ellen had sent exactly three years earlier. The note well captured what Ellen prized in others, and implicitly the standard that she set for herself. Others at the service whom Ellen had befriended had received similar notes from her over the years.

Ellen set some high standards for those who knew her. We honor her memory and keep her alive in our hearts by trying to live up to those standards.

[*"President's Column"* continues on page 16]

Threading the (Space) Needle



NOLHGA's 2018 Annual Meeting heads to Seattle

After staging its 2017 Annual Meeting in historic Charleston, South Carolina, NOLHGA changes gears in 2018, heading for the West Coast and the high-tech setting of Seattle. The meeting, which will be held on October 18–19 at the Grand Hyatt Seattle, will feature a mix of old and new, with speakers touching on regulatory challenges, rising economic inequality, the outlook for health insurance, industry trends, and even World War II.

The speaker lineup includes Karen Shaw Petrou, Managing Partner of Federal Financial Analytics; Terri Vaughan, the Robb B. Kelley Visiting Distinguished Professor of Insurance and Actuarial Science at Drake University's College of Business and Public Administration; Washington Insurance Commissioner Mike Kreidler; and Bruce Ferguson, Senior Vice President of State Relations with the ACLI.

Petrou, who has been called “one of the most prominent non-governmental voices on financial regulation” by the International Monetary Fund, will discuss economic inequality and the role financial services regulation plays in creating it. Vaughan will discuss regulatory and industry trends; Commissioner Kreidler, a national expert on the healthcare market, will offer his insights into where the market and health insurance are headed; and Ferguson will give us the ACLI's perspective on the key issues facing the industry. In addition, a panel of former MPC Chairs will discuss a host of issues, including how the MPC process allows the guaranty system to adapt to the unique challenges posed by each insolvency.

The Annual Meeting will also offer attendees a rare historical perspective. Our luncheon speaker, Robert Edsel, is the author of the national best-seller *The Monuments Men*:

Allied Heroes, Nazi Thieves and the Greatest Treasure Hunt in History. His presentation will give guests an inside look at the work of the men and women who saved thousands of artistic and cultural treasures during World War II.

In the words of quite a few people, “but wait, there's more!” The 2018 Annual Meeting will also feature the members-

Speakers Include:



Karen Shaw Petrou: Managing Partner, Federal Financial Analytics



Terri Vaughan: Robb B. Kelley Visiting Distinguished Professor of Insurance and Actuarial Science, Drake University College of Business and Public Administration



Commissioner Mike Kreidler: Washington State Office of the Insurance Commissioner



Bruce Ferguson: Senior Vice President, State Relations, ACLI



Robert M. Edsel: Author and Founder & President of The Monuments Men Foundation for the Preservation of Art (Luncheon Speaker)

only Annual Meetings of GABC and LTC Re, as well as closed session briefings from the Lincoln Memorial and Penn Treaty/ ANIC Task Forces. The MPC will also meet on October 17. Check out *Meeting at a Glance* for registration information and a preliminary Annual Meeting schedule.

Let's not forget our host city! Before and after meeting hours, attendees can explore Seattle, once of the country's most popular tourist destinations. From Pike Place Market to the Space Needle (and the adjacent Museum of Pop Culture, or MoPOP) to the Chihuly Garden and Glass exhibit at the Seattle Center, Seattle has a wealth of attractions to offer.

Register Now!

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

We'll see you in Seattle! ★

Preliminary Program*

Wednesday, October 17

- 8:00 a.m. MPC Executive Committee Meeting
- 9:15 a.m. Lessons Learned Workshop
- 11:00 a.m. GABC Annual General Session
- 12:00 p.m. MPC General Session (with working lunch)
- 2:00 p.m. NOLHGA Board of Directors Meeting
- 5:30 p.m. Welcome Reception

Thursday, October 18

- 7:15 a.m. Breakfast
- 8:00 a.m. Major Receivership Briefing: Lincoln Memorial Task Force (Closed Session: Affected GAs Only)
- 8:30 a.m. Major Receivership Briefing: Penn Treaty/ ANIC Task Force (Closed Session: Affected GAs Only)
- 10:00 a.m. LTC Re Annual Meeting

FIRST GENERAL SESSION

- 11:00 a.m. Call to Order & Incoming Chair's Address
Susan E. Voss: Incoming Chair, NOLHGA Board of Directors
- 11:30 a.m. Industry Outlook
Bruce Ferguson: Senior VP, State Relations, ACLI
- 12:00 p.m. Welcome Luncheon with Speaker
Robert M. Edsel: Author and Founder & President of The Monuments Men Foundation for the Preservation of Art
- 2:00 p.m. Healthcare Outlook
Commissioner Mike Kreidler: Washington State Office of the Insurance Commissioner

* Subject to Change

Meeting at a Glance

Where: Grand Hyatt Seattle

When: October 18–19 (MPC meeting on October 17—no registration fee)

Website: www.nolhga.com/annualmeeting.cfm

Registration: \$650 for Members
\$775 for Non-Members | \$125 for Guests

- 2:30 p.m. NOLHGA Conversations: Regulatory & Industry Trends
Terri Vaughan: Robb B. Kelley Visiting Distinguished Professor of Insurance and Actuarial Science, Drake University's College of Business and Public Administration
- 3:15 p.m. Break
- 3:30 p.m. Annual Business Session
- 4:00 p.m. NOLHGA Board of Directors Organizational Meeting
- 5:15 p.m. Taste of Seattle Reception

Friday, October 19

- 7:00 a.m. Breakfast

SECOND GENERAL SESSION

- 8:00 a.m. Call to Order & Immediate Past Chair's Address
Mark J. Backe: Immediate Past Chair, NOLHGA Board of Directors
- 8:30 a.m. President's Address
Peter G. Gallanis: President, NOLHGA
- 9:00 a.m. State Regulation
Speaker TBA
- 9:30 a.m. Break
- 9:45 a.m. NOLHGA Conversations: Economic Inequality & the Regulation of Financial Services
Karen Shaw Petrou: Managing Partner, Federal Financial Analytics
- 10:30 a.m. MPC Chairs Panel
- 11:30 a.m. Adjourn

“Our Job Is to Tell You What’s Legal & What’s Right”

MassMutual General Counsel Mike O’Connor talks about the changing role of the General Counsel and what keeps him up at night



Mike O’Connor is MassMutual’s General Counsel, leading the company’s legal, compliance, government relations, internal audit, and corporate governance functions. He is also a member of MassMutual’s Executive Leadership team. He initially joined the company’s Law Division in 2005, and from 2008–2011 he led the company’s corporate law and government relations teams.

From 2011 to 2017, Mike served in several business leadership positions at the company, first as Chief of Staff to MassMutual’s CEO Roger Crandall and later as head of corporate development and mergers and acquisitions and then as head of MassMutual’s international insurance operations.

*The following is an edited transcript of our discussion at NOLHGA’s 2018 Legal Seminar on July 19.
—Peter G. Gallanis*

Gallanis: *In talking to some of the great people in this industry, none of them seem to have had a calm first day in the office. I wondered if you could share with us a little bit about your first day in the law department at MassMutual.*

O’Connor: I started at MassMutual in 2005, but I spent the first three years officially working at Babson Capital Management, which at the time was a separate asset management subsidiary of MassMutual and was merged into Barings in September 2016. I was invited to move over to the home office in the fall of 2008 to run the corporate law group. I’ll always remember the actual date, because it was September 15, 2008, which was the morning that Lehman declared bankruptcy. On my way to the office, I got a call on my cellphone from our CEO at the time, Stu Reese, and he asked me, “If AIG goes under, what happens to our D&O coverage?” It was an interesting first morning on the job at MassMutual.

Gallanis: *In the past few decades, we’ve seen so much change in the nature of the General Counsel position and the law department. What’s your perspective on how the position of chief legal officer, especially in an insurance company, has developed?*

O’Connor: I graduated law school in 1995 and went to work in a firm in Boston. I did a lot of merger and acquisition work and representation of private equity firms. Had you told me in 1996 or 1997 that I would be working in Springfield, Massachusetts, for a mutual life insurance company, I would’ve said, “No, never, no way.” I was destined to be a “hotshot deal lawyer.”

But not too long after that, an offer came along, and I looked at it and it was very attractive. And now, in retrospect, I wouldn’t look back. I love my job. I love being able to partner with the business people as they’re setting strategy.



For those who have read Ben W. Heineman's book, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*, he really tracks the evolution of the in-house legal function from being a service department whose primary role was to bring in expert outside counsel to advise the CEO and the senior leadership team and the Board to the current role where that's our job.

I was thinking about this the other day. About twice a year, I bring our CEO, Roger Crandall, to meet with our outside counsel. But when we're prepping for a Board meeting on a major M&A transaction, for example, there's no outside counsel in the room. They advise me behind the scenes. Sometimes, with large deals, we'll bring them in to outline the transaction for our Board of Directors, but as the in-house counsel, we really are the experts. We're the lawyers for the senior leadership team, and we're the advisors to the Board.

Gallanis: *Speaking of advising senior leadership, a word you didn't hear a lot 20 years ago, particularly in connection with the role of the General Counsel, was the word "governance." And then we had Enron and the changes from Gramm-Leach-Bliley. What thoughts do you have to offer about the role of a General Counsel or the role of in-house attorneys in contributing to, policing, and leading a company's governance obligations?*

O'Connor: I think that's one of, if not the, most important roles of a General Counsel and the in-house staff. But I think you also have to be careful. When I consider monitoring governance, ensuring proper governance happens, I think we need to talk about what that means on a day-to-day basis. Because when you get into this conversation about governance and ethics and integrity, it's easy to talk about it at a 30,000-foot level. It's a little bit tougher to say, "Okay, when I show up in the morning and sit at my desk, how do I do that?"

Frankly, with the Enron scandal and with some other similar and recent cases, these weren't things that happened in a back room, hidden from lawyers. Lawyers were at the table, approving some of these transactions. Our role in making sure that Enron-type events don't happen is crucial, and our role in overseeing all the operations of the company to ensure that proper governance is in place and is being respected every day is crucial.

I think it's important, though, not to say that we as lawyers own governance or we're the keepers of the company's brand or reputation or integrity. Because I think every leader in the company has to do that, and you don't want to get into a situation where people think that's the lawyers' job and they don't have to worry about it. Governance and ethics and integrity are

everyone's responsibility.

So how do I think about making governance happen when I show up in the morning? It's just ensuring that the right information is the hands of the right people at the time they're making the decisions. Now, to do that, you can't rely on the information as it is presented to the CEO. You can't look at the same deck and assess it along with the CEO.

As a General Counsel and in-house lawyer, you have to get ahead of that. You have to be out there with the business people who are working on a particular transaction, getting in the weeds. This is where I think my six years of sojourning outside of the law before I became General Counsel is particularly helpful, because for a while, I ran the corporate development team. I ran our international insurance operation. So I have a better view.

I don't think you have to do that to play those roles as a lawyer, but it helps me really get into the minutia as the presentations are being developed, to make sure things aren't getting left out. Because even with the best-intentioned people who are trying to put everything on the table, the reality is, as stuff works its way up the chain, it gets sugarcoated. Your job is to take that layer off and get at what's underneath. You really have to get your hands dirty on the front lines to do that.

Gallanis: *You're a truth merchant.*

O'Connor: Yeah, I think that's right.

Gallanis: *Staying on that point of experiences outside the law itself and how they contribute to being able to do the job, you served as chief of staff to the CEO. Is that typical in big companies, and what was your experience with that role?*

O'Connor: I would say chief of staff to a CEO is becoming a better-defined role in corporate America. And I would say I was probably the worst chief of staff in history. I don't think I fulfilled that role at all when I did it.

I told the General Counsel at the time that I was interested in going back to school and getting an MBA, and I had found a program at MIT. It was every third weekend, and it would work with my family situation at the time. I proposed applying to this program, and the primary pitch was that it won't interfere with my job. I sold the General Counsel on it, and he said, "Go talk to Roger Crandall."

I went to talk to Roger Crandall, and he said, "Well, that's a great idea, but you're thinking about this all wrong. If you're going to go to business school, immerse yourself in it. Do a program where you get the entire MBA curriculum as if you were



I think it's important not to say that we as lawyers own governance...Every leader in the company has to do that. Governance and ethics and integrity are everyone's responsibility.

a full-time student. The only place you can do that is Wharton.” And ultimately out of that series of conversations came, “And why don’t you come work for me as my chief of staff while you do this program?”

So, I went to Wharton, and I worked as Roger’s chief of staff while I did. It was largely a special projects role. Those special projects tended to be M&A transactions, as I had a lot of background there.

That was supposed to be a two-year program. A year into it, we started talking to The Hartford about its retirement business. And at that time, our head of corporate development had left the company. So I was summarily fired as chief of staff and sent to run the corporate development function and work on The Hartford deal. I stayed in that role for a few years.

There have now been two chiefs of staff since me, and I would say it’s now a pretty well-defined function. We tend to have a fairly senior person in that role, one who really helps with governance and helps with filtering information that gets to the CEO. It’s not an administrative position at all. It really is a person who gets into substance, who stands in for the CEO at certain times,

and I think it’s been incredibly helpful to him. As a company, we’ve been fortunate to have two outstanding people in that role since I “attempted” it.

Gallanis: *It does seem that company management and directors as well as external stakeholders are looking to corporate in-house attorneys more and more these days on some subjects we didn’t used to talk about a lot—things like risk management, contingency planning, and even crisis preparedness and response. Where does the General Counsel fit into those types of issues? And how much do you think about that as part of your portfolio?*

O’Connor: I think about those things a ton, but we attack those issues as a senior leadership team. I don’t think risk management or crisis management is my job any more than it is the CFO’s. We’re all in it together, but that has to mean we’re all in it completely together. You know, sometimes you get into situation where if something is everybody’s job, it’s nobody’s job. I think one of the roles of the General Counsel is to make sure that, even though it is everybody’s job, everybody recognizes it’s his or her job.

The advances in the discipline and structure around risk

management have been very significant, even in the last five to seven years. I'm speaking from the MassMutual perspective, but my impression is that it's happening universally. I think we deal with risk management much better than we did as recently as five years ago. But it has to be a constant focus. As General Counsel, I'd say half the time I spend could probably be described as risk management. Planning for contingencies, how to deal with them if they happen—preferably how to keep them from happening—is a huge and vitally important part of my job.

Gallanis: *My sense would be that the things that keep a General Counsel up at night are not the same things that kept a General Counsel up at night 26 years ago. It seems like everybody is losing sleep over cybersecurity and privacy issues, class-action litigation, the almost endless multiplication of regulatory bodies that have some element of supervisory oversight or jurisdiction over financial services entities, the importance of intellectual property and being able to do business internationally, tax law changes, and the impact of disruptive technologies or disruptive market trends. As you look at the landscape of things that trigger your "worry meter," what are you and your peers most concerned with?*

O'Connor: I think you touched on most of the things that do actually scare me a lot. Cybersecurity is scary. We've heard the statistics about how frequently people are trying to hack into

our systems, and that piece is scary, but the scarier piece is the unknown—what are they going to figure out next? You can only contingency plan for things you know and understand today, and when you really think about what's likely to happen, it's probably not that, right? It's probably the thing you haven't thought about. That's terrifying.

When you think about cyber, you think about class-action risk. But if you really think about the impact of a major cyber breach on a company like ours, the financial impact is likely to be manageable—knock on wood. The bigger risk is the harm to your reputation.

Our CEO is great about harping on this at all our meetings. We stand on the shoulders of people who, for 167 years, have made good decisions, and we're benefiting from those. We can never rest on that. Every day you have to earn it, because one or two mistakes or bad decisions made today can ruin several good ones over the years. It's that potential reputational harm that comes from all those things that really worries me.

Now, with legislative and regulatory change, everybody in this room knows we are in an environment of rapid and significant change at all levels of regulation. That's difficult to deal with, but I think it's something that can be managed. What I worry about at a more macro level, as you think about the tone and the tenor of what's going on in government in this country, is volatility.

People talk about wanting legislative and regulatory certainty. We've never had that, and we're never going to. It's probably unrealistic to think about certainty. On the other hand, there have been certain assumptions that businesspeople can make. For instance, significant tax reform only happens once in a generation, or once in 20 years. But I worry that as more and more legislation and regulation are done on a partisan basis, even by executive actions, we could be entering a world of what I'll call "legislative volatility," where every four years, everything is back on the table.

There's going to be a panel at this seminar on the impact of the last tax reform on the insurance industry. The thing I worry about is, in four years, is that back on the table? Is the pendulum going to swing back the other way? And if so, how is it going to be done? The simplest way is to raise rates, and as an industry, that's a really bad outcome for us. In a lot of ways, we paid for the rate decrease that we just received with some other technical changes. If the rates just go up and those other things aren't fixed, we're going to be significantly worse off than we were before.





You can only plan for what you know is in front of you. If it's going to change so significantly with each election cycle, it's just something that's going to be very, very difficult to deal with.

Audience Question: *How do you handle a situation where you know from your expertise and your field work the correctness of a position that is irritating to some members of the Board? They have an idea of what they want to do, and they discuss it with their fellow Board members. Then you come along and in some way indicate that it is a very bad idea. How do you handle that knowing that ultimately, you are not a director of the Board and they have the final say?*

O'Connor: In my now 18 months on the job, I don't think I've had that precise issue. Our Board tends to listen to information as we present it. But in that situation, my client is the company, and the Board is the human embodiment of that client. I work for

them. You described the decision as "irritating." If that's all it was, I think I'd probably defer to them.

If it was something more significant, where I actually thought there were ethical concerns and I thought it was really something as a company we shouldn't do? Our job as General Counsel is not to tell you what's legal. Our job is to tell you what's legal and what's right. I would do that. ★

[“Center Stage” continues from page 1]

Changing Storylines

Thomas Workman, Independent Member with Insurance Expertise of the Financial Stability Oversight Council (FSOC), got the meeting started by reviewing the charge and recent activities of the Council, which was formed after the most recent financial crisis. He noted that 2017 was a pivotal year in financial services regulation. President Trump issued an Executive Order in February outlining the core principles for regulating the U.S. financial system, and the Treasury Department produced four reports (a fifth was issued early in 2018) on areas such as asset management and insurance, FSOC designations of systemically important financial institutions (SIFIs), and orderly liquidation and bankruptcy reform.

The asset management report, Workman said, “endorses the state-based regulatory model for the U.S. insurance industry” and recommends realigning the Federal Insurance Office (FIO) to support state regulation. The report on SIFI designation, he added, signals a shift from judging companies by their size to an industry-wide analysis of potentially risky activities or products. “There’s also a desire for engagement with these entities,” he said, “along with an emphasis on providing as much transparency as possible” to the process. That transparency would include an “off ramp” for companies that receive the SIFI designation.

Workman also issued an invitation for input from the industry as FSOC develops this activities-based approach, particularly in answering the question of how to resolve the failure of a large company with multiple regulators. “If that terrible day comes,” he explained, “where do you go? Who do you see? What happens first?”

The next presentation, a panel discussion entitled *Solvency & Macro-Prudential Regulation: Material Developments* (moderated by Pat Hughes of Faegre Baker Daniels), picked up on the changes in regulatory focus that Workman had mentioned. “A lot of what is being said today

could not have been said 10 years ago,” said Nicholas Kourides (DLA Piper), noting that FSOC was originally tasked with identifying entities that posed a risk to the economy. “The Treasury report referred to the entities-based approach as a blunt



David Axinn (New York Liquidation Bureau) welcomed attendees to New York and spoke about the revolutionary nature of the bureau, which was founded in 1909. “It was a time of great optimism and idealism for state government,” he explained, and the bureau was created as people realized “there’s a real harm and cost to the boom and bust cycles of the economy, especially for life insurance customers.”

instrument” and stressed engaging with a company’s primary regulators at the time of designation. “I think that was missing” from FSOC’s original charge, he added.

Kourides also emphasized the need to consider the likelihood of financial distress, rather than just the impact, and added that a cost/benefit analysis of being designated a SIFI should be performed. “I don’t think anyone would have dared raise that point early on” after the financial crisis, he said. He added that one danger of the entities-based approach to designation was that “there may be a market expectation that the government will bail out the entity.”

Joseph Engelhard (MetLife) called the switch to an activities-based approach “a fundamental shift.” This new approach, he explained, focuses on asset liquidity risk and counterparty exposure and asks if either poses a threat to the entire U.S.

economy. “That’s the heart of an activities-based approach,” he said, contrasting it with an entities-based approach, which “measures without analyzing.”

Engelhard added that the key to avoiding risk is a strong enterprise risk management (ERM) program. If regulators identify a company with potentially risky activity, “they need to make sure the company improves its ERM. I would argue that any company with a good Own Risk and Solvency Assessment (ORSA) is not systemic.”

Kristine Maurer (New Jersey Department of Banking and Insurance) said that “state insurance regulation has truly evolved over the last 10 years and embraced the idea that we need to understand the risks from insurers and non-insurers in our insurance groups.” The NAIC’s Macro-Prudential Initiative “is the next step in that process.” The initiative has three work streams: best practices, recovery/resolution planning, and identifying any misalignment between federal and state laws that could harm recovery/resolution planning.

Maurer also detailed the NAIC’s Financial Stability Task Force’s efforts to develop better ways to

monitor threats to the economy and their analysis of how other regulators track these threats. “It all comes back to liquidity—the ability of firms to withstand run risks,” she said. “Think about it. We’re dealing with bank regulators, and that’s where their focus is.”

The focus of the next panel, *Special Issues in Insurance Regulation* (moderated by Mark Backe of Northwestern Mutual) was on how companies deal with closed blocks of business and the potential effect of new corporate division legislation that allows companies to divide into two or more companies and allocate business among them. Andrew Rothseid (RunOff Re.Solve LLC) said that “there’s been a tremendous amount of regulatory activity in the last few years related to closed blocks of business,” pointing to New York and Pennsylvania specifically. He added that “nobody chooses to go into runoff”

and that while traditionally the focus of a runoff is on policyholders' rights, "companies want finality," which they sometimes can't achieve since some laws allow policyholders to opt out of runoffs.

Corporate division legislation offers a new way to approach these blocks, but Tom English (New York Life) pointed out that "there are a lot of questions about the regulatory status of the companies in the other 49 states." Germaine Marks (Prudential Financial), a former insurance commissioner, said that at the very least, regulators in the state where the division takes place would want to check with the state most affected by the new company. "I think that's something you'd have a responsibility to look at."

English added that if there are enough assets to support both companies, the effect on policyholders and state guaranty associations would be negligible. But if the assets are insufficient, "then the parade of horrors comes out, including questions about guaranty association capacity." Rothseid agreed, saying that the domestic regulator "would want to have the backstop of knowing that the guaranty associations in states where there are policyholders are involved in the transfer. You don't want your own association to have to fill that void." Marks noted that even though policyholders don't have an opt-out in these corporate divisions (as they do in assumption reinsurance transactions), "there's a way for regulators to make that happen even if it's not expressly mandated by the law."

The Long-Term Outlook for LTC

Reinsurance and closed blocks of business were also very much on the minds of a few panels that dealt with LTC insurance. In *Reinsurance: Life, Annuity, Health & Long-Term Care* (moderated by David Spector of Schiff Hardin), Dmitri Ponomarev (Wilton Re) said that the reinsurance market for in-force LTC products is "fairly challenging," in particular because it's difficult for companies to agree on a

proper valuation of the business. Premium rate increases are also a problem. While ceding companies have seen some recent success in gaining increases," for reinsurers, it's a different story."

Mike Kaster (Willis Re) agreed, noting



Pulitzer Prize-winning author and music critic Tim Page entertained the luncheon audience by recounting tales of his days spent as a critic and teacher. In both fields, he said, it's important to trust your instincts and not simply parrot what you've heard or read. As he tells his students, "learn to use your own ears."

that "getting reinsurance on new LTC business is possible," but only one or two companies are in the market. The real interest is in legacy blocks, which companies are eager to offload.

Thomas Zurek (OneAmerica Financial Partners) came at the issue from a different angle—his company sells life and annuity products with LTC components. "It's basically a life or annuity product," he explained. "If you don't use your LTC benefits, they'll pay out in life benefits." He's seen "a reemergence" in the reinsurance market for this type of product. "Reinsurers can understand it, and they can underwrite it from their standpoint."

That optimism was seconded by the panel *Long-Term Care Insurance: Developing Legal, Marketplace & Public Policy Issues*. In setting the stage for the panel's discussion, moderator Stephen Serfass (Drinker Biddle & Reath) said

that "there is reason for hope" in the LTC market. "The financial condition of most of these blocks is dramatically improved from where it was a few years ago." Patrick Cantilo (Cantilo & Bennett) added that "the need for people to have a decent

senior age will continue to be a pressing social concern, and LTC will be a big part of this."

All was not sunshine and roses, though. Cantilo still doesn't see a vibrant market for these closed blocks of LTC. "These legacy products are simply not self-sustaining," he said. While there are many creative ideas for dealing with these blocks, "in my cynical perspective, they all have the same thing missing—there's no new money."

Rate increases alone won't solve the problem. Kevin Smith (Genworth Financial) noted that companies are just looking to break even with rate increases in their legacy business—they're not recouping any losses. And Cantilo pointed out that "you can only increase rates on people who are still paying premium." Policyholders with premium waivers (not to mention those who have passed on) are exempt.

One of the ways regulators have reacted to issues in the LTC market was to amend the NAIC's Guaranty Association Model Act to change how LTC business is assessed in insolvencies and to add HMOs as member insurers on the health side. James Kennedy (Texas Department of Insurance), who led the task force that drafted the amendments, calls them "the most significant amendments to the Model Act to date."

Kennedy walked the audience through the process of drafting and approving the amendments, noting that speed was one of the task force's top priorities. "We had to focus on the most critical issues that we could address inside of a year," he said. He acknowledged that not all stakeholders were thrilled with the results—including the 50/50 split between the health and life accounts when assessing for LTC business—but stressed that "we could not let the perfect be the enemy of the good."

Looking to the future, Smith expressed some optimism for combination products like the ones Zurek described in the earlier panel. “These products avoid the moral hazard of traditional LTC—the temptation to go on claim to avoid rate increases.” They also allow policyholders to keep their benefits even if they’re not used for LTC. “You need to find some way to avoid the ‘use it or lose it’ aspect of the product,” he explained.

Another panel, *HMOs and the New NAIC Life & Health GA Model Act* (moderated by Joel Glover, then with Lewis Roca Rothgerber Christie LLP), examined the issues guaranty associations could face as they adopt the 2017 amendments to the NAIC’s GA Model Act (13 states have adopted the new provisions so far) and incorporate HMOs as member insurers. Randi Reichel (UnitedHealth Group) traced the origin of HMOs from their creation in 1973 to the impact the Affordable Care Act (ACA) had on the organizations. She explained that most states originally regulated HMOs as health providers rather than insurers, but by the late 1990s HMOs had come to resemble traditional health insurers. “There were very limited distinctions between what HMOs and commercial insurers were doing,” Reichel said. The ACA, she added, erased those distinctions. “At that point, the markets just merged.”

Candie Kinch (who leads the Idaho, Oregon, and Wyoming guaranty associations) offered insights into how guaranty associations would cover HMO products. In 1995, Wyoming included HMOs as member insurers, and HMOs became members of the Idaho association in 2000 due to a 1998 change in Idaho’s insurance law. “There was apprehension on both sides of the aisle,” Kinch explained, with Idaho’s life insurers concerned about HMO solvency and HMOs worried about possible guaranty association assessments

for non-HMOs. While the concerned parties took some convincing, both sides are now happy with the arrangement.

Kinch also reported on the liquidation of WINhealth Partners, a Wyoming-based



*In **The New Tax Law: Consequences for Insurance** (moderated by Margaret Sperry of the Rhode Island guaranty association), Christopher LaFollette (Anthem) and Scott Lenz (New York Life) analyzed the impact of the new tax code on the insurance industry. “The general consensus is that everyone’s a winner, but some are bigger winners than others,” said LaFollette (shown above), noting that the health industry made out better than life. While warning that “this still requires a ton of guidance from the IRS,” Lenz pointed to the reduction in the corporate tax rate and new reserving rules as big wins for the insurance industry. “The new reserving rules make things much simpler for us.”*

HMO that failed due to the change in risk corridor payments. According to Kinch, handling the insolvency was no different than handling a traditional health insurer insolvency.

Retirement & Other Scary Things

A number of presentations looked to the future—to retirement age, what comes next for health insurance, and the amazing and sometimes scary advances in medical technology.

In *Insurance, Retirement Security & Consumer Protection* (moderated by NOLHGA President Peter Gallanis), J. Mark Iwry (Brookings Institution) said that “about a third of working families have no access to retirement plans.” He added that fear of outliving their savings in retirement is listed as their greatest fear by 6 in 10 Baby Boomers—11,000 of whom are retiring

every day. Even when people have access to an employer retirement plan, only 70% to 80% participate. “One of the major things we’ve done is auto-enrollment” he added, which parks people in plans unless they specifically opt out. That boosts participation to 90%.

The next step, Iwry said, is using auto-enrollment for people without plans by encouraging employers that don’t offer plans to invest in IRAs for their employees. This sort of program has been enacted in six states already, he said, “but the politics of this have gotten complicated by Obamacare.” While the program had been endorsed by both parties, the battle over the ACA caused that support to wither.

Mary Griffin (Life Insurance Council of New York, or LICONY) highlighted the difficulty of selling life insurance, especially to millennials. “Buying life insurance is complicated,” she said. “We don’t want to make it so complicated that no one wants to buy the policy.” When it comes to teaching financial literacy, she added, the banking and securities industries are ahead of insurance.

Birny Birnbaum (Center for Economic Justice) drew a distinction between insurance products that spread risk, such as immediate and deferred fixed annuities, and those that he said concentrate risk, such as indexed and variable annuities. “The insurance company is guaranteeing market returns in these products, which concentrates the market risk in the companies,” he said. “We’d like to see the sale of low-cost, high-value retirement products.” He also expressed concern over Congress considering allowing annuities in retirement plans. “Trillions of dollars in annuities could create tremendous pressure on guaranty associations if it were concentrated in one company or product.”

Mark Smith (Eversheds Sutherland) walked attendees through the life (and possible death) of the Department of Labor’s proposed fiduciary rule, saying that “this

particular exercise in consumer protection has run its course.” The department, he said, “plans to move into the back seat and let the native regulators for this issue drive the bus,” adding that the NAIC is addressing the issue and the New York Department of Financial Services recently published a ruling extending the best interest standard to life insurance sales. But he also warned that some members of the department are strong supporters of the rule and could bring it back if the right conditions arose.

Griffin noted that LICONY supported the extension of the best interest standard and worked with the department to improve the definition of “best interest.” Birnbaum stressed the need to apply such a standard to the sale of indexed annuities. “There’s no reason to advantage one product over another,” he said. “There should be the same standard of care.”

A different type of care was on the minds of the freewheeling (and that’s putting it mildly) *Breaking Developments in Health Insurance Law & Practice* panel, moderated by Susan Voss (American Enterprise Group). J. P. Wieske (Wisconsin Office of the Commissioner of Insurance) reported that Wisconsin insurers have lost approximately \$500 million since the ACA went into effect, and that the number of carriers in some areas had dropped from 25 to 1.

Kim Holland (Blue Cross and Blue Shield Association) noted that the individual market only accounts for 6% to 8% of the total health insurance market and has always been a problem. The ACA tried to address the problem through guaranteed issue rules, the individual mandate, and risk adjustment payments, “and what we’ve seen lately is a constant undermining of those principles. This has resulted in the insurance industry floundering.”

Keith Passwater (Anthem) agreed, saying that the industry as a whole has lost anywhere from \$5 billion to \$15 billion on ACA individual market business. “It’s certainly worse than it was,” he said. “In many states, it’s become a new version of high-risk pools.” Wieske added that the ACA tried to address both affordability and accessibility and failed: “Trying to kill two birds with one stone doesn’t work.”

In Holland’s opinion, the problem is that

the country hasn’t decided what it wants out of healthcare. “What is it we expect as a society for our health and the health of our loved ones? And how are we going to pay for it?” Passwater said the same is true of the health insurance industry, which has struggled to get behind one program. “The industry needs to figure out what they want.”

Passwater added that there’s a great deal of innovation on the state level. Holland concurred, adding that “I wish the Trump Administration would live up to its motto of more state flexibility.” Wieske agreed, noting that healthcare needs can vary widely from state to state. “I’m not sure a big federal solution works,” he said. A state-based solution could be byzantine, he added, but that wouldn’t matter as long as it was effective.

None of the panelists expressed much hope for help from Capitol Hill. “I don’t know that the folks in the Senate believe things are as bad as they are,” Wieske said. Passwater didn’t see any promise in the midterm elections—he’s looking to the next presidential contest. Holland, on the other hand, predicted a hard pivot toward single-payer if the Democrats take the House in the midterms. “I’ve never seen anything like this,” she added. “I don’t think we’re going to see any progress.”

One place we have seen progress is in medical technology. Another is in the ability of hackers to cost companies millions. Both these topics were addressed in the panel *Cutting-Edge Developments in Science & Technology: Legal & Practical Consequences for the Insurance Marketplace*, moderated by Ted Lewis of the Utah guaranty association. Paul Luehr (Faegre Baker Daniels) addressed cybersecurity, noting that all 50 states now have data breach statutes and that “the timeline on which we need to report is shrinking rapidly.” That’s unfortunate, he added, because companies often know very little about a breach during those first few days in which they now must notify everyone.

The average cost of a breach is almost \$8 million, and roughly two-thirds of that consists of “hidden costs” such as staff hours and loss of goodwill. “The real cost often ends up being to the company’s

reputation.” Threats are almost everywhere, but Luehr singled out e-mail and the “Internet of Things,” with hackers targeting smart watches, cars, your new Alexa, and anything running on old technology (which includes many computerized medical devices).

Dr. Dave Rengachary (RGA Reinsurance Company) discussed a different kind of threat to privacy—the sequencing of the human genome, which promises to unlock a wealth of information about an individual’s health. The question is, who gets that information, and what can they do with it? Dr. Rengachary noted that there is a bill in Florida to eliminate genetic data and expressed amazement that “there was a subset of individuals who still thought this data was rare.”

Genetic testing used to be expensive, but “cost is a short-term limitation now,” according to Dr. Rengachary. The biggest limitation is genetic variability, “but we’re at the cusp of determining which differences are important and which are just chatter.”

This sounds like science fiction, but Dr. Rengachary stressed that “the future is now.” As an example, he cited pharmacogenetics—determining the proper medication and dose for an individual based on his/her genetic profile—as well as epigenetics, which tracks changes to our genes that do not involve the genetic sequence. These changes can be caused by many factors—diet, smoking, stress, etc.—and they can be predictive of various conditions. Can an insurance company use that data in underwriting? “The regulatory future of this is uncertain,” he said; because the information isn’t technically genetic, no laws about genetic data apply.

The potential benefits of this technology are undeniable. As just one example, Dr. Rengachary pointed to liquid biopsies—testing blood or saliva for genetic signatures for cancer. “Doctors are already making decisions on cancer without going in and looking at it,” he said. “This will totally redefine the way cancers are diagnosed.” ★

Sean M. McKenna is NOLHGA’s Director of Communications

[“President’s Column” continues from page 3]

The note had accompanied a gift—a copy of Plutarch’s *Lives* (Ellen having acquired a deep interest in Ancient Greece and Rome during her retirement). The note said:

To my kind, loving, wise friend:

You’ve been so important to me in so many ways, and I’ve carried you in my heart for many years now.

Here’s a book I’ve loved.

Plutarch’s brilliance reminds me of yours – always eager to examine all sides of an issue; willing to consider the other guy’s argument, but always with the courage to make a judgment and put your opinion out for the world to see and swing at.

May you stick with me in friendship and love for many, many years.

Ellen

Alas, there weren’t but a couple of years that remained to be shared after that note was written. The Plutarch volume is highly prized, but Ellen’s note is treasured even more.

Unlike some who were at the service, I’m not a deeply religious person. My mother, God bless her, tried, but it just

didn’t sink in. I hope that Ellen’s soul is someplace where she is happy and enjoying the company of other good and decent souls, people like Chuck LaShelle, Dick Horne, Virginia Shehee, Ron Long, Ben Dasher, Jim Mumford, Ron Bowers, Jim Kleen, Jane Lopp, Sye Leer, Charles Pace, Luther Hill, Dick Cooley, Randy Cox, Doug Furlong...and so many others we have lost. But I don’t know if that’s so.

If there is no other sort of immortality, though, there is this: The great people whom we have known live on through their accomplishments; through the mark they made in their professional achievements; through the families they’ve raised and nurtured; and in the love with which they are remembered by their friends.

Ellen set some high standards for those who knew her. We honor her memory and keep her alive in our hearts by trying to live up to those standards. ★

Peter G. Gallanis is President of NOLHGA.



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NOLHGA

13873 Park Center Road, Suite 505

Herndon, VA 20171

TEL: 703.481.5206 FAX: 703.481.5209

Editor: Sean M. McKenna

E-mail: smckenna@nolhga.com

The views expressed herein are those of the authors and do not necessarily reflect those of NOLHGA or its members.



NOLHGA Calendar of Events

2018

October 17 MPC Meeting
Seattle, Washington

October 18–19 NOLHGA’s 35th Annual Meeting
Seattle, Washington

November 15–18 NAIC Fall National Meeting
San Francisco, California

2019

January 8–9 MPC Meeting
Bonita Springs, Florida

April 5–8 NAIC Spring National Meeting
Orlando, Florida

April 17–18 MPC Meeting
Phoenix, Arizona