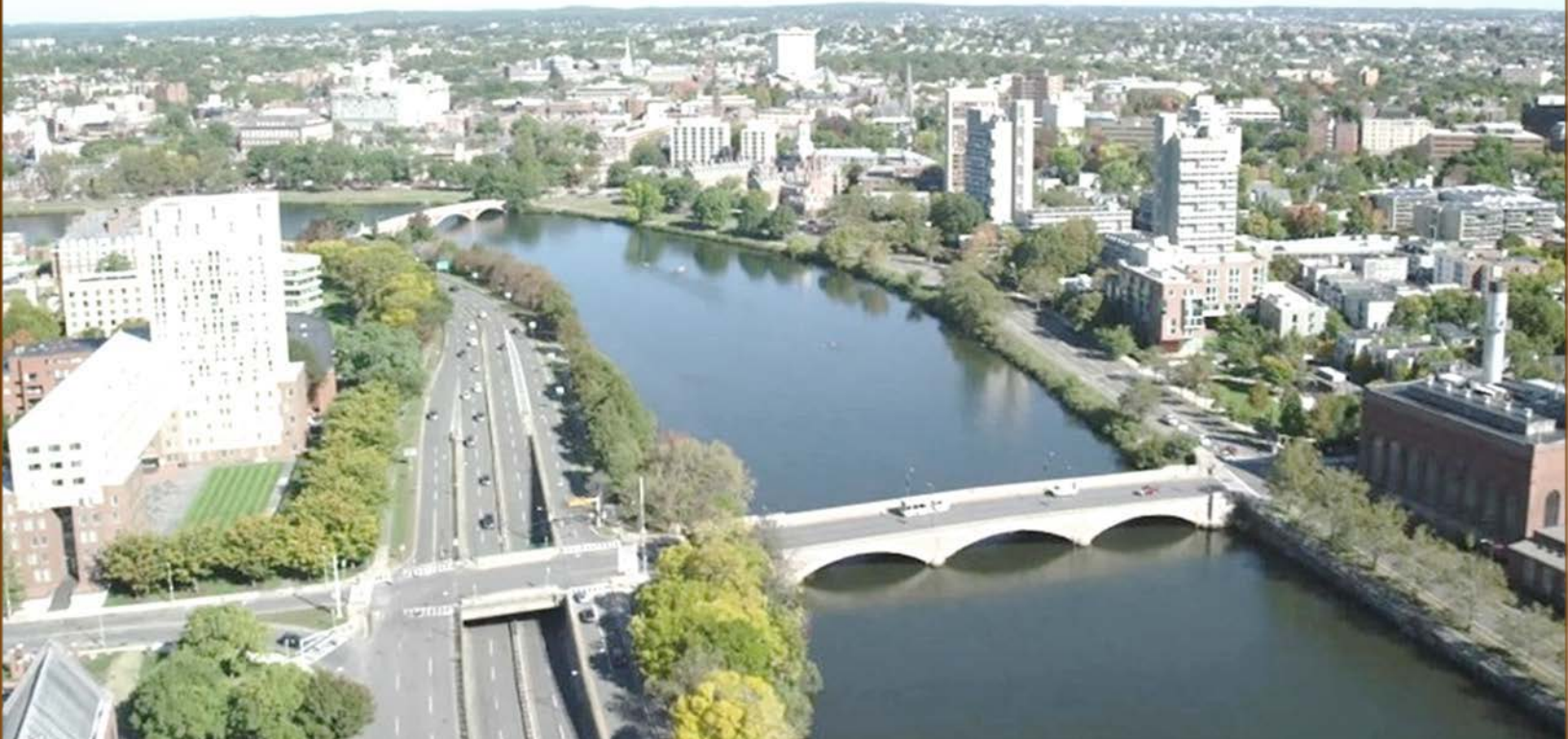




Presentations

# 57<sup>th</sup> ANNUAL WORKSHOP ON TRANSPORTATION LAW



Sunday, July 15 – Wednesday, July 18, 2018  
Hyatt Regency Hotel  
Cambridge, Massachusetts

ORGANIZED BY  
Technical Activities Division  
Transportation Research Board

SPONSORED BY  
Legal Resources Group

*The National Academies of*  
SCIENCES • ENGINEERING • MEDICINE

**Sunday, July 15**

3:30 p.m. – 6:00 p.m.

**REGISTRATION**

6:30 p.m. – 8:00 p.m.

**WELCOME RECEPTION****Monday, July 16**

7:30 a.m. – 5:00 p.m.

**REGISTRATION**

7:30 a.m. – 8:00 a.m.

**CONTINENTAL BREAKFAST**

8:00 a.m. - 8:30 a.m.

**WELCOME**

Fred Wagner, Chair, Legal Resources Group

Ann Brach, Director, Technical Activities Division, Transportation Research Board

8:30 a.m. – 10:00 a.m.

**OPENING PLENARY SESSION: FHWA, FTA AND FRA CHIEF COUNSELS' UPDATES**

Mark Lillie, Chief Counsel, Federal Highway Administration (FHWA)

Arjun Garg, Chief Counsel, Federal Transit Administration (FTA)

Juan D. Reyes, III, Chief Counsel, Federal Railroad Administration (FRA)

The Chief Counsels of FHWA, FTA, and FRA will brief attendees on current policy and program developments and initiatives of their respective administrations, as well as the United States Department of Transportation (USDOT).

10:00 a.m. – 10:30 a.m.

**BREAK**

10:30 a.m. – Noon, Concurrent Sessions

**SESSION 2: WHEN A MOTORIST BECOMES YOUR CUSTOMER: THE LEGAL CHALLENGES AND OBLIGATIONS OF TOLL OPERATORS**

Marcelle S. Jones, Jacobs Engineering Group, *moderator*

*Sponsored by: Transportation Law Committee (AL010)*

As more transportation agencies move toward user fees to pay for new roadways or to manage congestion, the relationship between the user of the road and the agency changes as the once anonymous motorist is now a paying, account-holding customer. This session will discuss the legal obligations and liabilities that tolling agencies encounter when motorists become their customers and how operations, policies and procedures can mitigate exposure to legal challenges and the public and political scrutiny often related to setting toll rates and fees, protecting customer information, accessing and sharing customer information, providing sufficient notice to customers, and collections and violations processes.

**Debt Collections and Violation Enforcement**

Marcelle S. Jones, Jacobs Engineering Group; and Deanna L. Longo, Linebarger Goggan Blair & Sampson, LLP

**The Impetus of a Class Action Suit: How to Minimize Your Exposure**

Dena Stroh, North Texas Tollway Authority (NTTA); and Jennifer L. Stueber, Ohio Turnpike and Infrastructure Commission

**SESSION 3: GRANTS 101**

Robin M. Reitzes, San Francisco City Attorney's Office, *moderator*

*Sponsored by: Transit and Intermodal Transportation Law Committee (AL020)*

This session will focus on FTA and FHWA grants and what attorneys should know about them -- what grants are available, what they're for, and what requirements attach to them. Speakers from the FTA and FHWA, as well as from a transit agency and a State DOT will give their perspectives.

**Panel Discussion**

[Steve Rochlis](#), Federal Highway Administration (FHWA); [Charles J. Dyer](#), Federal Transit Administration (FTA); [Jonathan Rewers](#), San Francisco Municipal Transportation Agency (SFMTA); and Ronald L. Epstein, New York State Department of Transportation (NYSDOT)

Noon – 1:30 p.m.

**COMMITTEE MEETINGS**

**Transportation Law Committee (AL010)**

**Contract Law Committee (AL030)**

**Eminent Domain and Land Use Committee (AL060)**

1:30 p.m. – 3:00 p.m., Concurrent Sessions

#### **SESSION 4: AUTOMATION IN BOSTON**

Elizabeth Machek, U.S. Department of Transportation, *moderator*

*Sponsored by Emerging Technology Law Committee (AL040)*

The City of Boston and its surrounding areas are home to self-driving technology companies, innovative start-ups, leading research institutions, and public agencies involved in shaping automation policy. As new technologies enter the transportation system, all actors must address new regulatory, policy, and legal questions. State and local governments around the country have taken different approaches. This session will provide an overview of the automation ecosystem in Massachusetts and highlight perspectives from industry and different levels of government engaged in facilitating the testing and operation of automated vehicles. The session will include a panel discussion and an interactive Q&A.

##### **Panel Discussion**

Kris Carter, City of Boston; Daniel Sullivan, Massachusetts Department of Transportation (MassDOT); [Nazareth Ekmekjian](#), Piaggio Fast Forward; and Anita Kim, U.S. Department of Transportation

#### **SESSION 5: NEGOTIATING “MASTER” UTILITY AGREEMENTS FOR ALTERNATIVE DELIVERY PROJECTS**

Bryce Little, WSP, *moderator*

*Sponsored by Contract Law Committee (AL030)*

Transportation agencies enter into Master Utility Agreements (MUAs) with utility owners to set the framework for utility relocations associated with design-build, P3 and CM/GC delivery. These MUAs are critical to mitigate utility risk for alternative delivery projects. This session will focus on:

1. Utility-related risks for alternative delivery contracts.
2. Terms and conditions of a sample MUA and how negotiations are affected by the competing goals of the transportation agency, utility owner and contractor.
3. Impacts of various factors on relocations, such as: project type, size and delivery method; property rights of the agency and utility company; and type of utility company (public vs. private).
4. Practitioner experience with issues such as:
  - a. Establishment and enforcement of utility company project schedule commitments.
  - b. Establishing and working within “prior rights” of both parties.
  - c. Speed vs. accuracy: Balancing the need to ensure that MUAs, and follow-on project-specific utility agreements (UAs) are correct and complete with the need to present these documents to potential project contractors/developers prior to bid submittal.
  - d. Property access, business disruption and financial responsibility.

### **Panel Discussion**

Wanda R. Stansbury, Maryland Transit Administration (MTA); Donna Brady, Nossaman LLP; and [Jennifer M. Porter](#), Chiesa Shahinian & Giantomasi PC

3:00 p.m. – 3:30 p.m.

### **BREAK**

3:30 p.m. – 5:00 p.m., Concurrent Sessions

### **SESSION 6: LIVING ON THE EDGE: INNOVATIVE BICYCLE TRAFFIC CONTROL DEVICE EXPERIMENTATION & RISK**

Christopher Brehmer, Kittelson & Associates, Inc., *moderator*

*Sponsored by: Tort Liability and Risk Management Committee (AL070)*

When designing streets and intersections for bicyclists and pedestrians, communities can take advantage of a growing toolbox of treatments that promote the safety and comfort of nonmotorized road users. New and innovative traffic control devices can be tested and evaluated, even if they aren't currently compliant with the Manual of Uniform Traffic Control Devices (MUTCD). This session explores issues and challenges faced by practitioners and communities interested in experimenting with new and innovative devices and applications. Our panel of experts will present an overview of the issues, MUTCD history and practice, National Association of City Transportation Officials (NACTO) guidance, the federal rulemaking process, the FHWA experimentation process, as well as case studies featuring projects in the Cambridge area and beyond.

### **Panel Discussion**

Patrick Baxter, City of Cambridge; and [William DeSantis](#), VHB

### **SESSION 7: ACQUISITION AND RELOCATION UNDER THE UNIFORM ACT: PROTECTING YOUR FEDERAL FUNDING**

Laura Curry, Jennings, Strouss & Salmon, PLC, *moderator*

*Sponsored by: Eminent Domain and Land Use Committee (AL060)*

Failure to properly administer or provide relocation benefits in a federal assistance project can put federal funds at risk. This session will provide attendees with a working knowledge of the substantive and procedural requirements of relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Act (as amended).

### **Panel Discussion**

Mack Dickerson, Tierra Right of Way Services, Inc.; Darby Venza, Texas Department of Transportation (TxDOT); and Charles Grombacher, Overland, Pacific & Cutler, Inc.

## Tuesday, July 17

7:30 a.m. – 3:00 p.m.

### **REGISTRATION**

7:30 a.m. – 8:00 a.m.

### **CONTINENTAL BREAKFAST**

7:30 a.m. – 8:00 a.m.

### **ETHICS SESSION: WELCOME TO PRIVATE PRACTICE--LEGAL ETHICS AND YOUR POST- GOVERNMENT CAREER**

[Fred Wagner](#), Venable, LLP

*Sponsored by: Legal Resources Group (AL000)*

Attorneys who plan to leave and actually decide to leave government service have unique restrictions and guidelines to follow in order to make smooth and ethically precise professional transitions. This session will provide an overview of federal statutes, rules of professional conduct, and political guidelines that impact employment transitions in and out of government service. Although these rules articulate many specific prohibitions, they are also designed to permit and encourage individuals to take on public service without sacrificing future employment opportunities.

8:00 a.m. – 9:30 a.m., Concurrent Sessions

### **SESSION 8: EXPEDITING ENVIRONMENTAL REVIEWS THROUGH EXECUTIVE ACTIONS**

Jamie Auslander, Beveridge and Diamond, *moderator*

*Sponsored by: Environmental Issues in Transportation Law (AL050)*

Administrations of both political parties have prioritized improving the environmental review and permitting process, principally through executive and administrative actions. The administration of President Trump has vigorously embraced this viewpoint by asserting that delays and other inefficiencies in the environmental review and permitting process are severely impeding critically important projects to rebuild and modernize our nation's infrastructure.

Some of the current administration's reform efforts in this are widely promoted. Other potentially significant reforms have been less visible. These initiatives have left federal, state, and local transportation officials with significant questions regarding what the practical impact will be for individual transportation projects.

This panel will explore Executive Orders on expediting environmental reviews, other initiatives by the Executive in this area, and the legislative agenda to make further changes.

### **Expediting Environmental Reviews**

Manisha Patel, WSP; Jamie Auslander, Beveridge and Diamond; Gerald Solomon, Office of the Secretary of Transportation (OST); and S. Ross Irvine, Ohio Department of Transportation (ODOT)

## **SESSION 9: LESSONS LEARNED FROM CONTRACT TERMINATIONS AND CONTRACTOR BANKRUPTCIES**

Jeffrey Mullan, Foley Hoag LLP, *moderator*

*Sponsored by: Contract Law Committee (AL030)*

The panel will speak about lessons learned from problems faced by transportation agencies with contractors on different projects including:

- Termination of the construction manager/general contract for the MBTA's GreenLine
- Contractor bankruptcy and other issues affecting the Central Artery
- Concessionaire bankruptcy for the South Bay Expressway P3 in California
- Concessionaire bankruptcy for the SH 130 P3 in Texas

### **Panel Discussion**

Marie Breen, Massachusetts Department of Transportation (MassDOT); Glenn B. Mueller, California Department of Transportation (CALTRANS) and Christine D. Ryan, Nossaman LLP

9:30 a.m. – 10:00 a.m.

### **BREAK**

10:00 a.m. – 11:30 a.m., Concurrent Sessions

## **SESSION 10: RETAINED CONTROL: AGENCY LIABILITY FOR CONTRACTOR EMPLOYEE INJURIES**

Terri L. Parker, Missouri Highway and Transportation Commission, *moderator*

*Sponsored by: Tort Liability and Risk Management Committee (AL070)*

Contractor employee's damages should be limited to workers compensation. But under retained control theory the DOT may be liable for contractor's employee's damages. The workers compensation provider may also seek indemnity for all benefits paid or to be paid.

This presentation covers construction operations, tort liability and contract documents (incorporated into the contract by guidance). The presentation will have three Chapters:

Chapter 1: Case study. The facts will be California-based but could take place anywhere in the USA. Example 1: During a night time lane closure an employee of a contractor is struck by a third party in the closed lane. Theory of liability focused on documents.

Example 2: The falsework collapsed while an employee of the contractor was working on it. Theory of liability focused on the acts of the DOT's employees' actions.

Chapter 2: The law. Retained control is a nationwide standard of liability. DOT retains control over the work of the contractor so as to affirmatively contribute to contractor's employee's injuries

Chapter 3: Lessons learned. Enterprise risk management is a nationwide effort to improve business processes to reduce risk. Risk Based Decisions: Development of construction manuals, specs and contract document should be a collaborative effort involving Legal and Construction. Legal provides legal risk assessments. Construction takes that information and makes business decisions in an environment of enterprise risk management.

**Panel Discussion**

[Lauren A. Machado](#) and Rachel Falsetti, California Department of Transportation (CALTRANS)

**SESSION 11: PERFORMANCE MANAGEMENT: IMPLEMENTATION ISSUES FROM THE LAWYER'S PERSPECTIVE**

Nicolle Fleury, Federal Highway Administration (FHWA), *moderator*

*Sponsored by: Transportation Law Committee (AL010)*

FHWA and FTA have issued final rules to implement some of MAP 21's transformative performance management requirements, which require a transition of the Federal-aid highway program and the Federal transit program to performance-driven, outcome-based approaches in key areas. Activities are ramping up for stakeholders as they all work to implement these new requirements. This session will provide an opportunity to learn about how States, MPOs, and transit agencies are integrating the MAP-21 and FAST Act performance management requirements into their programs, the types of challenges they are confronting, and how lawyers can help clients navigate the requirements.

**Panel Discussion**

[Michael D. Nesbitt](#), Federal Highway Administration (FHWA); [Kristin Wood](#), Federal Transit Administration (FTA); Bryan K. Pounds, and Virginia Reeder, Massachusetts Department of Transportation (MassDOT); and Karen Conrad, Merrimack Valley MPO

11:30 a.m. – 1:00 p.m.

**COMMITTEE MEETINGS (lunch provided)**

**Transit and Intermodal Transportation Law (AL020)**

**Emerging Technology Law Committee (AL040)**

**Environmental Issues in Transportation Law Committee (AL050)**

**Tort Liability and Risk Management Committee (AL070)**



1:00 p.m. – 2:30 p.m., Concurrent Sessions

**SESSION 12: THE SCOPE OF THE ADMINISTRATIVE RECORD IN ENVIRONMENTAL LITIGATION**

[Edward V.A. Kussy](#), Nossaman, LLP, *moderator*

*Sponsored by: Environmental Issues in Transportation Law (AL050)*

Recent actions by the Departments of Justice and Transportation may have created uncertainty about what should be included in the Administrative Record in NEPA and related environmental litigation. This panel will discuss the thinking behind these changes and guidance on the scope of Administrative Records going forward.

**Panel Discussion**

Glenn B. Mueller, California Department of Transportation (CALTRANS); Hazem Isawi, Federal Highway Administration (FHWA); David Miller, Nossaman, LLP; and [Andrew Mergen](#), U.S. Department of Justice

**SESSION 13: WHO OWNS THE DATA -- MITIGATING DATA BREACH RISKS IN A "SMARTER" WORLD**

[Gregory Rodriguez](#), Best, Best & Krieger, *moderator*

*Sponsored by: Transit and Intermodal Transportation Law Committee (AL020) and Emerging Technology Law Committee (AL040)*

With smarter transportation comes increased data collection. Data brings with it both opportunities and risks for transit agencies and their users. This panel will discuss the evolving legal landscape around data ownership, data collection, and how to mitigate risks related to the collection of data from innovation-focused projects. Presentations will include examples of pilot projects involving data sharing between the public and private sector, tools for promoting collaborative data-sharing, and considerations around privacy policies and public outreach.

**Panel Discussion**

Dana Henderson, Pierce Transit; and [Catherine J. Groves](#), Hanson, Bridgett LLP

2:30 p.m. – 3:00 p.m.

**BREAK**

3:00 p.m. – 4:30 p.m., Concurrent Session

**SESSION 14: RECENT DEVELOPMENTS IN EMINENT DOMAIN AND CONDEMNATION LAW**

William E. James, Tennessee Attorney General's Office, *moderator*

*Sponsored by: Eminent Domain and Land Use Committee (AL050)*

**Panel Discussion**

Laura Curry, Jennings, Strouss & Salmon, PLC; Bernadette Duran-Brown, Nossaman LLP; [Robert H. Thomas](#), Damon Key Leong; and William E. James, Tennessee Attorney General's Office

## **SESSION 15: TRANSPORTATION AGENCY RISK MANAGEMENT AND INSURANCE ISSUES**

Denise Standridge, AC Transit, *moderator*

*Sponsored by: Transit and Intermodal Transportation Law Committee (AL020) and Tort Liability and Risk Management Committee (AL070)*

This session will cover insurance and liability issues facing transportation agencies, as well as tools to reduce risk and costs.

### **Panel Discussion**

[Denise Standridge](#), AC Transit; Kimon Manolius, Hanson, Bridgett LLP; [Katie Kraft](#), Thompson Coburn LLP; and [Jeanne E. Scherer](#), California Department of Transportation (CALTRANS)

5:15 p.m. – 7:30 p.m.

### **PRESENTATION AND RECEPTION**

U. S. Department of Transportation, Volpe Center

## **Wednesday, July 18**

7:30 a.m. – 8:00 a.m.

### **CONTINENTAL BREAKFAST**

8:00 a.m. – 9:30 a.m., Concurrent Sessions

## **SESSION 16: OPPORTUNITIES AND PITFALLS OF STATE DRONE POLICIES**

Bryant Walker Smith, University of South Carolina

*Sponsored by: Emerging Technology Law Committee (AL040)*

There are now ten times as many unmanned aircraft registered in the United States as there are manned aircraft. Along with their popularity, the potential uses of drones continue to expand. As drones become more widespread, many states and local governments have considered imposing their own requirements on drone users. Some states have turned to their Department of Transportation to develop policies for the use of unmanned aircraft by citizens or the state. Meanwhile, courts have only just begun to weigh in on the regulation of drones. This session will address some of the opportunities and pitfalls that states and DOTs face when developing unmanned aircraft policies.

### **Panel Discussion**

[Craig Gustafson](#), Minnesota Department of Transportation (MNDOT); [Michael Singer](#), Cartesian Therapeutics; [Thomas DeCesar](#), K&L Gates; and Barbara Rankin, Kansas Department of Transportation (KDOT)

## **SESSION 17: EXPLORING THE NO ACTION BASELINE IN NEPA REVIEWS**

[Courtney Leas](#), Federal Highway Administration (FHWA), *moderator*

*Sponsored by: Environmental Issues in Transportation Law (AL050)*

Courts not infrequently find NEPA violations when an agency miscalculates the "no build" baseline or when the baseline assumes the existence of a proposed project. See, e.g., *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037-38 (9th Cir. 2008); *N.C. Alliance for Transp. Reform, Inc. v. United States DOT*, 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001); *Sierra Club, Illinois Chapter v. United States Department of Transportation*, 962 F. Supp. 1037 (N.D. Ill. 1997). Courts have also invalidated a no build baseline where the future land use baseline is inconsistent with the land uses projected in the metropolitan transportation plan. *Openlands, Midewin Heritage Ass'n. v. U.S. Dep't of Transportation*, 124 F. Supp. 3d 796 (N.D. Ill. 2015). The federal circuits differ in approach and the level of deference afforded to agencies' use of a no build baseline that assumes the future land uses in approved local land use plans. Compare, *Laguna Greenbelt v. U.S. Dep't of Transp.*, 42 F.3d 517, 525 (9th Cir. 1994) and *Protecting Arizona's Resources & Children v. FHWA*, \_\_\_ F.App'x. \_\_\_, 2017 WL 6146939 (9th Cir. 2017), with *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, 677 F.3d 596, 605 (4th Cir. 2012). The panel will engage in an interactive presentation that (i) summarizes the case law with a focus on the recent and conflicting decisions in the 4th and 9th Circuits, (ii) the relationship of the no build baseline issue to the evaluation of growth-inducement and cumulative impacts, (iii) little-NEPA approaches to the no build baseline, and (iv) practical analytical approaches to structuring the no build baseline to comply with NEPA and to minimize litigation risks.

### **Panel Discussion**

Robert D. Thornton, Nossaman LLP; Jeff Frantz, Jacob's; and Christopher "Scott" Jones, Federal Highway Administration (FHWA)

9:30 a.m. – 9:45 a.m.

### **BREAK**

9:45 a.m. – 11:15 a.m.

### **ETHICS SESSION**

## **SESSION 18: CREATING AND MAINTAINING AN ETHICAL CULTURE IN YOUR ORGANIZATION**

Edward V.A. Kussy, Nossaman, LLP, *moderator*

*Sponsored by: Legal Resources Group (AL000)*

Most government agencies and many other entities have rules relating to the conduct of their employees. Lawyers are often involved in the development and implementation of these rules. However, an effective ethics program involves more than just promulgating rules. This program explores how organizations can develop and maintain a culture of ethical behavior, and what can happen when this process fails.

**Panel Discussion**

Edward Kussy, Nossaman, LLP; [Carol Carson](#), Connecticut Office of State Ethics;  
[Margaret M. Cassidy](#), Cassidy Law PLLC; and [Bruce Smith](#), Apperson Crump & Maxwell,  
PLC

11:15 a.m. – 11:45 a.m.

**CLOSING REMARKS & ADJOURNMENT**

11:45 a.m. – 2:00 p.m.

**GROUP COUNCIL MEETING (CLOSED MEETING)**