Message from the Chair

Dear Fellow Members of the Business and Corporate Litigation Committee:

The Business & Corporate Litigation Committee (BCLC) is fortunate to have a number of new Subcommittee Chairs as of the recent Annual Meeting in Chicago. Welcome, and thank you to both the new leaders and our returning leaders. We are pleased to have talented and motivated people in leadership. If you are interested in getting involved in a leadership position, please let me know.

As part of celebrating the BCLC’s 25th Anniversary two years ago in Boston, our Historical Subcommittee, chaired by Steve Brauerman and Vanessa Tiradentes, conducted interviews of all the past BCLC chairs. We have shared those interviews in past Network Newsletters and are pleased to profile in this issue former BCLC Chair Pete Walsh, who remains active in the Business Law Section as Chair of the Publications Board. Pete has been a wonderful mentor and friend to me over the years.

The Annual Meeting was a tremendous success, with BCLC sponsoring 3 primary CLE programs and co-sponsoring many others. Photos from the Annual Meeting can be found in this Newsletter and on the BCLC webpage. A special Thank You to Dan Formeller of Tressler LLP for his hard work in heading up the Chicago Host Committee and organizing the various BCLC events, including an amazing dinner at The Metropolitan Club in the Willis (formerly Sears) Tower. Attendees were treated to spectacular views overlooking the Chicago Skyline and Lake Michigan. Thank you again to our Chicago dinner sponsors — Huron Consulting, Tressler LLP, and Morris, Nichols, Arsht & Tunnell.

Congratulations and welcome to the new Fellows assigned to the BCLC - Kate Harmon with Elliott Greenleaf in Wilmington, DE; Mian Wang with Greenberg Traurig in Boston, MA; and Indira Sharma with Saul Ewing in Baltimore MD. We look forward to their involvement and contributions to the BCLC. The continuing Fellows to the BCLC who are in their second year are Anne Steadman (Editor of this Newsletter), Alyn Beauregard (immediate past Editor of this Newsletter), and Jonathan Stemerman (Vice Chair of E-Discovery and Membership Subcommittees). Our outgoing Fellows are Tomas Garcia, Paige Greenlee, Sam Light, and Keola Whittaker - who we hope will remain active and engaged in the BCLC.

The BCLC will join numerous other Section Committees at the Fall Meeting, November 16-18, in Washington, DC. Read more about CLE programming and Subcommittee meetings in this Newsletter. The BCLC’s ever popular joint dinner with the Judges Initiative and Dispute Resolution Committees will be held on Thursday evening, November 16.

SAVE THE DATE for the Section Spring Meeting in Orlando, Florida (Rosen Shingle Creek) - April 12-14, 2018. Planning is underway for the Pro Bono & Public Service Project, as well as the Women’s Business & Commercial...
Advocates reception, which includes honoring notable members of the legal community.

Sponsorship opportunities are also available for the Spring Meeting. Information is available on the ABA website, or you can contact Melissa Visconti (mvisconti@dvllp.com) or Paul Masinter (PMasinter@stonepigman.com), or Julia Passamani (Julia.Passamani@americanbar.org) at the ABA.

Congratulations to Bill Johnston (former BCLC Chair) for an excellent year as Chair of the Business Law Section. Best wishes also are in order for Pat Clendenen (my predecessor as BCLC Chair), who is climbing the "leadership ladder" to become Section Chair in the next few years. Thank You to the BCLC Vice Chairs, Stuart Riback, Hon. Gail Andler and Hon. Mac McCoy, and all of the BCLC Subcommittee leaders for their continuing efforts in making the BCLC among the most active and successful Section Committees. Last but not least, many thanks to the ABA Staff who pull everything together for our Section meetings and events.

Finally, we are proud to present two columns debuting in this edition of the Newsletter, which we hope to continue in future editions: Member Spotlight and Members in the News and Notes. In Member Spotlight, we will be showcasing current and former members of the BCLC. In this edition, Kurt Heyman honors his friend and former law partner Vern Proctor. Members in the News and Notes is an exciting new way for our members to keep us all posted on their recent achievements. If you have celebrated a milestone, made an important move, or just have interesting news to share, please consider submitting a few lines on your activities for our next edition.

If you're passing through Phoenix, please let me know and we can grab a cup of coffee. Enjoy the fall season!

Best,
Heidi

Heidi McNeil Staudenmaier - Chair
Business and Corporate Litigation Committee
American Bar Association, Business Law Section

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Former Chair Profile: Peter Walsh, Jr.—BCLC Chair 2007-2010

By Steve Brauerman and Vanessa Tiradentes

Peter Walsh, Jr. ("Pete") is a corporate and commercial litigator at Potter Anderson & Corroon LLP in Wilmington, Delaware. Pete served as BCLC Chair from 2007-2010, following in the footsteps of one of his mentors at the BCLC, Mitchell Bach.
Pete first got involved with the BCLC through a then-senior partner at Potter Anderson, Mike Goldman, who suggested that Pete attend a Business Law Section meeting after they had worked on an appraisal article together. Pete attended the meeting in San Antonio, Texas that year. At that first meeting, he met Mitch Bach and others at the Committee dinner "where the pitchers of margaritas flowed freely."

At some point, Pete was asked to become the Vice Chair of the Corporate Litigation Subcommittee. After serving in that capacity, he became the Chair of the Corporate Litigation Subcommittee, and, at some point, Mitch (after consulting with Judge Stong and others) asked if he was interested in serving as the Vice Chair of the BCLC (which then led to serving as the Chair). Pete was flattered and honored by the invitation, as the BCLC was among the most influential and largest in the section and a number of influential Delaware lawyers, including former Chief Justice Veasey, Frank Ballotti, Jim Holzman, and Mike Goldman, were or had been involved in the work of the Committee.

As BCLC Chair, Pete's first goal was to continue the tradition of being an open and welcoming committee, especially to diverse and younger members of the section. Second, he focused on increasing committee membership and involvement, including continuing the efforts by his predecessors to foster the increased participation of judges in the BCLC. Third, he wanted to make sure to keep the fun aspect of the committee, an aspect that he noted early on in his participation with the BCLC. In that respect, with many sports fans in the ranks, the Committee enjoyed a White Sox game during a Chicago meeting instead of doing the traditional dinner, and later got a box at a Mavericks basketball game in Dallas during another meeting. Both events were well received, and a lot of fun.

Pete has found tremendous value in his participation in the BCLC and the ABA at large, both professionally and personally. Putting on a number of successful programs and working to ensure strong attendance at meetings during his term as Chair, Pete helped make sure that a new group of younger leaders felt welcome and ready to take on new leadership roles as his term ended. After his tenure as BCLC Chair, he has continued to stay on top of what the Committee is doing and attends meetings and the dinners regularly. Since stepping down as Chair, he has served on the Council of the Section and now chairs the Section's Publication Board.

To future leaders of the BCLC, Pete offers the following words of wisdom:

First, don't take it too seriously. Second, be prepared to do a little "herding of cats," as they say. As Chair, when deadlines start to approach and you need to line up the programs and speakers, you must be the one to step in and say "we need to get it done". I think you need to be serious enough to get things done, but not so strict that you don't enjoy the experience or turn off the participants. Third, be prepared to think about how the Committee and Section are going to evolve and meet the challenges of the practice of law in the future. Ten years ago the spring meetings were huge. Unfortunately, our Section members are not coming to meetings like they used to for expense reasons and because so much information is available online. One of the challenges is to get people to stay involved and it may not necessarily involve attendance at meetings. Fourth, be flexible and prepared for
Old school. Those are the first words that come to mind when thinking of my friend and (now retired) partner, Vern Proctor, a longtime member of BCLC. And of course I mean those words in the best way possible.

It is not only that Vern is a loveable luddite, who still "hunts and pecks" when typing emails and may be one of the last attorneys on earth to use a Dictaphone.

Rather, it is that Vern is a living link to and exemplar of what is unfortunately becoming a bygone era of gentility and integrity. After obtaining both his undergraduate and law degrees from Harvard, Vern entered the Delaware Bar in 1979 and practiced with some of its legends, including as an associate and then partner of former BCLC Chair Jim Holzman at the Prickett Jones firm.

Vern and I began our professional career together when I joined what was then the Bayard Handelman firm in 1996. He was the one who encouraged me to become involved with BCLC.

When Vern bravely agreed to start Proctor Heyman with me in 2006, we consciously did so with some "old school" principles in mind. To Vern, law was never just a "business." We viewed ourselves as "practicing the art of law" -- our firm slogan. Profit, while important, was never Vern's primary motivation. Providing high quality legal advice to the client was always the foremost goal, which meant not taking a case where we did not believe we could provide such service. And if profit is not your primary motivation, you cannot be tempted by monetary concerns to compromise your principles or veer from the ethical path.

Vern was also the consummate gentleman, committed to practicing with civility and professionalism, always taking the high road and avoiding sharp litigation practices, even when the other side engaged in shenanigans.

That said, Vern and the firm have always been successful even while sticking to our principles, or as I would like to think, as a direct result of doing so. Vern is noteworthy for working on some of the leading corporate law cases of the last four decades, including Production Resources Group v. NCT Group, Emerald Partners v. Berlin, Gilbert v. El Paso and Thorpe v. CERBCO. He also earned the respect of his peers, serving as a longtime member of the Corporation Law Council and later the Alternative Entities Committee of the Delaware State Bar Association. He even managed to co-author a treatise called Drafting LLC Operating Agreements.

He was also active in BCLC, serving as Chair of the Alternative Business Entities Subcommittee.

While maintaining his successful practice, Vern always remained active in the community, as part of his commitment to the tradition of "giving back." Among other things, he served for a number of years on the board of St. Michael's School and Nursery in Wilmington, including as its President; and he sang with the Delaware Valley Chorale.

Vern retired at the end of last year and now spends most of his time in Bethel,
Delaware, with his wife, Maggie. He remains active, serving as a member of Bethel's Planning and Zoning Commission and Board of Elections, and as a current Vestry member of St. Philip's Episcopal Church in Laurel. He is also planning on pursuing a master's degree in conflict analysis and dispute resolution at Salisbury University, and I hear he is available for mediation and other alternative dispute resolution engagements. Perhaps most significantly, Vern's retirement coincided with the birth of his first grandchild, Vivian, who I know brings him more joy than the practice of law ever could.

I miss looking forward on a daily basis to Vern's friendship, wise counsel and steadfast commitment to "old school" principles. I also greatly miss his well-known sense of humor, including his ability to do spot-on impressions of famous persons, and working with him on our firm's notorious holiday cards. We had a lot of fun over the years with parodies of the Beatles, the Blues Brothers, Kiss and the Village People. Last year's card (reproduced here) was a fitting send-off for Vern: it depicted Vern as the Wizard of Oz, about to take off in his hot air balloon for new horizons and adventures. "If ever a wonderful wizard there was …"

Featured Articles

Business Law Section Diversity Clerkship Program
By Hon. Christine Ward and Vanessa Tiradentes

To further its mission "[t]o encourage diversity in the Section by fostering a welcoming environment for all lawyers and promoting full and equal participation by all lawyers, including lawyers of color, women lawyers, gay and lesbian lawyers, and lawyers with disabilities," the ABA Business Law Section created the Diversity Clerkship Program, which gives law students the opportunity to intern with judges in business courts and specialized judicial commercial litigation programs throughout the country, exposing them to business practices and new areas of law. The Diversity Clerkship Program began under the leadership of Mitchell Bach, while he was BCLC Chair, former Section Chair Amy Boss, and William Woodward, who saw this as a means of providing leadership opportunities for young lawyers, women, and minorities within the BCLC and the Business Law Section at large, while serving a dual role in supporting business courts throughout the United States, which the Section has promoted for many years. Today, the Diversity Clerkship Program is co-chaired by Mitch Bach, The Honorable Christine Ward, and Vanessa R. Tiradentes.

The Diversity Clerkship Program provides qualified first and second year law students of diverse backgrounds with experience and exposure to business law. Nine applicants are chosen and paired with a business court judge for the summer. Participating judges are from business courts and specialized judicial commercial litigation programs all over the country. In 2017, students worked with judges in Delaware, Pennsylvania, New York, Nevada, Maryland, Michigan, and Illinois. The participants also receive a $6000 stipend from the Section to cover living expenses, and an all-expense paid trip to the Business Law Section Annual Meeting in September, where they are encouraged to take full advantage of programming and networking opportunities.

Both during and after their participation in the Program, students are encouraged to forge relationships with business law practitioners and to consider careers in business law. This year, we had former Diversity Clerks serve as mentors to incoming clerks, and also circulated information about the participants to members of the BCLC, who in turn met incoming clerks for coffee or lunch in the area in which they were clerking. Overall, it was another successful year, with very positive reviews from the clerks and the participating judges!

For more information on the application process, please visit the ABA website or
Good Faith, Bad Faith, No Faith: Will a Subjective Good Faith Standard Influence How Litigants Approach Mediation?

By Brian J. Laliberte

Mediation as a dispute resolution mechanism does not succeed because courts, statutes, or rules impose a good faith standard on participants or sanction bad faith conduct. Mediation succeeds because litigants and their lawyers prepare their case, know their objectives, and work to achieve them. Ideally, requiring lawyers and litigants to adhere to minimal objective good faith requirements, to act professionally and civilly, and to respect the process should be sufficient to facilitate meaningful participation in mediation. Often, it is not. In some cases, lawyers and litigants misbehave and frustrate the process. Will a subjective good faith mediation standard influence how litigants approach mediation?

Read more...

Subcommittee Reports

Business Divorce Subcommittee

The Business Divorce Subcommittee will be meeting at the BCLC Annual Meeting in D.C. on November 17, 2017, at 1:00 p.m. We are excited to welcome Neal Jacobs, Esq. of the Jacobs Law Group PC, who will be giving a presentation on the Parasitic Partner and methods of dealing with him or her. The Subcommittee welcomes all attorneys interested in the Business Divorce practice area and is always seeking members who would be interested in speaking at Subcommittee meetings. Members interested in presenting at Subcommittee meetings should contact Melissa Donimirski (mdonimirski@hegh.law).

Communications and Technology Subcommittee

The Communications and Technology Subcommittee is continuing to work on the subcommittee webpages. Subcommittee Leaders, here are some suggestions for your pages:

- Add links to articles from Business Law Today or The Business Lawyer relevant to your Subcommittee, even if not produced by your Subcommittee
  - If you would like to add links to other articles, please get permission from the original publisher
- Add pictures from any upcoming meetings or presentations
  - Don't forget to provide captions for smaller group photos identifying names and roles in the committee or subcommittee
- Add links to program audio or materials from meetings or presentations
- Add some narrative on what your Subcommittee is doing or what your Subcommittee focuses on.

You can send text, links, or pictures to Graham Hunt (graham.hunt@americanbar.org) or Laura Readinger (lreadinger@morrjs.com), and we will make sure they get posted.

Women Business and Commercial Advocates Subcommittee

We are beginning our planning for our Spring Meeting in Orlando, Florida (April 12-14) where we hope to be honoring outstanding women in our profession from the general region who have distinguished themselves as business advocates—including as house counsel, or on the bench, or in academia. Please let us know if you would like to nominate someone by contacting Dan Formeller.
(DFormeller@tresslerllp.com), Melissa Visconti (mvisconti@dvllp.com), or Judge Gail Andler (judgeandler@icloud.com). Also, we have begun holding regional round tables to discuss providing pathways to success and leadership for women business and commercial advocates. Successful events have been held in Irvine, California; Las Vegas, Nevada; and Jackson, Mississippi. Planning is underway for second events in those areas and an event in San Diego, California. Please contact Judge Gail Andler (judgeandler@icloud.com) if you would like to learn more, and help bring this exciting effort to your region. Finally, we are always looking for content, so please let Dan, Melissa, or Gail know if you would like to author an article on an issue of interest to our members.

Leadership

Meet Our New BCLC Business Law Fellows

The BCLC Business Law Fellows began their tenure at the 2017 Annual Meeting in Chicago. They will serve as Fellows through the 2019 Spring Meeting.

Past Meetings

Annual Meeting CLE Roundup

The BCLC was proud to present three CLE programs the Annual Meeting in Chicago. We thank all of our members who participated in and attended these great programs!

Business Law Health Club — 2017 Annual Meeting

Bright and early each morning of the Annual Meeting in Chicago, attendees gathered to participate in a guided run or walk through Chicago led by professional guides. This early morning group has become known as the Business Law Health Club, and is a tradition at each meeting. This year at the 2017 Annual Meeting in Chicago, runners and walkers enjoyed the breathtaking scenery of the downtown Chicago skyline and riverfront as well as the company of like-minded participants who wanted an active start to their day.

Upcoming Meetings

Fall Meeting Programming Preview

Join us in Washington, D.C. for these great programs!

At the ABA Business Law Section Fall meeting, beginning at 8:30 a.m. on Friday, November 17, 2017, the BCLC will put on its annual Bankruptcy for Breakfast program, which will be chaired and moderated by Katherine Good, Whiteford, Taylor & Preston. The panel includes The Honorable Elizabeth S. Stong, Bankruptcy Court for the Eastern District of New York; The Honorable Christopher S. Sontchi, Bankruptcy Court for the District of Delaware; Sarah Cave, Hughes Hubbard & Reed; Michael Rubenstein, Liskow & Lewis; and Javier Lorente, Naveira, Truffer, Martinez, Anido, Lorente & Lopez Abogados. The panel will
focus on developments in bankruptcy in 2017, including overview of statistical filing information from the Courts, analysis of recent significant cases, trends in international insolvencies and cross-border cases, and predictions for the bankruptcy and insolvency industry in 2018.

Read more...

**Spring Meeting Programming Preview**

From Thursday, April 12 to Saturday, April 14, 2018, the Business and Corporate Litigation Committee will be offering a top-notch lineup of CLE programs at the ABA Business Law Section Spring Meeting in Orlando.

Read more...

**Pro Bono Project in Planning for Spring Meeting**

The BCLC's Pro Bono and Public Service Subcommittee, in conjunction with the Young Lawyer Committee, is planning another exciting project for the Spring Meeting in Orlando. It is anticipated that this year's project will take place on Thursday, April 13, 2018 from 8 a.m. to 10 a.m., and volunteers will offer career "speed mentoring" to local high school students who are participants in a pre-law magnet program. The students will be enthusiastic about the opportunity to learn from volunteers about their respective backgrounds, education, and challenges they faced in their path to success. Lawyers, Judges, and law students are all welcome! Details to follow when we get closer to the Meeting date. In the meantime, should you have any questions please contact the Pro Bono Subcommittee chair, Kristin Gore (kgore@carltonfields.com).

**Publications**

**The New Business Law Today Launches This Fall, Creating New Opportunities for You to Get Published**

By Sara E. Bussiere

This fall, the ABA Business Law Section is launching a new and improved Business Law Today ("BLT"), which will replace the former BLT publication with a robust, content-rich website. The mission of the new BLT is to serve as a trusted source of insight on the current issues most critical to business lawyers. To that end, the new BLT will provide content covering 8 practice areas, 39 topic areas, and enumerable subcategories that users can search to find content most relevant and helpful to their practices. The website will feature articles, webinars, interviews, CLEs, monthly updates on new laws and court decisions, and other tools to best aid BLT's readership in remaining fully informed on current business law issues, including business litigation and dispute resolution.

BLT presents tremendous opportunities to the members of the Business and Corporate Litigation Committee ("BCLC") who are interested in sharing original or repurposed work with the broader Business Law Section readership. The Honorable Mac R. McCoy has agreed to serve on the BLT Editorial Board as the Executive Editor for the Business Litigation and Dispute Resolution Practice Area. Judge McCoy will work with BCLC's Content Director, the Honorable Gail Andler (ret.), and others to solicit timely content submissions on a monthly basis. Please look out for more information after the BLT launch regarding the different ways you can contribute to the new BLT. In the meantime, if you have any questions or are interested in learning more about specific BLT publication opportunities, please email Judge McCoy (mac_mccoy@flmd.uscourts.gov) (Executive Editor), Sara Bussiere (sbussiere@bayardlaw.com) (Managing Editor), and Rick Paszkiet (rick.paszkiet@americanbar.org) (the Section "Content Guy").
Members in the News & Notes

Matthew Archer-Beck, Senior Counsel at U.S. Securities and Exchange Commission, was appointed by the ABA President to be the Chair of the ABA's Council for Diversity in the Educational Pipeline, effective August 2017. Matthew is also a Vice Chair of the Securities Litigation and Arbitration Subcommittee.

Adrienne Bouleris joined the Senior Partnership at Emtec, Inc. this year. Emtec is an international IT services consultancy that focuses on client technical transformation and growth. Adrienne had served as Emtec's corporate counsel since 2009 and helped Emtec transform into a partnership structure this year.

Pat Clendenen assumed the role of Vice Chair of the Business Law Section after the most recent BLS Annual Meeting in Chicago. In that role, he will serve as one of the five ladder officers of the Section generally and focus most of his energies as Editor-in-Chief of The Business Lawyer. Pat "aged out" of the ABA Young Lawyers Division as a Massachusetts Delegate in 2000 and was fortunate to be selected as a BLS Fellow from 2000-2002, assigned to the Business and Corporate Litigation Committee, which was then chaired by the Honorable Elizabeth Stong. Pat was the first co-chair of BCLC's Subcommittee on Pro Bono and Public Service and later chaired the Subcommittee on Class and Derivative Actions. He later served as one of former BCLC Chair and BLS Section Chair Bill Johnston's Vice Chairs, and he's the Immediate Past Chair of BCLC. Within BLS, Pat co-chaired the Fellows Committee from 2002-2005, the Meetings (now Programs) Committee from 2005-2010, and served on Section Council from 2010-2014. Pat also co-chaired Business Law Today from 2011-2013 and chaired BCLC from 2013-2016, after which he was nominated and elected to be BLS Secretary. Pat practices business, corporate, and IP litigation in Boston as a Shareholder of Davis, Malm & D'Agostine P.C.

Eddie Fitzgerald was recently appointed as Co-Chair of the Membership Committee for the Business Law Section, with his tenure beginning immediately following the 2017 Annual Meeting. Eddie joined the Business Law Section and the BCLC Committee in 2014 as a Business Law Fellow. He also currently serves as the Co-Chair of the BCLC Membership Subcommittee with Judge Elizabeth Stong.

Heidi McNeil Staudenmaier, Partner with Snell & Wilmer in Phoenix, AZ, was named 2018 Phoenix Lawyer of the Year for Gaming by Best Lawyers in America. Heidi previously earned similar honors in 2011 and 2016, and also was named Phoenix Lawyer of the Year for Native American Law in 2015 and 2017.

Hon. Elizabeth S. Stong was reappointed for a second term, through 2031, as a United States Bankruptcy Judge for the Eastern District of New York.
Mediation as a dispute resolution mechanism does not succeed because courts, statutes, or rules impose a good faith standard on participants or sanction bad faith conduct. Mediation succeeds because litigants and their lawyers prepare their case, know their objectives, and work to achieve them. Ideally, requiring lawyers and litigants to adhere to minimal objective good faith requirements, to act professionally and civilly, and to respect the process should be sufficient to facilitate meaningful participation in mediation. Often, it is not. In some cases, lawyers and litigants misbehave and frustrate the process. Will a subjective good faith mediation standard influence how litigants approach mediation?

II. Good Faith/Bad Faith/No Faith

A. Objective Good Faith

What is good faith mediation? Most courts interpret the concept narrowly. Generally, it has been limited to requiring parties to do the following: (1) provide a mediation statement prior to the mediation date; (2) attend the mediation; and, (3) have a representative with authority to settle present. These are the most basic and widely accepted objective good faith mediation requirements.

These requirements often are memorialized in detailed pre-trial mediation orders issued pursuant to Fed. Civ. R. 16. Rule 16 authorizes the use of pretrial conferences to “formulate and narrow issues for trial and to discuss means for dispensing with the need for costly and unnecessary litigation.” As such, “[p]rettrial settlement of litigation has been advocated and used as a means to alleviate overcrowded dockets, and courts have practiced numerous and varied types of pretrial settlement techniques for many years.” Indeed, since 1983, “Rule 16 has provided that settlement...
of a case is one of several subjects which should be pursued and discussed vigorously during pretrial conferences.”

Rule 16 also addresses a court’s authority to sanction litigants for failing to comply with pretrial orders – including orders directing them to mediate and to do certain things prior to a scheduled mediation. Rule 16 states:

On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate – or does not participate in good faith – in the conference; or

(C) fails to obey a scheduling or other pretrial order.

In addition to rule-based powers to sanction, Courts have inherent powers to control the proceedings before them and to see to “the orderly and expeditious disposition of cases” through sanctions and other means.

Complying with a court’s mediation order, appearing at mediation, and sending a representative with authority to negotiate (and/or with access to higher corporate authority), are basic requirements any litigant and its lawyer can meet. If, for some reason, one of those requirements cannot be met, it behooves counsel for that litigant to contact opposing counsel, the mediator, and/or the court to obtain relief. A litigant’s unexcused failure to satisfy minimal objective good faith mediation requirements likely warrants sanctions. Such sanctions should be designed to compensate the non-offending party for the fees and costs expended to prepare for and attend mediation. They should not, however, serve to influence the outcome of the case. In short, objective good faith mediation requirements should serve the interests of judicial economy and case administration without imposing punitive or coercive sanctions upon litigants.

B. Subjective Good Faith

Courts have struggled to define subjective good faith requirements intended to evaluate the quality of litigant participation in mediation. The district court in *In Re A.T. Reynolds & Sons, Inc.*, explained the pros and cons of using subjective good faith mediation standards.

It vacated sanctions entered by the bankruptcy court after an unsuccessful mediation between two creditors. The bankruptcy court held that one creditor (Wells Fargo) failed to mediate with another creditor in good faith. It explained that:

Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation, because mediation requires
listening, discussion and analysis among the parties and their counsel. Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with risk analysis, a fundamental practice in mediation. This Court has authority to order the parties to participate in the process of mediation, which entails discussion and risk analysis.\textsuperscript{vi}

The bankruptcy court found that Wells Fargo engaged in bad faith mediation for the following reasons: (1) Wells Fargo failed to meaningfully participate in mediation because it “insisted on being dissuaded of the supremacy of its legal obligation in lieu of participating in discussion and risk analysis;” (2) the Wells Fargo corporate representative (a) only had authority to settle for a predetermined amount, despite the potential actual amount in controversy; (b) the representative was only prepared to discuss certain specific legal issues; (c) the representative had no authority to enter into “creative solutions that might have been brokered by the Mediator;” and, (3) Wells Fargo “sought to control the procedural aspects of the mediation by resisting filing a mediation statement and demanding to know the identity of the other party representatives.”\textsuperscript{vii} It then concluded that “attendance without participation in the discussion and risk analysis… constitutes failure to participate in good faith.”\textsuperscript{viii}

The district court rejected the bankruptcy court’s qualitative analysis of Wells Fargo’s participation in the mediation. It explained that such an analysis: (1) interferes with litigant autonomy; (2) may encroach upon confidential attorney-client communications and work product; and (3) may coerce settlement in cases where a litigant otherwise may take a “no pay” or “nuisance value” settlement position.\textsuperscript{ix} The district court characterized the bankruptcy court’s analysis of Wells Fargo’s conduct as impractical and unrealistic. It concluded that an inquiry into the reasons a litigant has taken a certain settlement position, in the absence of a statute or rule authorizing such an inquiry and defining a standard, goes too far.\textsuperscript{x}

\textbf{C. Bad Faith}

Defining bad faith can be an inherently vague notion that is difficult or even impossible to reasonably and logically enforce.\textsuperscript{xi} Using a common definition of bad faith may be helpful. In the litigation context, it may include unreasonable, unprofessional, or vexatious conduct.

Specific examples of “bad faith” conduct during mediation include: refusing to discuss the mediation process with the mediator and opposing counsel before the conference; unprofessional and acrimonious statements or behavior during mediation (e.g., insulting the opposing party, counsel or the mediator); placing unreasonable time limits on offers/counteroffers; unilaterally terminating or abandoning a mediation without explanation; and disrespecting the mediator or the process (e.g., interrupting, ignoring, or refusing to engage in dialogue).\textsuperscript{xii}

None of this conduct should require an inquiry into a litigant’s motives. Rather, it should be evaluated against professional conduct rules, local standards for civility among members of the bar, and common sense. It also should be evaluated in the context of the entire litigation – i.e., has a litigant and/or its lawyer behaved badly throughout the case.
Finally, in addition to compensatory sanctions, punitive sanctions may be appropriate in the “bad faith” context. Punitive sanctions should be crafted to both punish recent unprofessional, uncivil and vexatious conduct and to deter it in the future.

D. No Faith?

It may be fair at this point to ask: What value does mediation have if litigants only must adhere to basic, non-stringent objective good faith standards? What value does it have if there is no subjective evaluation of litigant participation? These are not questions a reviewing court or appointed neutral should answer. These are questions that in-house, transactional, and trial lawyers should be asking each time they are presented with an opportunity to mediate a dispute regardless whether it is voluntary or mandatory. The answer should not be “none.” If it were, it would reflect a lack of faith in mediation that should not govern our approach to dispute resolution.

Lawyers, therefore, must take responsibility for engaging in mediation consistent with their duty to zealously represent their client and their corresponding duties of professionalism and civility. This will facilitate adherence to both objective and subjective good faith standards, even if the latter cannot be defined precisely or enforced. It also will diminish the likelihood that litigants will engage in bad faith conduct designed to degrade the mediation process.

III. Conclusion

Lawyers should approach mediation with the intent to maximize its value regardless of the context. This takes effort and a commitment to prepare for mediation as thoroughly as one would for a hearing or argument. To maximize the value of mediation, lawyers must: know their client; know their case; know their adversary; identify their client’s objectives; value the claims rationally; set the stage for mediation with their client and their adversary; time the mediation to maximize potential outcomes; negotiate from a position of strength (if possible); and, be prepared to take the case to trial. Preparing to mediate using these guidelines will serve the client’s best interests and should demonstrate good faith participation in the process regardless of outcome and regardless whether objective or subjective criteria are used to evaluate it.

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ii Id.
iii Id.
iv Nick, 99 F. Supp.2d at 1060. See also Link v. Wabash R.R., 370 U.S. 626 (1962) (holding that the Federal Rules of Civil Procedure are not intended to be the exclusive authority for district
courts to manage cases efficiently, to preserve the integrity of the judicial process, and to control their dockets).


viii Id.
x A.T. Reynolds, 452 B.R. at 385.
Meet Our New BCLC Business Law Fellows

The BCLC Business Law Fellows began their tenure at the 2017 Annual Meeting in Chicago. They will serve as Fellows through the 2019 Spring Meeting.

Kate Harmon, Wilmington, Delaware

Kate Harmon is a Senior Associate in Elliott Greenleaf P.C.’s Wilmington, Delaware office.

Prior to joining Elliott Greenleaf P.C., Kate managed the mass tort litigation docket for the Wilmington office of a regional defense firm and has litigated cases in Delaware’s various state and federal Courts from inception through trial. She is familiar with entity formation and local licensing requirements relating thereto. Kate has a broad range of litigation experience including: products liability, construction defect, post-confirmation of bankruptcy trusts, insurance coverage disputes, contract disputes and execution of and collection on judgments. She has presented on numerous topics including all phases of litigation and various theories of liability. Kate conducts her practice in the areas of complex commercial litigation, bankruptcy litigation, entity formation, non-profit representation, insurance coverage disputes, compliance, and intellectual property.

Kate is co-author of two chapters of the recently published Reorganizing Failing Businesses (3d ed.): Fiduciary Duties of Financially Troubled Corporations, with C. J. Myron T. Steele (Ret.) and Rafael X. Zahralddin-Aravena, and Collective Bargaining Agreements, Employee Benefits and Executive Compensation, co-authored with Albert Togut, Neil Berger, and Rafael X. Zahralddin-Aravena.

Kate is a Leadership Council on Legal Diversity Pathfinder and was selected to participate in the 2016 Next Generation Program of the National Conference of Bankruptcy Judges.

Kate represents children in Delaware’s dependency system as a guardian ad litem and is passionate about child welfare and child welfare reform.

Kate currently serves as the Assistant Treasurer of the Delaware State Bar Association and previously served as a Member-at-Large on the DSBA’s Executive Committee. She is also the current Secretary for the Women and the Law Section of the DSBA.

Kate is a lifelong Delaware resident who lives in Wilmington with her husband and daughter.
Indira Sharma, Baltimore, Maryland

Indira Sharma is Counsel at Saul Ewing Arnstein & Lehr, LLP in the Baltimore office, where she serves as Chair of the firm’s Diversity & Inclusion Committee. Indira practices business litigation with an emphasis on real estate litigation, contract disputes, business torts, and employment litigation.

Indira has been recognized as a Rising Star in Business Litigation by *Maryland SuperLawyers* from 2013 through 2017. She was also named recently named this year one of Maryland’s Top 100 Women by The Daily Record and one of the Outstanding 50 Asian Americans in Business by the Asian American Business Development Center.

Indira is very active in her local community. She serves as a Board Member and Immediate Past Chair of the Board of Directors of Community Law in Action, a non-profit dedicated to improving the lives of youth in Baltimore City through mentoring and teaching advocacy. She served for the past six years on the Board for the University of Maryland School of Law’s Alumni Association. Indira has also served on multiple committees for the Maryland State Bar Association, the Bar Association of Baltimore City, and the Asian Pacific American Bar Association of Maryland. Indira is the current Chair-Elect for the MSBA’s Young Lawyers Section.

In her spare time, she is active in running her local Hindu temple and serves as the treasurer. Indira is also a very busy mother of three small children, ages 7, 5, and 3, and enjoys spending time with them and volunteering at their schools. Her interests include meditation, wellness, and advancing diversity and inclusion in the legal profession, especially for women.
Mian R. Wang, Boston, Massachusetts

Mian R. Wang is an attorney with Greenberg Traurig, LLP, an international law firm with 2000 attorneys and 38 locations around the world.

Prior to moving to Boston and joining Greenberg Traurig, Mian was a law clerk to the Honorable Alvin W. Thompson in the United States District Court for the District of Connecticut.

Mian specializes in defending corporations in business disputes, and practices primarily in federal district courts and bankruptcy courts across the country. Mian also has experience advising clients on regulatory compliance in the energy and disaster relief fields. She is active in the BCLC, the Professional Responsibility Committee, and the Legal Analytics Committee.

Mian received her law degree from Cornell Law School. She also holds a S.M. and a S.B. from Massachusetts Institute of Technology. In her spare time, she enjoys practicing yoga.
Annual Meeting CLE Roundup

The BCLC was proud to present three CLE programs the Annual Meeting in Chicago. We thank all of our members who participated in and attended these great programs!

On Friday, September 15, 2017, the BCLC put on a program entitled You Have a Whistleblower - Now What?, which was chaired by Jay Dubow, Pepper Hamilton LLP. Using a hypothetical situation, the presenters discussed how companies should respond when faced with a whistleblower. Issues included when to investigate and who should do so, advice regarding seeking to ascertain the identity of an anonymous whistleblower, and the impact of retaliation. The speakers were comprised of former SEC officials and attorneys with different perspectives including white collar, SEC enforcement, labor and employment, and an attorney who represents whistleblowers. The panelists included Elizabeth Gray, Willkie Farr & Gallagher, LLP; Marjorie Peerce, Ballard Spahr, LLP; Karl Riley, Snell & Wilmer, LLP; and Timothy Warren, Labaton Sucharow. The program was very well attended and the audience asked insightful questions that enhanced the program.

Also at the Annual Meeting, the BCLC put on a program titled Cybersecurity and Data Protection Guidance for Law Firms: Protecting Your Clients’ Crown Jewels in the Age of the Internet, which was chaired and moderated by James Melendres, Snell & Wilmer. Panelists included Matthew Gardner, Wiley Rein LLP; Timothy Howard, United States Attorney’s Office, Southern District of New York; Acadia Senese, Google; and Darrell Switzer, Kudelski Security. The program: (i) addressed the current cyberthreat environment; (ii) reviewed law firm cyberattacks; and (iii) reviewed recent guidance from the Association of Corporation Counsel entitled “Model Information
The final program put on by the BCLC at the Annual Meeting was titled **Alternative Billing Arrangements and Litigation Financing: Ethical Issues and Practical Solutions**, co-chaired by **Douglas Eyre**, McAlpine PC and **Daniel Formeller**, Tressler LLP. Mr. Formeller also moderated the program. Panelists included William Farrell, Jr., Longford Capital; Adam Hoeflich, Northwestern School of Law; Renee Knake, University of Houston Law Center; Wendy Muchman, Illinois Attorney Registration and Disciplinary Commission; Sarah Teachout, Trinity Industries, Inc.; and Henry Turner, Valorem Law Group. The program explained, in practical terms, the use of litigation financing and alternative fee arrangements and focused on the ethical issues faced by clients, prospective funders and practitioners.
Bright and early each morning of the Annual Meeting in Chicago, attendees gathered to participate in a guided run or walk through Chicago led by professional guides. This early morning group has become known as the Business Law Health Club, and is a tradition at each meeting. This year at the 2017 Annual Meeting in Chicago, runners and walkers enjoyed the breathtaking scenery of the downtown Chicago skyline and riverfront as well as the company of like-minded participants who wanted an active start to their day.

Not only was this an energizing beginning to each day, but was also a great way to explore Chicago before the crowds were even awake. The run/walk on Thursday morning included visits to Navy Pier and other iconic spots along the Chicago River. On Friday, the route included a stop in Millennium Park for a Chicago must: a “Bean” group-photo, and a chance to watch the sun rise over Lake Michigan.
Sunrise over Lake Michigan at Buckingham Fountain Flower Gardens

Additionally, the guides are knowledgeable of the history of the area, and make stops along the route to point out historically and culturally significant spots. For example, one such spot was a sign designating the beginning of historic Route 66. Another location pointed out by the guides was the site of a U.S. fort built in 1803, Fort Dearborn, the southern parameter of which is now marked by plaques and a line embedded in the sidewalk and road near Michigan Avenue Bridge and Wacker Drive.

The Health Club is a wonderful combination of exercise, history, and comradery. The Honorable Judge Joseph C. Iannazzone, State Court of Gwinnett County, Lawrenceville, GA, sums up this experience perfectly:

An unexpected highlight of my attendance at the Business Law Section Annual Meeting (and prior meetings) has been participation in the Health Club held each morning of the meeting. All it takes getting up an hour early. In exchange, you get to walk [or run] with other BLS members accompanied by a guide who provides lots of history about the area, and just as importantly, gets you back to the hotel on time without getting lost.
It’s a great way to get some exercise (if you count them – lots of steps), meet fellow members, and learn about the city you are visiting. Our walks and runs in Chicago had the extra benefit of being timed to coincide with sunrise over Lake Michigan. What more could you ask for? I’m looking forward to runs in Washington, Orlando, and Austin.

_Sunrise over Lake Michigan with a view of Navy Pier_
Sunrise over Lake Michigan from the end of Navy Pier.
Fall Meeting Programming Preview

Join us in Washington, D.C. for these great programs!

At the ABA Business Law Section Fall meeting, beginning at 8:30 a.m. on Friday, November 17, 2017, the BCLC will put on its annual Bankruptcy for Breakfast program, which will be chaired and moderated by Katherine Good, Whiteford, Taylor & Preston. The panel includes The Honorable Elizabeth S. Stong, Bankruptcy Court for the Eastern District of New York; The Honorable Christopher S. Sontchi, Bankruptcy Court for the District of Delaware; Sarah Cave, Hughes Hubbard & Reed; Michael Rubenstein, Liskow & Lewis; and Javier Lorente, Naveira, Truffat, Martinez, Anido, Lorente & Lopez Abogados. The panel will focus on developments in bankruptcy in 2017, including overview of statistical filing information from the Courts, analysis of recent significant cases, trends in international insolvencies and cross-border cases, and predictions for the bankruptcy and insolvency industry in 2018.

Also at the ABA Business Law Section Fall Meeting, beginning at 10:30 a.m. on Friday, November 17, 2017, the Business Divorce Subcommittee will present a CLE seminar titled Valuation and Damages in Business Divorce Cases. This program will examine issues in calculating, proving and defending against valuation and damage claims in cases involving privately held entities, with views from practitioners, experts and the bench. The moderator will be Kurt Heyman, Heyman Enerio Gattuso & Hirzel LLP, Wilmington, DE. Panelists will include: The Honorable Sam Glascock, III, Vice Chancellor, Delaware Court of Chancery; Business Divorce Co-Chair Melissa Donimirski, Heyman Enerio Gattuso & Hirzel LLP, Wilmington, DE; Vanessa Tiradentes, Gould & Ratner LLP, Chicago, IL; Brett Margolin, Ph.D., BLDS, LLC, Wilmington, DE; and Jaime d’Almeida, Duff & Phelps, Boston, MA.

The BCLC will also put on a program titled Tour of the Ivory Tower: Developments in the U.S. Supreme Court for Business Lawyers and Clients beginning at 2:00 p.m. on Friday, November 17, 2017. Kendyl Hanks will chair and moderate the program. In its twelfth year, the Ivory Tower panel presents a lively expert discussion regarding major developments in the U.S. Supreme Court over the last term, with an emphasis on major business cases. This year we feature return panelists Robert Barnes, the Washington Post’s Supreme Court correspondent, and Brianne Gorod, Chief Counsel for the Constitutional Accountability Center and former clerk for Justice Breyer. We are excited to be joined this year by two new panelists, both expert Supreme Court advocates. William Jay is Co-Chair of the Appellate Litigation Practice and head of the
Litigation Department at Goodwin in Washington. Willy has argued 15 cases at the Supreme Court, including the *Teva Pharmaceuticals* patent case and this term’s *TC Heartland* case involving the patent venue statute. Neal Katyal of Hogan Lovells served as acting U.S. Solicitor General and clerked for Justice Breyer. Neal has argued 34 cases before the Supreme Court—including seven in just the last term—which is more than any other minority attorney with the exception of Thurgood Marshall (with whom he is currently tied). The *Ivory Tower* panel will cover significant decisions from the October 2016 term, and important cases pending for decision in the coming term. The panel will also reflect on recent changes at the Court (including Justice Gorsuch’s confirmation), and where the Court is headed in the broader context of Supreme Court jurisprudence.
Spring Meeting Programming Preview

Paul J. Masinter

From Thursday, April 12 to Saturday, April 14, 2018, the Business and Corporate Litigation Committee will be offering a top-notch lineup of CLE programs at the ABA Business Law Section Spring Meeting in Orlando.

The programming kicks off on Thursday, April 12 at 10:30 a.m. with Breaking Up is Hard to Do – What to Do When a Key Employee Leaves and Goes to a Competitor? The panel, chaired by Anat Maytal of Baker Hostetler LLP and the Honorable Nancy Allf of the Eighth Judicial District Court in Nevada, will cover a variety of topics related to how businesses can best protect themselves when an employee jumps ship to the competition. These topics include: measures to put in place during employment to safeguard against future disclosures, particularly upon employee departures; how both the former employer and the new employer hiring the individual should respond; and key issues that arise in litigation, including what to be prepared for and think about.

The BCLC’s Annual Review of Developments in Business and Commercial Litigation begins at 2:00 p.m. on Thursday, April 12. Brad Newman of Paul Hastings LLP serves as chair. The presentation will provide a run-down of significant business-related court decisions from the previous year and consist of three panels addressing different topics in business and commercial litigation.

10 Traps for the Unknown – Avoiding Ethical Traps in Transnational Matters leads off the programming on Friday, April 13 at 11:00 a.m. The program chairs are Bret Cohen of Nelson Mullins Riley & Scarborough LLP and the Honorable James Gale, Chief Judge of the North Carolina Business Court. During the hour and a half presentation, the panel plans to identify and discuss ethics issues that frequently arise in transnational business deals. The panel will also discuss the ethical dilemmas involving employment matters that can plague cross-border deals. Finally, the panel will offer advice on how to manage privacy issues when working on transnational and cross-border transactions.

At 2:30 p.m. on Friday, April 13, there will be a two-hour program titled Slants, Redskins, Wedding Cakes, and Credit Cards: First Amendment Limits on Regulation of Business Speech. Communication is a key part of doing business that the government often regulates. There are rules for how one deals with customers and the general public, what can and can’t be said. Recent First Amendment litigation under both the speech and religion clauses has thrown a spotlight on the limits of the government’s ability to regulate. Thus, the Slants and the Redskins can use allegedly offensive trademarks and trade names. Under the First Amendment, can businesses say they charge a premium for credit card purchases or can they only offer a discount for cash? And can vendors such as bakers and shopkeepers be required to provide goods or services that conflict with their moral, religious, or political beliefs? In this program, a panel of law professors, business lawyers, and judges consider how recent and upcoming First Amendment case law is likely to affect how businesses deal with their customers, the general
public, and state and federal governments. **Keola Whittaker** of McGuireWoods LLP and the **Honorable Richard Licht** of the Superior Court of Rhode Island will serve as the program chairs.