Message from the Chair

Dear Business and Corporate Litigation Committee Members:

Thank you to our Newsletter Editor Anne Steadman and her hard-working editorial board for compiling a stellar Summer Newsletter. In this issue we focus on the important topic of work-life balance. In this regard, our Member Spotlight column highlights member perspectives on balancing the practice of law with other things that matter to them. There also is a special feature on efforts that one state (Delaware) has made towards assessing the issue. Kudos for preparing this excellent article are extended to Newsletter Vice Chair Kristen Swift.

This issue will be Anne’s last as Newsletter Editor, with our other great Newsletter Vice Chairs Sarah Ennis and Kate Harmon stepping up to serve as Co-Editors of the Fall Newsletter. Anne, however, will not be going far. As she transitions off as Newsletter Editor, she has accepted the challenge of succeeding Brad Newman as the Editor in Chief of the Annual Review of Recent Developments in Business & Corporate Litigation. Brad will continue as Editor for the 2019 Annual Review, with Anne taking over for the 2020 edition. We are fortunate to have such talented and hard-working committee members on all fronts.

As you read this Newsletter, I hope you are finalizing your plans to attend the Annual Section Meeting in Austin, Texas at the Fairmont Hotel, September 13-15, 2018. As always, the BCLC is proud to present an excellent lineup of programming and substantive Subcommittee meetings. Our CLE programs include:

**Admitting Digital Evidence**
Thursday 9/13/2018 10:30AM - 12:30PM
Fairmont, Park View B, 7th Floor

**Managing Corporate Crisis - In House, In Court & In the Market - Counsel, Compliance & Public Affairs Experts Shares Tips on Navigating Through Crisis**
Thursday 9/13/2018 3:00PM - 4:30PM
Fairmont Park View B, 7th Floor

**Business Divorce in Delaware, New York and California: Around the Horn**
Friday 9/14/2018 10:30AM - 12:00PM
Fairmont Park View B, 7th Floor

**Sharing the Attorney-Client Privilege - Too Much of a Good Thing**
Friday 9/14/2018 2:30PM - 3:30PM
Fairmont Park View A, 7th Floor

The BCLC’s ever popular joint dinner with the Judges Initiative, Dispute Resolution Committee, Sports Law Committee, and Young Lawyer Committee will be held on Thursday night at Lambert's Downtown BBQ, where everyone can...
Human Rights Protections in Supply Contracts

Leadership

- Current BCLC Leadership Roster (effective until September 15, 2018)
- Upcoming BCLC Leadership Roster (effective as of September 15, 2018)

Past Meetings

- Spring Meeting in Sunny Florida by Sarah Ennis

Upcoming Meetings

- BCLC Programs in Austin by Stuart M. Riback
- Join your Colleagues and Friends for the BCLC Dinner in Austin!

Publications

- Recent Developments in Business and Corporate Litigation is Searching for Contributors by Bradford K. Newman
- Recent Business Law Basics Webinar - "Recent Developments in the Delaware Chancery Court and the New York State Supreme Court Commercial Division" by Vanessa Tiradentes

Members in the News & Notes

Important Dates

- Business Law Section Annual Meeting
  September 13-15, 2018
  Austin, TX

A Special Thank You to Our BCLC Sponsors:

![Bayard](image)

Former Chair Profile: Patrick Clendenen—BCLC Chair 2013-2016

By Vanessa Tiradentes and Steve Brauerman

Patrick Clendenen ("Pat") is a trial lawyer from New England practicing business and corporate litigation in both Massachusetts and Connecticut. He served as BCLC Chair from 2013 to 2016. Pat

Enjoy mouth-watering Texas barbeque and other Austin culinary delights. Pre-dinner reception at 7:30 PM, followed by dinner at 8:00 PM. Thank you to our generous dinner sponsors: Bayard, P.A.; Capitol Core Group; Case Anywhere LLC; CourtCall; McAlpine & Associates PC; and Hon. Stephen Schuster.

Immediately preceding our dinner, make sure to attend the Tips From The Trial Bench networking event at the University of Texas Law School on Thursday, 5:30 PM to 7:00 PM. Sponsored by the BCLC Trial Practice Subcommittee and the UT Student Board of Advocates. Thank you to Michaela Sozio, Judge Mary Johnston and Jeff Benz for their efforts in coordinating this event.

The BCLC all-hands meeting - open to all members - will be held on Friday, 4:00 PM - 5:00 PM. In addition, multiple BCLC Subcommittee meetings are scheduled, including several with substantive speakers/presentations. All BCLC members are welcome to attend any of the Subcommittee meetings, regardless of whether you are actively involved.

Welcome to the new Section Fellows assigned to the BCLC - Stephanie Kanan (mentor, Judge Elizabeth Stong) and Mareesa Frederick (mentor, Michaela Sozio).

SAVE THE DATES:

- Section Fall Meeting - Washington, DC - November 15-16, 2018. Our usual Committee dinner will be held on Thursday night, with three excellent CLE programs on Friday: Bankruptcy for Breakfast, Class Action Litigation, and US Supreme Court Review.

Special thanks to:

- BCLC Vice Chairs, Stuart Riback, Hon. Gail Andler and Hon. Mac McCoy;
- Melissa Visconti and Paul Masinter for their assistance in securing sponsorships for the BCLC Dinner;
- BCLC Subcommittee leaders for their continuing efforts in making the BCLC among the most active and successful Section Committees; and
- ABA Staff who pull everything together for our Section meetings and events, with particular thanks to Katie Koszyk, Nicole Nikodem, Julia Passamani, Leslie Archer, Gina Dickinson and Graham Hunt.

If you're passing through Phoenix, please let me know and we can grab a cup of coffee. Enjoy the last days of summer as we head into the fall.

Best,
Heidi

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

If you're passing through Phoenix, please let me know and we can grab a cup of coffee. Enjoy the last days of summer as we head into the fall.

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Former Chair Profile: Patrick Clendenen—BCLC Chair 2013-2016

By Vanessa Tiradentes and Steve Brauerman

Patrick Clendenen ("Pat") is a trial lawyer from New England practicing business and corporate litigation in both Massachusetts and Connecticut. He served as BCLC Chair from 2013 to 2016. Pat
recently joined Clendenen & Shea, LLC, a firm started by his father in New Haven, Connecticut.

Pat started with the Business Law Section and BCLC as a 2000-2002 BLS Fellow after serving as a Massachusetts Delegate to the ABA Young Lawyers Division House of Delegates and chairing the YLD’s Litigation Committee and serving on its Executive Board. He applied to the BLS Fellows program because "it is the best and the oldest of its kind in the ABA and because of the quality of the lawyers who 'aged out' of the YLD and into the BLS." Pat was assigned to the BCLC and Judge Alvin Thompson became his mentor. As a Fellow, he was appointed the Co-Chair of a new subcommittee, BCLC’s Pro Bono and Public Service Subcommittee. He also became active in the BCLC’s Class and Derivative Actions Subcommittee, and quickly found his "home" in the BCLC.

Pat became BCLC Chair in 2013, appointed by then Chair-Elect Dixie Johnson. Pat accepted the appointment because "it was a huge honor and an opportunity to continue the great collective work and mission of BCLC." He, along with former BCLC Chair William Johnston and then fellow BCLC Vice Chair Heidi Staudenmaier, collaborated on BCLC strategic planning and leadership succession throughout his tenure as BCLC Chair.

As Chair of BCLC from 2013 to 2016, Pat's principal goal was to continue to strengthen the committee structurally with great people and great leadership. This continues with current BCLC Chair Heidi Staudenmaier's leadership. The number of BCLC Vice Chairs was expanded during his tenure, and Vice Chairs were provided more defined areas of responsibility. The Women's Business and Commercial Advocates Subcommittee and Reception was strengthened by combining it with the BCLC Committee Dinner and focusing on sponsorship support. Pat also supported different publications, including continued participation in the Annual Review of Developments Publication and growth and improvement of the Network Newsletter.

During Pat's term, the Judges' Initiative, in particular, and the D & O, Dispute Resolution, and Young Lawyers' Committees resolved to be a regular part of the BCLC Committee Dinners, which remains a highlight of every BLS Meeting. Under BCLC Vice Chair Gail Andler's leadership, Trial Tips from the Bench took off as a wonderful collaboration and recruiting tool. In addition, three new subcommittees (Business Divorce, Health Law & Life Sciences Litigation, and Historical) were created. Most importantly, in Pat's view, the BLS Advisors, Business Court Representatives, Judicial Designees, BLS Continuing Advisors, and judges from the Judges Initiative took on real, meaningful, and active leadership throughout BCLC and the BLS. Pat attributes the successes during his tenure to "communication, collaboration, and cooperation," which "are real hallmarks of BCLC leadership across the board."

Following his tenure as BCLC Chair, Pat remains involved in the Section and BCLC. He joined the BLS Leadership as an Officer, currently serving as Editor in Chief of The Business Lawyer and as Vice Chair of the Section. Pat sums up his experience in and appreciation for the BCLC below:

*Participation in the ABA/BLS and BCLC has been invaluable to my practice. I've grown personally and professionally over the eighteen years of my involvement with BCLC and BLS, and I've relied on my network of BLS colleagues to serve clients. I'm fortunate to have had the opportunities in the BLS and BCLC,*
I'm grateful to my successors who will continue to improve and grow BCLC as a professional, engaging, fun, and authoritative home for business trial lawyers, in house lawyers, and judges.

Member Spotlight: BCLC Members Talk Work-Life Balance

Editor's Note: In this edition's Member Spotlight, BCLC Members offer their perspectives on work-life balance. It's a hot topic—and an important one that has been a recent focus in my home state of Delaware (see our special feature, Orders to Restore Order: Delaware Leads the Charge in Improving Work-Life Balance in the Legal Profession).

How do you balance "work" with "life"?

For me, work-life balance does not depend on how much I work or how much I "life." It depends on whether I am able to do the things that matter to me in each arena.

Early in my career, what was important to me outside of work was attending table-top roleplaying game conventions—perhaps the nerdiest hobby imaginable. This involved long weekends out of pocket every month or two. To make that happen, I needed to convince other, generally more senior, attorneys to nudge deadlines, and I occasionally needed a colleague to cover for me. The attorneys at my firm were willing to be inconvenienced to let my hobby happen for three reasons: First, I made it very clear that I was willing to sacrifice most other aspects of my free time as needed to make my career work. Second, I did get the work done. And, third, I was not just willing to cover for them when they needed to handle a sick child or to pursue their own passions—I volunteered to whenever I could do so without sacrificing my own top priority.

Read more...

Special Feature: Orders to Restore Order: Delaware Leads the Charge in Improving Work-Life Balance in the Legal Profession

By Kristen S. Swift

On July 17, 2018, the Delaware Supreme Court issued a press release to introduce what is being colloquially referred to as "the Work Life Balance Order", issued on the same date. The Order moves the filing deadline for Delaware state courts from 11:59 p.m. to 5:00 p.m. in non-expedited cases, effective September 14, 2018. The Work Life Balance Order was issued after lengthy consideration of the impact on practitioners and in effort to improve quality of life for attorneys and their staff (who are also directly affected by the change).

The Work Life Balance Order also instructs that state trial courts consider
adopting best practice policies. Three specific considerations are identified: (1) avoid setting filing due dates on Mondays or the day after a holiday, (2) avoid issuing non-expedited opinions after 4:00 p.m. and noon on Fridays, and (3) to refrain from scheduling oral arguments or trials in August, which is consistent with the Delaware Supreme Court's existing general practice of not hearing cases in July or August. The best practice recommendations do not apply to expedited matters, and they are not mandates. The courts are required to report their progress to the Supreme Court by March 15, 2019. As a result, Delaware practitioners will likely see more rule changes aimed at promoting work life balance.

Read more...

**Featured Articles**

**Pennsylvania Uniform Voidable Transactions Act**
*By Robert J. Hobaugh, Jr.*

The Pennsylvania Uniform Voidable Transactions Act (the "Act") makes uniform amendments to the law formerly known as the Pennsylvania Uniform Fraudulent Transfer Act ("UFTA" and as amended, the "Law"). The UFTA was adopted in 1993 to create statutory rights, remedies, and defenses that support the policy that a debtor should be prevented from transferring property or assuming an obligation to the detriment of an unsecured creditor with a claim against the debtor. The Act implements the changes proposed for legislation such as the UFTA by the Uniform Law Commission, including the change of name to the Uniform Voidable Transactions Act. Sponsored by Senators Reschenthaler (R37), Rafferty (R44), Mensch (R24), Bartolotta (R46), Folmer (R48), Vogel (R47) and White (R41), as Senate Bill No. 629, and adopted as Pennsylvania Act No. 78 of 2017, the Act clarifies certain matters for courts and parties. The Act addresses electronic transactions, the burden of proof required to be sustained by certain parties to prevail under the Law, which state's law governs actions under the Law, and series organizations. The Act is written as amendments to 12 Pa.C.S. Chapter 51.

Read more...

**Some California Surprises in Business Divorce**
*By Garland A. Kelley and Jesse B. Levin*

When the first sign of business divorce appears on the sunny California horizon, a cloud of litigation predictably follows. Recent developments in California law create thorny issues for business principals and their attorneys involved in these disputes.

One recent change can make divorcing members of a California LLC wary of immediately running to court to seek judicial dissolution. Under current law, filing such a cause of action grants an *irrevocable* buyout option to the other owners of the company, and with it, an enormous source of leverage.

Of additional concern to defense practitioners and their clients, a string of recent federal court decisions restrict the protective scope of the business judgment rule in a manner peculiar to California: unlike directors, officers of California corporations are not protected by the business judgment rule for business decision they make on behalf of the corporation.

Read more...

**Litigation Cropping Up as Losing Applicants Scrap for Handful of Medical Marijuana Cultivator Licenses in Ohio**
By Brian Laliberte and Chad M. Eggspuehler

Losing medical marijuana cultivator applicants have ferociously litigated the constitutionality of Ohio's new program, the validity of the application process, and alleged fraud and abuse in selecting winning cultivator provisional licensees. The scarcity of provisional licenses (and corresponding certificates of operation), combined with the lucrative opportunity to be one of Ohio's first legal marijuana cultivators and distributors, fueled the litigation. Though the litigation has thus far failed to derail the entire program, specific plaintiffs have achieved a measure of success, ranging from a prompt administrative hearing to an isolated scoring error that resulted in the award of an additional license.

Read more...

Subcommittee Reports

Cannabis and Alcoholic Beverages Litigation Working Group

The Working Group will be meeting again in Austin. Our meeting is on Friday, September 14 from 10:30 a.m. to 11:30 a.m., CDT. There will be a dial in number for those of you who would like to participate but will not be in Austin. We plan to discuss current litigation and regulatory issues as well as to assess whether there is interest in doing a chapter for the annual Recent Developments in Corporate and Business Litigation Book. We also will be discussing ideas for future programs, both CLE and non-CLE. If you have an interest in this area or know others who do, come join us in Austin. For more information, please contact Jay Dubow (dubowj@pepperlaw.com).

Communications and Technology Subcommittee

Dear Subcommittee Leaders: We are continuing to work on the subcommittee webpages. 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.
- For those of you attending the annual meeting in Austin, make sure you take a few pictures from any meetings or presentations your subcommittee has;
  - 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; and
- 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@morrisjames.com), and we will make sure they get posted.

Financial Institutions Litigation Subcommittee

The Financial Institutions Litigation Subcommittee will hold a meeting in Austin at the Business Law Section Annual Meeting on Friday September 14 from 1:30 to 2:30 p.m. Among other matters, the Subcommittee will discuss topics for the 2019 edition of Recent Developments in Business and Corporate Litigation and 2019 goals. The Subcommittee welcomes new members and encourages BCLC members interested in the area of financial services and litigation impacting
financial institutions to join us at the meeting. As part of its annual meeting, the Subcommittee will present a non-CLE presentation with an update on Initial Coin Offering ("ICO") regulatory and litigation developments and a discussion of how these developments may be impacting startups. As part of this presentation, Jeffrey Ruppert and Chad Burton will discuss their startup Omnes.Legal LLC, how this company is attempting to utilize DLT technology to address access-to-justice problems in the legal industry, and how ICO legal developments may be impacting their company. If you are interested, please contact Mark Konrad at mkonrad@swlaw.com.

**Membership Subcommittee**

The Business and Corporate Litigation Committee is currently the eighth largest committee in the ABA Business Law Section with 1,832 total members. From June 2017 to June 2018, the BCLC membership count experienced a slight decline in overall members, going from 1,866 members to 1,832 members. The Section also experienced a decline in overall membership during this period, with a 2.69% decline in Section membership. As evidenced by these figures, membership retention and growth continues to be a challenge facing the ABA. To address the issue, the ABA's Board of Governors is expected to announce changes to the membership model at the upcoming ABA Annual Meeting in Chicago. The Membership Subcommittee will report on updated membership statistics, changes to the membership models, and recruitment efforts at the upcoming ABA Business Law Section Annual Meeting in Austin. As always, the Membership Subcommittee welcomes the participation of all BCLC members in its efforts to increase our membership and that of the Section. For the 2017-2018 term, Judge Elizabeth Stong and Edward Fitzgerald will continue to serve as Co-Chairs of the BCLC Membership Subcommittee. For more information, please contact Edward Fitzgerald, Edward.Fitzgerald@hklaw.com.

**Securities Litigation & Arbitration Subcommittee**

The Subcommittee will have another joint meeting in Austin with the Class and Derivative Litigation and Criminal and Enforcement Litigation Subcommittees from the Business and Corporate Litigation Committee and with the Civil Litigation and SEC Enforcement Matters Subcommittee of the Federal Regulation of Securities Committee. Among the topics that we will be discussing are current cases and trends at the SEC's Division of Enforcement. The meeting is from 2:30 p.m. to 3:30 p.m. on Friday, September 14, CDT. There will be a dial in number for those of you who would like to participate but cannot make it to Austin. For more information, please contact Jay Dubow (dubowj@pepperlaw.com).

**Sports-Related Disputes Subcommittee**

The BCLC’s Sports-Related Disputes Subcommittee presented a successful panel at the April BLS meeting in Orlando: Hoop Dreams and Shoe Schemes: Where is the Internal Governance in Collegiate Athletics? The featured speakers included a former NBA player, college athletic director and former Reebok executive, and a prominent attorney in NCAA investigations.

The Subcommittee will hold a meeting in Austin at the Business Law Section Annual Meeting on Thursday September 13 from 1:00 - 2:30 p.m. Joining our Subcommittee will be the Sports Law Committee. Among other topics, the Subcommittee will discuss the planning underway for a webinar, a possible CLE in collaboration with the International Litigation Committee, and additional leadership for our group. The Subcommittee welcomes new members and encourages BCLC members interested in the area of sports-related disputes to join us at the meeting. If you are interested, please contact Chair Jeffrey Schlerf at jschlerf@foxrothschild.com.

**Working Group to Draft Human Rights Protections in Supply Contracts**

Protecting Human Rights in Supply Chains: Moving from Policy to Action:
The 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts is now finalized and was fast tracked to be published in The Business Lawyer, Fall 2018, Volume 73, Issue 4. The Report is one of several initiatives within the Business Law Section's implementation of the ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor. Once the Model Clauses are published, the Working Group hopes to quickly develop a strategy to demonstrate the value of the suggested clauses to manufacturers, hotel chains, health care provider systems, state and local bar associations, university systems, and other procurement departments. Completing the drafting of the Report was rewarding but the objective has always been widespread use of the Model Contract Clauses to protect both businesses and the human rights of workers in global supply chains.

To that end, the Working Group and will have another working session during the Business Law Section's Annual Meeting on Thursday, September 13, 2018 from 3 p.m. to 5 p.m. If you have been interested in the project but held back for fear that your participation in the UCC and CISG research and drafting would take too much of a commitment of your already inadequate time, the working session is the perfect opportunity to learn how you can get involved. The research and writing is largely finished (for now), and anyone who wants to talk to clients about the issues, or simply to hear about the issues and the next steps, will be most welcome. The Working Group is looking for your ideas as to how best to communicate to your clients, general counsel and others the reasons to adopt the Model Clauses. For more information, please contact David Snyder, Chair (dsnyder@wcl.american.edu) or Susan Maslow, Vice Chair (smaslow@ammlaw.com).

Past Meetings

Spring Meeting in Sunny Florida

By Sarah Ennis

The Spring 2018 Business Law Section Meeting, held April 12-14 in Orlando, Florida, not only offered great substantive programs (such as the BCLC's four sponsored programs), but also offered plenty of opportunities for fun and adventure in a "magical" city.

Read more...

Upcoming Meetings

BCLC Programs in Austin

By Stuart M. Riback

The Business and Corporate Litigation Committee is pleased to present four CLE programs at the Business Law Section Annual Meeting in Austin, and will be cosponsoring six other worthwhile programs to be presented by other Business Law Section Committees. The BCLC programs cover varied subject matters and will be of interest to anyone concerned about business law and business litigation.

Read more...

Join your Colleagues and Friends for the BCLC Dinner in Austin!

Join us at Lamberts Downtown Barbeque, 401 West Second Street
The Business & Corporate Litigation, Dispute Resolution, Judges Initiative, Sports Law, and Young Lawyer joint committee dinner will take place on Thursday, September 13, 2018 at the Annual Meeting in Austin, Texas. Get ready for some great barbeque in a historic downtown Austin space.

The social reception will begin at 7:30 p.m., with dinner at 8:30 p.m.

Please join us in thanking our BCLC Sponsors, who made this event possible: Bayard, P.A.; Capitol Core Group; Case Anywhere LLC; CourtCall; McAlpine & Associates PC; and Judge Stephen Schuster!

Publications

**Recent Developments in Business and Corporate Litigation is Searching for Contributors**

By Bradford K. Newman

*Recent Developments in Business and Corporate Litigation* will be published by March 2019. For those interested in contributing to the publication, we will begin our efforts in the fall of 2018, with *chapters due in mid-November 2018*. If you are interested in contributing or editing a chapter, please reach out to Jaqui Walters (jaquiwalters@paulhastings.com).

In addition, the 2018 Edition of *Recent Developments in Business and Corporate Litigation* is now available for purchase [here](#). This two-volume, annual compilation by the ABA Business Law Section Business and Corporate Litigation Committee contains the latest developments on key issues, detailed outlines, and summaries of recent cases, legislation and trends in the field through 2017. Drafted by more than 200 members of the committee, this new edition includes a new chapter dedicated to the fascinating law of Sports, and witnesses the return of chapters on Intellectual Property, Antitrust, Business Divorce, Business Torts, General Partnerships, Health Law and Trial Practice. Members are encouraged to purchase this practical guide which incorporates superb insight from a diverse collection of national practitioners designed to assist both junior and seasoned practitioners.

**Recent Business Law Basics Webinar - “Recent Developments in the Delaware Chancery Court and the New York State Supreme Court Commercial Division”**

By Vanessa Tiradentes

On July 26, 2018, members of the BCLC put on a Business Law Basics webinar, focusing on procedural and substantive changes in the New York State Supreme Court Commercial Division and Delaware Court of Chancery. The program, titled "Recent Developments in the Delaware Chancery Court and the New York State Supreme Court Commercial Division," was a great success, attracting over 240 participants. The Honorable Timothy S. Driscoll of the Nassau County Commercial Division of New York Supreme Court moderated the program. He was joined by fellow panelists Vice Chancellor Joseph R. Slights, III of the Court of Chancery of the State of Delaware, Matthew F. Didora, Chair of Commercial Litigation at Abrams Fensterman in Lake Success, New York and
Vanessa R. Tiradentes, Partner at Gould & Ratner in Chicago.

The New York portion of the program focused on the rules and procedures of the New York State Supreme Court Commercial Division. It highlighted the work of the New York State Chief Judge’s Commercial Division Advisory Council, which has recommended some 30 changes to the Division’s rules. Many of these rules are designed to make discovery more expeditious and cost-efficient, and mirror recent changes to the Federal Rules of Civil Procedure. In addition, the New York participants highlighted the difference between New York State case law and Fed. R. Civ. P. 37(e) regarding electronic discovery and spoliation. The second half of the program dealt with recent case law trends in Delaware, as well as recent statutory and administrative changes. The Delaware members of the panel discussed recent cases dealing with controlling shareholder transactions and shareholder ratification under Corwin, as well Delaware Supreme Court guidance on appraisal actions and contract interpretation.

The panel also featured a discussion of the new clarification to Section 204 of the Delaware General Corporation Law, the upcoming addition of two new judges to the Court of Chancery, and the new work-life balance policies recently adopted by the Delaware Supreme Court. In addition, all of the panelists provided listeners with many tips for practice in these two courts, including advice on discovery disputes and how the courts in these jurisdictions are dealing with them. The audience asked some great questions, prompting a short discussion about the use of special masters by the judges in New York and Delaware.

The webinar and materials are available here to members of the Business Law Section.

Members in the News & Notes

Our BCLC members are engaged in the profession and the community!

Maikel N. Eskander, Partner at Eskander Loshak LLP in Fort Lauderdale, Florida, reports that Eskander Loshak LLP just celebrated our one-year anniversary as a law firm. On June 1, 2017, we opened our doors in downtown Fort Lauderdale to serve the South Florida community. Since then, we’re happy to report that business is thriving and we're steadfastly helping our clients with all their business and real estate needs.

Stephanie A. Kanan, commercial litigation associate in Snell & Wilmer’s Denver, Colorado office, has been named a Business Law Fellow for the ABA Business Law Section. Kanan is one of only 20 lawyers chosen nationwide and will serve a two year term.

The Fellows Program represents a commitment by the Section to encourage the participation of young lawyers, lawyers of color, LGBT lawyers and lawyers with disabilities in Section activities. Participants are given an opportunity to become involved in the substantive work of the Section, attain Section leadership roles, and enhance knowledge about the Section among members of diversity-focused bar organizations.

Additionally, Stephanie has been appointed to the Associate Board of City Year Denver, a national nonprofit organization that mobilizes young adults to serve as full-time tutors, mentors, and role models in many of the nation’s highest need urban schools. As an appointed member of its Associate Board, Kanan will promote the mission of City Year by engaging others through community outreach, volunteer activities, and fundraising events.

John Sciaccotta, Member at Aronberg Goldgehn Davis & Garmisa in Chicago, Illinois, was honored with the prestigious Accipiter Award from his high school
alma mater, Fenwick High School, on May 18, 2018. The Accipiter Award was first presented in 1997 as a way to honor members of the Fenwick community who have distinguished themselves in the legal profession. A 1980 graduate of the school, John is Co-Founder and Past President of the Fenwick Bar Association, which is currently celebrating its 30th year. He focuses his practice on business and commercial litigation, arbitration and business counseling matters, with a special emphasis on complex civil trial matters brought in federal and state courts throughout the United States. He is also an Arbitrator and Lawyer Neutral who adjudicates various claims and disputes in arbitration.

**Marta A. Stein**, CEO at STEIN Strategic Solutions LLC, reports that after 30 years in BigLaw (most recently as an equity partner at McGuireWoods), she launched STEIN Strategic Solutions, a strategic legal consulting firm for executives and boards (www.steinstrategicsolutions.com): The new model allows me to coordinate the legal needs of multiple companies and be completely aligned with their interests; value-add rather than billable hours is paramount. No longer charging close to $1000+/hr., I am now on a monthly retainer only. I work with the client's current counsel to ensure efficiencies and proactive, winning strategies, or bring in specialists from my Quality Services Network who adhere to my demand for excellence, integrity and client-first focus.

**Vanessa Tiradentes** was named Partner at Gould & Ratner LLP in Chicago, Illinois. Vanessa is a member of Gould & Ratner's Litigation Practice, where she represents a wide range of businesses and individuals in all phases of commercial litigation in both federal and state courts. Vanessa's experience includes handling allegations of breach of fiduciary duty, business divorces, contract disputes and indemnification claims, among other commercial matters.

**Stephan Wilske**, Partner at Gleiss Lutz, Stuttgart, Germany, has newly been appointed as a member of the Editorial Board of *Arbitration*, the journal of the Chartered Institute of Arbitrators. At the 33rd Annual Joint Symposium of the School of International Arbitration (London) and the ICC Institute of World Business Law in London on March 12, 2018, Stephan gave a presentation on "Ethical Duties for Witnesses in International Arbitration." Further, Stephan co-authored *The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?*, which was published in Indian Journal of Arbitration Law Vol. 6(2) (February 2018).
Editor’s Note: In this edition’s Member Spotlight, BCLC Members offer their perspectives on work-life balance. It’s a hot topic—and an important one that has been a recent focus in my home state of Delaware (see our special feature, An Order to Restore Order: Delaware Leads the Charge in Improving Work-Life Balance in the Legal Profession).

How do you balance “work” with “life”?  

For me, work-life balance does not depend on how much I work or how much I “life.” It depends on whether I am able to do the things that matter to me in each arena.

Early in my career, what was important to me outside of work was attending table-top roleplaying game conventions—perhaps the nerdiest hobby imaginable. This involved long weekends out of pocket every month or two. To make that happen, I needed to convince other, generally more senior, attorneys to nudge deadlines, and I occasionally needed a colleague to cover for me. The attorneys at my firm were willing to be inconvenienced to let my hobby happen for three reasons: First, I made it very clear that I was willing to sacrifice most other aspects of my free time as needed to make my career work. Second, I did get the work done. And, third, I was not just willing to cover for them when they needed to handle a sick child or to pursue their own passions—I volunteered to whenever I could do so without sacrificing my own top priority.

Fast forward a couple of years, and what mattered to me outside of work was glassblowing. To get better at that, I needed to spend uninterrupted time every weekend practicing. The favors that I asked for to let that happen shifted, and the help that I volunteered shifted, but the principle remained the same. I decided what mattered, asked for the help that I needed, and offered to do whatever I could to let my colleagues do the same.

Today, I have a two-year-old and a six-month-old. My current personal hobbies are purely theoretical. What is important to me now is walking out the door to put my kids to bed at night. Suddenly, I am the person asking colleagues to wrap a call up by six, if at all possible. And, equally, I am the person who is willing to log back in at eight and help get that brief written in a case that is not mine so that someone else can have their vacation.

In my experience, work life balance has never been a one person juggling act; it has always been a team sport, and it has always had less to do with balance than with priorities.

-Emily V. Burton, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware
What advice could you give to younger members of the legal profession regarding work-life balance?

The legal profession is truly the greatest profession in the world (unless you can hit a 100 mph fastball, in which case you can be the center fielder for the Yankees). I have had the privilege of serving as a law clerk to a federal judge, attorney in private practice, state and local prosecutor, local government official, and now judge, along with teaching at Brooklyn Law School, Harvard Law School, and Nassau Community College. The challenge for me, and for so many other busy lawyers, is balancing a wonderful career with my even-more-wonderful wife and children. The best advice I’ve received to achieve balance is, if asked to do something in three months (when my schedule is likely to be free), to ask myself “would I still do this if I had only one week’s notice and a crowded calendar.” If the answer is yes, then I readily commit. If not, I need to think long and hard about whether to sacrifice my family time. For younger lawyers who may not have the luxury of saying “no” to anything, my best advice is to seek out mentors throughout your career. Find a lawyer (or lawyers!) with whom you can share your career dreams, and who will assist you in making those dreams reality. And when your proposed mentor says that he/she doesn’t have time to meet you, offer to meet him/her before work for coffee—every lawyer starts the day with some sort of caffeinated beverage!”

-Justice Timothy S. Driscoll, Supreme Court of the State of New York, Nassau County Commercial Division

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What helps you unwind/feel fulfilled outside your day-to-day practice?

About ten years ago, I asked myself this very question. The answer: Do what made me happy when I was a kid! I made a conscious effort to reflect on my childhood and all of the things I enjoyed doing. So, I began swimming (recreationally), riding a bicycle (long distances for charity), running (why did I start running again?), and creating abstract art. When I do any of these things, and in particular when I paint, I can totally release myself from the stress and pressure of an active business trial practice. Candidly, if I could earn a living as a working artist, I might consider doing that full time.

-Brian Laliberte, Tucker Ellis LLP, Columbus, Ohio
What helpful advice did you receive as a young attorney?

When I was a first year associate just starting out after law school, I was lucky enough to work for a partner who really cared about mentoring young lawyers. One of the best pieces of advice she ever gave me was that “the practice of law can consume you if you let it, and you need to make sure to take time for yourself.” I thought it was great advice, and have tried to take that with me as I’ve progressed in my career. I’ve horseback ridden competitively since I was a kid, and throughout my career I’ve continued to ride regularly. Most weekend mornings, even when I’m at my busiest at work, you’ll find me out at the barn riding. It’s a lot of fun and a wonderful stress release, and I feel very fortunate to be able to do it regularly!

-Jessica Mendelson, Paul Hastings LLP, Palo Alto, California

What do you do to help achieve work-life balance?

I think when considering work life balance, you should consider both sides of the equation. My wife and I are both busy lawyers with three girls in a highly competitive school district so managing our work and home life balance is a family affair.

Work: I try not to make my work life unnecessarily stressful by engaging in pointless battles with my adversary. Litigators are naturally competitive and that can lead to hostility between the lawyers. Such hostilities do not serve the client’s interest but can foster immense personal stress. Civility and zealous advocacy are not mutually exclusive. I try to open and close every interaction with my adversary with pleasantries. “How are the kids?” or “how was your weekend?” go a long way. I always read over my correspondences before sending and replace “you” with “your client” because “your client has failed to respond” does not impugn the attorney. I try to cooperate and grant courtesies whenever it does not prejudice my client’s interest. Fostering cooperative relationships with your adversaries
not only sets up an environment where the case might be more easily resolved, but also reduces the overall stress and anxiety of a litigation practice.

**Life:** To balance the work life, we travel as much as we can. With today’s technology, we can get away several times a year, still be connected to our clients, and work during portions of every day. For example, we will spend Thanksgiving in Florida, spring break skiing, or a long weekend in St. Michael’s. My ThinkPad X1 is thin and light, keeps me connected, and travels easily. In the summer, I try to spend weekend days on our small boat. Salt water and nature is the antidote to stress for me. There’s always something to look forward to when we have travel planned, or to reflect upon when we have just returned. Only in August do we really try to unplug from the office and take a long vacation in Europe or a National Park. No matter how stressful work gets I always feel like I have recently “hit the reset button” or will do so in the near future.

-Eric C. Milby, Lundy Beldecos & Milby, P.C., Narbeth, Pennsylvania

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**How can lawyers overcome the struggle to find work-life balance?**

Work-life balance sounds great, but I think it’s very difficult to achieve, especially as a young lawyer with billable hour demands. Nonetheless, I have found that finding time for myself is key to my happiness in this profession. In today’s interconnected, global world where we can remain in contact with each other instantaneously, it is even harder to disconnect from work. While I’m not as disciplined as I would like, I try to work out daily, giving myself 45 minutes where I’m not checking emails. I joined the book club at my firm, which is helping me read for fun again. And every year, I try and take a real vacation, limiting my compulsive desire to check email every few minutes. Generally, I try and travel somewhere with limited connectivity or I limit myself to checking emails (both personal and work) in the morning and afternoon and leaving my phone in my hotel room during the day while I’m out. The picture is one of my favorite family pictures: in 2014, we took a trip to Rio de Janeiro to be in Brazil during the World Cup. Being Brazilian, soccer is part of my story and my parents are total fanatics, so it was a once-in-a-lifetime
trip for us. During our tour of Rio, we made sure to stop for a family photo in front of Tiradentes Square!

-Vanessa Tiradentes, Gould & Ratner LLP, Chicago, Illinois
Special Feature on Work-Life Balance

Orders to Restore Order: Delaware Leads the Charge in Improving Work-Life Balance in the Legal Profession

By Kristen S. Swift

On July 17, 2018, the Delaware Supreme Court issued a press release to introduce what is being colloquially referred to as “the Work Life Balance Order”,1 issued on the same date. The Order moves the filing deadline for Delaware state courts from 11:59 p.m.2 to 5:00 p.m. in non-expedited cases, effective September 14, 2018.3 The Work Life Balance Order was issued after lengthy consideration of the impact of the filing deadline change on practitioners and in effort to improve quality of life for attorneys and their staff.

The Work Life Balance Order also instructs that state trial courts consider adopting best practice policies. Three specific considerations are identified: (1) avoid setting filing due dates on Mondays or the day after a holiday, (2) avoid issuing non-expedited opinions after 4:00 p.m. and noon on Fridays, and (3) to refrain from scheduling oral arguments or trials in August, which is consistent with the Delaware Supreme Court’s existing general practice of not hearing cases in July or August. The best practice recommendations do not apply to expedited matters, and they are not mandates. The courts are required to report their progress to the Supreme Court by March 15, 2019. As a result, Delaware practitioners will likely see more rule changes aimed at promoting work life balance.

The Delaware Supreme Court issued an Order on August 22, 2018, to strike and replace Rule 10.2(6)(a) to implement a 5:00 p.m. filing deadline. The Delaware Supreme Court mandates that all electronic filings must be completed by 5:00 p.m.,

BCLC Member Patricia L. Enerio was Chair of Delaware’s Work-Life Balance Committee, which gathered information to better understand the impact of a filing deadline change.


2 All times referenced herein are Eastern Standard

3 The 5:00 p.m. filing deadline also does not apply to complaints or notices of appeal.
except for notices of appeals and expedited matters, which must be completed by midnight. Like the Superior Court Order, this Order shall also take effect on September 14, 2018.

Those who have been paying attention to Delaware Supreme Court Chief Justice Leo E. Strine, Jr.’s stated goals for the judiciary are likely unsurprised by the Orders. In 2014, the year he became the 8th Chief Justice of the Court, Chief Justice Strine reminded those in attendance at the Delaware State Bar Association Bench and Bar Conference that Delaware’s legacy demands that those who practice law in the First State act as stewards for generations to come. To promote Delaware’s continued stewardship, Chief Justice Strine introduced a goal to address work life balance within the legal community. In the 2014 Annual Report of the Delaware Judiciary, Chief Justice Strine states that, “if courts can help lawyers to strike a better work-life balance, we can improve the legal practice overall and lessen the need for lawyers to make stark choices between professional success and personal and parental fulfillment.”

Following Chief Justice Strine’s 2014 Bench and Bar address, the Delaware State Bar Association conducted an online survey of members of the bar (the “DSBA Survey”) in May 2015. The DSBA Survey asked practitioners in Delaware’s five different state courts about a 5:00 p.m. filing deadline.

In summer 2015, a Work Life Balance Committee (the “WLB Committee”), comprised of members of the Rules Committees for the Court of Chancery, the Supreme Court, and the Superior Court, was formed to further investigate measures to improve lawyering in Delaware. The WLB Committee gathered information to better understand the impact of a filing deadline change, but the WLB Committee was unable to reach consensus as to the alteration of the existing filing deadline.

In May 2016, the DSBA and the Delaware Chapter of the American College of Trial Lawyers issued a Joint Study of Delaware Courts (the “Joint Study”), based in part on the findings of the DSBA Survey and at the request of the Delaware Supreme Court. The Joint Study was aimed at determining best practices for administering and adjudicating Delaware state court cases.

The results of the DSBA Survey, the WLB Committee findings, and the Joint Study were presented to the Delaware judiciary in a report entitled “Shaping Delaware’s Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware” (the “Report”). The results of the DSBA Survey regarding the filing deadline change are on pages

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4 Chief Justice Strine also addressed his goal to improve work life balance during the Delaware State Bar Association Women and the Law Section Retreat in March 2015.

5 Chief Justice Strine laid out six goals for the Delaware Judiciary which were addressed during the DSBA 2014 Bench and Bar Conference and are available for review in the 2014 Annual Report of the Delaware Judiciary.

6 Shaping Delaware’s Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware, p. 15.
11-13. The Report notes that most participants in the DSBA Survey opposed a filing deadline of 5:00 p.m. 7

The Report also analyzed e-filing statistics, and found that the majority of e-filings in the Superior Court in the first quarters of 2014, 2015, and 2016 were completed between 5:00 p.m. and 6:00 p.m., with only 9-12% of e-filings occurring during the same quarters between 9:00 p.m. and 12:00 a.m. In the Court of Chancery, after-hours filings constituted 15%-16% of the total filings for the first quarters of 2014, 2015 and 2016. Again, the largest percentage of these after-hours filings occurred between 5:00 p.m. and 6:00 p.m. and the after-hours filings are not limited to time sensitive matters, but include pro hac motions, entries of appearances, and various notices and stipulations. Based on these statistics, the Report concluded that the filing deadline change to 5:00 p.m. would not require a “material change in filing practice in terms of when most filings are made” and that there is “no demonstrable need for an 11:59 p.m. deadline in non-expedited cases.”8

The Report also addressed several specific criticisms of the 5:00 p.m. deadline, noting that the recommended filing deadline change is a “controversial” and “contested” issue.9 Ultimately, the Report recommends the e-filing deadline for non-expedited matters change to 5:00 p.m.10 Recommendations were also made regarding other initiatives to improve work life balance, some of which are mirrored in the best practices portion of the Work Life Balance Order.11

Based on the recommendation in the Report, the Delaware Supreme Court issued the Work Life Balance Order changing the state courts’ filing deadline to 5:00 p.m., effective September 14, 2018. The Work Life Balance Order references the Report and notes that the standard practice before e-filing was to file during regular business hours, and “th[e] extension of the filing deadline has contributed to a culture of overwork that negatively impacts the quality of life for Delaware legal professionals without any corresponding increase in the quality of their work

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7 Shaping Delaware’s Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware, p. 11 n.33.

8 Id. at 24, 33.

9 Id. at 25-31.

10 Id. at 20, 33.

11 Shaping Delaware’s Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware, p. 37-39; In Re Work-Life Balance, p.2. Recommendations to unify and codify e-filing practices in the Court of Chancery were made by the Joint Study. Joint Study of the Delaware Courts Conducted by the Delaware State Bar Association and the Delaware Chapter of the American College of Trial Lawyers, Tab 3 p.2.
product or the functioning of the judiciary.”12 The Work Life Balance Order also considers the positive impact the deadline change will have on lawyers, staff and litigants.13

Patricia L. Enerio14 was actively involved in the work life balance initiative over the last three years. Ms. Enerio co-authored the Report along with William M. Lafferty and Gregory P. Williams. She was also chair of the WLB Committee, and she is a member of the Court of Chancery Rules Committee.

Ms. Enerio emphasized that before e-filing, filings had to be hand delivered to the courthouse before 4:30 p.m., and although some courts had night boxes, using the night box was “the exception and not the rule.” Moreover, Ms. Enerio noted that there is strong precedent for the success of a more balanced filing deadline. In October 2014, almost four years ago, the United States District Court for the District of Delaware (“District Court”) implemented a 6:00 p.m. filing deadline. District Court practitioners are content with the deadline except when it conflicts with daycare closing times, which was one reason the 5:00 p.m. deadline was recommended in the Work Life Balance Order.15

Ms. Enerio also notes the goal to improve balance was not singularly focused on the filing deadline, and the Report includes several other recommendations for the courts to consider regarding rule changes and best practices.

The trial courts are now tasked with reviewing the best practice recommendations and reporting back to the Supreme Court, so we can anticipate that this is the first step of many aimed at aligning legal work expectations within reasonable boundaries.

About the Author: Kristen S. Swift works at a renowned Delaware insurance defense firm and was recently named one of Delaware’s Top Lawyers by Delaware Today. Kristen has previously been published on her proven approach to managing a demanding career and enjoys presenting workshops and consulting with fellow lawyers to empower her colleagues with strategies for identifying and achieving their goals. She enjoys spending time with her husband and four children exploring the great outdoors.

12 In Re Work-Life Balance, p.2.

13 Id.

14 Ms. Enerio is a partner at Heyman Enerio Gattuso & Hirzel LLP in Wilmington, Delaware, and the founder of Women Chancery Lawyers (a.k.a. Chancery Chicks), a networking group for women lawyers who practice corporate and commercial litigation in the Delaware Court of Chancery.

15 Shaping Delaware’s Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware, p. 9-10.
The Pennsylvania Uniform Voidable Transactions Act (the “Act”) makes uniform amendments to the law formerly known as the Pennsylvania Uniform Fraudulent Transfer Act (“UFTA” and as amended, the “Law”). The UFTA was adopted in 1993 to create statutory rights, remedies, and defenses that support the policy that a debtor should be prevented from transferring property or assuming an obligation to the detriment of an unsecured creditor with a claim against the debtor. The Act implements the changes proposed for legislation such as the UFTA by the Uniform Law Commission, including the change of name to the Uniform Voidable Transactions Act. Sponsored by Senators Reschenthaler (R37), Rafferty (R44), Mensch (R24), Bartolotta (R46), Folmer (R48), Vogel (R47) and White (R41), as Senate Bill No. 629, and adopted as Pennsylvania Act No. 78 of 2017, the Act clarifies certain matters for courts and parties. The Act addresses electronic transactions, the burden of proof required to be sustained by certain parties to prevail under the Law, which state’s law governs actions under the Law, and series organizations. The Act is written as amendments to 12 Pa.C.S. Chapter 51.

To be liable under section 5104 of the Law as to present or future creditors, a debtor must have transferred property or incurred an obligation with actual fraudulent intent to defeat another creditor or through constructive fraud. Under the UFTA, courts determined that the burden of proving actual or constructive fraud was on the creditor but questions arose as to whether it was by a preponderance of the evidence or by clear and convincing evidence. Under the Act, new language provides “[a] creditor making a claim for relief [as to either actual or constructive fraud] has the burden of proving the elements of the claim for relief by a preponderance of the evidence.” 12 Pa.C.S. §5104 (c). A preponderance is more than 50 percent.

To be liable under section 5105 of the Law as to present creditors, there must be proof of constructive fraud. “A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.” 12 Pa. C.S. §5105 (a). As with proof with present or future creditors, the burden under section 5105(a) is on the creditor. “Burden of proof, - Subject to section 5102(b) (relating to insolvency), a creditor making a claim for relief under subsection (a) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.” 12 Pa.C.S. §5105 (b). The proof of insolvency is an exception so that the creditor must make an initial showing to reach a presumption of insolvency and the debtor thereafter has “the burden of proving that the nonexistence of insolvency is more probable than its existence.” 12 Pa.C.S. §5102(b).

Under section 5106 of the UFTA and the Law, timing of the transfer or the incurrence of the obligation is essential to proof of a transfer or obligation subject to relief. As to real or personal property, the transfer occurs when it is perfected by recording a document in a public recording
office which serves as notice to third parties, including creditors making a claim. If the transfer
is not capable of this perfection, then it occurs when the transfer is effective between the debtor
and the transferee. The transfer can only occur when the debtor has an interest in the asset.
However, when the obligation is incurred has changed under the Act. Under the UFTA, the
obligation, if by verbal agreement, is when undertaken and, if in writing, when executed by the
obligor and delivered to the obligee. Section 5106(5)(ii) pertaining to writings is expressed
under the Act as a “record signed by the obligor” not a writing executed. The reason for this new
language is that writings now include electronic records which are signed, not executed.

Section 5101(b) of the Act sets forth appropriate definitions for “electronic,” “record,” and
“signed.” “Electronic” means “[r]elating to technology having electrical, digital, magnetic,
wireless, optical, electromagnetic or similar capabilities.” A “record” is “[i]nformation that is
inscribed on a tangible medium and is retrievable in perceptible form.” The verb, to “sign”
means “[w]ith present intent to authenticate or adopt a record: (1) to execute or adopt a tangible
symbol; or (2) to attach or logically associate with the record an electronic symbol, sound or
process.” These new terms correspond to our electronic communication and present new
elements of proof in a claim for relief.

Remedies, defenses, liabilities, and protections of UFTA have been revised under the Act to
clarify that the Law covers both transfers and new obligations. The Law contains the same
remedies as the UFTA: (1) avoidance of the transfer or obligation, (2) attachment or other
provisional remedy against the asset transferred or assets of the transferee, (3) injunction as to
the asset or transferee, (4) appointment of a receiver, (5) other applicable relief, or (6) a creditor
with a judgment may obtain an order to levy directly on an asset transferred or its proceeds. 12
Pa. C.S. §5107. Against these remedies, Section 5108 clarifies a defense found in UFTA
against actual fraud in a transfer or incurrence of a new obligation as follows: “[a] transfer or
obligation is not voidable under section 5104(a)(1) (relating to transfer or obligation voidable as
to present or future creditor) against a person that took in good faith and for a reasonably
equivalent value given the debtor or against any subsequent transferee or obligee.”

Specific new rules apply to the remedy of avoiding “the transfer or obligation to the extent
necessary to satisfy a creditor’s claim” under section 5107(a)(1) that clarify good faith defenses
of first and subsequent transferees. A judgment may be entered against the first or subsequent
transferee for the value of the asset adjusted to the amount of the claim whichever is less. The
judgment may not, however, be entered against (1) a good faith transferee that took for value or
(2) a good faith transferee for value of that prior good faith transferee for value. Accordingly, it
is not just the first transferee who must take in good faith and for value. Each subsequent
transferee must take in good faith and for value, not only in reliance on the good faith for value
of its predecessor in title. Further, to the extent value was given by a good faith transferee or
obligee, in a voidable transaction, such person is entitled to “(1) a lien on or a right to retain an
interest in the asset transferred; (2) enforcement of an obligation incurred; or (3) a reduction in
the amount of the liability on the judgment.” 12 Pa. C.S. §5108(d).

The burden of proof for remedies is expressed as a preponderance of the evidence and the Act
specifies which party bears that burden. A party invoking the following defenses has the burden
of proving: (1) affirmative defense to actual fraud of taking in good faith for reasonably
equivalent value, (2) affirmative defense to constructive fraud of taking in good faith for reasonably equivalent value, and (3) that the transfer is exempted as (a) a transfer in lease termination on debtor default or (b) an enforcement of security interest. The creditor has the burden of proving judgments against transferees and the measure of recovery except that the transferee must prove good faith and taking for value of itself and predecessors and any reduction in recovery.

The Act specifies which state law applies to an action under the Law. Applicable law is the jurisdiction where the debtor is located at the time the transfer is made or the obligation is incurred. 12 Pa.C.S. §5108(b). A debtor who is an individual is located at his or her principal residence. A debtor that is an organization is located (a) at its principal place of business if there is only one such place, or (b) at its chief executive office if it has more than one place of business. 12 Pa.C.S. §5108(a).

The Act addresses series organizations which have been authorized by the State of Delaware. Series organizations generally include a master entity with a charter providing for one or more protected series, each series having specific property and whose debt is enforceable only out of the assets of that series. Each series can issue separate ownership interests. Mutual funds have followed this model. The Law states at 12 Pa. C.S. § 5111(a): “Separate person. -A series organization and a protected series of the series organization is a separate person for purposes of this chapter, even if for other purposes a protected series is not a person separate from the series organization or other protected series of the series organization.” This provision considers each protected series a separate person so that the assets or obligations pertaining to each protected series are considered transferred or incurred by that protected series, not the series organization.

The Act announces its intention to make the Law uniform subject to national interpretation. “This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.” 12 Pa.C.S. §5113. Accordingly, interpretations by appellate courts in other states a having similar uniform law will have precedent in interpreting the Law. Such a goal is important because the Law tracks and is coordinated with provisions of the Bankruptcy Code, a federal law applicable to debtors located in each state. Nevertheless, Pennsylvania has not included section 5105(b) proposed by the Uniform Law Commission which would have included insider preferences as transfers fraudulent as to present creditors.

The Governor approved the Act on December 22, 2017, and it took effect 60 days thereafter. The Law applies only to transfers made and obligations incurred on and after its effective date and prior law applies to prior transfers and obligations. The date of transfer or incurrence is to be determined under 12 Pa.C.S. §5106 which was not substantively amended by the Act. The Act brings Pennsylvania closer to the vision of the Uniform Law Commission and will clarify what proof is needed in claims and defenses under the Law.
Some California Surprises in Business Divorce

By Garland A. Kelley and Jesse B. Levin, Glaser Weil LLP

When the first sign of business divorce appears on the sunny California horizon, a cloud of litigation predictably follows. Recent developments in California law create thorny issues for business principals and their attorneys involved in these disputes.

One recent change can make divorcing members of a California LLC wary of immediately running to court to seek judicial dissolution. Under current law, filing such a cause of action grants an *irrevocable* buyout option to the other owners of the company, and with it, an enormous source of leverage.

Of additional concern to defense practitioners and their clients, a string of recent federal court decisions restrict the protective scope of the business judgment rule in a manner peculiar to California: unlike directors, officers of California corporations are not protected by the business judgment rule for business decision they make on behalf of the corporation.

**The Buy Out Option for Divorcing LLCs is Now Irrevocable Upon Commencing Suit**

The statutory grounds under which members of an LLC can seek dissolution in California are relatively numerous, but have remained static since California enacted the prior LLC regime in the Beverly-Killea Limited Liability Act in 1994 (“Beverly-Killea”). Today, those grounds are still found at Cal. Corp Code § 17707.03(b), which provides:

1. It is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.
2. Dissolution is reasonably necessary for the protection of the rights or interests of the complaining members.
3. The business of the limited liability company has been abandoned.
4. The management of the limited liability company is deadlocked or subject to internal dissension.
5. Those in control of the limited liability company have been guilty of, or have knowingly countenanced, persistent and pervasive fraud, mismanagement, or abuse of authority.

Should an LLC member invoke the foregoing grounds by filing a judicial dissolution cause of action, the other LLC members, similar to corporate shareholders and limited partners, can elect

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1 The number of available grounds in California contrasts with states such as Delaware, which recognizes “impracticality” and “deadlock” as grounds for judicial dissolution. See 6 Del. C. § 18-802 (“whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement”); *Haley v. Talcott*, 864 A.2d 86, 89 (Del. Ch. 2004) (ordering dissolution where there was “indisputable deadlock between the two 50% members of the LLC”).
to buy out the suing member’s interest at fair market value set by agreement or neutral appraisal in lieu of a judicial wind up of the LLC. See Cal. Corp. Code §§ 2000 (applying to corporations), 15908.02(b) (applying to limited partnerships), and 17707.03(c) (applying to LLCs).

For decades prior to the repeal of Beverly-Killea, the suing member could counter a buyout by simply filing a voluntary dismissal of the judicial dissolution cause of action. See, e.g., Cubalevic v. Super. Ct. for Los Angeles Cty., 240 Cal. App. 2d 557, 562 (1966) (holding that the trial court lost jurisdiction over enforcement of the buyout option upon dismissal of the cause of action for judicial dissolution).

Today, however, this strategy no longer works for LLC members whose operating agreements were entered after the enactment of California’s “Revised Uniform Limited Liability Act.” (“CRULLCA”). Upon the Uniform Law Commission’s promulgation of a model LLC law and California’s adoption of CRULLCA in 2012, Beverly-Killea was repealed for LLCs with operating agreements entered into after January 1, 2014. See Kennedy v. Kennedy, 235 Cal. App. 4th 1474, 1491 (2015), as modified (Apr. 22, 2015) (holding CRULLCA non-retroactive and that the Beverly-Killea governed an LLC with an operating agreement entered prior to 2014) (“Kennedy”). Following the guidance in Kennedy, the legislature adopted further “clean up” amendments to CRULLCA effective January 1, 2016, codifying the Kennedy limitation on CRULLCA retroactivity. See Cal. Corp. Code § 17713.04(b).

The new language of the buyout statute under CRULLCA states that a “dismissal of any suit for judicial dissolution by a manager, member, or members shall not affect the other members’ rights to avoid dissolution pursuant to this section.” Cal. Corp. Code § 17707.03(c)(6).

The facts and reasoning of Kennedy illustrate the impact of this text on litigants ensnared in a bitter business divorce. Plaintiff Drake Kennedy (“Drake”) filed a lawsuit in late 2013 alleging extensive misconduct against his fellow LLC members (“Defendants”). Kennedy at 1478. Indeed, Drake alleged that Defendants had “stopped communicating []; restricted Drake’s access to information and the books and records; looted and diverted corporate assets; refused to pay costs defending a lawsuit; [and] stole valuable real estate.” Id. Along with multiple direct and derivative causes of action for breaches of fiduciary duties, conspiracy, fraudulent concealment, and others, Drake’s complaint included a cause of action for judicial dissolution. Id. at 1479.

Exploiting the opportunity afforded by this single count, Defendants moved for a stay of the action to appoint appraisers to buyout Drake’s interest in the company. Id. Faced with a threat to his control of the LLC and a stay of his litigation, Drake pivoted and dismissed his judicial dissolution cause action with prejudice, causing the court to deny the defendants’ motion to stay because it “lack[ed] jurisdiction to consider defendants’ motion for a buyout.” Kennedy at 1480.

Defendants appealed, claiming that CRULLCA’s new language rendered the buyout option irrevocable notwithstanding the dismissal. Unfortunately for Defendants, their LLC and Drake’s action were commenced prior to CRULLCA’s effective date, and the appellate court in Kennedy rejected CRULLCA retroactivity, deducing that the “Legislature intended that [Beverly–Killea] remain in effect until January 1, 2014” and therefore applied to the instant case. Id. at 1490. In light of this holding, the Kennedy court affirmed the trial court’s denial of the motion to stay
reasoning that “upon dismissal of the dissolution cause of action, there is no dissolution to avoid and, thus, no right to buy out plaintiff's interests.” *Id.* at 1481.

But while retroactivity was jettisoned, the *Kennedy* court agreed that CRULLCA changed the game for later created LLCs:

“Once the buyout procedure is commenced, the moving party cannot, by dismissing the judicial dissolution action, prevent the buyout procedure from going forward. The purchasing party has the right to pursue the buyout procedure by compelling a sale (if the valuation is favorable) or walking away (if it is not).”


Post-*Kennedy*, members seeking to scrap a California LLC rather than cash out have new reason to look at the effective date of their operating agreements, and pause before adding a judicial dissolution cause of action to their list of other claims. CRULLCA could catch the hasty by surprise because rushing to engage the judicial machinery can now lead to unintended consequences that cannot be undone. Even a deliberate pursuer of judicial dissolution would be well advised to carefully weigh the favorability and likelihood of a hostile buyout before filing. On the flip side, defending LLC members faced with defending a judicial dissolution claim can use the buyout option with greater leverage than ever before.

While CRULLCA may have reset LLC litigation strategy, the old rule is still a factor for California corporate shareholders and limited partners. The *Kennedy* court even noted that there “is no similar buyout provision in the General Corporation Law.... [Citations.] Also, no such comparable terms are present in the Uniform Limited Partnership Act of 2008.” *Kennedy* at 1487. Nevertheless, the CRULLCA may be the start of a trend, and practitioners in Corporate and Limited Partnerships should monitor possible future amendments to these statutes on the chance that this creature of California LLC law expands into other business forms.

**Considerations for California Decision Makers:**

*California’s Business Judgment Rule – Statutory and Common Law – Does Not Apply to California Corporate Officers*

It may come as no surprise that business divorce litigation is often piggy backed, as it was in *Kennedy*, with multiple of claims – manufactured or real – of breach of fiduciary duties, negligence, and other derivative causes of action against corporate decision makers. A key defense to such claims, deployable at the pleadings stage, is the business judgment rule (“BJR”).

In California and elsewhere, the BJR precludes judicial second-guessing of business decisions made in good faith by certain corporate decision makers. It is a legal presumption that corporate decisions are proper, and it “can be rebutted only by a factual showing of fraud, bad faith or gross


*Perry* involved a motion to dismiss of a “Complaint for Negligence,” wherein the FDIC sued IndyMac's former Chairman of the Board and CEO, Matthew Perry, for allegedly causing IndyMac to create “a pool of more than $10 billion in risky, residential loans” that later generated losses for the bank in excess of $600 million. *Perry* at *1. Within months, IndyMac closed and the FDIC was appointed as its receiver. *Id.*

The complaint alleges that IndyMac’s core business model was to generate or purchase residential loans, in particular so-called “Alt-A” loans that carry enhanced risk, for sale to the secondary market. The FDIC alleged that Perry's decisions that “aggressively gamble by investing in these risky loans [] were beyond what a reasonable banker would have done under similar circumstances.” *Id.* It sued Perry – alone, and solely in his capacity as an officer of IndyMac – for ordinary negligence in breaching his duties to IndyMac. *Id.*

Perry moved to dismiss, contending that the FDIC failed to plead facts sufficient to overcome the business judgment rule. Judge Otis Wright denied the motion, holding that the business judgment rule “does not apply to corporate decisions of officers in California.” *Id.* at 4.

The *Perry* court rejected two possible ways in which California’s BJR might apply to them. First, California’s statutory codification of the business judgment rule explicitly pertains only to directors, and does not mention “officers” at all. See Cal. Corp. Code § 309. Given this textual clarity, courts are “not to insert what has been omitted, or to omit what has been inserted.” *Perry*

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2 See also *Gantler v. Stephens*, 965 A.2d 695, 705-06 (Del. 2009) (the business judgment standard “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del 1984) (overruled on other grounds)).

3 See Defendant Michael W. Perry’s Motion to Dismiss, Memorandum of Points and Authorities (“Motion”), at 2. The allegations suggest that as of December 2007, “IndyMac was the seventh largest savings and loan association, the second largest independent mortgage lender, and the eighth largest mortgage servicer in the United States.” *Id.* at 5.

4 The FDIC brought suit pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), by which directors and officers of insured depository institutions may be held liable for money damages brought by the FDIC for “gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law.” 12 U.S.C. § 1821(k).
at 3. Indeed, the *Perry* court noted that the California legislature appears to have consciously excluded officers from § 309, citing among other things a Legislative Committee Comment that the “standard of care does not include officers.” *Id.* at 4. In other words, the *Perry* court commented, “when the California legislature had the opportunity to codify common law BJR, it purposely excluded its application to corporate officers.” *Id.* Thus, § 309 offers no protection to corporate officers.

Second, the *Perry* court acknowledged that there existed in California a common law business judgment rule, and that it had two components – “one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization’s best interest.” *Id.* at 3 (quoting *Berg & Berg*, 178 Cal.App.4th at 1045). The *Perry* court concluded, however, that common law BJR had been applied to shield only qualifying decisions made by corporate directors, and never those of corporate officers. *Perry* at 3. To the contrary, the court noted that at least one prior appellate decision had refused to extend business judgment rule protections to “interested directors who effectively were acting as officers.” *Id.* (citing *Gaillard v. Natomas, Co.*, 208 Cal. App. 3d 1250, 1265 (1989)).

For these reasons, the *Perry* court held that California’s business judgment rule “does not protect officers’ corporate decisions.” *Id.* at 4.

For directors and officers of California corporations (and those who advise them), the *Perry* decision provides a reminder that corporate titles and responsibilities matter, and the protections afforded to officers should not be presumed. Business decisions made by corporate officers in good faith are not immune from legal challenge, nor easily resolved through presumptions such as the BJR that can dispose of such challenges early in litigation.

For legal practitioners, the posture of *Perry* is important. Resolved on a motion to dismiss, the Court acknowledged – but considered as premature – Perry’s arguments that the FDIC’s allegations were contrived, and actually pertained to Perry’s “capacity as IndyMac’s director as opposed to his role as CEO” and thus the business judgment rule should apply. *Id.* at 4. Perry argued that the complaint does not take issue “with what Mr. Perry did in managing IndyMac's day-to-day operations. Rather, it attacks IndyMac’s core business strategy in 2007, which necessarily was established by the Board of Directors.”

The court concluded, however, that “Plaintiff is the master of the Complaint” and that at this stage, it had sufficiently alleged that Perry's actions were taken in his officer capacity. “Whether Plaintiff can ultimately prove these

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5 The Court also quoted a Legislative Committee Comment regarding possible reasons for this exclusion, including that although “a non-director officer may have a duty of care similar to that of a director [ ], his ability to rely on factual information, reports or statements may, depending upon the circumstances of the particular case, be more limited than in the case of a director in view of the greater obligation he may have to be familiar with the affairs of the corporation.” *Id.*

6 While *Gaillard* refused to extend the judicial deference afforded under the BJR to officer / directors who “were acting as officer employees of the corporation,” it did not explore the common law aspect of the rule, citing only § 309. In this regard, *Perry* extends the holding of *Gaillard*.

7 Motion, at 2.
allegations is not before this Court at this time.” *Perry* at 4. In other words, Plaintiff’s counsel seeking to follow this path must be careful to distinguish between actions taken as an officer and those taken as a director. A failure to do so may provide defense counsel with opportunities to raise similar objections at the motion to dismiss stage or (as in *Perry*) beyond.8

8 Perhaps anticipating such a burden, the FDIC included in its complaint quotes from Mr. Perry it may rely on to establish that “Perry knew in real time that the secondary market for [these] loans was, at best, uncertain and, at worst, dying” and that Mr. Perry’s “failure to use real time information . . . resulted in substantial losses to the Bank.” Opposition of Plaintiff FDIC to Motion, at fn. 2 (emphasis in original). A number of those writings apparently reflect statements by Mr. Perry that refer to his role as a corporate officer, including that “the losses are 100% operating management’s fault” and that “the buck stops with the CEO.” *Id.* at 13. In any event, such allegations were apparently sufficient at the pleading stage to survive a motion to dismiss.
Litigation Cropping Up as Losing Applicants Scrap for Handful of Medical Marijuana Cultivator Licenses in Ohio

By Brian Laliberte and Chad M. Eggspuehler

Losing medical marijuana cultivator applicants have ferociously litigated the constitutionality of Ohio’s new program, the validity of the application process, and alleged fraud and abuse in selecting winning cultivator provisional licensees. The scarcity of provisional licenses (and corresponding certificates of operation), combined with the lucrative opportunity to be one of Ohio’s first legal marijuana cultivators and distributors, fueled the litigation. Though the litigation has thus far failed to derail the entire program, specific plaintiffs have achieved a measure of success, ranging from a prompt administrative hearing to an isolated scoring error that resulted in the award of an additional license.

By statutory design, Ohio’s Medical Marijuana Control Program (MMCP) permits only 24 licensed cultivators at the start of the Program. Once a provisional licensee passes state inspection, it then receives one of 24 coveted certificates of operation. Of the 24 certificates of operation, 12 authorize cultivation of up to 25,000 square feet of medical marijuana (Level I Cultivators), and an additional twelve authorize no more than 3,000 square feet of cultivation (Level II Cultivators).

The Ohio Department of Commerce oversees the licensing component of the MMCP. It used anonymous teams to score and rank the Level I and Level II applications using a number of published criteria. The applicants with the 10 highest consensus scores for each Level received provisional licenses, with the 2 remaining provisional licenses for each Level reserved by statute for the 2 highest scoring “economically disadvantaged groups,” or “EDGs.” The statute defined EDGs as applicants consisting of a certain percentage of “Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians.”

The first case filed in December 2017, Pharmacann Ohio, LLC v. Ohio Department of Commerce, challenged the constitutionality of the MMCP, targeting its statutory set-aside for EDGs. Because neither EDG receiving a Level I application scored in the top twelve, they effectively displaced two non-EDG applicants who were ranked 11 and 12 respectively. The two EDGs that received provisional licenses were joined as parties, and they in turn joined all other Level I Cultivators as third-party defendants. Motion practice ensued.

On May 31, 2018, the court in deciding multiple motions to dismiss held as follows: (1) the EDG set-aside was severable from the remainder of the MMCP statutory scheme, eliminating the need for the third-party defendants to participate in the case; (2) the EDG provision of the MMCP was subject to strict scrutiny because it imposed race-based selection criteria; (3) Pharmacann properly asserted a federal equal protection claim by alleging that it was deprived of a property right secured by the U.S. Constitution; and, (4) Pharmacann was not required to exhaust its administrative remedies before pursuing a facial challenge to the EDG provision. The court did not, however, decide the merits of the plaintiff’s constitutional claim.
Surprisingly, before the court issued its decision, the Department of Commerce admitted that it incorrectly scored Pharmacann’s application. Pharmacann should have been ranked in the top ten, the Department conceded, and it should have received a Level I Cultivator provisional license. The court permitted the twelfth ranked non-EDG applicant to intervene and effectively replace Pharmacann as the plaintiff. The case remains pending without a decision on the merits of the constitutionality set-aside.

Another losing applicant, Cannascend Ohio LLC, filed suit against the Ohio Department of Commerce and each of the Level I Cultivators that received a provisional license. It challenged the validity of the application scoring process, alleging conflicts of interest on the part of outside reviewers and fraud and/or misrepresentation by certain applicants that should have invalidated their applications. It also asserted violations of the Ohio Public Records Act. Cannascend sought a preliminary injunction that would have halted the entire MMCP. Specifically, it asked the court to revoke all Level I provisional licenses and to prohibit the Department of Commerce from converting the licenses to certificates of operation.

On May 17, 2018, the court declined to exercise jurisdiction over Cannascend’s claims that challenged the scoring process, holding that it failed to exhaust its administrative remedies. In dismissing the licensing-related claims, the court denied Cannascend’s broad request for a preliminary injunction shutting down MMCP licensing. It did not, however, dismiss the public records claims, which remain pending solely against the Ohio Department of Commerce.

Finally, in Ohio Releaf, LLC v. Jaqueline T. Williams, Director, Ohio Department of Commerce, et al., a losing Level I applicant sought to compel the Department of Commerce to afford it a prompt administrative hearing. Ohio’s administrative code requires that state departments and their agencies hold such hearings within 15-days of receiving a notice of appeal, and this administrative review process applies to losing MMCP applicants. Upon receiving Ohio Releaf’s notice of appeal, the Department initially scheduled the hearing, but then unilaterally continued it indefinitely. The Department’s counsel then informed Ohio Releaf that the first available hearing date likely would be in early 2019, some 14 months after the Department denied its application.

Ohio Releaf filed a motion for preliminary injunction asking the Court (1) to compel Commerce to hold a prompt hearing, and (2) to stop Commerce from converting provisional licenses to certificates of operation until it received that hearing. Like Cannascend, it also sought to compel the production of public records. Ohio Releaf amended its complaint to join the Level I provisional licensees as defendants, and the matter proceeded to a preliminary injunction hearing.

During the preliminary injunction hearing, Ohio Releaf attempted to demonstrate that it would suffer an irreparable competitive disadvantage and nearly insurmountable barriers to entering Ohio’s medical marijuana marketplace if the MMCP was not enjoined and administrative review of its application resulted in it receiving an additional license. It also attempted to demonstrate the merits of its application in the hopes that the court would conclude that it had a viable application. Witnesses from the Department of Commerce testified concerning their first-come,
first-serve policy for scheduling hearings based on the time that notices of appeal were filed. The delay in Ohio Releaf’s hearing, they explained, reflected its slow filing, which occurred after the filing of 50 other appeals. They also testified that a substantial point-gap separated Ohio Releaf from the top scoring Level I provisional licensees, making it unlikely that it would receive a license after an administrative hearing. Hence, there was no urgency in scheduling Ohio Releaf’s hearing ahead of any other losing applicant.

The court also heard evidence from a patient advocate who described the anticipated effect medical marijuana treatment would have on her epileptic daughter. She explained that her family had exhausted all other pharmaceutical options—medical marijuana was the last option for mitigating her daughter’s seizures. The court opined from the bench that the Ohio legislature identified the public’s interest in making medical marijuana available to certain patients, including epileptics.

Finally, the chief operating officer of one of the Level I licensees testified about the substantial harm a broad injunction of the MMCP would have on his company. He stated that more than $14 million of an anticipated $16 million budget had been spent to obtain the company’s license, construct a state-of-the-art facility, hire qualified personnel from around the country, and prepare for inspection and the first crop of medical marijuana. He further testified that his company’s facility alone created approximately 300 new construction jobs and dozens of permanent operations jobs. Other Level I licensees submitted affidavits that contained similar information. All in, Level I licensees have more than $150 million invested in Ohio’s MMCP.

On May 18, 2018, the court granted a limited injunction that denied Ohio Releaf’s broad request for an order shutting down the MMCP. Though the court rejected the same jurisdictional arguments that won the day in Cannascend, it granted only limited relief by ordering the Department to hold an administrative hearing within two weeks of the order. The court also dismissed Ohio Releaf’s public records act claims, holding that Commerce acted, and continued to act, in good faith in responding to records requests. Ohio Releaf received its administrative hearing, which concluded in July 2018. Aspects of the case remain pending before the common pleas court.

Brian Laliberte is a business trial lawyer with Tucker Ellis LLP, resident in the firm’s Columbus, Ohio office. He represented a Level I Cultivator provisional licensee in each of the cases described in this article.

Chad M. Eggspuehler is an appellate lawyer in the Cleveland, Ohio office of Tucker Ellis LLP. Along with Mr. Laliberte, he represented a Level I Cultivator provisional licensee in the Cannascend and Ohio Releaf cases.

All of the information presented in the article is from public sources, including court transcripts and written judicial decisions.
Spring Meeting in Sunny Florida

By Sarah Ennis

The Spring 2018 Business Law Section Meeting, held April 12-14 in Orlando, Florida, not only offered great substantive programs (such as the BCLC’s four sponsored programs), but also offered plenty of opportunities for fun and adventure in a “magical” city.

Health Law Club

Each morning at 6:00 a.m., the Business Law Health Club met to run or walk with professional local guides in and around the grounds of Rosen Shingle Creek. Although mornings in April are fairly dark, as the sun rose, the beauty of the resort’s grounds was revealed, enticing further exploration through the resort’s winding nature trail.

BCLC Dinner

The ever-popular BCLC dinner was held jointly with Judges Initiative, Dispute Resolution, and Sports Law Committees on Thursday evening at Del Frisco’s Double Eagle Steak House. This sold out event featured the Women’s Business & Commercial Advocate’s Reception immediately preceding the dinner and honored prominent members of the legal profession while enjoying the opportunity to meet with old and new colleagues and friends in a beautiful venue.

The WBCA award was presented to Judge Alice L. Blackwell. Judge Blackwell currently serves as Associate Administrative Circuit Judge for the Ninth Judicial Circuit Court of Florida, and in her nearly 40 years as an attorney and judge, has become well-known for her intelligence, character, and her dedication to the advancement of women in the legal profession. To name a few examples of her achievements, Judge Blackwell was appointed to the Circuit bench at the age of 34, the second-youngest person to become a Circuit Judge at that time in Florida. She has served as the president of both Inns of Court in Orlando and has promoted women in each and was awarded the George C. Young American Inn of Court Outstanding Member Award of Professionalism in 2016. Additionally, Judge Blackwell was awarded the James G. Glazebrook Memorial Bar Service Award in 2009, the Outstanding Leadership Award of the Domestic Violence Task Force of Orange County in 2002 and 2009, and was named the Central Florida ABOTA Trial Judge of The Year in 1998.
Melanie Damian was presented with a special award by BCLC Chair, Heidi McNeil Staudenmaier. Ms. Damian, a senior partner with the law firm of Damian & Valori LLP in Miami, Florida, represents public and private companies and individuals in a variety of complex business and securities litigation. Her character, commitment to her community, and her professional accomplishments are as impressive as they are inspiring. She currently serves as Chair of the Business Law Section of the Florida Bar, and as Chair-Elect of the International Women’s Forum (IWF) Florida Chapter and as Co-Chair of the IWF 2018 World Leadership Conference.

**Section Dinner at Seaworld**

Who can go to Orlando without visiting a theme park? Taking advantage of this prime location for fun, the Business Law Section Dinner was held Friday evening at Seaworld in Orlando. The evening began at “Ports of Call,” where exotic animals greeted attendees as they enjoyed cocktails and hors d’oeuvres. After dinner, guests were invited on Base Station Wild Arctic to “fly” through the North Pole in a flight simulation ride. After “flying” through the North Pole, attendees had the opportunity to observe beluga whales, seals, and other arctic animals as they played and swam in their polar habitat. The evening ended with dancing and desserts – a truly great end to a “magical” evening.
BCLC Programs in Austin

By Stuart M. Riback

The Business and Corporate Litigation Committee is pleased to present four CLE programs at the Business Law Section Annual Meeting in Austin, and will be cosponsoring six other worthwhile programs to be presented by other Business Law Section Committees. The BCLC programs cover varied subject matters and will be of interest to anyone concerned about business law and business litigation.

“Admitting Digital Evidence” will be presented on Thursday, September 13, starting at 10:30 a.m. This 90 minute program will examine how traditional concepts of admissibility such as relevance, authentication and hearsay apply to the various new forms of electronic evidence: emails, social media posts, website posts, text messages, chat and others. Peter Valori of Damian & Valori LLP in Miami and Chief Judge J. Stephen Schuster of Superior Court of Cobb County, Georgia, are the program chairs. Judge Schuster will be on the panel together with Michaela Sozio of Tressler LLP’s Los Angeles office and Victor Vital of Barnes & Thornburg LLP in Dallas. Peter Valori will moderate.

At 3:00 p.m. Thursday afternoon BCLC will present “Managing Corporate Crisis - In House, In Court and In the Market — Counsel, Compliance, and Public Affairs Experts Shares Tips on Navigating Through Crisis.” How a company responds to crisis when challenges come from all sides takes experience, skill and an ability to see the whole playing field. In this program, experts in compliance, litigation, investigations and media share their tips and best practices for navigating corporate calamities. Kevin Metz of Latham & Watkins LLP in Washington, DC, Judge Louis A. Bledsoe III, Special Superior Court of North Carolina Judge for Complex Business Cases, and Judge Heather Welch of the Indiana Business Court are program co-chairs. Natalia Shehadeh, Senior Vice President and Chief Compliance Officer of TechnipFMC in Houston; Erin Pelton, Managing Director of Mercury Public Affairs in New York; and Brant Bishop of Wilkinson Walsh Eskovitz LLP in New York will be on the panel, together with Judge Bledsoe and Judge Welch. Kevin Metz will be the moderator of this 90-minute program.

Peter Ladig of Bayard PA in Wilmington, Delaware and Justice Timothy Driscoll of New York Supreme Court Commercial Division (Nassau County) are chairing “Business Divorce in Delaware, New York and California: Around the Horn,” a 90-minute program that will begin at 10:30 a.m. on Friday, September 14. Peter Ladig will moderate the program. The panel will consist of Justice Driscoll; Helen Maher of Boies, Schiller & Flexner LLP in New York; Vice Chancellor Joseph Slichts of the Delaware Court of Chancery; Susan Wood Waesco of Morris Nichols Arsht & Tunnell in Wilmington, Delaware; and Judge Gail Andler (Ret.), now with JAMS in Orange County, California. In this program, judges and lawyers from New York, Delaware and California look at how each state handles common issues in business divorce.

On Friday afternoon, a panel of judges and attorneys will discuss ethical issues raised when more than one party has access to privileged information. “Sharing the Attorney-Client Privilege: Too Much of a Good Thing” will look at issues concerning the common interest privilege: does
the doctrine extends beyond co-parties in litigation to include business co-venturers, or co-parties to a deal that the parties expect will be the subject of litigation? Can it be expanded by a written agreement? Need there be a written agreement for it to apply? What should an agreement cover? The panel will also address the ethical issues that arise when a lawyer represents multiple clients. For instance, who controls the privilege when the clients’ interests become antagonistic? Michael Rubenstein of Liskow & Lewis will moderate and co-chair the program. The other moderator and program co-chair is Judge Mary M. Johnston of Delaware Superior Court. Rounding out the panel are Vice Chancellor Joseph Slights of the Delaware Court of Chancery; Merrick L. Gross of Carlton Fields LLP in Miami; James McCormack of Austin, Texas; and Melissa Visconti of Damian & Valori LLP in Miami. This will be a 60-minute program.

**BCLC will also be cosponsoring several programs that other committees are presenting.** These programs are on topics that business litigators are likely to find interesting and worthwhile, and the committee is pleased to recommend these to its members.

- On Friday morning at 8:00 a.m. the Cyberspace Committee will be presenting a two hour program, “Voices in the Room: Professional Ethics of Advising Clients on Responding to Cyber Extortion Demands.”

- Also on Friday morning, from 9:00 a.m. to 10:30 a.m., the Banking Law Committee will present “Making it Personal: Trends in Agency Actions Against Individuals,” which will deal with regulatory enforcement actions.

- On Friday afternoon, the Mergers and Acquisitions Committee will present “Successor Liability in Asset Acquisition Transactions,” which will run from 3:30 p.m. to 5:00 p.m.

- The next day, Saturday September 15, the Government Affairs Practice Committee will present “Protecting the Client and Preserving Privilege: A Look at the Ethics of Attorney Client Privilege in the Context of Government Investigations and Government Affairs,” a 60-minute program that will run from 8:00 a.m. to 9:00 a.m.

- At 9:00 a.m. on Saturday, the Professional Responsibility Committee’s program, “Ethics Rule 1.6 Confidentiality, the Attorney Client Privilege, and the Attorney Work Product Doctrine - What Business Lawyers Need to Know,” will be presented from 8:00 a.m. to 10:00 a.m.

- Finally, at 10:30 a.m. on Saturday, the Dispute Resolution Committee will present “Arbitration: An Effective Alternative to Courts,” a 90-minute program.