



January 2017

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April 6-8, 2017

New Orleans, LA

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### Message from the Chair

Two notes for January, one happy and one sad.

To start on a positive note, the [Cyberspace Law Institute & Winter Working Meeting](#) in San Diego at the end of this month promises fantastic CLE speakers and legal discussions, a peek at the technology of contemporary satellites, and work on publication and thought projects important to moving cyberspace law forward. We are also hosting the first ever Legal Prototype Jam on Thursday, January 26. Join us.

Please also note the passing of our friend, colleague and cyberspace law pioneer, Elaine Ziff. Former Committee Chair Candace Jones has written a thoughtful and moving tribute below in this newsletter. We are considering projects reflecting Elaine's contributions to the history of Internet contracting, and will discuss the possibilities at the Winter Working Meeting. Elaine's legacy of groundbreaking work and wry humor will also be toasted at the meeting. We miss her.

Stay warm this month, and if you can't do that, join us in San Diego.

Ted Claypoole  
Chair, Cyberspace Law Committee

### Cyberspace Law Institute Winter Working Meeting San Diego - January 27-28, 2017

[Registration](#) is now open for the Cyberspace Law Institute and Winter Working Meeting in San Diego, January 27-28, 2017 (all day Friday, half-day Saturday). Please join us to take advantage of some cutting-edge CLE, networking with the best group of lawyers around, and a winter escape (typical highs of 70<sup>o</sup>+). We will have 9 programs of 30-60 minutes each for a total of 5.5 hours of CLE, and our 12 subcommittees and task forces will hold working meetings and in-depth discussions during four blocks of time. This is an excellent opportunity to roll up your sleeves and get involved in the Cyberspace Law Committee. We welcome your ideas and contributions to the many projects in various stages of development.

Our meeting will be at the historic US Grant Hotel in historic downtown San Diego with an optional Friday dinner nearby. The hotel block deadline has been extended to January 12, and registration closes January 13, so [register](#) and book your hotel and air now. We look forward to your participation!

[Read more...](#)

### BLS Spring Meeting Plans New Orleans - April 6-8, 2017

The Cyberspace Law Committee is gearing up for the BLS Section Spring Meeting in New Orleans, April 6-8, 2017. In conjunction with a Section initiative

and given that our subcommittee chairs often arrange for some excellent presentations as part of their meetings, we will offer three CLE programs within our scheduled subcommittee times. In addition, we will have a couple of stand-alone CLE programs. We will offer programs on the following topics:

- Celebrity use of social media and paid endorsements
- Enforcement and litigation trends in privacy and data security
- Report on the ULC's draft Uniform Regulation of Virtual Currency Business Act
- EU privacy shield impact on data transfer from mobile devices
- Changing standards of unfairness as seen in recent enforcement CFPB actions

[Registration is open](#) for the meeting, so take advantage of the early bird discount and register now.

## In Memoriam: Elaine D. Ziff

We lost our dear friend and Committee colleague, Elaine Ziff, on December 13. Elaine didn't dwell on her illness or lament the challenges and losses it brought her. When I spoke with her or we traded messages, she focused on her family, a trip she made to visit her son at the University of Michigan, outings with friends in NYC, and ABA projects to which she could still contribute her deep understanding of the law and passion for her profession.



Elaine concentrated her practice at Skadden, Arps, Slate, Meagher, & Flom, LLP on intellectual property transactions. In the early 2000s, Elaine found a new application for her combination of transaction and technology expertise in the Internet and the work of the Cyberspace Law Committee.

Many now take for granted that the Internet is a commercial zone where distant parties can connect to conduct their business. That was not always the case. Elaine contributed to much of the Committee's seminal work demonstrating the legal underpinnings for commerce supported by online terms and electronic click-through mechanisms.

For a few of those early years, Elaine cochaired the Electronic Commerce Subcommittee with Juliet Moringiello. During that time, she was a co-author with Christina Kunz, John Ottaviani, Juliet Moringiello, Kathleen Porter, and Jennifer Debrow of the article *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 *Bus. Law.* 279 (2003). Elaine also co-chaired a project to create an ABA website, [SafeSelling.org](#), designed to help small businesses navigate their way onto the Internet, and she contributed to a revision of [SafeShopping.org](#), an ABA website designed to educate consumers about online shopping.

Kathy Porter, Chris Kunz, and Tom Laudise shared fond memories of Elaine. Kathy wrote: "Elaine was brilliant, funny, kind and a genuine team player. She was pivotal on our browse-wrap article. She was devoted to her work, but also to her family." Chris echoed the sentiment: "Her thought process was really at the center of the browse-wrap article that we did as a team. And she was so much fun to work with." Tom added: "We were both on the same flight returning from an ABA meeting which was delayed, and we spent the two hours or so at the gate chatting. I learned Elaine was also funny. Very funny. The two hours went very quickly."

More recently, Elaine helped coeditors Roland Trope and Tom Smedinghoff organize the project that produced the forthcoming *Guide to Cybersecurity Due Diligence in M&A Transactions*, and she commented on early drafts of some

chapters. Roland remembers that Elaine gave generously of her time to discuss the book, but their best conversations were about children and education. Elaine was devoted to her family. Roland and Tom plan to dedicate the Guide to the memories of Elaine and Tom's daughter, Anne.

Throughout her career, Elaine also wrote frequently about intellectual property issues for the Business Law Section. In her final ABA leadership role, Elaine served as a Vice Chair of the Model Intellectual Property Security Agreement Joint Task Force, which is cosponsored by the Commercial Finance and UCC Committees. The Task Force published its initial work, the Model Intellectual Property Security Agreement and Introductory Report and Background Considerations, in the Summer 2016 issue of *The Business Lawyer*. The Task Force chairs recognized Elaine "for her IP knowledge, tenacity and commitment."

I am deeply saddened by Elaine's death. We have lost a sharp legal mind, talented leader, prolific contributor, and a kind spirit.

- Candace Jones, December 27, 2016

## Committee Doings

### **From the Cybersecurity Subcommittee**

*Co-chairs Roland Trope and Tom Smedinghoff*

The contributing authors have each submitted their final draft chapters for the *Guide to Cybersecurity Due Diligence in M&A Transactions*. The Guide's co-editors (Thomas Smedinghoff and Roland Trope) completed their work and submitted the Guide to the Publications Board at the end of December. Publication is anticipated in Spring 2017.

The team of authors for *The ABA Cybersecurity Handbook* met by telephone with co-editors, Vince Polley and Jill Rhodes, for preparation of a Second Edition. Cybersecurity Subcommittee members Tom Smedinghoff, Roland Trope, and Lixian Hantover are among the contributing authors.

The Cybersecurity Subcommittee will be meeting at the WWM. The agenda: consider new project(s). Potential examples: Connected Car Cybersecurity; and, Paradigm Shift Towards Prescriptive Cybersecurity and Enhanced Resilience.

### **From the International Trade Subcommittee**

*Co-chairs Hal Burman and John Gregory*

The International Trade Subcommittee (ITS) is holding two working conference calls per month, which may in some months move to three in order to keep pace with developments. The push in December and January is to assess various approaches to IdM (Identity Management) which is due to be on the table on at least two international fora, and possibly more. The target is to get comments and recommendations on proposals that have been made on IdM to the Uncitral Secretariat by early February. The next focus will be to return to whether ITS should recommend that enhanced provisions on cross border e-commerce be considered for trade and other multilateral agreements. Want to participate? Let co-chairs Hal Burman ([Halburman@aol.com](mailto:Halburman@aol.com)) or John Gregory ([John@euclid.ca](mailto:John@euclid.ca)) know.

## Other News

Sarah Jane Hughes is to be a panelist at the ABA Banking Law Committee's Meeting in DC on January 7th. The panel focuses on cybersecurity challenges,

fraud, and mitigation.

## Programs of Interest

### [Cybersecurity in Regulated Industries](#)

January 12, 2017

Location: Webinar

### [Social Media Law Basics](#)

January 18, 2017

Location: Webinar

### [Cars, Cars, Cars: From Potential Liabilities of Driverless Cars to Privacy Concerns to Aging Airbags and Beyond](#)

February 15, 2017

Location: Webinar

## A Note from the Editor

In addition to reporting on the committee's work and what its members are up to, we'd like the newsletter to include articles on topics of interest to members. Articles should be 250-500 words, timely, and original content not already published elsewhere (including on your firm's website). To submit an article or ask questions, please contact the editor, [Lois Mermelstein](#).

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**Cyberspace Law Institute Winter Working Meeting  
San Diego – January 27-28, 2017**

[Registration](#) is now open for the Cyberspace Law Institute and Winter Working Meeting in San Diego, January 27-28, 2017 (all day Friday, half-day Saturday). Please join us to take advantage of some cutting-edge CLE, networking with the best group of lawyers around, and a winter escape (typical highs of 70<sup>o</sup>+). We will have 9 programs of 30-60 minutes each for a total of 5.5 hours of CLE, and our 12 subcommittees and task forces will hold working meetings and in-depth discussions during four blocks of time. This is an excellent opportunity to roll up your sleeves and get involved in the Cyberspace Law Committee. We welcome your ideas and contributions to the many projects in various stages of development.

Our meeting will be at the historic US Grant Hotel in historic downtown San Diego with an optional Friday dinner nearby. The hotel block deadline has been extended to January 12, and registration closes January 13, so [register](#) and book your hotel and air now. We look forward to your participation!

Here is the complete agenda:

<b>Pre-Event: Thursday, January 26, 2017</b>	
6:00 – 8:30 pm	<p><b>Prototype Jam</b> at WeWorks (Comerica Bank Building, 600 B St, San Diego, CA 92101)</p> <p>Help the San Diego legal hacking community and the Legal Analytics Working Group (<b>Warren Agin</b>, Chair) design tools to give small businesses access to legal services. Supported by sponsors LexPredict, Kira Systems, and Bloomberg BNA.</p>

<b>Day 1: Friday, January 27, 2017</b>			
7:30-8:30 am	Breakfast (included in Registration – Hotel)		
8:30-9:00 am	Opening Session	<b>Ted Claypoole</b> , Partner, Womble Carlyle (Charlotte, NC)	Welcome and remarks about the upcoming programs and working sessions.
9:00 -10:00 am	<b>Year in Review</b> (CLE)	<b>Ian C. Ballon</b> , Litigation Shareholder and Co-Chair, Global Intellectual Property and Technology	A review of events, trends, cases and regulatory developments of interest to Cyberspace lawyers. What happened in 2016 and where is the law headed (or where should it be headed) in 2017?

		Practice Group, Greenburg Traurig (East Palo Alto, CA)	
10:00 - 10:45 am	<b>Global Social Media &amp; Dark Data: Issues of Record Retention, Disposition, &amp; Legal Holds (CLE)</b>	<b>John Isaza</b> , Partner, Rimon PC (Los Angeles CA) and <b>Valerie Surgenor</b> , Partner, MacRoberts LLP (Glasgow, Scotland)	Social media is a phenomenon which is generating a landmine of legal concerns ranging from employment to cyber security, ownership, ethics and governance concerns. Picking up on the governance issues, this session focuses on record retention and disposition issues. Two U.S. and EU legal experts will help generate a stimulating discussion on the often conflicting U.S. record retention requirements versus the EU disposition requirements under the GDPR and the Privacy Shield. The session will begin with a quick overview of how social media content could generate regulated records, followed by an overview of disposition requirements in the U.S. and the EU. The goal of the session is to explore not only the issues but best practices approaches to management of these volatile and sensitive issues for most organizations.
10:45- 11:00 am	Break		
11:00- 11:30 am	<b>Vehicle Cybersecurity (CLE)</b>	<b>Roland Trope</b> , Partner, Trope and Schramm LLP (New York, NY)	A discussion of the issues related to vehicle cybersecurity, including recently issued regulations that attempt to address the need for vehicle cybersecurity as well as those issues that can arise in a review by the U.S. Committee on Foreign Investment of an inbound acquisition or investment by a non-U.S. company.
11:30 am- 12:30 pm	<b>Subcommittee and Task Force Meetings</b>	<p><b>International Trade Subcommittee Meeting (Co-Chairs: Hal Burman and John Gregory)</b> This subcommittee meeting will focus on discussion of 2017 priorities for the group, including substantive discussions on: (a) e-commerce law in trade agreements; (b) upcoming identity management standards, including liabilities, at Uncitral and other fora; (c) cross-border standards for signature, authentication and related issues at UNESCAP, UNECE, Cefact and other standards bodies; and(d) data rights and usage under Single Window systems now being developed. Discussions from this session will be continued and completed at the Federated Identity Management Task Force meeting in the afternoon.</p> <p><b>Cloud, Platform, and Analytics Subcommittee Meeting (Co-Chairs: Richard Cohen and Ariane Siegel)</b> Discussion topic TBD</p>	

		<p><b>Internet Governance Task Force Meeting (Co-Chairs: Michael Kelly and David Satola)</b> Report on issues from last four ICANN meetings, IANA transition, and human rights and transparency concerns emerging from multi-stakeholder community. Discussion about attempted lawsuit by four state AGs to stop the IANA transition and infuse constitutional protections via contract into ICANN's corporate structure.</p>	
12:30- 2:00 pm	<p>Lunch (included in Registration-- - Hotel)</p> <p><b>Cybersecurity and Communication</b></p>	<p><b>Charles Renert</b>, Vice President, Cybersecurity for Networking Systems Business (SNS), ViaSat, Inc. (Carlsbad, CA)</p>	<p>ViaSat makes commercial and military satellite communication devices and systems. Mr. Renert will discuss the challenges of cybersecurity in the telecom technologies that ViaSat designs and develops for both their military and civilian customers.</p>
2:00 -2:30 pm	<p><b>State of Artificial Intelligence (CLE)</b></p>	<p><b>Richard Balough</b>, Principal, Balough Law Offices, LLC (Chicago, IL)</p>	<p>We've discussed the Smart Grid and autonomous vehicles. They all have some human interaction. But what happens when the Internet of Things develops so that not only do machines talk to machines but also machines create intellectual property? Who owns the intellectual property? Who can override a machine when artificial intelligence makes decisions? Who is liable? The machine? The code developer who initially did the coding? Some AI experts fear that allowing weapons to have AI may mean the end of civilization. Will we have the same issue that occurred in 2001: A Space Odyssey when machines become more intelligent than humans (or think they are)?</p>
2:30- 3:00 pm	<p><b>Recent Developments in Cybersecurity Policy and Regulations (CLE)</b></p>	<p><b>Cheryl M. Burtzel</b>, Partner, Duggins Wren Mann &amp; Romero LLP (Austin, TX)</p> <p>and</p> <p><b>Candace M. Jones</b>, Counsel &amp; Vice President,</p>	<p>Cybersecurity continues to be a hot topic for regulators and others. This presentation will discuss developments in cybersecurity requirements, including recent guidance issued by U.S. regulators and practical approaches to addressing cybersecurity issues in contracting.</p>

		Federal Reserve Bank of New York (New York, NY)	
3:00 -3:15 pm	Break		
3:15-4:15 pm	Subcommittee and Task Force Meetings	Publications Subcommittee Meeting (Discussion Leaders: Juliet Moringiello and John Rothchild) Discussion of status of and timelines for Cyberspace Law Committee publications and related projects.	
		Enterprise Technology Subcommittee Meeting (Co-Chairs: Cheryl Burtzel and Candace Jones) A work session and discussion of commentary on enterprise contracting, including cybersecurity – related provisions, for the subcommittee’s project on <i>Contracting for Information Security and Resiliency</i> .	
		Cybersecurity Subcommittee Meeting (Co-Chairs: Tom Smedinghoff and Roland Trope) Discussion of potential new projects, including a guide on cybersecurity issues and emerging liabilities for clients that will be developing products to be installed in IoT platforms (cars, kitchen appliances, home-based digital assistants, personal robot assistants, and the like) and other topics.	
4:15-5:15 pm	Subcommittee and Task Force Meetings	Federated Identity Management Task Force Meeting (Chair: Tom Smedinghoff) This subcommittee meeting will focus on discussion of 2017 priorities for the group, including continuation of the substantive discussions begun in the International Trade Subcommittee Meeting earlier today, on: (a) e-commerce law in trade agreements; (b) upcoming identity management standards, including liabilities, at Uncitral and other fora; (c) cross-border standards for signature, authentication and related issues at UNESCAP, UNECE, Cefact and other standards bodies; and(d) data rights and usage under Single Window systems now being developed.	
		Financial Services and Payments Subcommittee Meeting (Co-Chairs: Steve Middlebrook and Ed Morse) Our meeting will focus on discussion and planning of a potential program for the Spring or Fall meeting to address technologies relevant to the payment industry. We will plan to be available via a telephone link for those who may be unable to attend in person. In addition, we will be discussing recent legal developments in the payments space, including some related issues including data collection for credit monitoring. The meeting will also include an update on our book project, <i>Electronic Payments in the 21<sup>st</sup> Century</i> .	
		Social Media Subcommittee Meeting (Co-Chairs: John Isaza and Valerie Surgenor) Report on Social Media book status and ABA editor commentary, including division of labor for re-write and edits based on ABA editor commentaries.	

7:00-9:00 pm	Dinner offsite	Note: This is a ticketed dinner – Location: <b>Don Chido</b> , 527 Fifth Avenue, San Diego, CA
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**Day 2: Saturday, January 28, 2017**

7:30-8:30 am	Breakfast (included in Registration – Hotel)		
8:15-9:15 am	Subcommittee and Task Force Meetings	Non-U.S. Cyber Regulations Task Force Meeting (Chair: David Flint) Discussion topic TBD	
		Electronic Contracting Task Force Meeting (Chair: Juliet Moringiello) Discussion of possible future projects on smart contracts.	
		Mobile and Connected Devices Subcommittee Meeting (Co-Chairs: Richard Balough and John Rothchild) Discussion of possible projects such as artificial intelligence as related to the Internet of Things.	
9:20-10:05 am	<b>Multiple Perspectives on Emerging Challenges in Cyber Liability Insurance (CLE)</b>	<b>Heidi Shadid</b> , Attorney, Eller & Detrick, P.C. (Oklahoma City, OK)	<p>A panel will discuss a range of exclusions and definitions in cyber liability policies that, practically speaking, result in unintended holes in coverage. The goal is also to facilitate an understanding of what risk can be and should be insured versus what constitutes a standard risk of doing business in the world today. To enable the conversation and gain multiple perspectives on this complex topic, the panel will be comprised of three experts that regularly encounter these challenges:</p> <p><b>Jerry Dawkins, Founder and CEO of True Digital Security, Inc.</b>, a cyber security services firm that conducts cyber risk assessment and cyber security audits;</p> <p><b>Alex Pezold, Co-Founder and CEO of TokenEx, LLC</b>, a data vaulting service that secures sensitive data such as financial and personal identifiable information; and</p> <p><b>Sean Shadid, CPCU, Executive Vice President at BancFirst Insurance Services</b>, with targeted experience and insight into multiple large insurance carrier’s cyber liability programs.</p>
10:05-10:20 am	Break		
10:20-10:50 am	<b>Consumer Reviews Online:</b>	<b>Denis T. Rice</b> , Senior	Recent developments affecting the protections afforded by Section 230 of the Communications

	<b>Impacts of Recent Court Decisions and Pending Federal Legislation (CLE)</b>	Counsel, Arnold & Porter LLP,(San Francisco, CA)	Decency Act (47 U.S.C. §230), including how the June 2016 decision of the California Court of Appeal in <i>Hassell v. Bird</i> , 247 Cal. App. 4 <sup>th</sup> 1336 (2016), <i>petition for review granted 381 P. 3<sup>d</sup> 231 (Cal. 2016)</i> allows persons criticized in posts on online sites to obtain injunctive relief against the site.
10:55 am- 11:25 am	<b>Smart Contracts (CLE)</b>	<b>Lois Mermelstein</b> , Attorney, Artegis Law Group (Austin, TX)	This session will provide a conceptual introduction to smart contracts - which include anything that is programmed for performance or enforcement, including but certainly not limited to the blockchain. The program will focus on contract law implications and practical implications beyond distributed ledgers and distributed performances. Some examples from different areas of business practice will be mentioned.  Many of these contracts are not as smart as some technology people, and even some lawyers, think they are. There are issues that may need traditional legal tools, not 'smart' programming, to resolve. The message will not be that smart contracts are not worthwhile, or not here to stay (or not still growing). However, applying some time-tested legal and equitable principles in the face of technology can help ensure that these new developments do not overpromise and lose credibility.
11:30 am- 11:45 am	<b>Report on Prototype Jam</b>	<b>Warren E. Agin</b> , Partner, Swiggart & Agin LLC (Boston, MA)	
12:00- 12:30 pm	Wrap-up --- <b>Ted Claypoole, Chair, Cyberspace Law Committee</b> (followed by optional offsite lunch)		