August 2017  

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Message from the Chair

Dear MMSB Committee Colleagues:

I hope that you are all having an enjoyable Summer.

I look forward to seeing many of you next month in Chicago for the Business Law Section Annual Meeting. Please join us for our usual array of informative subcommittee and task force meetings, CLE programs, and social activities as we continue our tradition as the best damn committee in the whole ABA!

I am excited to announce that our Committee will for the first time have a Business Law Advisor. Business Law Advisors are legal luminaries who are assigned to Committees to share their wisdom, knowledge, and experience. We are privileged that Mike Halloran, a partner with Halloran Farkas + Kittila, has been appointed as a Business Law Advisor to both the MMSB and Private Equity and Venture Capital Committees. Mike has had a distinguished corporate and securities law career having served as General Counsel of Bank of America, Counselor to the Chairman and Deputy Chief of Staff at the SEC, and as a partner at Pillsbury Winthrop. You will be seeing Mike at many of our upcoming Committee meetings.

The Chicago meeting will be a bittersweet one for me as it will mark the end of my three-year term as Committee chair. I am very pleased to report that current Vice Chair Erik Kantz (ekantz@arnstein.com) has been appointed to succeed me. Erik is filling out his leadership team and you should contact him if you are interested in getting more involved in Committee activities.

Until we meet in Chicago, all the best!

Thomas J. Walsh, Jr.
Chair, Middle Market and Small Business Committee
Business Law Section

What is the Middle Market and Small Business Committee, and What Do We Do?

A. Our Mission
The mission of the Middle Market and Small Business Committee ("MMSB Committee") is to serve, educate, and bring together corporate, transactional, and securities lawyers—in an effort to improve the legal profession—who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies. To achieve this objective:

**Read more...**

**B. Committee Facts**

Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,400 members, both in the United States and abroad.
- The MMSB Committee holds live and in-person meetings 3 times a year in conjunction with the ABA Business Law Section Meetings.

**Read more...**

**C. Areas of Expertise**

Some of the specific areas that are frequently covered by the MMSB Committee in our panel presentations, programs (CLE and otherwise) and workshops include the following:

- Entity organization and owner agreements
- Capital formation, financing, and strategic partnering
- Employment and compensation matters
- Intellectual property protection and transference
- Corporate governance
- Securities law compliance
- International expansion and cross-border transactions
- Business combinations and M&A activities
- Business divorces, breakups, and restructurings

**Start-Up Activity Series**

In our continuing series highlighting start-up activities around the globe, Shavon Smith and Samantha Jeffers discuss the start-up scene in our nation's capital.

**Not Just for Policy Wonks: The Place to Be is Washington, D.C., If You Are Thinking of Starting a Start-up!**

By: **Shavon Smith**, Partner, and **Samantha Jeffers**, Intern, **SJS Law Firm**

Richard Harroch, Venture capitalist and entrepreneur once said, "If you want to build a successful business, make sure you have three things—a big market opportunity, great people, and more than enough capital." Washington D.C. is one of the places in the United States where all three are accessible to start-up companies and their owners. Washington D.C. is a city that is rarely known for its start-up scene, but that is slowly changing. D.C. has not always been as lively as it is today, but today it's buzzing with new energy that has added to the victory of start-up companies. D.C.'s rise to prominence has been fueled by a perfect combination of an abundance of organic creativity and pre-existing demographic advantages.

**Read more...**
Trans-Border Perspectives

Our Trans-Border Perspectives series features articles from members that discuss and analyze various legal issues facing smaller and mid-sized companies doing business in foreign jurisdictions or involved in cross-border deals. This issue features an article on supply chain issues in the United Kingdom and an article discussing some lessons learned from living and working internationally.

A. UK Supply Chain Law

Doing Business in and with the UK - Modern Slavery and Transparency of the Supply Chain

By: Charles Wander, Partner, and Alex Kaufmann, Partner, Fladgate LLP

Our firm is regularly asked to advise businesses looking to open up in, or trade with, the United Kingdom (UK). Since last June, the most frequent question has inevitably been about the impact of the UK's departure from the European Union in March 2019 - now saddled with the name "Brexit". The inevitable answer to the question has been, and will for some time continue to be, that we simply don't know.

The press is full of daily speculation about the shape of the UK's trading relationships with the EU and the rest of the world after Brexit. There is certainly a degree of optimism, with the securities markets climbing back above their pre-June 2016 levels, although at the time of writing we are enduring a six-week general election campaign that has given rise to a different set of uncertainties.

In looking at the areas of law that may change after Brexit, there is one recent piece of UK legislation that we can be confident won't change and which needs to be understood by any business seeking to trade in or with the UK. With the fight against modern slavery an urgent issue in times of globalised trade and international supply chains, we see this reflected in actions by legislators and companies, showing that they are mindful of their corporate social responsibility. With increasing frequency, businesses are asked by their customers to disclose details of their supply chain as well as the measures they have taken to prevent modern slavery.

At the legislative level, the Modern Slavery Act 2015 (MSA 2015) has been adopted in the United Kingdom. The law applies to any company operating in the United Kingdom with a minimum global turnover of 36 million GBP. And it should be noted that the law applies whether or not there is even the slightest suspicion of modern slavery in a company's business or supply chain.

Read more...

B. International Lessons Learned

Some Thoughts on Crossing Borders in Your Career

By: Elizabeth A. DiRusso, Partner, DiRusso + Brooks Law Group, LLC

"You are not actually *that* American," my new British friend in the Tax Department said, referring to how much I did not *act* American in discussing the tax inefficiencies of moving various executives into different countries. I took this as a great compliment and I enjoyed receiving it more than any other compliment I can remember. Interestingly, while my friend may or may not have intended it as a slight against Americans in particular, I took it as an acknowledgement of an ability to put aside the perceptions you bring with you from the culture in which you were raised and, instead, to consider the perceptions, sensitivities and concerns of someone or a group of people in a different culture but relevant for the moment. In other words, I was being recognized as someone with unusual
emotional intelligence. Do I dare say, unusual emotional intelligence for an American? Well, if the shoe fits …

Read more…

Areas of Law of Interest to Business Lawyers

A. Bankruptcy

Risky Business: Shell Games and Substantive Consolidation

By: Jennifer L. Villier, JD, WealthCounsel, LLC

Business planning attorneys routinely counsel clients on the risks of veil piercing. Failing to operate a business as a separate entity may lead courts to pierce the entity’s veil and use the owner’s personal assets to satisfy the business debts.

Read more…

B. Patents

How to Serve Your Clients in Patent Matters

By: Rich Beem, Beem Patent Law Firm

You’re a business lawyer. You represent middle market and small businesses. You do your best to serve them in all of their legal needs, which can span many areas of legal practice.

How can you most effectively serve your clients in patent matters? It starts with being attentive to your clients’ business, technology, and competitive landscape.

For example, some of your clients need patents to protect their new and improved products, to obtain and maintain a lead over their competitors, to be market leaders, to generate sales and revenues, and to able to charge fair prices at healthy margins without fear of being undercut by low-price copyists. Some will want to identify minefields of competitors’ patents and steer clear of them. Some will encounter issues of infringement or alleged infringement.

Read more…

Meeting Information

A. Recap of Programs from the Spring Meeting in New Orleans, April 2017

1. Securities Law for the Non-Securities Lawyer

Chair: Greg Yadley

Panelists: Bonnie Roe, Elizabeth Bleakley, Nancy Fallon-Houle, Eric Graben, Gary Ross

Description: The panel discussed the basics of what a general practitioner needs to know and gave enough “walking-around” knowledge so that a lawyer can determine whether a securities specialist is needed and to what extent.

Co-Sponsors: Federal Regulation of Securities; Young Lawyer

Program Materials

2. Fiduciary Duties in Action: Advising Small to Mid-Sized Business Fiduciaries in
Drafting, Decision-Making, and Disputes

Chair: Michael Connolly

Panelists: Lawrence Goldman, Sara Stock, John Zeberkiewicz

Description: This program focused on advising small and mid-sized business owners and managers on applicable fiduciary duties; negotiating and drafting provisions for such duties in formation documents; carrying out fiduciary duties during the life of the business; and common claims and defenses concerning alleged breaches of fiduciary duty.

Co-Sponsors: Corporate Counsel

Program Materials

B. Subcommittee and Task Force Updates

1. Emerging Companies Subcommittee

At the Emerging Companies Subcommittee meeting, the attendees continued the hot topic of entity selection. They focused on how LLCs work and the use of profits interests as incentive units. They agreed that the Subcommittee should participate in the program slated for September now titled: Choice of Entity - Planning Without a Crystal Ball.

2. Securities Regulation Subcommittee

At the Securities Regulation Subcommittee meeting, the attendees first heard a report from Anthony Barone, who is Special Counsel in the Office of Small Business Policy at the SEC. Tony discussed the recent projects at the SEC in which the Office of Small Business Policy was involved, including: recent amendments to Rule 504 under Regulation D; amendments to Rule 147 and the adoption of new Rule 147A, which provide federal securities law exemptions for intra-state offerings, including intra-state crowdfunding; and adjustments to federal crowdfunding dollar limits to reflect inflation (so that, for example, the maximum amount that can be raised in any 12 month period is now $1,070,000, rather than $1,000,000).

The Subcommittee then discussed the recommendations of the SEC’s Small Business Forum, which met in November 2016. The Subcommittee also discussed what regulatory changes the group thought would be most helpful for smaller company capital raising. One change advocated by the group was a clarification and liberalization of the rules regarding registration as broker-dealers for individuals who acted as finders of equity capital for small businesses. In particular, the group thought it would be helpful to have an exemption specifically tailored to smaller companies and smaller offerings.

If you are interested in getting more involved with this Subcommittee, please contact Chair Bonnie Roe.

C. Overview of Annual Meeting to be held in Chicago, September 2017

1. Thursday, September 14, 2017

(a) Program: Choice of Entity: Identifying and Advocating for the Right Entity, 10:30 a.m. - 12:30 p.m.

(b) Middle Market & Small Business Luncheon, 12:30 p.m. - 2:00 p.m.

(c) International Expansion & Cross Border Transactions, 2:00 p.m. - 3:30 p.m.

(d) Business Entities Governance, 2:30 p.m. - 3:30 p.m.

(e) Emerging Companies, 3:30 p.m. - 4:30 p.m.
(f) Private Placement Broker Task Force, 4:30 p.m. - 5:30 p.m.

(g) Middle Market & Small Business Dinner, 7:30 p.m. - 10:00 p.m.

2. Friday, September 15, 2017

(a) Contractual Governance of Business Entities Joint Task Force, 9:30 a.m. - 10:30 a.m.

(b) Family-Owned Businesses, 9:30 a.m. - 10:30 a.m.

(c) Short Form M&A Documents Task Force, 10:00 a.m. - 11:00 a.m.

(d) Program: Funding a War of the Roses - Fundamentals of Director and Officer Insurance, Advancement and Indemnification in a Business Divorce, 10:30 a.m. - 12:00 p.m.

(e) Meeting of Subcommittee Chairs, Task Force Chairs, and Vice Chairs, 3:30 p.m. - 4:30 p.m.

(f) Middle Market and Small Business Committee Meeting, 4:30 p.m. - 6:00 p.m.

3. Saturday, September 16, 2017

(a) Securities Regulation Joint Subcommittee, 2:00 p.m. - 3:00 p.m.

Leadership List of Middle Market and Small Business Committee

The following is a list of the MMSB Committee leadership. Please contact the Chairs or Vice Chairs of our MMSB Committee or any Subcommittee, or of our Task Forces or any of our Liaisons, to get involved in the particular MMSB Committee activities that interest you and which can benefit you, your practice and your clients. All levels are welcome, and we hope to see you soon in Chicago!

Read more...

Contact Information; Disclaimers

The MMSB Committee prepares and delivers the Business Visions Newsletter to its members and the public to enhance our members’ understanding of, and access to, the MMSB Committee's abundant programs and activities. This is a free service that is continually under development. While we try to keep the information timely and accurate, we cannot make any guarantees. We will and do strive to rectify all errors brought to our attention, and we ask for your vigilance in bringing to our attention any inaccuracies. Readers of our Business Visions Newsletter should be aware that information available in our newsletter may not reflect official positions of the ABA, the Business Law Section, the MMSB Committee or its members, or any regulatory agency or governmental authority. Additionally, the views expressed in any article in the Business Visions Newsletter may not necessarily be the views of any organization with which the author is affiliated. Neither the ABA nor the MMSB Committee is responsible for the content or accuracy of any articles or other submissions included in our newsletter.

The Business Visions Newsletter may contain links to information or websites created and maintained by other public and private organizations. Our newsletter also contains links that direct the reader to other websites, both ABA websites
and third-party websites. By clicking on any links provided in the Business Visions Newsletter, you assume any risks associated with accessing a website controlled by a third party, and you further agree to hold the ABA and the MMSB Committee harmless from any damage you may suffer as a result of going on or surfing such third-party websites. Please be aware that the MMSB Committee does not control or guarantee the accuracy, relevance, timeliness, or completeness of any information provided by any source other than the MMSB Committee.

If anyone has any ideas concerning future editions of the MMSB Committee’s newsletter, or would like to get more involved with the Newsletter Subcommittee, please contact Evangelos "Andy" Kostoulas (at EKostoulas@myneil.com) or Mark D. Hobson (at markhobson@hobsonfirm.com), Co-Chairs of the Newsletter Subcommittee.

**Listserv Protocols**

a) **Listserv.** The MMSB Committee encourages all of its members (especially those who have recently joined) to become active participants in all committee activities, including participating in discussions on our Listserv. It is a great way to learn about current legal issues affecting your practice. The Listserv provided by the MMSB Committee ("MMSB Listserv") is a great medium from which to solicit the advice of your peers, benefit from their experience and participate in an ongoing conversation about relevant topics. To be able to send a message through the MMSB Listserv, however, you must first be a member of the MMSB Committee. All Listserv participants are also required to comply with the Rules & Etiquette Guidelines described below.

b) **Listserv Archive.** Members of the MMSB Committee who are fully signed up for the Listserv can access the extensive MMSB Listserv archive at the following link: Listserv Archive

c) **How to Manage Listserv Emails:** The following link provides instructions on how to set up a subfolder on your computer, so that all emails that you receive from the MMSB Committee Listserv automatically will be filed into that subfolder: Managing Listserv E-Mails

d) **Rules & Etiquette Guidelines for Use of the MMSB Listserv.**

The MMSB Committee has established Rules & Etiquette Guidelines that govern all participants’ use of the MMSB Listserv. If a participant fails to adhere to these Rules & Etiquette Guidelines, the MMSB Committee may suspend or terminate that person's future participation on the MMSB Listserv.

The Rules & Etiquette Guidelines for the MMSB Listserv can be found here: MMSB Listserve Rules & Etiquette. If you have questions, contact Evangelos "Andy" Kostoulas at ekostoulas@myneil.com, Co-Chair of the Newsletter Subcommittee.

**Requests for Submissions/Sponsors**

Dear Middle Market and Small Business Committee Members:

Our Committee is always actively seeking sponsors and volunteers, and we need your continued help. Please continue reading below to learn how you can contribute to our Committee's success.

Having sponsors will provide a financial contribution to help fund Committee dinners. But perhaps more importantly, sponsors can provide a strategic
relationship with our committee and provide substantive content and market intelligence during Committee meetings as well as participate in our CLE programs. Efforts to secure additional sponsors are being led by Michel Gélinas (mgelinas@stikeman.com). If you have any leads or suggestions, please let Michel know.

We want to continue to express profuse thanks to our current sponsor, Stout Risius Ross, Inc. Please be sure to thank its representatives in person when you see them at our meetings, lunches, and dinners. The last page of this newsletter contains more information about our current sponsor. Please check it out!

If you are interested in preparing a short, substantive article on a topic that is relevant for our Committee, please contact Evangelos "Andy" Kostoulas (at EKostoulas@myneil.com) or Mark D. Hobson (at markhobson@hobsonfirm.com), Co-Chairs of the Newsletter Subcommittee.

All articles for the newsletter should be minimal in length (up to 2,000 words). In addition to being circulated to our approximately 1,400 members, your article may also be eligible for publishing in the Business Law Section's Business Law Today, a monthly publication circulated to approximately 37,000 members.

Thanks to everyone for your support!

Thomas J. Walsh, Jr.
Chair, Middle Market and Small Business Committee
Business Law Section

Law Student Committee Associate Program

ABA Committee Associate Program

The ABA's Committee Associate Program ("CAP") is designed to build relationships between law students and members of the ABA Business Law Section (the "Section"), by giving students the opportunity to gain experience through substantive and administrative projects with committees of the Section.

The MMSB Committee is continually seeking up to 3 associates to help write (i) articles and (ii) summaries of the various activities of the MMSB Committee's subcommittees and task forces for inclusion in our newsletter. Articles and summaries will be based on live programs from the MMSB Committee's Fall, Spring and Annual Meetings as well as other MMSB Committee meetings, webinars, and lunches that feature one or more speakers. CAP Associate(s) will work with the program presenters and speakers to write certain articles, and also have the opportunity to work with program presenters and speakers to help draft and eventually possibly submit article(s) for publication in the ABA's Business Law Today. Published articles will be drafted primarily by the program presenter or speaker. Attending meetings is required and since travel is not reimbursable, the MMSB Committee is seeking primarily law students who are local to each of the next Fall, Spring and Annual Meetings. The date and location of upcoming meetings are:

- Annual Meeting 2017 - September 14-16, 2017 - Chicago, IL
- Fall Meeting 2017 - November 16-18, 2017 - Washington, D.C.
- Spring Meeting 2018 - April 12-14, 2018 - Orlando, FL

The duration of the position is for at least the applicable meeting and completion of article(s) arising from the same meeting that the CAP Associate(s) attended.

Law students may apply by visiting the CAP website for an application.

If you are interested in participating in the CAP and helping the MMSB
Committee, please contact Evangelos "Andy" Kostoulas at EKostoulas@mynel.com.

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*Nick Jachim, Managing Director/Group Head*
+1.312.752.5336
NJachim@stoutadvisory.com

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A. **Our Mission**

The mission of the Middle Market and Small Business Committee (“MMSB Committee”) is to serve, educate, and bring together corporate, transactional, and securities lawyers—in an effort to improve the legal profession—who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies. To achieve this objective:

- The MMSB Committee provides a forum for its members to share information, to deliver and receive continuing legal education, to address current and practical legal issues affecting smaller and mid-sized businesses, and to learn best practices concerning relevant areas of law, legal ethics, and technology applicable to the delivery of legal services in the 21st Century.

- The MMSB Committee zealously advocates before various regulatory agencies, and has been doing so for decades. Such advocacy concerns current issues and laws that relate to specific problems and needs of small businesses, including smaller public companies. Agencies before which the MMSB Committee and its members regularly advocate include, among others, the Securities and Exchange Commission (“SEC”), the Internal Revenue Service, the Financial Industry Regulatory Authority (“FINRA”), and the National Association of Securities Dealers. For example, our Private Placement Broker Task Force and some of its individual members lobby the SEC, FINRA, and other regulatory agencies to implement a simplified registration system for finders of financing for early-stage companies.

- The MMSB Committee brings scrutiny and discourse to the entire business “life cycle” of our member’s clients with expert panels focused on highly relevant topics such as:

  (i) entity organization and owner agreements  
  (ii) capital formation, financing, and strategic partnering  
  (iii) employment and compensation matters  
  (iv) intellectual property and trade secrets protection  
  (v) corporate governance  
  (vi) securities law compliance  
  (vii) international expansion and cross-border transactions  
  (viii) business combinations, restructuring, and breakups

In this issue, the Business Visions Newsletter continues its ongoing series on start-up activity and cross-border issues.
Committee Facts

Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,400 members, both in the United States and abroad.

- The MMSB Committee holds live and in-person meetings 3 times a year in conjunction with the ABA Business Law Section Meetings. For 2017, these meetings include:
  - the Spring Meeting, held from April 6-8 in New Orleans,
  - the Annual Meeting, to be held from September 14-16 in Chicago, and
  - the Fall Meeting, to be held from November 16-18 in Washington, D.C.

- Meetings of the MMSB Committee typically feature a mini-presentation on a substantive practice area and provide an opportunity to share practical advice relevant for smaller and medium-sized companies as well as the lawyers who counsel them.

- An area in which a great deal of the MMSB Committee’s efforts are directed involves the federal and state securities regulations that affect smaller public companies and capital-raising activities of private companies, including qualifications for exemptions from registration, qualifications for exemptions from registration for private placement brokers, and implementation of scaled disclosure regulations to help smaller and medium-sized businesses be able to raise legally the capital they need to expand their operations and without the need to comply with unnecessary, burdensome, and expensive regulatory requirements.

- Membership in the MMSB Committee provides numerous opportunities to participate in CLE panels and workshops, writing opportunities, and opportunities to comment on regulations proposed by the SEC and other regulatory agencies. Participation is strongly encouraged and the MMSB Committee welcomes all levels of experience. Come learn why the Middle Market and Small Business Committee is called The Best Damn Committee in the whole ABA! Please see the Leadership List in Section VI for people you can contact to get more involved.
Not Just for Policy Wonks: The Place to Be is Washington, D.C., If You Are Thinking of Starting a Start-up!

By: Shavon Smith, Partner, and Samantha Jeffers, Intern, SJS Law Firm

Richard Harroch, Venture capitalist and entrepreneur once said, “If you want to build a successful business, make sure you have three things—a big market opportunity, great people, and more than enough capital.” Washington D.C. is one of the places in the United States where all three are accessible to start-up companies and their owners. Washington D.C. is a city that is rarely known for its start-up scene, but that is slowly changing. D.C. has not always been as lively as it is today, but today it’s buzzing with new energy that has added to the victory of start-up companies. D.C.’s rise to prominence has been fueled by a perfect combination of an abundance of organic creativity and pre-existing demographic advantages.

Washington D.C. has attracted educated, creative risk-takers that are fearless when it comes to taking a leap of faith into the unpredictable pool of start-ups. The D.C. metro area is home to a high number of universities, including The George Washington University, Howard University, Georgetown, and American University. As a result of these prestigious universities, the city has no shortage of intelligent, creative, and gifted people. The area is teeming with new graduates eager to explore and execute their exciting new ideas. Many of these ideas have developed into the vivacious start-up scene we see today.

In addition to the abundance of intellect walking the streets of D.C., it is the stomping grounds of successful start-ups such as &Pizza, Blackboard, and Living Social. These highly successful start-ups give integrity and publicity to other start-ups in the area, as everyone is always on the search for the next big thing! D.C. is continuously under the permanent magnifying glass of investors waiting for the next start-up company to take the throne.

Effective incubators also contribute to the success of D.C. start-ups. Incubators help entrepreneurs by providing workspace, seed funding, mentoring, training, and much more. By supplying all of these things, incubators help entrepreneurs grow their business. Start-up incubators are usually run by both public and private entities, and often associated with universities and business schools. While most of the media focuses on technological start-ups, incubators focus on various industries, and can even vary by region. An example of an effective incubator that is popular in the D.C. area is 1776. 1776 focuses on connecting start-ups to the latest wisdom on how to build highly scalable businesses through their curriculum. 1776 also focuses more narrowly on start-ups in government-dominated markets, such as education, energy and sustainability, health, transportation, and cities. Though not an incubator, Project 500, a program through the Deputy Mayor’s Office for Greater Economic Development, supports start-ups by aiming to help 500 disadvantaged small businesses in the District grow in revenue and size.

When looking at the D.C. start-up market, tech start-ups seem to be at the forefront. In 2013, Forbes declared the nation’s capital the number one new tech spot in the country. Over the past decade, D.C.’s start-up technology sector has grown by 50 percent. The nation’s capital is now home to more than 1,000 tech start-ups such as Galley, a gourmet food delivery business that focuses on healthy, local chef-prepared meals; Upside, a business that is revolutionizing business travel by combining flights and hotels into single cost packages that save 5-10% off regular rates; and PhishMe, a cybersecurity company that helps businesses protect themselves against cyberattacks. With the new incursion of technological start-ups, more people are comparing D.C. to the West Coast “King of Tech” Silicon Valley. Former Mayor Vincent Gray was quoted as saying that, “there’s going to be a day where people will say, ‘We want to be the next D.C.’”
Start-up companies, just like any mid- to large-sized business need to be able to access legal advice to ensure that they are adhering to rules and regulations within their niche. Start-ups do not always have the capital needed to hire counsel to help them along their journey in growing their business, so where do start-ups seek the legal advice they need, but can’t always afford? Luckily, there are a few ways start-up companies can access legal advice and do so in a way that will not be detrimental to their finances.

The Small Business Legal Assistance Program of the D.C. Bar has a wide range of services that primarily help start-ups and small businesses obtain the legal assistance they need. There are services such as the Small Business Brief Advice Legal Clinics, which are walk-in clinics established every month to provide legal information to business owners and prospective entrepreneurs who have limited financial resources, the Small Business Trainings, which conduct in-person and webinar trainings in conjunction with law firms and government agencies, and finally the Small Business Legal resources provides free guides and alerts on relevant changes to law. In addition to this program provided by the D.C. Bar, there are also small business clinics within reputable universities around D.C. that aim to give legal advice to start-ups. The George Washington University Law school, for example, has the Small Business & Community Economic Development Clinic that provides legal assistance to small businesses by students, under faculty supervision. There are also other ways that start-up companies can access legal advice such as internet services like Upcounsel and Legalzoom. These online services allow start-up companies to choose the legal area that they need help with and request a lawyer to assist them along their start-up journey.

Successful start-up companies within the Nation’s Capital are on a steady upward trek. Combining an abundance of creative intellectuals, and previous success stories of start-ups, D.C. will continue to transform from a government town into a Tech Hub! Although some start-ups may be unsure of where to find effective, affordable legal advice, there are many clinics and services to help them succeed throughout their journey.
UK Supply Chain Law

Doing Business in and with the UK – Modern Slavery and Transparency of the Supply Chain
By: Charles Wander, Partner, and Alex Kaufmann, Partner, Fladgate LLP

Our firm is regularly asked to advise businesses looking to open up in, or trade with, the United Kingdom (UK). Since last June, the most frequent question has inevitably been about the impact of the UK’s departure from the European Union in March 2019 – now saddled with the name “Brexit”. The inevitable answer to the question has been, and will for some time continue to be, that we simply don’t know.

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In looking at the areas of law that may change after Brexit, there is one recent piece of UK legislation that we can be confident won’t change and which needs to be understood by any business seeking to trade in or with the UK. With the fight against modern slavery an urgent issue in times of globalised trade and international supply chains, we see this reflected in actions by legislators and companies, showing that they are mindful of their corporate social responsibility. With increasing frequency, businesses are asked by their customers to disclose details of their supply chain as well as the measures they have taken to prevent modern slavery.

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So what is modern slavery? In English law, it is defined as a situation in which “a person holds another person in slavery” or “requires another person to perform forced or compulsory labour.” Modern slavery can manifest itself in many forms. Child labour and inhumane working conditions can, for example, fulfil the definition. The law also applies to human trafficking in all forms.

MSA 2015 applies to an organisation if the following conditions are met:

- It is set up as a “body corporate”, which includes limited partnerships and LLPs, as well as corporations. It is irrelevant whether the body corporate is registered in the United Kingdom or some other jurisdiction.
- It supplies goods or services in the United Kingdom, whether directly or through a subsidiary.
- It has a worldwide aggregate turnover of at least 36 million GBP. This relates to the turnover of the organisation as a whole (including all its subsidiaries) irrespective of where they do business.

MSA 2015 requires organisations to compile and publish a “slavery and human trafficking statement” (MSA Statement) for each financial year in which these criteria apply. In this statement the organisation should describe the steps it has taken to recognise and prevent modern slavery in its business and supply chains. The MSA Statement can provide for information about:
• the organisation’s structure, its business, and its supply chains;
• its policies in relation to slavery and human trafficking;
• its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
• the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
• its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
• the training about slavery and human trafficking available to its staff.

Alternatively, an organisation may state in its MSA Statement that it has taken no such steps. It is, however, unlikely that many will choose this option because of the possible significant impact on a business’s reputation.

The MSA Statement of a parent company has to include any subsidiary that is part of the parent company's business or part of its supply chain. A subsidiary to which the MSA 2015 criteria apply must also publish an MSA Statement. If both the parent and the subsidiary are affected by the Act, they may publish a single MSA Statement as long as it also covers the measures taken by both entities.

MSA statements must be published by the relevant organisations for each financial year ending on or after 31 March 2016. There is no statutory stipulation as to the timing of the publication of the statement; it should be made "as soon as possible."

The MSA Statement must be approved by the governing body of the organisation (for example, the board of directors) and signed by one of the body’s members. It has to be published on the organisation’s website.

In case of non-compliance, the authorities may in theory force the publication of an MSA Statement by seeking an injunction. However, the UK government has expressed its hopes that organisations will comply voluntarily, given the reputational risks at play.

As an example, you can see our firm’s statement on our website, at: https://www.fladgate.com/about-us/slavery-human-trafficking/

Note that companies which don't themselves operate in the UK, but supply UK businesses (even indirectly) are likely to find that they are asked to provide a statement of their own relevant policy. This will enable the UK company which ultimately buys from them to have complied with its obligation to satisfy itself about its supply chain, and to make appropriate reference to this in its MSA Statement.
International Lessons Learned

Some Thoughts on Crossing Borders in Your Career

By: Elizabeth A. DiRusso, Partner, DiRusso + Brooks Law Group, LLC

“‘You are not actually that American,’ my new British friend in the Tax Department said, referring to how much I did not act American in discussing the tax inefficiencies of moving various executives into different countries. I took this as a great compliment and I enjoyed receiving it more than any other compliment I can remember. Interestingly, while my friend may or may not have intended it as a slight against Americans in particular, I took it as an acknowledgement of an ability to put aside the perceptions you bring with you from the culture in which you were raised and, instead, to consider the perceptions, sensitivities and concerns of someone or a group of people in a different culture but relevant for the moment. In other words, I was being recognized as someone with unusual emotional intelligence. Do I dare say, unusual emotional intelligence for an American? Well, if the shoe fits …

Having Emotional Intelligence is defined as being aware that emotions can drive our behavior and impact people (positively and negatively), and learning how to manage those emotions – both our own and others – especially when we are under pressure. Corporate America often dismisses the idea of emotional intelligence as psychobabble. But the concept has palpable relevance when working as an expat. As one of few Americans in the London corporate office of a Fortune 200 Madison Avenue marketing and advertising company I know this first hand. It took me months to begin to understand how to navigate the personalities. And as a lawyer from the corporate headquarters in New York, the perception was that I was transferred to London as a spy for US management.

I approached this newly created position with great caution in an effort to understand how to succeed. I will add a personal anecdote that was useful for me then. When I was eleven, my family reconnected with our Hungarian heritage and relatives in what was then Communist Budapest. We actually discussed in the car ride from then Yugoslavia the various topics, and even words, that could not be uttered in our newfound relatives’ presence. “Politics,” “Democracy,” “Freedom.” At eleven, I didn’t fully understand the issues until I actually arrived there, where initially we had to register as visitors with the local police department, all of which was unsettling, to say the least. We ended up bonding with our relatives and have since remained in close contact. Each return to Hungary broadened our understanding of the Hungarian culture and what living through a revolution means.

I approached my experience as an American operating in countries throughout Europe, the Middle East and Asia with the same respect I developed for my Hungarian relatives. It is important to appreciate the context in which they have had to live in order to serve people of a different culture. This is now a topic of much discussion and addressed by a thoughtful and informative article called Contextual Intelligence, by Tarun Khanna published in the Harvard Business Review, vol. 92, issue 9 (2014), and presumably expounded on and discussed at length since. I kept this issue of HBR because it validates my thinking. When I was 2 years into my experience in London, the CEO of the division for which I was International General Counsel asked me a question the import of which I did not process immediately. He was in the midst of determining how to cut costs at the holding company level and push them down to the operating companies. He—being an American born in Indiana and for many

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1 This definition is from the Institute for Health and Human Potential and is attributed to two researchers – Peter Salavoy and John Mayer – and popularized by Dan Goleman in his 1996 book of the same name.
years working on Madison Avenue in New York—said, “I don’t need an office in California, so why do I need an office in London [since they are both about 3000 miles from New York]?” I was stymied by the question as I had so much to say on this subject and was not sure where to start. I suddenly blurted out, “Because people have fought wars over these borders!” While some may feel that there is a tremendous cultural shift between some states in the US, those differences are quite minor when compared to the correlations analyzed by Mr. Khanna and his colleague, Jan W. Rivkin and depicted in a graph in the article, Contextual Intelligence. In 2001, Khanna and Rivkin analyzed the data from empirical research from 43 countries throughout the globe. They were looking at whether it was true that if an industry was highly profitable in Germany, for example, it would also be highly profitable in Thailand or Brazil. And while managers of America’s Fortune 500 companies would like this to be true, it simply is not. Instead, as Khanna and Rivkin present in Khanna’s article in the HBR, it is only true in 11% of cases, and typically when the countries are similar, such as the US and Canada. The important take away from Khanna’s article is that we can actually improve at being successful across borders. In an oversimplified nutshell: aside from hiring management from the local area who can assist in informing, it is also important to accept that you will not know how to operate in the new culture immediately upon arriving there. Taking time to observe, process and accept the differences from your native economy will serve you well.

As a final and hopefully useful point, I will say that I ultimately found it helpful that my nature is to be introverted. At first I felt this was unfortunate as it made me less likely to insert myself into surrounding situations without invitation or obvious acceptance. But I soon realized that by being quiet and observing those with whom I was working as well as the dynamic in which they worked, I began to learn the culture of the office. Like most introverts, I can adapt to being an extrovert if the need arises. It is something we learn to do to survive in corporate America. See Quiet: The Power of Introverts in a World That Can’t Stop Talking, Susan Cain (New York: Crown Publishers, 2012) (an incredibly informative read for all managers). Being an introvert made it natural for me to listen, as that was easier than speaking in many early meetings in which I found myself. So I listened, listened and listened some more to everyone at my office and at the various subsidiaries I was supporting in my General Counsel role. I became a sounding board for many issues which sometimes did not seem to be in the nature of legal issues, but would ultimately inform much of my work over time. Being able to exhibit extrovert qualities as needed allowed me to execute on the necessary management, negotiation and advisory elements of my job. The combination of these characteristics, i.e., listening and processing, then later having the confidence to question and the voice to lead, is absolutely essential to succeeding in a position of leadership as an expat.

While these lessons are not uniquely applicable to lawyers, I would suggest that is even more important for our profession to take heed when – as an expat – you are attempting to gain trust and credibility such that you can succeed at advising those who grew up locally. For example, you may find it trite or even ridiculous to talk about the weather to break the ice, but it goes a long way to acknowledge that such a conversation is uniquely British – and expected. Similarly, while it was somewhat painful for me, I finally learned to accept that people say “Cheers” without an alcoholic beverage in hand and by saying it, mean “Thank you.” But so be it. Cheers
Risky Business: Shell Games and Substantive Consolidation

By: Jennifer L. Villier, JD, WealthCounsel, LLC

Business planning attorneys routinely counsel clients on the risks of veil piercing. Failing to operate a business as a separate entity may lead courts to pierce the entity’s veil and use the owner’s personal assets to satisfy the business debts.

Substantive consolidation is a close cousin of veil piercing. It allows bankruptcy creditors to satisfy an obligation with the consolidated assets of affiliated entities. Substantive consolidation treats separate legal entities as if they were merged into one, with the surviving entity holding all of the cumulative assets and liabilities. This remedy is used when a non-debtor is a subsidiary or alter ego of the debtor, or where the entities’ assets and liabilities are so intertwined that it would be impossible to disentangle their affairs. Absent this remedy, debtors could insulate assets through transfers among intercompany shell corporations. Substantive consolidation protects creditors from a debtor’s shell game. For substantive consolidation to be granted, its potential benefits must outweigh any potential harm to interested parties.

A recent Bankruptcy Court case, In re Cameron Construction & Roofing Co., Inc., serves as a reminder that an entity formed for asset protection purposes must be operated as a legitimate, separate entity from its owner and any affiliated entities, or it may risk substantive consolidation in a bankruptcy proceeding. Wilfred Cameron (“Cameron”) incorporated Cameron Construction & Roofing Co., Inc. (the “Corporation”) in Massachusetts in 2000. Cameron served as the Corporation’s President, Treasurer, Clerk, and sole Director. In 2002, Cameron formed Cameron Construction LLC (the “LLC”). Cameron contributed $108,000 to the LLC in exchange for a 99.9% interest. The Corporation contributed $12,000 and received a 0.1% interest in the LLC. Although Cameron filed separate tax returns and Annual Reports for the Corporation and the LLC, he otherwise treated them as the same entity. For example:

- the LLC’s employees worked exclusively for the Corporation and there were no written subcontractor agreements or invoices issued for the services;
- the Corporation “leased” space from the LLC, but there was no written lease, and the “rent” payments far exceeded the fair market value of the property;
- Cameron intermingled assets between the entities;
- the Corporation was thinly capitalized;
- Cameron could not produce evidence of any corporate record keeping—no meeting minutes, voting records, or resolutions;

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1 See Genesis Health Ventures, Inc. v. Stapleton, 402 F.3d 416, 423 (3d Cir. 2005).
2 See Gray v. O’Neill Props. Group, L.P., No. 02-41045, 2004 WL 2181669 (Bankr. D. Mass. Sept. 24, 2004); Woburn Assocs. v. Kahn, 954 F.2d 1 (1st Cir. 1992). It varies by jurisdiction whether substantive consolidation of non-debtors is permitted. In the 1st Circuit, for example, substantive consolidation is approved for multiple debtors only; the remedy may not be applied to a non-debtor. Id.
3 See In re Bonham, 229 F.3d 750 (9th Cir. 2000).
• Cameron’s wife performed part-time administrative work on behalf of both entities, receiving a salary much larger than the value of the services performed; and
• the Corporation received a disproportionate 0.1% interest in the LLC despite having invested 10% of the capital.

The Corporation filed a Chapter 7 bankruptcy petition in 2014. The Bankruptcy Court had to decide whether to disregard the distinction between the LLC and the Corporation in order to make the LLC’s assets available to the Corporation’s creditors. As part of its analysis, the Court considered the similarities between piercing the corporate veil and substantive consolidation. The Court stressed that the Bankruptcy Trustee was not seeking to pierce the LLC’s veil to hold Cameron personally liable for the Corporation’s debts. Rather, the Trustee was seeking to pool the two entities’ assets and liabilities since the Corporation’s assets alone were insufficient to satisfy its debts.

The Bankruptcy Court held that the Trustee demonstrated a substantial identity between the two entities, and the benefits of consolidation outweighed any harm. The Court applied veil piercing factors to the substantive consolidation analysis, ruling that the factors supported consolidation of the two entities. Ultimately, the business owner’s failure to treat the companies as separate entities derailed his asset protection strategy.

Takeaways

Business planning attorneys should continually impress upon clients the importance of operational governance. Filing separate tax returns is insufficient to protect assets from the risks of veil piercing and substantive consolidation. For clients with both simple and sophisticated multi-entity business structures, separateness is the key to asset protection—separate bank accounts, separate employees, separate governing documents, and separate records. Clients should resist the temptation to make undocumented intra-company transfers of assets, liabilities, properties, employees or cash, or to otherwise commingle funds.

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How to Serve Your Clients in Patent Matters

By: Rich Beem, Beem Patent Law Firm

You’re a business lawyer. You represent middle market and small businesses. You do your best to serve them in all of their legal needs, which can span many areas of legal practice. How can you most effectively serve your clients in patent matters? It starts with being attentive to your clients’ business, technology, and competitive landscape.

For example, some of your clients need patents to protect their new and improved products, to obtain and maintain a lead over their competitors, to be market leaders, to generate sales and revenues, and to able to charge fair prices at healthy margins without fear of being undercut by low-price copyists. Some will want to identify minefields of competitors’ patents and steer clear of them. Some will encounter issues of infringement or alleged infringement.

The Good Patent Client

Patent infringement, of course, requires immediate legal attention. These matters typically arrive in the form of a letter from a patent attorney or a summons and complaint. Your client will call you in an agitated tone of voice when they receive such documents, or when they want you to initiate such actions against their competitors, and you’ll want to bring in a patent attorney.

The patent issues that are harder to spot are those that involve potential patentability. I’m not talking about the shirt-tail relative who calls you and says, “I have an idea—how much does a patent cost?” I’m talking about your best client—the company that uses technology—engineers or programmers—to make and sell new, improved products for a profit.

A good patent client:

1. Is a business, i.e., a company, already at work in an industry, often in a particular niche.
2. Uses technology, typically employing engineers or programmers, to solve customers’ technical problems and convert ideas into implementable solutions.
3. Actually makes and sells products, for example, mechanical devices, new compositions, electronics, or software. (Many people dream of licensing their “ideas” to companies for big royalty checks, but that’s harder to do than it might appear.)
4. Makes products that are new or improved—they incorporate proprietary technology that at least initially is exclusive to the company, that confers a competitive edge, and that sells at a premium price.
5. Sells (or aims to sell) at a profit—which attracts competitors and imitators, who often undercut prices, steal sales, and undermine profits.

By the way, many a company becomes a true believer in patents only after they are on the receiving end of a patent infringement lawsuit. When they see how powerful patents can be, they often decide to build their own patent portfolios.
The Unasked Patent Question

Sometimes a company will fit the above description of a good patent client, yet their engineers and developers often will not recognize themselves as inventors. In fact, many engineers are inventors, but almost none think of themselves as such. They’re embarrassed to blow their own horns; they won’t even ask about patenting their new or improved products. To them, they’re just solving customers’ problems using well-known engineering principles. They’re eager to get the new product into production and onto the market. Then, it’s on to the next project.

Inventors often overlook and lose their patent rights. Statutory bars can arise without anyone noticing until it’s too late. Absolute novelty at the time of first filing is required for international patent rights. There is a limited one-year grace period in the U.S., but it too is often missed.

Here’s the secret of patent success: Invent, file for patent, make, and sell. In that order. How can you help your clients? When you see or hear that your client is working on new or improved products, you might ask the question, “Have you thought about patent protection?” Your client will thank you for the compliment and for thinking of their interests.

Are they ready to Patent?

1. Do they have an invention (more than an idea) and the technical skill to make it work?
2. Are they ready, willing, and able to invest time, money and effort (now and throughout prosecution) to obtain issuance of a patent?

Conclusion

If your client seems to be qualified and ready for patent services, you may wish to refer them to a patent attorney. The acts of obtaining a patent and engaging a patent attorney, however, do have a cost, a cost that a client must be willing to, and capable of, bearing. The actual cost involved in obtaining a patent will depend on several factors that your patent attorney can help you and your client weigh and assess to determine whether to proceed with pursuing a patent.
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