

STATE BAR OF MICHIGAN - BUSINESS LAW SECTION
COUNCIL MINUTES

December 5, 2015

Pursuant to notice duly given, a meeting of the Council of the Business Law Section of the State Bar of Michigan was held at Butzel Long in Bloomfield Hills, Michigan on Saturday, December 5, 2015. Council members present were Judy Calton, Shane Hansen (via telephone) Daniel Morely (via telephone), Mark Peters, John Schuring (via telephone), Douglas Toering, James Waggoner and Christopher Yates (via telephone). In addition, Committee Chairs and Directors present were David Barton (via telephone), James Carey, DJ Culkar, Marguerite Donahue, Jane Forbes, Dee Dee Fuller, Bruce Haffey, Justin Klimko, Richard McDonald, Daniel Minkus and Dawn Reamer (via telephone). Others present were Terri Shoop and Ian Williamson.

1. Call to Order and Determination of Quorum. Section Chairperson Douglas Toering called the meeting to order at approximately 10:05 a.m. and determined that a quorum was present.

2. Approval of Minutes of September 25 and September 26, 2015 Council Meeting. Mr. Toering called for a motion to approve the Minutes of the September 25 and September 26, 2015 Council meetings. Pursuant to motion duly made and seconded, the Minutes were unanimously approved, 8-0-0

3. Treasurer's Report. A written Treasurer's Report was provided to Council. Mr. Peters reported that the Section's fund balance has increased by more than \$30,000. Two Business Law Institute sponsors have not yet paid their fee and those monies will be forthcoming. Mr. Peters asked that expenses be submitted promptly.

Judge Yates reported on the proposed amendments to the Business Court statutes. Changes with respect to non-controversial cleanup matters will move forward. Discussions regarding further proposed changes are expected to take place early in 2016. A bill with the proposed amendments is expected in early 2016 and a sponsor is being sought.

The Commercial Litigation Committee, Small Business Forum and ADR Section hosted *Business Courts and Early ADR: The Latest From Bench and Bar* on November 12 in Troy. The panel consisted of eight business court judges and three attorneys. The seminar sold out and was attended by approximately 60 attorneys and a representative of *Lawyers Weekly*. There are currently 40 people on a waiting list for a future seminar on this topic. Discussions are underway regarding a possible seminar in March in the Troy area. Judge Yates would possibly like to host a seminar in Grand Rapids.

4. Chairperson's Report. Mr. Toering announced that Jim Carey has been approved to serve as Chair of the LLC & Partnership Committee; Dawn Reamer and Mary Ann Kanary have been approved as Co-Chairs of the In-House Counsel Committee. Mr. Toering reported that David Barton has agreed to serve as Co-Chair of the Financial Institutions Committee with DJ Culkar. A motion was made to approve David Barton and DJ Culker as Co-

Chairs of the Financial Institutions Committee. The motion was seconded and passed unanimously, 8-0-0.

Mr. Toering reported that he attended a training session for Section Chairs in October.

Mr. Toering reported that the Section received a thank you from Michigan Community Resources for its \$5,000 contribution.

Mr. Toering stated that he was contacted by Howard Lederman of the Antitrust, Franchising, and Trade Regulation Section (“AFTRS”) about a presentation at Cooley Law School in Auburn Hills on February 29, 2016. The AFTRS will be speaking about franchising and antitrust and they would like us to speak about business law. This would be an opportunity to make a pitch for the Section. If you would like to volunteer for this event, please let Mr. Toering know.

Mr. Toering reported on a proposed amendment to MCR 2.407 with respect to a reduction in time to respond to a case evaluation from 28 to 14 days. The Section will not take a position on this amendment.

Mr. Toering reported on several initiatives he would like the Section to focus on with respect to outreach. These may be areas in which the Communication and Development Directorship can assist:

- a. Proposed dinner for former Chairs after the June Council meeting.
- b. Joint programs with other sections.
- c. Outreach to in-house counsel.
- d. Ask judges speak at events when appropriate. Attendance at events is greatly increased when judges are involved and the Section should utilize this resource when possible.
- e. Outreach to the bench. Complimentary Section membership was extended to all Business Court and Bankruptcy Judges. Approximately one-half of those invited accepted membership in the Section.
- f. Liaisons with other sections. A discuss ensued regarding whether consideration should be given to liaisons with Sections such as real estate, intellectual property or tax.

The Council has been provided with a copy of Robert Meisner’s December 1, 2015 letter to the Section regarding the Michigan Nonprofit Corporation Act. A discussion ensued. Mr. Toering will respond to Mr. Meisner’s letter. The Executive Committee will review Mr. Touring’s response before it is sent to Mr. Meissner.

5. Committee/Directorship Reports.

A. Standing Committees.

(i) Business Courts Committee. Annual and quarterly written reports have been provided by the Business Courts Committee.

(ii) Commercial Litigation Committee. Annual and quarterly written reports have been provided by the Commercial Litigation Committee.

(iii) Corporate Laws Committee. Annual and quarterly written reports have been provided by the Corporate Laws Committee.

(iv) Debtor/Creditor Rights Committee. Annual and quarterly written reports have been provided by the Debtor/Creditor Rights Committee.

(v) Financial Institutions Committee. No written reports. Mr. Barton and Mr. Culkar spoke on aging of practicing lawyers. They would like to engage with law school students in an effort to interest them in the banking and finance area. Their goal for the coming year is for the Committee to be more active. The next meeting of the Committee is expected to be held in February, and they expect to hold two meetings each year.

(vi) In-House Counsel Committee. No report.

(vii) Law Schools Committee. A written Annual Report has been provided by the Law Schools Committee.

(viii) LLC & Partnership Committee. Annual and quarterly written reports have been provided by the LLC & Partnership Committee. The Committee is currently drafting an amicus brief for the Section, as requested by the Michigan Supreme Court, in the case *Allard v. Allard*. The brief is due in late December, 2015. The Committee seeks Council approval to take the following positions in that brief:

(1) Property owned by the LLC is NOT to be considered as property owned by any individual member of such LLC (Section 504(2) – MLC 450.4504).

(2) Membership interests owned by an individual are personal property of that individual (Section 504(1) – MLC 450.4504). Real estate held by the a divorcing spouse's limited liability companies, including the marital home, and any income generated by those properties, would NOT be treated as marital assets. However, the right to receive distributions from the LLC, as evidenced by the membership interests COULD be treated as marital assets depending how the membership interests were acquired, how the membership interests were held, and how the provisions of any nuptial agreement between the spouses addresses them.

(3) LLC interests are not transferrable without the consent of the members of the LLC (Section 506(1) – MCL 450.4506(1)) and, therefore, a court should not award one spouse membership interests in the LLC as part of a divorce judgment. While the statute permits the assignment of membership interests (Section 505(1) – MCL 450.4505(1)), it clearly provides that an assignment does

not entitle the assignee to participate in the management and affairs of a LLC, or to become or exercise any rights of a member – it only entitles the assignee to receive the distributions to which the assignor would be entitled because of the assignment (Section 505(2) – MCL 450.4505(2)). Therefore, the court may determine the value of the LLC membership interests and, when appropriate for the decree of divorce, place a charging order against a spouse’s members interest (Section 507 – MCL 450.4507). In this manner the economic value of the membership interests can be ascertained without disrupting the management of the company.

(4) “Income” earned by the LLC may have different character depending on the elections made by the LLC (i.e. corporation, partnership or S Corporation). Therefore, one cannot automatically assume that the income (“business income” as referenced by the COA opinion) of the LLC can be attributed to the owner for these purposes. The COA’s use of tax terminology to assist it in defining income for purposes of the nuptial agreement is misplaced and could lead to differing results depending on the elections of the LLC.

The Committee will not be taking a position as to whether or not the Allard nuptial agreement does or does not require that any LLC membership interests owned by a spouse in this case are or are not marital property. Instead, we will be seeking to give the court the proper framework to consider the issues and determine how the law should be applied to the facts that the court finds.

A discussion ensued. A motion was made to adopt the general position in *Allard v Allard* Amicus Brief as outlined in paragraphs 1-4 above. A roll call vote of the Council was taken as follows:

- Judy Calton – yea
- Shane Hansen - yea
- Daniel Morley - yea
- Mark Peters – yea
- John Schuring - yea
- Douglas Toering – yea
- James Waggoner – yea
- Christopher Yates – yea

The motion passed 8-0-0.

It is possible that Mr. Carey will seek an extension to file the Amicus Brief.

(ix) Nonprofit Corporations Committee. Annual and quarterly written reports have been provided by the Nonprofit Corporations Committee

(x) Regulation of Securities Committee. Annual and quarterly written reports have been provided by the Regulation of Securities Committee

(xi) Small Business Forum. Annual and quarterly written reports have been provided by the Small Business Forum. A joint program with the International Law Section is being considered for the Spring.

(xi) Uniform Commercial Code Committee. Annual and quarterly written reports have been provided by the Uniform Commercial Code Committee

B. Directorship Reports.

(i) Communication & Development Directorship. Annual and quarterly written reports have been provided by Communication & Development Directorship.

(ii) Legislative Review Directorship. A written report has been provided by the Legislative Review Director.

(iii) Nominating Directorship. Annual and quarterly written reports have been provided by the Nominating Director. Ms. Fuller asked to be contacted with suggestions for future Council members.

(iv) Programs Directorship. Annual and quarterly written reports have been provided by the Programs Directorship. The Business Law Institute has been scheduled for October 7, 2016 at the Amway Grand Plaza Hotel in Grand Rapids. The format will remain unchanged from the 2015 event, including the Annual Meeting, Schulman Award presentation, a social event, and a Council meeting on October 8. Business Boot Camp I is expected to be held in November in Grand Rapids and in January 2017 in the metro Detroit area.

a. ICLE Liaison. A written report has been provided by the ICLE Liaison.

(v) Publications Directorship. Annual and quarterly written reports have been provided by the Publications Director.

C. Liaisons.

(i) Probate Section. No report.

6. Other Business and Announcements. Mr. Toering reported that Julia Dale suggested that notice for Council meetings should be distributed to the entire Section membership. After discussion, it was decided that notice would be given via the Section listserv.

7. Announcement of March 10, 2016 Council Meeting. The next meeting of the Business Law Section Council will take place on March 10, 2016 at the State Bar of Michigan in Lansing at 3:00 p.m.

8. Meeting Adjournment. There being no further business to come before the Council of the Business Law Section, upon motion duly made, seconded, and unanimously approved 8-0-0, the meeting was adjourned at approximately 11:45 a.m.

Respectfully submitted,

By: _____
Kevin Block
Secretary