MASSBAR ASSOCIATION

ComCom Quarterly

MBA COMPLEX COMMERCIAL LITIGATION SECTION NEWSLETTER JULY 2019

CLOSELY HELD LLCs: THE SJC CLARIFIES WHEN MEMBERS OF A MASSACHUSETTS LLC OWE EACH OTHER FIDUCIARY DUTIES

BY RYAN P. McMANUS AND NATHAN N. McCONARTY

Massachusetts has long recognized that shareholders of a Massachusetts "close corporation" owe each other fiduciary duties. In the seminal case of *Donahue v. Rodd Electrotype Co.*, 367 Mass. 578 (1975), the Massachusetts Supreme Judicial Court (SJC) adopted the oft-cited duty of "utmost good faith and loyalty" between a close corporation's shareholders, relying on the fiduciary duties owed between partners as precedent.

In recent years, the growing popularity of the limited liability company (LLC) form of organization has given rise to a new question: in what circumstances will a Massachusetts LLC be considered a "closely held" entity in which members owe each other a duty of "utmost good faith and loyalty?" Many commentators and some judicial decisions had assumed that an LLC would be treated much like a corporation, giving rise to fiduciary duties among members if it satisfied the same criteria courts have used to classify a corporation as closely held. Yet the LLC entity structure is intentionally designed to offer more flexibility than a corporation, with one of the key advantages being that the parties may assign and allocate their rights and responsibilities by contract.

In the recent case of *Allison v. Erikson*, 479 Mass. 626 (2018), the SJC provided its most definitive guidance yet on the circumstances in which a Massachusetts LLC will give rise to fiduciary duties among members. In doing so, the SJC clarified that one of the defining features of Massachusetts LLCs — the flexibility to allocate rights by contract — is critical in determining whether an LLC will be treated as "closely held."

DUTIES IN CLOSELY HELD CORPORATIONS UNDER *DONAHUE*

In *Donahue*, the SJC recognized that a minority shareholder in a close corporation is in a uniquely vulnerable position. Without some duty owed by shareholders to one another, minority shareholders can be forced to endure potentially harmful actions by the majority with little recourse. They can neither stop the majority from taking such action, nor exit the company by selling or disposing of their shares when they disagree with the majority's decisions. For these reasons, the SJC held that shareholders of a close corporation owe one another a fiduciary duty of "utmost good faith and loyalty." 367 Mass. at 593.

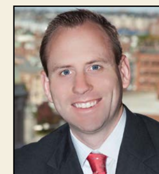
When a corporate dispute devolves into litigation, the existence of that fiduciary duty can often be dispositive. Whether a corporation is deemed "closely held" is thus critical to defining its shareholders' rights and obligations, and to establishing liability. In *Donahue*, the SJC laid out three defining characteristics of a "closely held" corporation: "(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." *Id.* at 586. When those circumstances are present, minority holders are uniquely "vulnerable to a variety of oppressive devices, termed 'freezeouts.'" *Id.* at 588.

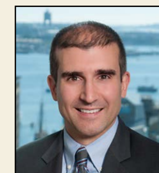
Donahue also recognizes, however, that actions specifically contemplated and authorized by a corporation's articles of organization or bylaws, or a shareholders' agreement, do not violate the duty of "utmost good faith and loyalty." *Id.* at 598 n.24. Subsequent cases have likewise held that, so long as shareholders are on notice, and consent, a corporate action that might otherwise seem oppressive would not be a breach of the shareholder's fiduciary duties.[1]

DONAHUE DUTIES IN THE LLC CONTEXT

Until recently, Massachusetts courts have had few occasions to consider and expound upon the scope of fiduciary duties owed among members of a closely held LLC. In its 2009 decision in *Pointer v. Castellani*, 455 Mass. 537 (2009), the SJC treated an LLC as a closely held organization whose members were subject to the fiduciary duties imposed by *Donahue*, because the issue was not contested by the parties.[2] As a result, the court's analysis focused entirely on assessing the actions of the LLC's

CONTINUED ON P. 2


RYAN P. McMANUS is a partner at Hemenway & Barnes LLP, concentrating his practice in the areas of fiduciary and business litigation. Ryan has extensive appellate experience representing clients before the U.S. Supreme Court, the U.S. Court of Appeals and the Massachusetts Supreme Judicial Court. Ryan clerked for Hon. Nathaniel M. Gorton of the U.S. District Court and Hon. Jose A. Cabranes of the Second Circuit.


NATHAN N. McCONARTY is an associate at Hemenway & Barnes LLP, representing businesses in all stages of their corporate growth, including debt and equity financings, mergers and acquisitions, corporate restructurings and other general commercial transactions. Nathan also counsels boards and management teams on corporate governance issues and provides corporate advice to tax-exempt entities.

INSIDE THIS ISSUE

Further, the Privilege Belongs to the Client........3

Proving Intentional Interference Without a Failed Contract........4

Lowy Keynotes Fourth Annual Complex Commercial Litigation Conference........5

ComCom Hosts 'Conflicts of Interest in Complex Commercial Litigation' Program........6

ComCom Volunteers at the Pine Street Inn..6

CLOSELY HELD LLCs CONTINUED FROM P. 1

managers and members through the *Donahue* lens, drawing no distinction between corporations and LLCs or shareholders and members. Because the issue was not raised or briefed by the parties, the decision in *Pointer* did not acknowledge or explore important differences between the corporate and LLC structure.

Not surprisingly, following *Pointer*, many commentators and practitioners assumed that the *Donahue* analysis applied equally in the LLC context — that is, if an LLC had a small number of members, no ready market for its ownership units, and substantial member involvement in the management of the LLC, then its members would owe fiduciary duties to each other under *Donahue*.[3] Yet others remained skeptical of *Pointer's* precedential value on this issue, given the lack of analysis of the differences between corporations and LLCs.[4] And in a 2015 opinion, the U.S. District Court for the District of Massachusetts noted that "no court in Massachusetts appears to have clearly and explicitly held that the members of a closely held LLC owe one another fiduciary duties analogous to the duties imposed on the shareholders of a closely held corporation." *Butler v. Moore*, Civ. No. 10-10207-FDS, 2015 WL 1409676, *60 (D. Mass. Mar. 26, 2015). In discussing the *Pointer* opinion, the District Court recognized that the case "applied the principles of *Donahue* to an LLC, but erroneously referred to the LLC as a 'close corporation.'" *Id.* The District Court nevertheless went on to apply *Donahue* close corporation principles to a dispute between LLC members as a matter of "logic and fairness." *Id.*

This uncertain state of the law persisted until the SJC had the opportunity to provide more definitive guidance on the applicability of *Donahue* duties in the LLC context in its recent decision of *Allison v. Erikson*, 479 Mass. 626 (2018).

THE SJC'S DECISION IN *ALLISON*

The dispute in *Allison* centered largely on the remedies available where an LLC merger is undertaken in violation of a member's fiduciary duties, and specifically whether equitable relief remains available notwithstanding the statutory remedies available to members who dissent from a merger. The plaintiff in *Allison* was the minority member in a Massachusetts LLC. He enjoyed many protections under the LLC's operating agreement against dilution and other actions that could harm his interest. He sued the majority member of the LLC for breach of fiduciary duty after the majority member caused the Massachusetts LLC to be merged into a newly created Delaware LLC, the operating agreement of which had been stripped of the substantial protections of the minority member.

On appeal, the SJC concluded that the majority member of the LLC owed fiduciary duties to the minority member under *Donahue*, and that he had breached those duties. But in reaching that conclusion, the court provided a new framework for determining whether an LLC is "closely held" such that its members owe one another fiduciary duties. The SJC explained that "[t]he test for whether a corporation is closely held . . . is not dispositive for determining whether an LLC is closely held." *Allison*, 479 Mass. at 636 n.14. In other words, that an LLC may have a small number of members, no ready market for its ownership units, and substantial member involvement in the management of the LLC, is not alone sufficient. Instead, because "LLCs are creatures of contract, determining whether an LLC is closely held is a more fact-specific determination that will depend on the way in which a particular LLC is structured." *Id.*

In *Allison*, the SJC concluded that the Massachusetts LLC qualified as closely held based on a careful analysis of the provisions of its operating agreement. Although members of an LLC are permitted by statute to limit the fiduciary duties owed by members and managers through an operating agreement, G.L. c. 156C, § 63(b), the parties to the operating agreement at issue "chose instead to expand them." *Allison*, 479 Mass. at 635. Specifically, the LLC's operating agreement "expressly prohibited . . . the ability to dilute a member's interest without that member's consent, the ability to amend the operating agreement without the original member's consent, and the ability to cut members out of the management of the company." *Id.* The SJC thus held that the "many minority protections provided in [the LLC's] operating agreement" indicated "that the company was set up to establish protections akin to those provided at law to a close corporation." *Id.* Thus, the SJC held that "the close corporation doctrine, and the strict fiduciary duty it imposes," applied. *Id.* at 636.

Allison establishes an additional analytical step that must be undertaken in the LLC context to determine whether *Donahue* duties apply. Upon determining that an LLC satisfies the traditional criteria of a closely held company, further analysis of the entity's operating agreement must be performed to determine whether it reflects an intention to create duties among members akin to the duty of "utmost good faith and loyalty."

KEY TAKEAWAYS

The *Allison* decision provides important guidance on how Massachusetts courts will analyze LLC members' responsibilities to their counterparts going forward. On the one hand, it confirms that *Donahue's* duty of utmost good faith and loyalty can apply to members of an LLC. Yet it also confirms the primacy of freedom of contract in the LLC context. Consistent with the Massachusetts statute, the fiduciary duties owed by members in an LLC will depend largely on what those parties have chosen to provide for in their operating agreement. For business lawyers, *Allison* thus confirms that care should be taken when structuring the relationship between members to ensure that the scope of obligations owed among members is consistent with the client's expectations and objectives.

For litigators, *Allison* gives rise to an additional step in establishing (or defending against) the existence of *Donahue* duties in the LLC context. In the already fact-intensive world of closely held business disputes, this creates yet another "fact-specific determination" dependent upon "the way in which a particular LLC is structured." *Allison*, 479 Mass. at 635 n.14. Early analysis of the structure of the LLC at issue — particularly the terms of its operating agreement — will often be critical in drafting pleadings, asserting defenses and planning for discovery. And while it provides helpful guidance, *Allison* still leaves many questions unanswered, including what types of contractual provisions will be viewed as creating protections akin to those provided by law in a close corporation, and what duties are owed among members of an LLC in the absence of any written operating agreement. Answers to those questions will have to await further cases.

---

1. *Merriam v. Demoulas Super Markets Inc.,* 464 Mass. 721, 726–28 (2013) ("Although a shareholder in a close corporation always owes a fiduciary duty to fellow shareholders, good faith compliance with the terms of an agreement entered into by the shareholders satisfies that fiduciary duty. A claim for breach of fiduciary duty may arise only where the agreement does not entirely govern the shareholder's actions."); *see also Blank v. Ob/Gyn PC*, 420 Mass. 404 (1995).

2. *Pointer*, 455 Mass. at 549 ("It is uncontested that FGC [the LLC] is a close corporation."); *see also One to One Interactive LLC v. Landrith*, 76 Mass. App. Ct. 142, 143 (2010) (similarly applying *Donahue* and referring to LLC as a "closely-held corporation.").

3. *See, e.g.,* William F. Griffin, Fiduciary Duties of Officers, Directors, and Business Owners § 8.7.12, in, *Advising a Massachusetts Business* (Karl P. Fryzel & Richard N. Kimball eds., 1st ed. 2011) (observing that, in *Pointer*, "the Supreme Judicial Court implicitly held that a limited liability company, described in the case as a

CONTINUED ON P. 6

FURTHER, THE PRIVILEGE BELONGS TO THE CLIENT

BY DAVID MICHEL

In *Vigor Works LLC v. White Skanska JV*, Suffolk C.A. No. 16-02146-BLS1 (Mass. Super. Ct. Feb. 12, 2019), the Superior Court Business Litigation Section considered whether a plaintiff's accidental production of privileged materials was an inadvertent disclosure subject to the parties' clawback agreement or a waiver of privilege. The scenario described reflects common, if not ubiquitous, practices in commercial litigation, and the errors that ultimately led to the disclosure of privileged documents are the stuff of litigation attorneys' nightmares.

Discovery in the parties' underlying construction sub-contract dispute was extensive. Plaintiff engaged a litigation support vendor to assist with imaging and sorting documents for review and potential production. The litigation support vendor ran keyword searches against the resulting image files in order to identify potentially privileged documents. The keywords included the names of all involved attorneys, and their law firms, in order to flag potentially privileged materials in the document set. Any documents that were flagged as potentially privileged were set aside and reviewed by counsel. After the review, documents identified as privileged were logged and withheld; those determined to be responsive and not privileged were produced.

The erroneous production began with errors by the litigation support vendor. First, the vendor scanned three separate documents into a single image file for review so that the separate documents appeared to be a single integrated item. The three documents were a FedEx cover sheet addressed to an executive of the defendant, a letter to defendant enclosing a marked-up draft of the parties' contract, and a four-page email from plaintiff's counsel to an executive of the plaintiff. The resulting image file was flagged as potentially privileged and set aside for counsel to review.

A second document, a draft letter from plaintiff to defendant, with the previously mentioned four-page privileged email pasted into the text of the draft, slipped past the litigation support vendor's keyword searches altogether. The email was not identified as potentially privileged, thus apparently not reviewed by any of plaintiff's attorneys prior to production.

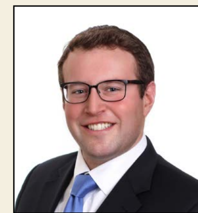
Counsel did review the amalgamated email/FedEx image file, but, relying on the FedEx cover sheet, believed that the entire document had previously been provided to defendant. As a result, the attorney decided that the file was not privileged and should be produced.

After more than a year had passed, after summary judgment was briefed and argued, plaintiff realized for the first time that the draft email had been produced. Further investigation revealed that the email was not included in the original FedEx package to defendant containing the letter and marked-up contract. Plaintiff's counsel, upon realizing the error, requested that defendant return or destroy all copies of the draft letter and the amalgamated email/FedEx documents. Defendant refused, and plaintiff moved to compel the return of the documents pursuant to the parties' clawback agreement and Mass. R. Civ. P. 26(b)(5)(B).

The court found that the draft letter, which was not flagged for further review as a result of the vendor's error, was to be a quintessential example of inadvertent disclosure, and should be returned. The privileged email scanned with the FedEx package into a single image file presented a closer question.

The court noted that perhaps the "oddity" of sending, via FedEx, an email from one's counsel that contains legal advice about ongoing contract negotiations, to the party with which one is negotiating that contract, should have been picked up when the documents were scanned into electronic format. Nevertheless, in a large-scale document collection, the court presumed that the scanning was not performed by an attorney. The court also noted that the aforementioned "oddity" likely should have warranted further inquiry at the time by the initial reviewing attorney.

Nevertheless, the plaintiff's privilege review protocol complied with the parties' clawback agreement, and the court found the safeguards employed by plaintiff to be reasonable and consistent with practices frequently employed in modern complex civil litigation. Further, neither the parties' clawback agreement nor Mass. R. Civ. P. 26 squarely addressed whether the present scenario, where a document was flagged, reviewed by counsel, and consciously included in a document production because counsel made an analytical error, constituted inadvertent disclosure. The court was not directed to any caselaw that it considered useful when applied to the circumstances here, where reasonable precautions were put in place to identify documents that may be privileged and set them aside for attorney review. The precautions worked, and a lawyer reviewed the documents, mistakenly assumed the privilege did not apply, and produced the document, yet further investigation prior to production



DAVID MICHEL is an associate in the litigation department at Sherin and Lodgen LLP, representing clients in a variety of complex civil and commercial disputes. Prior to joining Sherin and Lodgen, David was a staff attorney for the Committee for Public Counsel Services' Public Defender Division.

would have revealed that the document was, in fact, privileged. Ultimately, given the nature in which the documents were imaged with a FedEx cover sheet and letter to defendant, the court found that the reviewing attorney's belief that they were not privileged was "not an unreasonable conclusion."

The court cited to the SJC's opinion in *Matter of the Reorganization of Electric Mutual Liability Ins. Co. Ltd (Bermuda)*, 425 Mass. 419 (1997), which discarded the prior rule that any disclosure of a privileged communication destroys the privilege in favor of the "modern trend" (embodied in Mass. R. Civ. P. 26(b)(5)(B) and (C) and Fed. R. Evid. 502) that, so long as reasonable precautions are taken, inadvertent disclosure does not "impair the privilege." As such, the court in *Vigor Works* explained that "[w]hile lawyers may of necessity become the guardian of privileged documents during discovery, if reasonable precautions for security are in place, a lawyer's mistake that seems reasonable under the circumstances ought not prejudice the client." Ultimately, the *Vigor Works* court concluded that "[u]nder the circumstances presented here, the disclosure, while arguably preventable with more careful attention, was nonetheless inadvertent," and ordered that all copies of both inadvertently disclosed privileged documents be destroyed or returned.

The decision concludes with a note of caution, seemingly aimed at plaintiff, despite a disclaimer to the contrary. The court noted that it declined, as defendant requested, to consider the contents of plaintiff's privileged communications in its determination of whether to order the documents returned. Presumably, defendant argued for the court to consider the communication's contents because the document contained statements that defendant believed would be helpful to its case. The court recognized that, despite its order on plaintiff's motion, to a certain extent the disclosure was "like the bell that cannot be unrung." Thus, the decision ends with a warning that no witness ought to testify in a manner that is inconsistent with the information contained in the

CONTINUED ON P. 6

PROVING INTENTIONAL INTERFERENCE WITHOUT A FAILED CONTRACT

BY NICHOLAS D. STELLAKIS

Intentional interference is a tort of many colors, one whose elements are often confused and misunderstood. The purpose of this article is not to try to clarify all aspects of the tort, just to highlight a little-known way of proving the tort that differs from how it is traditionally conceived.

Massachusetts recognizes several flavors of intentional interference with advantageous relations: intentional interference with contractual relations by a third person, intentional interference with another's performance of his own contract, intentional interference with prospective contractual relations and intentional interference with business relations. Most practitioners understand the tort to apply only where the interference causes the advantageous relationship to be severed.

This is true in the version of the tort in which the defendant interferes with the contract between the plaintiff and a third party by acting on the third party. *See* Restatement (Second) of Torts § 766 (1979). But it is not the case in the version of the tort where the defendant interferes with the contract by acting on the plaintiff directly. *See id.* § 766A (1979). Where the defendant interferes with the plaintiff's performance, the plaintiff need not prove that the defendant prevented him from performing, just that the defendant made performance harder. Section 766A provides as follows:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Under this language, a defendant may be liable for interference with a contract between a plaintiff and a third party if he makes the plaintiff's own performance more expensive or burdensome. The comments to this section make clear that this alternative language is deliberate.

> The next logical step has also been taken. If the plaintiff's performance has intentionally been made more burdensome or more expensive by the actor, the cost that he incurs in order to obtain the performance by the third party has increased, and the net benefit from the third person's performance has been correspondingly diminished. This Section covers that loss, too.

Id. Comment c. The comments further add:

> It is also sufficient that the performance of the contract to which the plaintiff is obligated is made more expensive to him, so that he loses all or part of the profits that he would otherwise have obtained, or is subjected to a financial loss. Thus if the plaintiff is under a contract to keep a highway in repair, a defendant who intentionally inflicts additional expense upon him by damaging the highway is subject to liability under this Section.

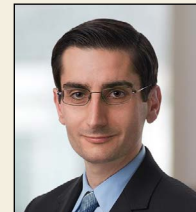
Id. Comment g.

The Section 766A principles reflect the law of Massachusetts. In *Shafir v. Steele*, 431 Mass. 365 (2000), the plaintiff had a contract to purchase a building, and the defendant unleashed what amounted to a reign of terror on her, with the result that she did not purchase the building and lost her deposit. *Id.* at 367-68. The court held that Section 766A reflected the law of Massachusetts, affirming judgment in favor of the plaintiff. *Id.* at 369-70. Notably, there was no indication that the defendant's conduct made it impossible for the plaintiff to purchase the building. Instead, that conduct — menacing behavior, the threat of a lawsuit, and other harassment — just made the plaintiff's ability to perform more expensive or burdensome. The Appeals Court expressly recognized the principle in *Resolute Management Inc. v. Transatlantic Reinsurance Co.*, 87 Mass. App. Ct. 296, 299 n.5 (2015). The allegations there were, essentially, that the defendants intentionally interfered with the plaintiff's contracts with third parties by making it more difficult and expensive for the plaintiff to perform under those contracts. *Id.* at 299. The plaintiff did not, however, break those contracts. *Id.* at 303. *See also Defonseca v. Sandler*, Middlesex Civil No. 020362, 2002 WL 1923885, at *2 (Mass. Super. Ct. June 25, 2002) (denying motion to dismiss claim for intentional interference where it alleged the defendant's actions made the plaintiff's performance of her contract with third party more burdensome, even though the plaintiff did not breach her contract with the third party).*

Practitioners should note, however, that there is some judicial resistance to the Section 766A theory, even though it is clearly Massachusetts law. *See, e.g., CareOne Mgmt. LLC v. Navisite, Inc.*, Suffolk Civil No. 1484CV00378BLS2, 2017 WL 2803060, at *11 (Mass. Super. Ct. Apr. 25, 2017) ("*Shafir* adopted § 766A of the Restatement, and held that it is just as tortious to interfere with a contract by making the plaintiff's own performance more expensive or burdensome and thereby 'preventing the plaintiff from performing' his contractual obligations . . . , [b]ut the SJC did not eliminate the element of interference that caused some party to the contract not to perform its obligations."); *Metro. Prop. & Cas. Ins. Co. v. Savin Hill Family Chiropractic Inc.*, 266 F. Supp. 3d 502, 543 (D. Mass. 2017) (complaint, which alleged that defendants interfered with contractual obligations by causing the plaintiff's performance to be more expensive and burdensome than it otherwise would have been, failed to state claim because it did not allege breaking of contract). Indeed, the SJC and the Appeals Court have also described the tort using shorthand language that leaves out the Section 766A theory. *Psy-Ed Corp. v. Klein,* 459 Mass. 697, 716-17 (2011) ("For Valenzano to be held liable for tortious interference, it must be proved that there existed a relevant contract to which Valenzano was not a party, that Valenzano caused one or more parties to that contract to 'break' (i.e., breach) it, that Klein was harmed as a result, and that Valenzano acted with actual malice."); *Cavicchi v. Koski*, 67 Mass. App. Ct. 654, 657 (2006). None of these cases, however, involved interference by creating a greater burden, so they do not contradict the clear precedent in favor of Section 766A's alternative theory.

In sum, the Section 766A principles are clearly developed in Massachusetts. Judicial resistance may simply reflect the court's unfamiliarity with the theory, stemming from the relatively rare circumstances in which it is invoked. Nevertheless, it can be a potent weapon, and it should not be overlooked. ■

* Not clear how these were decided.



NICHOLAS D. STELLAKIS is counsel at Hunton Andrews Kurth, focusing on civil litigation, including a wide variety of general business litigation and appellate work. Prior to private practice, Nicholas was a law clerk for Hon. Judith Cowin of the Supreme Judicial Court and Hon. Christopher Armstrong, chief justice of the Massachusetts Appeals Court.

LOWY KEYNOTES FOURTH ANNUAL COMPLEX COMMERCIAL LITIGATION CONFERENCE

BY KENNETH N. THAYER

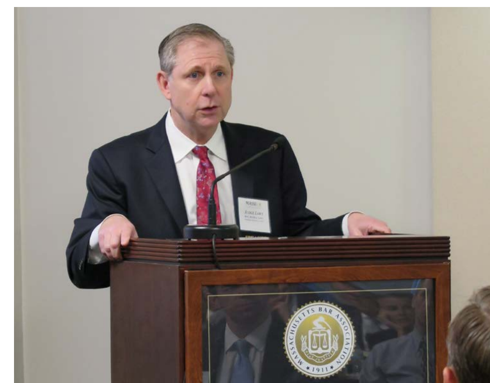
The Fourth Annual Complex Commercial Litigation Conference was held on April 23, featuring a stirring keynote address from Supreme Judicial Court Justice David A. Lowy, as well as informative presentations from federal and state judges and leading commercial litigators.

During his remarks, Justice Lowy commented on the heightened tensions of our current political moment and encouraged the audience to embrace civility in their professional — and personal — lives. While sharing anecdotes from his time on the bench and as a practicing attorney, Justice Lowy reminded attendees that effective advocacy and effective citizenship do not require combativeness or disrespect for opposing viewpoints, and that a willingness to listen to one's opponent is essential to resolving disputes.

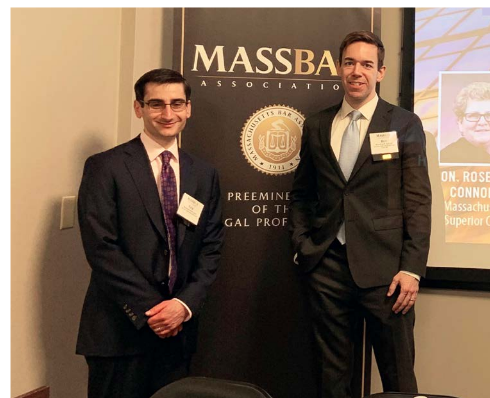
Preceding Justice Lowy's address was a judges' panel that included Hon. Rosemary Connolly (associate justice of the Superior Court), Hon. Christopher Panos (chief judge, United States Bankruptcy Court for the District of Massachusetts), Hon. Janet Sanders (associate justice of the Superior Court, Business Litigation Session), and Hon. Leo Sorokin (judge, United States District Court for the District of Massachusetts). The panel, which was moderated by Assistant Attorney General Julie Green, shared perspectives on the relative benefits and burdens of state vs. federal litigation, and offered advice on how to avoid discovery disputes, increase the effectiveness of dispositive motions, and litigate complex civil cases in a more timely and efficient manner. Highlights included: Judge Connolly's explanation of the work in progress to bring electronic filing to the Massachusetts Superior Court, Judge Panos' description of the impact that the new "proportionality" language has had on the scope of discovery in bankruptcy, Judge Sanders' commentary on the excessive filing of summary judgment motions and Judge Sorokin's customizable approach to case-management.

In addition, a panel of prominent Boston litigators presented an in-depth discussion of impactful recent cases in business litigation, bankruptcy and intellectual property. Moderated by Sara Shanahan (Sherin and Lodgen LLP), the panel featured commentary from Erin Higgins (Conn Kavanaugh Rosenthal Peisch & Ford LLP) on the latest decisions affecting fiduciary duty law, the anti-SLAPP statute and Chapter 93A; from Frank Morrissey (Morrissey, Wilson & Zafiropoulos LLP) on the significance of the pending United States Supreme Court case *In re Tempnology, LLC;* and from Andrew O'Connor (Goulston & Storrs PC) on the Supreme Court's recent decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, in which the court clarified the registration requirement in copyright infringement suits.

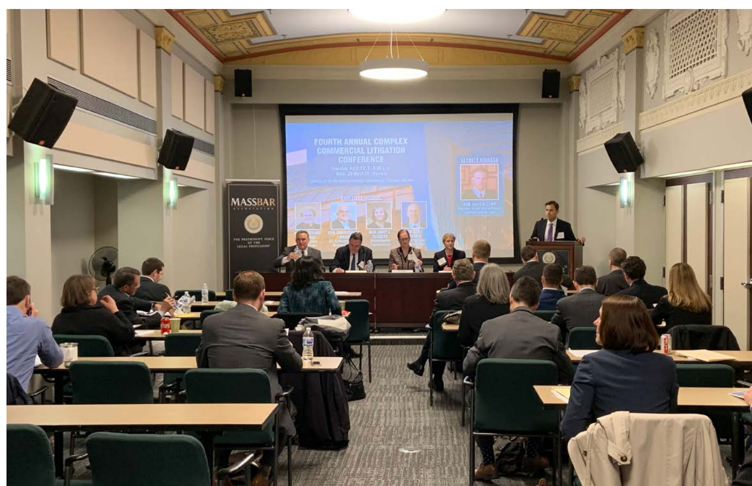
This year's conference, which was co-chaired by Ken Thayer (Sugarman, Rogers, Barshak & Cohen P.C.) and Nick Stellakis (Hunton Andrews Kurth LLP), took place at MBA headquarters in Boston. The conference was generously sponsored by Haystack-ID, Stoneturn, Evidox, Target Litigation and Language Connections. At the conclusion of the program, attendees, panelists and sponsors enjoyed a networking cocktail hour. ■



Massachusetts Supreme Judicial Court Associate Justice David A. Lowy delivered the conference keynote.



Conference co-chairs: Nicholas Stellakis, Esq. (left) and Kenneth N. Thayer, Esq. (right).



Trending Issues in Business Litigation, Intellectual Property and Bankruptcy Panelists (from left): Andrew T. O'Connor, Esq.; Francis C. Morrissey, Esq.; Erin K. Higgins, Esq.; Sara Jane Shanahan, Esq.; and MBA Complex Commercial Litigation Section Chair Matthew J. Ginsburg, Esq.

View from the Bench Panelists: Hon. Rosemary Connolly; Hon. Leo T. Sorokin; Hon. Janet L. Sanders; Hon. Christopher J. Panos; Julie E. Green, Esq.; and Conference Co-Chair Kenneth N. Thayer, Esq.

COMCOM HOSTS 'CONFLICTS OF INTEREST IN COMPLEX COMMERCIAL LITIGATION' PROGRAM

BY JESSICA KELLY

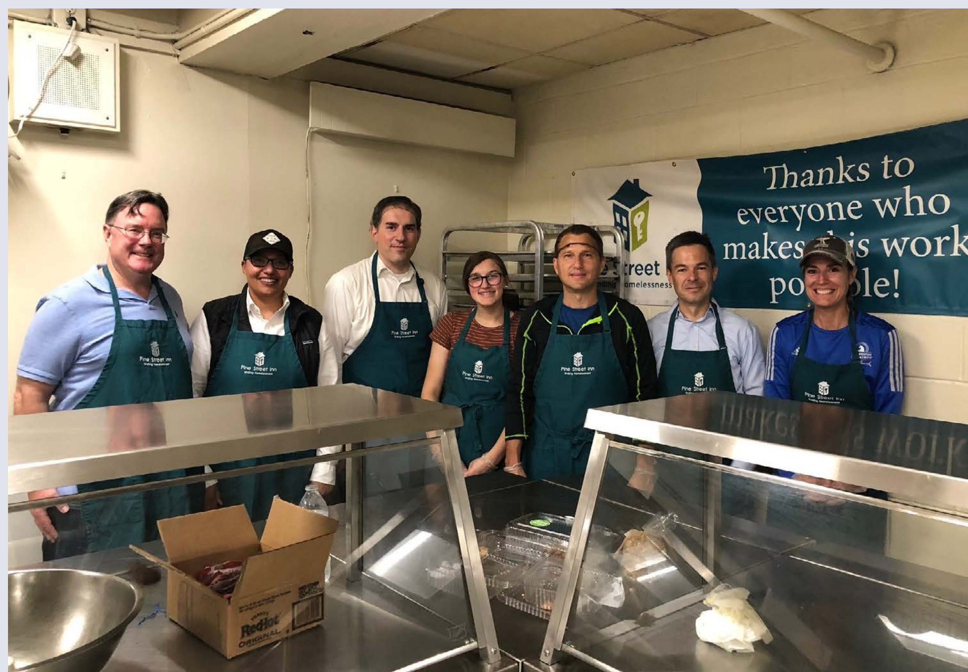
The Complex Commercial Litigation Section Council hosted a CLE program titled "Conflicts of Interest in Complex Commercial Litigation" on Tuesday, May 14, highlighting important ethical rules and considerations that face business, bankruptcy and intellectual property litigators. The panelists included Richard Rosensweig (director and general counsel, Goulston & Storrs LLP), Christopher Blazejewski (partner, Sherin and Lodgen LLP), Heather LaVigne (assistant bar counsel, Board of Bar Overseers) and Hon. Debra Squires-Lee (associate justice of the Superior Court). The program was moderated by Section Council member Jessica Gray Kelly (partner, Sherin and Lodgen LLP).

LaVigne began the program outlining the rules that business litigators need to pay particular attention to when representing business clients, including Rules 1.7-1.11, 1.13 and 1.18. LaVigne also discussed the prevalence of conflicts issues in bar discipline matters and noted that practitioners can always call the Board of Bar Overseers hotline when faced with a difficult conflicts issue.

Rosensweig, who is also his firm's general counsel, highlighted particular conflict of interest issues that arise when engaging new clients or during the representation of two clients, and explained how attorneys and firms can protect themselves from liability for conflicts of interest. Blazejewski presented an overview of the Supreme Judicial Court decision in *Maling v. Finnegan, Henderson, Farabow & Dunner LLP* (2015) and discussed some recent high-profile, high-damages cases involving conflicts of interest. Finally, Judge Squires-Lee provided an overview of how courts handle motions to disqualify based on conflicts of interest arising during litigation.

This CLE program was attended in person by MBA members and non-members as well as streamed online. The program is available on the MBA's website at www.MassBar.org. ■

COMCOM VOLUNTEERS AT THE PINE STREET INN



Continuing an annual tradition, the Complex Commercial Litigation Section Council served dinner at the Pine Street Inn on June 25. Council members (from left) Frank Morrissey, Corrina Hale, Dakis Dalmanieras and his daughter Julia, Matt Ginsburg, Derek Domian and Jessica Kelly volunteered.

CLOSELY HELD LLCs
CONT. FROM PAGE 2

'closely-held entity,' was a close corporation under *Donahue*." (citations omitted)).

4. *See* R.W. Southgate & D.W. Glazer, Massachusetts Corporation Law and Practice § 19.9[e] n.147c (2d ed. 2012 & Supp. 2018) ("In *Pointer* the Court referred to the LLC as a close corporation . . . without acknowledging the many differences between the rights of members of a Massachusetts LLC and those of shareholders of a Massachusetts corporation. . . . Instead, ignoring (or perhaps not understanding) the differences between the rights of shareholders of a corporation and the rights of members of an LLC, the Court wrote, 'Whatever the advantages of the corporate form, its very structure may suppl[y] an opportunity for the majority stockholders to oppress or disadvantage minority stockholders . . . .'"). ■

PRIVILEGE
CONT. FROM PAGE 3

clawed-back communications. Should a witness do so, much like a criminal defendant's suppressed statements can be used to impeach credibility should he testify inconsistently with those statements, the contents of the privileged emails (which remained under seal with the court) could be used to impeach that witness's credibility, and potentially be admitted to evidence at trial, albeit for that limited purpose. ■

2018–19 COMPLEX COMMERCIAL LITIGATION SECTION COUNCIL

Matthew J. Ginsburg, chair
Ascendant Law Group LLC

Derek B. Domian, vice chair
Goulston & Storrs PC

Robert F. Callahan Jr.
Robins Kaplan LLP

Euripides D. Dalmanieras
Foley Hoag LLP

Corrina L. Hale
Todd & Weld LLP

Jared L. Hubbard
Fitch Law Partners LLP

Jessica G. Kelly
Sherin and Lodgen LLP

Ryan P. McManus
Hemenway & Barnes LLP

Francis C. Morrissey
Morrissey, Wilson & Zafiropoulos LLP

Andrew T. O'Connor
Goulston & Storrs PC

Hon. Christopher J. Panos
U.S. Bankruptcy Court, District of Massachusetts

Michael R. Perry
Hunton Andrews Kurth LLP

Kenneth C. Pickering
Mirick, O'Connell, DeMallie & Lougee LLP

Svetlana Revina
Hubspot

Hon. Janet L. Sanders
Suffolk Superior Court

Laurence A. Schoen
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC

Courtney Shea Winters
Travelers Companies Inc.

Nicholas Stellakis
Hunton Andrews Kurth LLP

Kenneth N. Thayer
Sugarman Rogers Barshak & Cohen PC

Andrew T. Warren
Trenholm Warren LLC

Paul E. White
Arent Fox LLP