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Succession Planning and Shareholder Litigation Program; Recent Developments Nationally and in Delaware and New York

For this issue, we take a break from interviewing business court judges. Instead, we summarize a program sponsored the Business Law Section on business succession planning, shareholder litigation, judicial and mediation perspectives, estate planning, drafting, and valuation and tax; provide a brief summary of recent changes in Delaware corporate law; and give an update on recent developments in the New York Commercial Division.

Shareholder Litigation and Succession Planning

The Importance of Succession Planning Generally

On April 10, 2025, the Business Law Section's LLC & Partnerships Committee, the Corporate Laws Committee, and the Commercial Litigation Committee co-sponsored a program on succession planning, shareholder/LLC member litigation, estate planning, drafting, valuation, and tax. The program also included helpful insight from eight business court judges and five distinguished mediators.[1] In the past year or so, we have heard much about succession planning. Indeed, the largest transfer of wealth in history will occur in the upcoming decades. Estimates range from $80 trillion to $120 trillion. Thus, succession planning is an important issue for any business.

This brief column is not intended to provide any kind of in-depth treatment of the many complex and interrelated issues involved in succession planning. Rather, this is intended to raise the issue for lawyers and their clients (and for law firms, too).

Issues in Succession Planning, Drafting, and Estate Planning

Succession planning requires the that the owners and management look to the future, with all its uncertainties. "What happens when one of us retires, wants to do something else, or passes away?" This, in turn, involves issues of ownership (Who? family; others); management; control; voting classes and preferences; possible securities issues; employment; strategies to retain key employees (equity; phantom equity; employee stock ownership); exit strategy; mandatory or optional triggers (death, disability, divorce, termination of employment); right to profit distributions (and, if so, when and how calculated); debt; capital calls and dilution of shares; whether the owners may own competing businesses and the corporate opportunity doctrine; business valuation and buyout provisions (date of valuation; how the purchase price is calculated (formula; stipulated value), how much down, how much paid in installments, interest rates, security); tax; corporate organization (C-corporation, S-corporation, LLC); estate planning; and tax. In fact, tax issues—both gift and estate tax as well as income tax issues—can have a major effect on succession planning. Involving key advisors—the company's accountant, corporate counsel, bankers and financial planners, the owners' personal advisors, among others—is important. As is sometimes said, "Failing to plan, is planning to fail." And, the earlier the owners plan, the better.

Speaking of planning, a critical component is documenting the agreements in writing, whether in a shareholder agreement or buy-sell agreement, phantom stock agreement, operating agreement, and so forth. Board or manager resolutions will likely be needed. According to statistics presented at this program, about 50% of businesses will survive five years or more; only about 1/3 will survive ten years or more. Indeed, about 30% of family businesses survive the second generation.

Part of succession planning often involves family issues. Are family members capable of continuing the business? What if they are not interested? How can family members be treated fairly (although not necessarily equally) by their parent(s)? These raise complex issues involving family dynamics, corporate/LLC law, drafting, estate planning, tax, valuation, asset protection, and the potential use of life insurance for taxable estates.[2]

Litigation Issues

But even with proper planning, the transfer of ownership and control does not always go smoothly. This can lead to disputes and may result in litigation. Gerard V. Mantese was the lead-off speaker presenting on litigation and strategic considerations.[3]

In addition, eight business court judges shared some of their experience and wisdom. The judges included: Judge Annette J. Berry (Wayne), Judge Chris Christenson (Genesee), Judge Edward Ewell, Jr. (Wayne), Judge Brian S. Pickell (Genesee), Judge Brian R. Sullivan (Wayne), Judge Victoria A. Valentine (Oakland), Judge Kathryn A. Viviano (Macomb), and Judge Michael Warren (Oakland). Some of the main issues in shareholder litigation include: identifying the real issues ("What's really going on?"); how to manage the high emotional component; how counsel can rise above the fray (and avoid escalating the dispute), while still zealously representing their clients; effective communication with opposing counsel; how and when to involve the judge in resolving the litigation; and the importance of drafting agreements that will be clear years later if a dispute arises.

One trial issue is how a shareholder or an LLC oppression case[4] will be tried if legal claims will also be tried. The oppression claims are equitable,[5] so they are tried to a judge. But legal claims are tried to a jury.

Mediation Issues

Mediation is, of course, a key part of resolving business litigation, particularly business divorces. For that issue,

a distinguished panel of mediators provided their advice.[6] Some of the key issues include: understanding the interpersonal dynamics; addressing the emotional issues; getting to the heart of the dispute (again, "What's really going on here?"); allowing the parties the ability to be heard and proactive listening (mediation can be your client's "day in court"); recognizing that the parties cannot change the past, but they can move on to a better future by resolving the dispute; how the mediator can develop trust with the parties; the importance of preparation for mediation (by both the clients and their counsel—this includes the clients reading the other party's mediation brief); pre-mediation sessions with the mediator, counsel, and the parties; the use (or not) of joint sessions; how to resolve differences among the experts (commonly called "hot tubbing"); how attorneys can be zealous advocates without raising the emotions the parties already have; and generally, how mediation can be more client-centric.[7] An excellent resource on dispute resolution issues generally is the Office of Dispute Resolution, which coordinates the dispute resolution services of the Michigan State Court Administrative Office.[8]

Nationally: American College of Business Court Judges Meets in Michigan

The 19th meeting of the American College of Business Court Judges occurred in Traverse City from April 30–May 2, 2025. Judge Christopher Yates presided as President and Judge Michael Warren was elected a Director. Congratulations to both!

Amendments to the Delaware General Corporation Law

Delaware's Senate Bill 21, signed on March 25, 2025, delivers the most sweeping overhaul of the DGCL in a generation.[9] It codifies bright-line safe harbors that bar equitable relief or damages when a conflicted transaction is either approved by a disinterested board or ratified by an informed, uncoerced vote of disinterested stockholders.[10] The statute introduces Delaware's first statutory definition of "controlling stockholder": one who (i) holds a majority of the voting power, (ii) enjoys contractual or other rights to elect a majority of directors, or (iii) owns at least one-third of the voting power while exercising managerial authority over the corporation.[11]

Amended § 220 confines routine inspection to nine specified records—including charter, bylaws, board materials, and three-year stockholder documents—and requires a clear-and-convincing, compelling-need showing for any extras such as e-mails.[12] Senate Bill 21 also grants controlling stockholders the same duty-of-care exculpation that directors receive under § 102(b)(7).[13] The General Assembly fast-tracked these changes after warnings that marquee corporations might reincorporate elsewhere and that § 220 demands had purportedly swelled into pre-complaint discovery battles. This, supporters claimed, threatened both Delaware's franchise tax revenues and overall transactional certainty.[14]

A single, easily-overlooked clause makes the overhaul even more consequential: all amendments apply retroactively unless a lawsuit was already pending or a § 220 demand was served before February 17, 2025. That one sentence shutters untapped entire-fairness claims, curtails books-and-records that are claimed to be fishing expeditions, and immediately changes settlement calculus for deals closed before that date (and that were not in suit or the subject of a § 220 demand as of February 17, 2025). Senate Bill 21's exculpation of controlling stockholders further narrows the field of claims, converting many potential fiduciary-duty disputes into purely disclosure-based skirmishes. Expect insurers of D&O (directors and officers) policies to reassess pricing and policy carve-outs as the statute's shields gain traction.

For Delaware corporations, boards should inventory past transactions to see which now fall within the § 144 safe harbors, update committee charters and director-independence questionnaires, and retrain finance and legal teams on the amended § 220 books-and-records response protocol. Family businesses in the midst of succession planning should reevaluate buy-sell formulas, trustee duties, and related-party arrangements in light of the statute's bright-line control threshold and retroactive reach. Counsel should also flag open questions: the undefined contours of "managerial authority," the interaction between § 144(5) exculpation and existing charter provisions, and the possibility of future Delaware tweaks on fee-shifting. Acting now secures the benefits of SB 21; waiting risks litigating under an outdated playbook while opponents leverage the new one.

New York Commercial Division

The New York County Lawyers Association honored the New York Commercial Division on its 30th Anniversary at NYCLA's 2025 Annual Gala on March 4, 2025. As part of the event, the Commercial Division presented a film explaining the effectiveness of the Commercial Division.[15]

On the rulemaking side, the Commercial Division has recently implemented a number of a procedural changes. Administrative Order, signed on May 13, 2025 by the Chief Administrative Judge of the Courts, adds a new Rule 23 to the Rules of the Commercial Division to provide for the filing of amicus briefs.[16] Also, pursuant Administrative Order dated May 6, 2025 (effective July 7, 2025), all parties with cases pending in the Commercial Division must make initial disclosures.[17] The initial disclosure scheme is similar to what has been commonplace in federal courts for some time, but it differs in several significant respects.

Administrative Order, signed on May 20, 2025, adds a model pre-trial order as a new Appendix E to Section 202.70 of the Uniform Rules of the Supreme and County Courts (Rules of the Commercial Division of the

Supreme Court) and amends the preamble to Commercial Division Rules 25-33 relating to trial preparation and procedure.[18]

NOTES

1. The program was titled, "War and Peace: Shareholder Litigation, Business Succession Planning, and the Largest Transfer of Wealth in History." It was held at the San Marino Club in Troy with approximately 165 people in attendance. Plans are already being discussed for a similar presentation in western Michigan in 2026. The program was planned and moderated by Gerard V. Mantese and Douglas L. Toering. The Chairperson of the Business Law Section, Ian Williamson, introduced the program.

2. Julius H. Giarmarco presented on estate planning, and James J. Vlasic presented on drafting issues. Thomas A. Frazee presented on valuation and tax.

3. Mr. Mantese also presented on litigation and drafting considerations in succession planning for the New York County Lawyers Association at a continuing education program on February 6, 2025.

4. MCL 450.1489 and 450.4515, respectively.

5. *Madugula v Taub*, 496 Mich 685, 853 NW2d 75 (2014).

6. The mediators were Jennifer M. Grieco, William Horton, Thomas G. McNeill, Paul Monicatti, and I.W. Winsten.

7. *See* McNeill, *Proposed Advancements in Mediation Practices: Placing Clients at the Center of Mediation*, 103 Mich B J 16 (June 2024),< https://www.michbar.org/journal/Details/Proposed-advancements-in-mediation-practices-Placing-clients-at-the-center-of-mediation?ArticleID=4895>; Toering & Rose, *Touring the Business Courts: Mediation Strategies Discussed at Statewide Business Courts Program; National Business Court Developments*, 44 MI Bus LJ 13 (Fall 2024),< https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/Fall2024.pdf#page=15>.

8. Michigan Courts, Office of Dispute Resolution, <https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/> (accessed June 9, 2025).

9. *See* Ann Lipton, Business Law Prof Blog, *Delaware Decides Delaware Law Has No Value*, <https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/ > (posted February 17, 2025) (accessed June 9, 2025).

10. 8 Del Code Ann § 144(a).

11. *Id.* § 144(e)(2).

12. *Id.* § 220(a)(1)(a)–(i), (g)(1)–(3).

13. *Id.* § 144(d)(5).

14. *See* Katie Tabeling, *Meyer Signs Corporate Law Bill After 'Dexit' Debate in the House*, Del Bus Times (March 26, 2025), <https://delawarebusinesstimes.com/news/meyer-signs-corporate-law-bill-after-dexit-debate-in-the-house/> (accessed June 9, 2025).

15. *A Court That Means Business* (video), <https://vimeo.com/1060574090/e2635bcfaf> (accessed June 9, 2025).

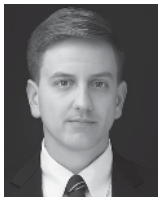
16. Administrative Order of the Chief Administrative Judge of the NY Courts, AO/105/25 (May 13, 2025).

17. Administrative Order of the Chief Administrative Judge of the NY Courts, AO/104/25 (May 6, 2025). See also newly promulgated Rule 11-h of the Statewide Rules of the Commercial Division.

18. Administrative Order of the Chief Administrative Judge of the NY Courts, AO/111/25 (May 13, 2025).

Douglas L. Toering of Mantese Honigman, PC, is a past chair of the SBM's Business Law Section, for which he chairs the Commercial Litigation Committee and Business Courts Committee. He is a 2021 recipient of the Stephen H. Schulman Outstanding Business Lawyer Award. His practice includes commercial litigation including shareholder litigation, business transactional matters, and healthcare law.

Gerard V. Mantese has a national practice in shareholder, member, and partnership disputes, and other complex business litigation. He is the CEO at Mantese Honigman, P.C. He is co-chair of the State Bar of Michigan (SBM) Business Law Section's LLC and Partnerships Committee, and he is on the Board of Commissioners of the SBM. Mr. Mantese is also chair of the New York County Lawyers Association (NYCLA) Committee on Corporations, LLCs, and Partnerships. The SBM has conferred both the Champion of Justice Award, as well as the SBM's highest award, the Roberts P. Hudson Award, on Mr. Mantese for his advocacy for vulnerable citizens and for his outstanding service to the profession.



Patrick L. Klida of Mantese Honigman, P.C., in Troy, Michigan, represents corporations, business owners, and professionals in high-stakes commercial disputes. His practice includes shareholder and partnership litigation, fiduciary duty claims, contract disputes, and appellate matters in state and federal courts. Before joining Mantese Honigman, he was a partner at a Detroit-area business firm and clerked for Judge Prentis Edwards, Jr., of the Third Judicial Circuit of Michigan.