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For Alternative Business Entities**

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FINDING (AND FUNDING) THE COST OF FREEDOM: INDEMNIFICATION AND ADVANCEMENT FOR ALTERNATIVE BUSINESS ENTITIES

Samuel T. Hirzel and Dawn Kurtz Crompton*

Delaware business entities often grant indemnification and/or advancement rights to attract qualified persons to serve in positions of authority and to protect them from exposure to out of pocket expenses for legal fees relating to their service to the business. Significant ink has been spilled by both commentators and the Delaware judiciary about the proper balance to strike between principles of “freedom of contract” in the context of alternative business entities (such as limited liability companies and limited partnerships) and fiduciary or other public policy principles that are generally applicable to corporations.¹ In opinions that generally receive less attention, however, Delaware courts have repeatedly stressed that contractarian principles alone govern indemnification and advancement provisions for alternative business entities. Using examples drawn from Delaware case law and the authors’ practice, this article will highlight some of the differences between indemnification and advancement rights under the Delaware General Corporation Law (the “DGCL”) and the statutory authority governing Delaware’s alternative entities. Contractual freedom often comes at a cost.

I. INDEMNIFICATION AND ADVANCEMENT UNDER DELAWARE LAW

Indemnification generally refers to the payment by the business entity of fees and expenses (and, in certain instances, liabilities) incurred by an individual serving as director, officer, manager, managing partner, partner, employee or member of the business for litigation or other proceedings.² Indemnification is generally not available until the conclusion of the proceedings giving rise to the indemnification right.³ Advancement refers to the payment of potential indemnification in advance of the conclusion of the proceedings giving rise to the indemnification right, such as out of pocket defense costs as they are incurred by the potential indemnitee. In essence, indemnification is akin to an insurer’s coverage obligations, whereas advancement is akin to an insurer’s duty to defend.

In order to encourage able people to serve in leadership positions in a business enterprise and encourage potentially profitable business risk taking, Delaware law permits and sometimes requires those businesses to indemnify or advance certain expenses to such persons. “Delaware has a strong public policy in favor of assuring key corporate personnel that

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1. See *Auriga Capital Corp. v. Gatz Properties LLC*, 40 A.3d 839 (Del. Ch. 2012), *aff’d sub. nom.* 59 A.3d 1206 (Del. 2012) (affirming but criticizing the then Chancellor’s “dictum” regarding default fiduciary duties); *Feely v. NHAOGC, LLC*, 62 A.2d 649, 661-63 (Del. Ch. 2012). See also Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnership and Limited Liability Companies*, 46 AM. BUS. L. J. 221 (2009); ANN E. CONAWAY & PETER I. TSOFILAS, *Challenging Traditional Thought: No Default Fiduciary Duties in Delaware Limited Liability Companies After Auriga*, 13 J. BUS. & SEC. L. 1 (2011).

2. See *In re Delta Holdings, Inc.*, C.A. No. 18064-VCC, 2004 WL 1752857, at *4 (Del. Ch. July 26, 2004).

3. *Paolino v. Mace Sec. Int’l, Inc.*, C.A. No. 4462-VCL, 2009 WL 4652894, at *4 (Del. Ch. Dec. 14, 2009).

the corporation will bear the risks resulting from performance of their duties on the grounds that such a policy best encourages responsible persons to occupy positions of business trust⁴ Beyond that, its larger purpose is “to encourage capable [persons] to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve.”⁵ Delaware law also permits indemnification and advancement for alternative business entities and similar policy concerns are in play.⁶

Without the benefit of advancement rights, an officer or director may not have the financial ability to mount a vigorous defense on the merits.⁷ The defense of a white-collar criminal prosecution relating to alleged accounting fraud (and related civil actions), for example, could cost millions of dollars to defend.⁸ While the terms of an advancement or indemnification agreement may be appealing to company decision makers on a “clear day,”⁹ business enterprises often have different views of those obligations after a former officer or director has been accused of serious wrongdoing. After accusations are made or troubling facts come to light, advancing fees and expenses of an individual who is alleged to have engaged in such malfeasance becomes unpalatable to the business, its governing body, its investors and even government authorities.¹⁰ In addition, in high profile matters, the amount of the advancement obligations can grow to staggering sums.¹¹ As a result, these provisions have been the subject of considerable litigation in Delaware courts.

II. STATUTORY AUTHORITY FOR INDEMNIFICATION AND ADVANCEMENT

Title 8, Section 145 of the Delaware General Corporation Law permits indemnification of directors, officers, employees and agents of a Delaware corporation for certain expenses in defending a proceeding, and for settlements,

4. DeLucca v. KKAT Mgmt., L.L.C., C.A. No. 1394-VCN, 2006 WL 224058, at *7 (Del. Ch. Jan. 23, 2006) (citing Perconti v. Thornton Oil Corp., C.A. No. 18630-NC, 2002 WL 982419, at *3 (Del. Ch. May 3, 2002)); VonFeldt v. Stifel Fin. Corp., 714 A.2d 79, 84 (Del. 1998).

5. In re Walt Disney Co. Deriv. Litig., 906 A.2d 27, 66 (Del. 2006) (citing Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 561 (Del. 2002)). See also Homestore, Inc. v. Tafeen, 888 A.2d 204, 218 (Del. 2005) (explaining that advancement provisions promote the public policy of attracting capable people into corporate service).

6. See, e.g., DeLucca, 2006 WL 224058, at *7 (“Delaware has a strong public policy in favor of assuring key corporate personnel that the corporation will bear the risks resulting from performance of their duties on the grounds that such a policy best encourages responsible persons to occupy positions of business trust, so Delaware courts have read indemnification contracts to provide coverage when that is reasonable.”).

7. Homestore, Inc. v. Tafeen, 886 A.2d 502, 505 (Del. 2005). See generally U.S. v. Stein, 495 F. Supp.2d 390 (S.D.N.Y. 2007).

8. Homestore, Inc. v. Tafeen, 2005 WL 656221 (Del. Ch. Feb. 24, 2005) (Jenkins, S.M.) (ordering the payment of nearly \$4 million of advancements).

9. See William D. Johnston, *Flexibility Under Delaware Law in Drafting Advancement Provisions on a “Clear Day,” and Potential Surprises for Those Who Do Not Take Advantage of that Flexibility*, 13:1 DEL. L. REV. 21, 24 (2011).

10. From 2003 through 2006, guidance from United States Department of Justice (*i.e.*, the so-called “Thompson Memo”) was widely viewed as hostile to the payment of certain advancement and indemnification obligations. See generally Stein, 495 F. Supp.2d at 390.

11. See Andrew M. Johnston, Amy L. Simmerman & Jeffery M. Gorris, *Recent Delaware Law Developments in Advancement and Indemnification: An Analytical Guide*, 6:1 NYU J. L. & Bus. 81, 83 (2009) (noting high profile cases with indemnification obligations as high as \$119 million).

judgments, penalties and fines.¹² Delaware corporations may indemnify such a person “who was or is a party or is threatened to be made a party” to any action brought by a third party “by reason of the fact that the person is or was a director, officer, employee or agent of the corporation.”¹³ Section 145 requires indemnification when “a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding . . . or in defense of any claim, issue or matter therein.”¹⁴ Section 145 also permits, but does not require, advancement of fees and expenses.¹⁵ Subject to certain public policy limitations reflected in Section 145, a corporation can elect to provide broader rights in its certificate of incorporation, bylaws, or other contractual agreements.¹⁶

Delaware limited liability companies (“LLCs”) are governed by the Delaware Limited Liability Company Act (the “LLC Act”).¹⁷ Section 18-108 of the LLC Act gives contracting parties great discretion in establishing the scope of indemnification and advancement rights for an LLC.¹⁸ The LLC Act provides:

Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.¹⁹

The LLC Act specifically provides that “it is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”²⁰ Consistent with this policy, Delaware courts have “made clear that § 108 defers completely to the contracting parties to create and delimit rights and obligations with respect to indemnification and advancement.”²¹ The “point of § 108 is that the parties to these agreements have complete freedom of contract — they are free to contract for advancement because neither the statute nor any principle of law or equity prohibits it.”²²

12. 8 *Del. C.* § 145.

13. *Id.* § 145(a) & (b); *VonFeldt v. Stifel Fin. Corp.*, C.A. No. 15688-VCC, 1999 WL 413393, at *2 (Del. Ch. June 11, 1999).

14. *Id.* § 145(c).

15. *Id.* § 145(e).

16. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d at 65-66.

17. 6 *Del. C.* §§ 18-101 *et seq.*

18. See *Delphi Easter P’rs Ltd. P’ship v. Spectacular P’rs, Inc.*, C.A. No. 12-1409-VCA, 1993 WL 328079, at *2 (Del. Ch. Aug. 6, 1993) (interpreting Limited Partnership Act). See also *Branin v. Stein Rowe Inv. Council, LLC*, 2014 WL 2961084, at *9 (Del. Ch. June 30, 2014) (“Limited liability companies are tersely and expansively authorized by statute to provide indemnification.”)

19. 6 *Del. C.* § 18-108.

20. *Id.* § 18-1101(b).

21. *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 591 (Del. Ch. 2006) (internal quotations omitted); *Delphi*, 1993 WL 328079, at *2.

22. *Majkowski*, 913 A.2d at 591.

Delaware limited partnerships (“LPs”) are governed by the Delaware Revised Uniform Limited Partnership Act (“DRULPA”).²³ Section 17-108 of the DRULPA allows a limited partnership to “indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever.”²⁴ A limited partnership is a creature of both statute and contract, and, like the LLC Act, the DRULPA “embodies the policy of freedom of contract and maximum flexibility.”²⁵ The Delaware Supreme Court has recognized that parties to a Delaware limited partnership have the discretion to create a limited partnership “in an environment of private ordering” and operate the partnership according to the provisions in the partnership agreement.²⁶ The DRULPA is therefore “broadly empowering and deferential to the contracting parties’ wishes regarding indemnification and advancement.”²⁷

III. DIFFERENCES BETWEEN ADVANCEMENT AND INDEMNIFICATION UNDER THE DGCL AND THE ALTERNATIVE ENTITIES ACTS

Alternative business entities such as LLCs and LPs have proliferated in the past two decades. Indeed, the formation of LLCs and LPs recently outpaced the formation of Delaware corporations.²⁸

While the DGCL provides a default structure of indemnification and advancement for Delaware corporations, the LLC Act and the LLP Act simply permit the members or partners to provide for such rights contractually. As the law applicable to these newer forms of business organization has developed, practitioners have sometimes attempted to apply the well-developed body of corporate law to such entities.²⁹ It is crucial, however, to recognize the differences in the fundamental nature of these business forms and critically evaluate those concepts in light of the contractual provisions that the members or partners chose to govern their business relationship. The body of law developed in the corporate context may not apply to the specific contractual provisions negotiated (or simply chosen) by the participants in an alternative business form. Delaware Courts have repeatedly stressed that alternative entities are creatures of contract and the contractual terms selected by the parties must be given primacy.³⁰

23. See 6 Del. C. §§ 17-101 *et seq.*

24. See also *Delphi*, 1993 WL 328079, at *2 (interpreting Section 17-108 of the DRULPA and noting that “Section 17-108 defers completely to the contracting parties to create and delimit rights and obligations with respect to indemnification and advancement of expenses. The statute itself creates no rights to indemnification.”).

25. 6 Del. C. §17-1101(c); *Gotham P’rs, L.P. v. Hallwood Realty P’rs, L.P.*, 817 A.2d 160, 170 (Del. 2002) (citing *Elf Atochem N. Am., Inc. v. Jafari*, 727 A.2d 286, 290, 291 n.27 (Del. 1999)).

26. *Twin Bridges Ltd. P’ship v. Draper*, C.A. No. 2351-VCP, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007.) (citing *Gotham P’rs*, 817 A.2d at 170).

27. *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, C.A. No. 14-15478-VCS, 1999 WL 743479, at *16 (Del. Ch. Sept. 10, 1999) (citing *Delphi*, 1993 WL 328079, at *1-2)).

28. See Rodney D. Chrisman, *LLCs Are the New King of the Hill: A Empirical Study of the Number of New LLCs, Corporations, or LLPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 *FORDHAM J. CORP. & FIN. L.* 460 (2010).

29. See, e.g., *DeLucca*, 2006 WL 224058, at *2 (rejecting attempt to “superimpose” the “typical ‘corporate capacity’ analysis” on the terms of an LLC indemnification provision “despite its absence from the contractual text.”).

30. See, e.g., *Phillip v. Centerstone Linen Services, LLC*, C.A. No. 8712-ML, 2013 WL 6671663, at *5 (Del. Ch. Dec. 3, 2013); *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co. LLC*, C.A. No. 20116-VCL, 2004 WL 550743, at *3 (Del. Ch. Mar. 10, 2004).

A. Fullest Extent Provisions

Many corporations include stock language in their charters or bylaws that includes mandatory indemnification and advancement “to the fullest extent permitted by Delaware law.” In the corporate context, it is well established that the “fullest extent” provisions encompass both indemnification and advancement under the default provisions of the DGCL and include the broadest possible right available.³¹ For example, such provisions require the indemnification of expenses incurred in successfully prosecuting an indemnification suit (*i.e.*, “fees on fees”)³² or fees incurred in successfully defending counterclaims brought by the corporation even when the indemnitee initiates the action.³³ Delaware Courts have also provided substantial guidance regarding the meaning of the terms employed in Section 145 of the DGCL including “by reason of the fact,” “in defending,” “successful on the merits or otherwise,” and “final disposition” under fullest extent provisions.

It is less clear, however, what the “fullest extent” terminology could mean for LLCs and LPs where the statute is simply broadly enabling and default terms are absent.³⁴ Indeed, two prominent members of the Delaware judiciary have recently noted that “when investors try to evaluate [alternative entity] contract terms, the expansive contractual freedom authorized by the alternative entity statutes hampers rather than helps. Precisely because the statutes lack mandatory terms and permit great flexibility, a profusion of provisions abounds.”³⁵

In *Stockman v. Heartland Indus. Partners, L.P.*,³⁶ the Court of Chancery interpreted a limited partnership agreement that had an indemnification provision that began “[t]o the fullest extent permitted by law, the Partnership agrees to indemnify and save harmless each of the Indemnitees from and against *any and all claims*, liabilities damages, losses, costs and expenses ... *of any nature whatsoever*, known or unknown, liquidated or unliquidated....”³⁷ The Court viewed this provision as “an expansive grant of mandatory indemnification rights.”³⁸ The Court noted that “to the fullest extent

31. See *Zaman v. Amedeo Holdings, Inc.*, C.A. No. 3115-VCS, 2008 WL 2168397, at *16 (Del. Ch. May 23, 2008) (interpreting “fullest extent” bylaw provision to encompass mandatory indemnification under Section 145(c)); *Cochran v. Stifel Fin. Corp.*, C.A. No. 173-350-VCS, 2000 WL 1847676, at *8 (Del. Ch. Dec. 13, 2000) (interpreting “fullest extent” contract provision to encompass mandatory indemnification under Section 145(c)), *aff’d in pertinent part*, 809 A.2d 555 (Del. 2002); *Dunlap v. Sunbeam Corp.*, 1999 WL 1261339, at *5 (Del. Ch. July 9, 1999) (holding that advancements were required under mandatory provision so long as mandatory indemnification under Section 145(c) remained a possibility).

32. *Stifel*, 809 A.2d at 561.

33. *Paolino*, 2009 WL 4652894, at *6.

34. See *Stockman v. Heartland Indus. Partners, L.P.*, C.A. Nos. 4227, 4427-VCS, 2009 WL 2096213, at *8 (Del. Ch. July 14, 2009) (noting that the DRULPA provides “wider freedom of contract” permitting limited partnerships to “craft their own scheme for a partnerships indemnitees than is available to corporations under Section 145 of the DGCL, which creates mandatory indemnification rights for corporate indemnitees in some circumstances and also bars indemnification in others.”).

35. Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in *ELGAR HANDBOOK ON ALTERNATIVE ENTITIES* (Mark Lowenstein & Robert Hillman eds., forthcoming 2014).

36. *Stockman*, 2009 WL 2096213, at *12.

37. *Id.*

38. *Id.*

permitted by law” language is “common in both corporate bylaws and in alternative entity operating agreements, and is ‘an expression of the intent for the promise of indemnity to reach as far as public policy will allow.’”³⁹ In *Stockman*, the limited partnership was required to provide indemnification for former officers of a portfolio company in connection with civil and criminal proceedings involving allegedly fraudulent financial reporting. Under such an expansive indemnification provision, however, one could conceive of mandatory indemnification for conduct that is less related to the business affairs of the entity – such as sexual harassment charges against a manager at a holiday party or even battery charges against an employee who channels “Terry Tate — Office Linebacker” when another employee forgets to refill the coffee pot. A contractual commitment to indemnify someone from “any and all claims ... of any nature whatsoever” reflects both poor drafting and bad business decision-making.

Drafters of indemnification agreements for alternative entities must exercise caution because, as expansive as indemnification rights may be under the DGCL, the DGCL provides an outer limit for those rights in the statutory requirements that, among other things, the claims arise “by reason of the fact” that the indemnitee was an “director, officer, employee or agent of the corporation,” whereas by contrast, the LLC Act and LP Act do not circumscribe the scope of the indemnification and advancement rights in any way.⁴⁰ Moreover, unless the indemnitee was an active participant in drafting the indemnification provision itself, any ambiguities are likely to be construed against the company and in favor of indemnification.⁴¹ Thus, a “fullest extent” indemnification provision for an LLC or LP could result in expansive, unanticipated, and expensive indemnification and advancement obligations for the business.

B. Who Is Covered By The Indemnification Provision?

Corporate indemnification and advancement provisions often apply to directors and officers and avoid extending mandatory advancement and indemnification rights to agents and employees. Such rights do not extend to investors (stockholders). The LLC Act and LP Act, however, do not limit who may receive indemnification.⁴² Instead, they permit the entities to offer indemnification to members, managers, partners, and “other persons from and against any and all claims and demands whatsoever.” Thus, passive investors without any role in managing the business affairs of the entity may be provided with indemnification and/or advancement rights.

39. *Id.* (citations omitted).

40. *Branin*, 2014 WL 2961084, at *8 n.54 (noting that “Defendants argue that to the ‘full extent permitted’ by Delaware law means to the full extent permitted by the [LLC Act]. The implication of Defendants’ assertion is that the full extent of the law permitted by Delaware’s [LLC Act] is limited and would prevent a company from creating an indemnification or advancement scheme which mirrors that permitted under Delaware’s corporate law in a manner which reproduces the results of *Kidsco* or *Salaman*. Defendants’ approach fails because it does not account for the broad powers granted to drafters of operating agreements.”) (internal citations omitted).

41. *Stockman*, 2009 WL 2096213, at *5 (“When an agreement like the Partnership Agreement makes promises to parties who did not participate in negotiating the agreement, Delaware courts apply the general principle of *contra proferentum*, which holds that ambiguous terms should be construed against their drafter. The *contra proferentum* approach protects the reasonable expectations of people who join a partnership or other entity after it was formed and must rely on the face of the operating agreement to understand their rights and obligations when making the decision to join.”); *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42-44 (Del. 1998) (holding that ambiguities in a limited partnership agreement should be construed against the general partner unless all participants engaged in individualized negotiations); *Harrah’s Entm’t, Inc. v. JCC Holding Co.*, 802 A.2d 294, 309-10 (Del. Ch. 2002).

42. *Branin*, 2014 WL 2961084, at *4 (noting that “[n]o criteria are established by statute to govern the indemnification that limited liability companies may offer.”).

Indemnification and advancement rights often are limited to expenses incurred in a business capacity. The scope of what is permitted, however, can be very different in a corporate case under Section 145 than under contractual provisions applicable to an alternative entity. Section 145 of the DGCL permits corporations to “indemnify any person who was or is a party or is threatened to be made a party . . . *by reason of the fact* that the person is or was a director, officer, employee, or agent of the corporation.” (emphasis added). Corporate charters, bylaws and indemnification agreements often track the language of Section 145 to ensure broad indemnification and advancement rights. The Delaware Supreme Court has held that “if there is a nexus or causal connection between any of the underlying proceedings . . . and one’s official corporate capacity, those proceedings are ‘by reason of the fact’ that one was a corporate officer, without regard to one’s motivation for engaging in that conduct.”⁴³ The requisite causal “connection is established if the corporate powers were used or necessary for the commission of the alleged misconduct.”⁴⁴ In *Perconti v. Thornton Oil Corp.*, for example, the Court of Chancery found that a corporate officer was entitled to indemnification after an unsuccessful criminal prosecution for, among other things, “investing beyond his authority and directing that corporate funds be applied for his personal benefit.”⁴⁵ Even though that indemnitee was alleged to have engaged in criminal conduct for personal benefit, he was, nevertheless, prosecuted by “reason of fact” that he was an officer because his “use of corporate powers entrusted to him was critical to, and instrumental in, the carrying out of the scheme in which he participated and because of which the [i]ndictment issued.”⁴⁶ On the other hand, the Court has held that the requisite causal connection does not exist when the proceeding “does not involve the exercise of judgment, discretion or decision-making authority on behalf of the corporation” such as the breach of personal contractual obligations under an employment agreement (*e.g.*, taking too much vacation time or submitting fraudulent travel expenses) without any connection to official duties to the company.⁴⁷

In the alternative entity context, however, there is minimal statutory “patina.”⁴⁸ The Court must simply determine whether indemnification or advancement is available under the relevant contractual provisions. An LLC or LP agreement may provide for indemnification and advancement for ‘any and all claims and demands whatsoever.’ Thus, the indemnifiable expenses need not be incurred in the potential indemnitee’s business capacity or even in connection with the business that is providing the indemnification.

In *Giannini v. Arthur Dogswell LLC*, after the company asserted claims against Giannini alleging breaches of a non-compete agreement and Giannini’s fiduciary duties to the Company, Giannini demanded advancement for his defense costs.⁴⁹ The LLC agreement provided for indemnification “to the fullest extent permitted by law” for any “threatened, pending or completed claim, action, suit or proceeding . . . arising out of, related to or in connection with” the terms of

43. *Homestore*, 888 A.2d at 214.

44. *Danenberg v. Fittracks, Inc.*, C.A. No. 6454-VCL, 2012 WL 11220, at *5 (Del. Ch. Jan. 3, 2012) (citation omitted).

45. *Perconti*, 2002 WL 982419, at *7.

46. *Id.*

47. *Paolino*, 2009 WL 4652894, at *11-15 (internal citations omitted).

48. See *Reinhard & Kreinberg v. Dow Chem. Co.*, C.A. No. 3003-CC, 2008 WL 868108, at *2 (Del. Ch. Mar. 28, 2008) (noting that “indemnification is a right conferred by contract, under statutory auspice.’ Although Courts use the tools of contractual interpretation when construing bylaw provisions relating to indemnification and advancement, they simultaneously apply the patina of Section 145’s policy.”).

49. *Giannini v. Arthur Dogswell, LLC, et al.*, C.A. No. 8942-VCP, transcript at 4 (Del. Ch. Jan. 15, 2014).

the LLC agreement.⁵⁰ In granting summary judgment in favor of the indemnitee, the Court reasoned that the language in the LLC agreement “appears to have been used to capture the broadest possible universe.”⁵¹ The Court rejected the proffered defense that the claims were personal rather than official in nature, noting that “while the distinction between personal and fiduciary obligations may have some significance in determining advancement in the corporate context, it is not an inherently relevant distinction in the LLC context” because “in the LLC environment, an entity or individual’s right to advancement and indemnification is governed by the terms of the parties’ agreement and not by Section 145 of the DGCL.”⁵² The Court refused to apply by analogy the distinction between personal and fiduciary obligations under the DGCL, highlighting that the “LLC agreement allows for advancement and indemnification for claims ‘arising out of, related to or in connection with’ the company’s business or affairs” and that coverage is broader than what is provided for under Section 145 of the DGCL.⁵³

In *DeLucca v. KKAT Management, LLC*, the potential indemnitee (DeLucca) was incurring fees to defend herself against claims by her former employer (Katonah) and its controller (Kohlberg).⁵⁴ DeLucca had served as the managing member of Katonah, which managed certain investment funds (the “Funds”).⁵⁵ DeLucca and Kohlberg also invested their own money in the Funds through the KKAT Companies.⁵⁶ DeLucca claimed a right to advancement under the Operating Agreements of the KKAT Companies.⁵⁷

The indemnitors (the KKAT Companies), however, were not the beneficiaries of the relief sought in the claims brought by Katonah and Kohlberg against the indemnitee DeLucca. Accordingly, the KKAT Companies contended that “it [was] absurd to think that they [were] bound to advance funds to DeLucca.”⁵⁸ The Court noted that “[a]t first blush ... [t]he mind does initially recoil at the notion that the KKAT Companies could have an obligation to advance funds for DeLucca to defend herself against claims by her former employer, Katonah, and its controlling stockholder, Kohlberg, when those claims do not seek monetary damages on behalf of the Katonah Funds or the KKAT Companies. But after deeper consideration, that immediate reaction is mistaken.”⁵⁹

50. *Id.* at 8.

51. *Id.* at 20.

52. *Id.* at 19-20.

53. *Id.* at 21. Robust advancement provisions may also disincentivize indemnitors with potentially valid, but monetarily insignificant claims, from vigorously pursuing litigation against a former member or partner. When the indemnification obligation is greater than the value of a claim, thereby rendering the claim economically unreasonable, a plaintiff may choose to forego such a claim, even if it is otherwise strategically advantageous. These situations often arise in the business divorce context, as in *Giannini*, when the damages at issue may be *de minimus*, but the former business associates are vying for control.

54. *DeLucca*, 2006 WL 224058, at *1.

55. *Id.* at *3.

56. *Id.* at *1, 3.

57. *Id.* at *7-8.

58. *Id.* at *2, 11.

59. *Id.* at *12.

In granting the requested advancement, the “basic task of the court” was “the same as in a corporate advancement case,” and the Court’s role was to determine:

1) whether [the potential indemnitee] is within the class of persons who are generally covered by the Operating Agreement’s advancement provisions; 2) whether she has suffered losses of the kind that are generally eligible for advancement; and 3) whether those losses were incurred in connection with a legal proceeding for which advancement is due her under the Operating Agreements.⁶⁰

The Operating Agreement included “capacious and generous”⁶¹ language that provided for indemnification and advancement for any loss in “connection with or arising out of or related to” the KKAT Companies’ operating agreements, “the operation or affairs of a KKAT Company or [a] Fund, or the operations, or affairs of Kohlberg [and his Affiliates] if the loss was attributable to a KKAT Company or [a] Fund.”⁶² The Court found that DeLucca was an affiliate of Kohlberg and that her fees and expenses incurred in defending the action brought by Kohlberg and Katonah arose out of or “related to” the “operations and affairs” of the funds and that KKAT Companies.⁶³ Thus, the KKAT Companies — investors in the funds that were being managed by the entity that was suing the indemnitee for its own benefit — were obligated to fund DeLucca’s defense of claims asserted by the entity managing the funds in which they had invested for claims that did not seek relief on behalf of those investors.

In *Connecticut General Life Insurance Company v. Pinkas, et al.*, the indemnitee was a limited partner of the general partner (itself a limited partnership) of a limited partnership investment fund (the “Fund”).⁶⁴ Limited partners of the Fund asserted claims against the Fund’s general partner (the management company) and its general partner (the GP). The GP then caused the management company to assert counterclaims and a third party claim against a limited partner of the management company alleging that he usurped a corporate opportunity of the management company. Although indemnification was available from the management company, mandatory advancement was only available from the Fund. The indemnitee therefore sought advancement from the Fund. The Fund’s limited partnership agreement provided for the advancement to that entity’s General Partner, and to the general and limited partners, agents, and employees of the General Partner, of “attorneys’ fees and expenses which arise out of or in any way relate to the Partnership ... or which arise by reason of any of them being the General Partner, or a partner, employee, or Partner.”⁶⁵ In discussing the breadth of the term “relate to” in the indemnification provision in the Fund’s Operating Agreement at oral argument, the Court noted:

I’m not sure I know how to draft anything more encompassing [than] ‘relate to.’ ... I’m still struggling with the notion of ‘relating to’ is so broadly drafted that it would almost be the functional equivalent of if it touches upon, it relates to and — and, therefore, there’s a sufficient nexus to what was going on with [the partnership] for the indemnification provision if it otherwise applies to kick in.⁶⁶

60. *Id.* at *7.

61. *Id.* at*2.

62. *Id.* at *1, 7.

63. *Id.* at *9-11.

64. 2010 WL 4925832, at *1 (Del. Ch. Nov. 18, 2010).

65. *Id.*

66. *Connecticut Gen. Life Ins. Co. v. Pinkas, et al.*, C.A. No. 5724-VCN, transcript at 14-15 (Del. Ch. Nov. 1, 2010).

The Court found that the limited partner/indemnitee had established an entitlement to advancement under the Fund's limited partnership agreement, and noted that while the "it may be attenuated, the nexus between these claims and [the limited partnership] is sufficient to satisfy the very broad 'in any way relate to' language of the advancement provision."⁶⁷ Thus, although the indemnitee may have ultimately been entitled to indemnification from the management company in which he was a limited partner, the Court ordered the Fund to advance the indemnitee's defense costs.

Delaware courts have repeatedly urged practitioners to exercise caution in drafting broad advancement and indemnification provisions under the DGCL.⁶⁸ The lack of default standards and flexibility afforded to drafters of alternative entity provisions warrants even greater caution. A broadly drafted indemnification provision may require an LLC or LP to fund claims brought against another entity, including claims seeking a personal benefit

C. Nature Of The Claims Giving Rise To The Indemnification Or Advancement.

The DGCL limits the availability of indemnification and advancement to certain types of claims and conduct. Mandatory indemnification under Section 145(c) and advancement under Section 145(e) are limited to expenses incurred "in defense of" or "in defending" a proceeding. In addition, indemnification is only available if the indemnitee "acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful." These statutory limitations preclude an indemnitee from having the corporation fund offensive claims against it⁶⁹ or to pay indemnification for intentional malfeasance or knowingly unlawful conduct.⁷⁰

The LLC and LP Acts, however, do not include those statutory limitations.⁷¹ Thus, an LLC or LP Agreement may provide for indemnification or advancement for persons who are involved in a proceeding or investigation in any way – including as a plaintiff – and regardless of whether the indemnitee is found to have been acting in bad faith or with criminal intent. For example, a broadly drafted indemnification provision in an LLC Agreement may provide: "Indemnity of Members, Employees and Other Agents. The Company shall, to the maximum extent permitted under the Limited Liability Company Act, indemnify and make advances for expenses to Members." Such a provision raises substantial issues because "the LLC Act permits parties to an operating agreement to provide indemnification and advancement rights for

67. *Connecticut Gen.*, 2010 WL 4925832, at *1.

68. *See, e.g., DeLuca*, 2006 WL 224058, at *2 ("this is yet another case in which defendants in an advancement case seek to escape the consequences of their own contractual freedom. Regretting the broad grant of mandatory advancement they forged on a clear day, they seek to have the judiciary ignore the plain language of their contracts and generate an after-the-fact judicial contract that reflects their current preference. But it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court's job to enforce the clear terms of contracts.").

69. *See, e.g., Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992); *Paolino*, 2009 WL 4652894, at *6; *Zaman*, 2008 WL 2168397, at *16; *Baker v. Impact Holding, Inc.*, C.A. No. 5144-VCP, 2010 WL 2979050, at *3 (Del. Ch. July 30, 2010).

70. *See Hermelin v. K-V Pharma. Co.*, 54 A.3d 1093, 1094 (Del. Ch. 2012).

71. *Fillip*, 2014 WL 1821299, at *6("[U]nlike Section 145(e), the LLC Act does not preclude a company from providing advancement rights beyond fees and expenses incurred 'in defending' a covered proceeding. Section 18–108 permits a limited liability company to 'indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.'").

‘any and all claims and demands whatsoever.’”⁷² Such a provision would entitle members (and potentially “other agents” and “employees”) to receive both advancement and indemnification for fees and expenses regardless of the capacity in which they incurred those fees, regardless of whether they were incurred as a plaintiff or a defendant, they were seeking benefit themselves or the company, or they were acting with criminal intent.

Indeed, in *Salovaara v. SSP Advisors*, the Court granted indemnification to an indemnitee for his fees and expenses incurred *as a plaintiff* in connection with actions to obtain a “personal recovery” under a limited partnership agreement that was not limited to defensive indemnification.⁷³ More recently, in *Fillip v. Centerstone Linen Services, LLC*,⁷⁴ the Court highlighted that “LLC Act gives contracting parties complete discretion in establishing the scope of indemnification and advancement rights”⁷⁵ and noted that unlike the DGCL, limited liability company operating agreements can provide indemnification “without regard to whether those costs are incurred ‘in defense of’ a covered proceeding or claim.”⁷⁶

In the absence of statutory limits on advancement and indemnification rights, drafters of alternative entity agreements must be cautious to include clearly defined limits on the scope of advancement and indemnification rights so that the business does not find itself in the position of funding actions against it or indemnifying intentional misconduct.

D. Mandatory Indemnification

Section 145(c) provides for mandatory indemnification when a present or former director or officer has been “successful on the merits or otherwise in defense of” a proceeding. The language of Section 145 been held to be broad enough to entitle a former officer partial indemnification if he successfully defends himself against one count of a criminal indictment but is convicted on another count.⁷⁷ Contractual provisions governing LLCs and LPs, however, may not provide for any mandatory indemnification at all (*e.g.*, the company’s decision making body can grant or deny indemnification in its discretion) or provide for mandatory indemnification under an even broader standard.

In *Branin v. Stein Rowe Investment Council, LLC*,⁷⁸ the indemnitee sought indemnification for fees and expenses of over \$3 million in litigation that spanned over 10 years.⁷⁹ The LLC agreement provided for indemnification “for any loss, damage or claim by reason of any act or omission performed or omitted by such Person in good faith on behalf of the Company and, as applicable, in a manner reasonably believed to be within the scope of the authority conferred on it

72. *Fillip*, 2013 WL 6671663, at *4.

73. *Salovaara v. SSP Advisors, L.P., C.A. Nos. 20288-NC, 16579-NC, 2003 WL 23190391, at *1 (Del. Ch. Dec. 22, 2003).*

74. *Fillip*, 2014 WL 1821299.

75. *Id.* at *6.

76. *Id.*

77. *See Fasciana v. Elec. Sys Data Corp.*, 829 A.2d 160, 185 (Del. Ch. 2003) (citing *Cochran*, 2000 WL 1847676, at *4 n.10, *aff’d in part, rev’d in part*, 809 A.2d 555 (Del. 2002)).

78. *Branin*, 2014 WL 2961084.

79. *Id.* at *1.

by this Agreement.”⁸⁰ The Court noted that the indemnitee’s rights did not depend upon being “successful on the merits or otherwise in defense of any action.”⁸¹ Instead the agreement simply required that the potential indemnitee have acted “in good faith” and in a manner that the indemnitee reasonably believed was “within the scope of his authority.”⁸² The Court noted that further proceedings were necessary to resolve the factual questions under this standard.⁸³ Thus, under the indemnification provision litigated in *Branin*, an indemnitee could be unsuccessful in defending the claims brought against him but still entitled to indemnification if he could demonstrate that he acted in good faith and in a manner he reasonably believed to be within the scope of his authority.⁸⁴ When advancement and indemnification rights are not carefully circumscribed even losers can be winners.

Leaving an indemnification decision entirely within the company’s discretion may seem like a sensible approach. It can, however, have serious consequences when there has been a change in control or when the company does not have independent decision-makers to authorize the indemnification. In the event of a change in control under a discretionary structure, an indemnitee may find themselves completely vindicated in underlying litigation but strapped with a hefty bill for legal fees that the company’s new decision-makers are unwilling to pay. If the company lacks independent decision-makers to authorize the indemnification, granting the indemnification may invite a lawsuit on the grounds of self-dealing.⁸⁵ Careful drafting with experienced counsel enables a more insightful, and often more economically efficient, approach.

IV. CONCLUSION

Practitioners may find it convenient to apply well-developed principles of DGCL to issues involving alternative business entities, but the contractarian nature of alternative entities must be given primacy. Time and again, Delaware Courts have warned business people that they “must exercise the contractual freedom afforded to them under Delaware law to delimit the circumstances in which they are obliged to advance funds to, or ultimately indemnify, employees and other officials. There is no requirement that advancement provisions be written broadly or in a mandatory fashion. But when an advancement provision is, by its plain terms, expansively written and mandatory, it will be enforced as written.”⁸⁶ Advancement and indemnification provisions in documents governing contractual alternative entities should be given particularly close scrutiny because even the limits of the DGCL do not apply to contractarian alternative entities. Far too often, participants in alternative entities do not carefully consider the importance and application of the indemnification and advancement provisions in their governing documents until it is too late.

80. *Id.* at *2

81. *Id.* at *5.

82. *Id.*

83. *Id.* at *10.

84. *See id.*

85. *See, e.g.,* *Havens v. Attar*, C.A. No. 15134-VCC, 1997 WL 55957, at *13-14 (Del. Ch. Jan. 30, 1997) (holding that plaintiffs were reasonably likely to rebut the presumptions of the business judgment rule in challenging a *quid pro quo* advancement decision).

86. *DeLuca*, 2006 WL 224058, at *13; *Branin*, 2014 WL 2961084, at *14 n.43.

METHODS FOR MODIFYING TRUSTS UNDER DELAWARE LAW

Daniel F. Hayward and Miguel D. Pena*

Delaware has become a favored jurisdiction for trusts for many reasons, perhaps most notably due to the flexibility and administrative advantages afforded by Delaware law. Individuals from across the country, and even internationally, have increasingly begun to use Delaware situs trusts to accomplish their planning objectives. In many cases, individuals with existing irrevocable trusts with a non-Delaware situs will seek to move the situs of the trust from another jurisdiction to Delaware in order to take advantage of certain aspects of Delaware law.¹ The purpose of this article is to discuss the various techniques available for migrating a non-Delaware situs trust to Delaware and modifying or reforming certain provisions of the governing instrument.

I. THE *PEIERLS* CASES IN DELAWARE COURT OF CHANCERY

Before the Delaware Supreme Court's rulings in the *Peierls* cases,² it was common practice in Delaware for parties interested in moving (or "migrating") a trust to Delaware from another jurisdiction to file a petition with the Delaware Court of Chancery ("Chancery Court") asking the Court to (i) confirm the appointment of a Delaware corporate trustee, (ii) accept jurisdiction over the trusts, and (iii) approve modification and reformation of the trusts at issue. In the context of such petitions, each of the beneficiaries would consent (thus leading to such petitions to be commonly referred to as "consent petitions") to the relief requested in the petition, and the Delaware trustee's acceptance of its appointment as successor trustee would typically be contingent upon an order from the Chancery Court confirming such requested relief.

The Peierls family sought to move several trusts to Delaware and to consolidate management of the trusts.³ The Peierls trusts had similar dispositive and administrative provisions, but not all were situated in the same jurisdiction and had different trustees.⁴ Petitions regarding each of the five inter vivos trusts, seven testamentary trusts, and one charitable

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1. There are a number of advantages to migrating a trust to Delaware, all of which have been discussed at length by other authors. See, e.g., R. Nenno, *Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection*, ALI-ABA Planning Techniques for Large Estates, 509-651 (Apr. 2007); T. Pulsifer, Esq., *Taking Advantage of the "Delaware Advantage": Why and How to Settle Trusts in Delaware and Move Trusts to Delaware*, <http://www.mnat.com/assets/attachments/208.pdf>. The purpose of this article, however, is not to discuss the relative advantages of Delaware law relating to trusts, but to summarize the various ways to transfer the situs of and modify an existing trust under Delaware law.

2. *In re Peierls Family Testamentary Trusts*, 77 A.3d 223 (Del. 2013) [hereinafter *Peierls Testamentary Trusts*]; *In the Matter of Ethel F. Peierls Charitable Lead Unitrust*, 77 A.3d 232 (Del. 2013) [hereinafter *Peierls Charitable Lead Unitrust*]; *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249 (Del. 2013) [hereinafter *Peierls Inter Vivos Trusts*].

3. *Id.*

4. Most of the trusts had a corporate trustee and two individual trustees.

lead unitrust were filed in the Chancery Court asking for the following relief with respect to each trust: (i) approval of the resignation of the individual trustees; (ii) confirmation of the appointment of a Delaware corporate trustee for each trust; (iii) acceptance by the Chancery Court of jurisdiction over each trust so that Delaware would be the situs of each trust and Delaware law would govern the administration of each trust; and (iv) modification or reformation of certain administrative provisions of each trust (including the creation of the positions of Investment Direction Adviser and Trust Protector, and modification of the provisions relating to the removal, resignation and appointment of corporate trustees).

The Chancery Court denied the petitions. With respect to the petitions relating to the five inter vivos trusts, the Chancery Court concluded that Delaware law did not govern the trusts and would not govern the trusts even if the Delaware corporate trustee accepted its appointment as successor corporate trustee.⁵ The Chancery Court held that because Delaware law did not currently govern the administration of the trusts, it could not consider the proposed modifications because the proposed modifications contemplated the use of Delaware law in order to effectuate the proposed modifications.⁶ With respect to the seven testamentary trusts, the Chancery Court concluded that other states retained jurisdiction over those trusts and therefore refused to consider such petitions as to do so would violate interstate comity principles.⁷ The Chancery Court denied the petition relating to the charitable lead unitrust because it concluded that the petitioners could already change the situs and administration of that trust under the terms of its governing instrument without the need for court involvement and that “reformation” of the trust, as opposed to “modification,” was not a proper remedy.⁸ Lastly, the Chancery Court held that it could not rule upon the resignation and appointment of trustees because the governing instruments already contained provisions relating to the resignation and appointment of trustees, and therefore ruling upon such matters would constitute an advisory opinion.⁹ The petitioners appealed the Chancery Court decision to the Delaware Supreme Court, which issued its opinions in October of 2013.

II. THE *PEIERLS* CASES IN THE DELAWARE SUPREME COURT: ADMINISTRATIVE SITUS, CHOICE-OF-LAW AND JURISDICTIONAL PREREQUISITES

The Delaware Supreme Court analyzed three issues in its opinions: (i) when does Delaware law govern the administration of a trust,¹⁰ (ii) when can or should a court exercise jurisdiction over a trust,¹¹ and (iii) whether the relief requested constituted an impermissible advisory opinion.¹²

5. *Peierls Inter Vivos Trusts*, 77 A.3d at 260.

6. *Id.* at 255.

7. *Peierls Testamentary Trusts*, 77 A.3d at 229-230.

8. *Peierls Charitable Lead Unitrust*, 77A. 3d at 237-238.

9. *Id.* at 237.

10. *Peierls Inter Vivos Trusts*, 77 A.3d at 256.

11. *Peierls Testamentary Trusts*, 77 A.3d at 228.

12. *Peierls Charitable Lead Unitrust*, 77 A.3d at 237.

The Delaware Supreme Court concluded that if a governing instrument contains a choice of law provision, the law governing the administration of the trust can be changed by changing the location of administration of the trust via appointment of a successor trustee in another jurisdiction, unless the governing instrument specifically provides that the laws of a particular jurisdiction shall always govern the administration of the trust.¹³

The Delaware Supreme Court held that the relief requested in the *Peierls* petitions (i.e., change of existing trustees, acceptance of jurisdiction over the trusts, change of trust situs and administrative law, and modifications of the trusts, including the creation of the positions of Investment Direction Adviser and Trust Protector) were “administrative matters.”¹⁴

A. Situs And Choice-Of-Law Issues Associated With Statutory Methods To Modify Or Reform Trusts

In order to access the methods available under Delaware practice and law to modify or reform an irrevocable trust, whether judicial or non-judicial in nature, the first key issue is to determine whether Delaware law applies to the administration of the trust. This question is critical because, as will be later discussed, once Delaware law governs the administration of a trust, the non-judicial methods for modifying an irrevocable trust potentially become available to the interested parties to the trust (assuming all other statutory requirements of such nonjudicial methods can be met). In addition, if the interested parties utilize the consent petition process in order to add administrative provisions that are specific to Delaware law, the ability to affirmatively show that Delaware law governs the administration of the trust can greatly simplify the consent petition process, since the petitioners will be able to avoid the need to address in the pleadings the laws of a jurisdiction (other than Delaware) relating to the ability to make the requested modifications to the trust.

Whether Delaware law governs the administration of a trust is very closely linked to the trust’s place of administration (commonly referred to as the “administrative situs,” or sometimes simply the “situs,” of the trust). If a trust contains a provision selecting Delaware law to govern the administration of the trust, and if the trust is being administered in Delaware, then typically no further inquiry is needed, as Delaware law generally provides that the administration of a trust shall be governed by Delaware law while the trust is administered in Delaware.¹⁵ A potentially more difficult scenario is where an irrevocable trust originally settled outside the State of Delaware is either (i) is silent as to law that governs of the administration of the trust, or (ii) affirmatively designates the law of a jurisdiction other than Delaware to govern the administration of the trust.

When seeking to migrate an irrevocable trust from another jurisdiction to Delaware, the question that naturally arises is whether the transfer of the administrative situs of a trust to Delaware is sufficient to then govern the administration of the trust, particularly if the trust selects another jurisdiction’s laws as the governing law of the trust. As previously noted, pursuant to Section 3332(b), the administration of a trust will be governed by Delaware law while the trust is administered in Delaware; however, the statute sets forth an exception stating that the general rule shall not apply if the application of the laws of another jurisdiction is “otherwise expressly provided by the terms of a governing instrument or by court order.” As such, under Section 3332 the question of whether changing the administrative situs of a trust from another jurisdiction to Delaware will cause Delaware law to apply to the administration of the trust is arguably left open

13. *Peierls Inter Vivos Trusts*, 77 A.3d at 258-259.

14. *Id.* at 256.

15. DEL. CODE ANN. TIT. 12, § 3332(B) (2006) [hereinafter “Section 3332(b)”].

to varying interpretations. However, the *Peierls* decisions directly addressed the impact of transferring the administrative situs of irrevocable trusts to Delaware through the appointment of a Delaware corporate trustee in a variety of factual circumstances, which has shed some much-needed light on the matter.

In *Peierls Inter Vivos Trusts*, the Delaware Supreme Court concluded that even if a trust contains a governing law provision, the law governing the administration of a trust will change when the place of administration of the trust (i.e., the administrative situs of the trust) is transferred as a result of the proper appointment of a successor trustee, unless the settlor has specifically stated his or her intent that a state's law shall always govern the administration of that trust.¹⁶ The Court related this principle back to the settlor's intent in creating the trust by stating that “[W]hen a settlor does not intend his choice of governing law to be permanent and the trust instrument includes a power to appoint a successor trustee, the law governing the administration of the trust may be changed.”¹⁷

In *Peierls Inter Vivos Trusts*, the Delaware Supreme Court analyzed the provisions of each of the inter vivos trusts at issue and determined that the settlor did not intend that the initial law governing the administration of the trusts, as reflected in the choice-of-law provisions contained in the trusts, must always remain the law of the original jurisdiction, and concluded that for each trust the “law of administration would change with a change in the place of administration.”¹⁸ It is important to note that, in connection with the discussion that follows concerning potential jurisdictional obstacles to be overcome before utilizing the available methods to modify or reform trusts under Delaware law, the trusts at issue in *Peierls Inter Vivos Trusts* had not previously been subject to court action in any jurisdiction. The Delaware Supreme Court was careful to note that for a typical inter vivos trust that has never been the subject of court action, a court acquires jurisdiction “only when a beneficiary or trustee brings a suit over the trust,” which is distinguishable from the situation in which the trustee has become subject to the continuing jurisdiction of a court to which the trustee is thereafter accountable.¹⁹ *Peierls Testamentary Trusts* contains a thorough discussion of the choice-of-law principles that apply when a trust is subject to the continuing jurisdiction of a particular court.²⁰

Determining the scope of matters that are administrative in nature is critical to understanding what issues relating to a trust will be governed by Delaware law. Thankfully, the Delaware Supreme Court does not disappoint, noting that administrative matters are matters relating to the management of the trust, including, among other matters, a trustee's powers and liabilities, the proper investments for the trust, and the removal and appointment of trustees.²¹ In *Peierls Inter Vivos Trusts*, the Delaware Supreme Court held that the items of relief requested in the consent petitions (which included the proposed modification of the trusts to create the positions of Investment Direction Adviser with authority over trust investment decisions and Trust Protector with the authority to amend the administrative and technical provisions of the trusts) were all “administrative matters.”²² The practical result of the holdings in the *Peierls* decisions is that for most *inter*

16. *Peierls Inter Vivos Trusts*, 77 A.3d at 263-64 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 271 cmt. g (1971)).

17. *Id.* at 259.

18. *Id.* at 263-66.

19. *Id.* at 257-58 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 272 cmt. e (1971)).

20. See discussion *infra* Part II.B.

21. *Peierls Inter Vivos Trusts*, 77 A.3d at 256 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 272 cmt. a (1971)).

22. *Id.*

vivos trusts settled outside of Delaware, once the administrative situs of the trust is transferred to Delaware through the appointment of a Delaware corporate trustee, Delaware law will then govern the administration of the trust, which in turn will allow the interested parties to the trust to access the methods available under Delaware to reform or modify the trust.

Even with the guidance provided by Section 3332(b) and the *Peierls* decisions in the areas of administrative situs and the determination of when the law governing the administration of a trust originally settled outside of Delaware, some questions remain that may be ripe for further clarification through future action by the General Assembly or the courts. For example, if a trust has multiple fiduciaries serving, how much “administration” needs to take place in the State of Delaware in order for Delaware to be considered the primary place of administration and administrative situs of the trust for purposes of Section 3332(b) or the *Peierls* decisions? While *Peierls Inter Vivos Trusts* does not directly answer this question, some insight can be gained from the ruling as the Delaware Supreme Court concluded that the appointment of a Delaware corporate trustee to replace the current non-Delaware corporate trustee would result in the application of Delaware law to the administration of the trust.²³ This suggests that the location or place of business of the corporate trustee is directly relevant in determining the administrative situs of a trust when the trust has multiple trustees serving at any given time.

III. METHODS FOR MODIFICATION

In light of the clarification of Delaware law regarding jurisdictional issues and the mechanics of the migration and modification of trusts set forth in the *Peierls* decisions, there are now several options available to individuals to move an existing trust to Delaware and modify it to take advantage of Delaware’s laws relating to the administration of trusts.

A. Consent Petitions

The consent petition process is governed by Delaware Court of Chancery Rules 100 through 104, which provide a streamlined judicial mechanism for the modification of trusts. Trust fiduciaries and trust beneficiaries may find the consent petition process to be an attractive option for modifying an irrevocable trust as compared to the available non-judicial methods. Among other reasons, the Delaware Court of Chancery’s imprimatur can carry significant weight among the interested parties. Further, the governing Rules contain numerous safeguards to ensure that jurisdictional, administrative situs and governing law requirements are met and that minor or unborn beneficiaries are properly represented. For these reasons, the consent petition process is a popular way to modify the administrative provisions of Delaware trusts, in particular the addition of “Advisers” under Delaware’s directed trust statute²⁴ with the authority to direct the trustee with respect to distribution decisions or decisions relating to the investment and management of trust assets.

The Delaware Court of Chancery Rules require that the party seeking a modification to a trust address in the petition (i) the basis for the Court’s jurisdiction over the trust,²⁵ (ii) whether the trust was settled or creates in a state

23. See *Peierls Inter Vivos Trusts*, 77 A.3d at 263-66

24. DEL. CODE ANN. TIT. 12, § 3313 (2014).

25. DEL. CHANC. CT. R. 100(a)(3) (stating that petition must address “[T]he basis for this Court’s jurisdiction over the trust and, to the extent jurisdiction is based on Delaware being the principal place of administration, a description of the administrative tasks and duties carried out by the Delaware trustee or other Delaware fiduciaries and a comparison of those tasks and duties to those entrusted to fiduciaries or proposed fiduciaries domiciled outside of Delaware.”).

other than Delaware or contains a choice of law provision that selects the law of a jurisdiction other than Delaware,²⁶ (iii) whether application has been made to the courts of the jurisdiction in which the trust had its situs immediately prior to the change in situs to Delaware,²⁷ and (iv) whether Delaware law governs the administration of the trust, and, if so, why.²⁸ For all such requirements, the *Peierls* decisions are instructive and have provided much needed clarity. Pursuant to the principles set forth in *Peierls Inter Vivos Trusts* and *Peierls Testamentary Trusts*, for most inter vivos trusts that are not subject to the primary supervision of another state, the key to establishing jurisdiction and administrative situs in Delaware and the application of Delaware law to the administration of the trust is to appoint, through the mechanism contained in the trust's governing instrument, a Delaware trustee prior to filing the Petition.

There are factual scenarios that will require an initial proceeding in the courts of a jurisdiction other than Delaware in order to release jurisdiction or transfer the situs of the trust to Delaware contingent upon an order from the Delaware Court of Chancery accepting jurisdiction over the trust or confirming the transfer of the trust's situs. This is typically referred to as a "pitch and catch" procedure,²⁹ and the consent petition will typically seek to modify the trust in addition to confirming the transfer of the trust's situs to Delaware. A "pitch and catch" may be required when (i) a court outside of Delaware is exercising primary supervision over the trust, (ii) the trust does not contain a valid mechanism for the appointment of a Delaware corporate trustee, in which case the court of such other jurisdiction will need to appoint the Delaware corporate trustee in addition to transferring the situs of the trust to Delaware, or (iii) the trust contains a provision stating that a particular jurisdiction's laws shall govern the administration of the trust even if the situs of the trust is moved, in which case the court of such other jurisdiction will need to change the law governing the administration of the trust to Delaware in addition to transferring the situs of the trust to Delaware.

A consent petition must include as exhibits a consent or statement of non-objection to the relief requested in the petition signed by all interested parties.³⁰ The interested parties to a trust may include, but are not limited to: (i) trustees and other fiduciaries (unless they have otherwise signified their consent to the Petition by acting as the Petitioner); (ii) the trust beneficiaries who have a current interest in the trust or whose interest would vest if the current interest in the trust terminated as of the date the petition is filed (without regard to the exercise or non-exercise of power appointment); and (iii) all other persons having an interest in the trust pursuant to the express terms of the trust instrument, such as power holders and persons having other rights and powers, held in a non-fiduciary capacity, with respect to trust property.³¹ A trust beneficiary's consent must be executed by: (i) the beneficiary personally; (ii) the beneficiary's attorney ad litem; (iii) a person authorized to virtually represent the beneficiary pursuant to 12 Del. C. § 3547 or any successor statute; or (iv)

26. DEL. CHANC. CT. R. 100(A)(2).

27. DEL. CHANC. CT. R. 100(d)(3) (stating that if the petition seeks to apply Delaware law to a trust despite a choice of law provision selecting the law of another jurisdiction to govern the trust, then the petition must address "[W]hether application has been made to the courts of the jurisdiction in which the trust had its situs immediately before the change in situs to Delaware for approval of the transfer of situs of the trust to Delaware, and the status of the application, or if no application was made, why such approval need not be sought.").

28. DEL. CHANC. CT. R. 100(D)(4).

29. See *Peierls Testamentary Trusts*, 77 A.3d at 230.

30. DEL. CHANC. CT. R. 101(A)(7).

31. *Id.*

a person authorized by applicable law to represent the beneficiary with respect to the Petition (such as the beneficiary's attorney-in-fact or the Delaware Attorney General in the case of certain charitable beneficiaries).³²

A minor or unborn beneficiary may be virtually represented by another party for purposes of any judicial proceeding or non-judicial matter involving a trust.³³ The virtual representation statute provides that the interest of "a minor, incapacitated, or unborn person, or a person...whose identity or location is unknown and not reasonably ascertainable" may be represented and bound by another with a substantially identical interest, to the extent that there is no material conflict of interest between the representative and the person being represented with regard to the particular question or dispute.³⁴ In the case of a minor or incapacitated beneficiary, the surviving and competent parent or parents (or the custodial parent in cases where one parent has sole custody) may represent and bind the beneficiary, provided "there is no material conflict of interest between the minor or incapacitated beneficiary and either of such beneficiary's parents with respect to the particular question in dispute."³⁵ A "presumptive remainder beneficiary" (one who would take if the trust terminated at that time without regard to the exercise or non-exercise of a power of appointment) may represent and bind contingent remainder beneficiaries, including adults and charities.³⁶ Use of the virtual representation statute can avoid the need for the Delaware Court of Chancery to appoint a guardian *ad litem* to represent the interests of minor or unborn beneficiaries in connection with a consent petition. However, the Court may appoint a guardian *ad litem* in the event the virtual representation statute cannot be properly invoked due to a material conflict of interest between the proposed representative and the minor or unborn beneficiary.

In 2013, the virtual representation statute was amended to provide that a material conflict of interest between a representative and each beneficiary is presumed when, as a result of the judicial proceeding or nonjudicial matter: (i) the representative will be appointed to a fiduciary or nonfiduciary office or role, unless the representative already serves in a fiduciary or nonfiduciary office or role and will not receive greater authority, broader discretion, or increased protection as a result of the new appointment; (ii) the representative currently holds a fiduciary or nonfiduciary office or role and will receive greater authority, broader discretion, or increased protection; or (iii) the representative has any other "actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth."³⁷ The 2013 amendment to the virtual representation statute aligns the virtual representation statute with Delaware Court of Chancery Rule 103 regarding what constitutes a material conflict of interest between a proposed representative and the individual proposed to be represented. As a practical matter, if the interested parties to a consent petition are seeking to create new fiduciary position and appoint trust beneficiaries in such roles, the parties should carefully consider the material conflict of interest presumptions set forth in the virtual representation statute if such beneficiary is purporting to virtually represent any other party.

32. DEL. CHANC. CT. R. 102(A)(2).

33. DEL. CODE ANN. TIT. 12, § 3547 (2013) [hereinafter the "virtual representation statute"].

34. DEL. CODE ANN. TIT. 12, § 3547(A) (2013).

35. DEL. CODE ANN. TIT. 12, § 3547(C) (2013).

36. DEL. CODE ANN. TIT. 12, § 3547(B) (2013).

37. DEL. CODE ANN. TIT. 12, § 3547(E) (2013).

In addition to modifying an irrevocable trust, it is also possible to utilize the consent petition process to seek a judicial *reformation* of an irrevocable trust. Under Delaware law, a trust reformation differs from a trust modification in that a reformation seeks to make a change to the trust that is effective as of the time of the creation of the trust, as opposed to a modification of a trust that only changes the terms of a trust from the date of the modification.³⁸ The Delaware Court of Chancery has authority to reform a trust, since “reformation is an equitable remedy and an ordinary remedy for mistake in the terms of a trust instrument.”³⁹

B. Decanting

Delaware law permits a trustee to distribute (or “decant”) the principal of a trust to the trustee of another trust that has the same dispositive provisions as the first trust.⁴⁰ Decanting has become an increasingly popular method for migrating trusts to Delaware and modifying such trusts to take advantage of certain aspects of Delaware trust law. Delaware’s decanting statute is available when Delaware law governs the administration of the trust or when the trust is administered in Delaware.⁴¹

The requirements of the decanting statute are as follows:

- (1) The beneficiaries of the second trust must also be beneficiaries of the first trust.⁴²
- (2) The second trust must comply with any standard that limits the trustee’s authority to make distributions from the first trust.⁴³
- (3) A written “decanting instrument” must be signed and acknowledged by the trustee and filed with the records of the trust.⁴⁴

While the second trust may not have beneficiaries who were not beneficiaries of the first trust, the decanting statute specifically permits the second trust to grant a beneficiary of the first trust a limited or general power of appointment, thereby allowing the beneficiary to appoint trust property to a person who is not a beneficiary of the first trust.⁴⁵

Unlike consent petitions, a trustee does not need the consent of the beneficiaries or any other interested party to exercise its decanting power. However, because decanting is an exercise of the trustee’s discretion it is common practice to have the beneficiaries consent to the decanting and release and indemnify the trustee from any liability in connection with the decanting.

38. See *Peierls Charitable Lead Unitrust*, 77 A.3d at 237-38.

39. 90 C.J.S. TRUSTS § 92.

40. DEL. CODE ANN. TIT. 12, § 3528(A) (2013).

41. DEL. CODE ANN. TIT. 12, § 3528(F) (2013).

42. DEL. CODE ANN. TIT. 12, § 3528(A)(1) (2013).

43. DEL. CODE ANN. TIT. 12, § 3528(A) (2013).

44. DEL. CODE ANN. TIT. 12, § 3528(B) (2013).

45. DEL. CODE ANN. TIT. 12, § 3528(A) (2013).

C. Merger

Delaware law permits the merger of trusts without judicial involvement. Under Delaware law, a trustee is authorized to “[m]erge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust.”⁴⁶ A simple merger instrument signed by the trustee is sufficient to accomplish a merger. Any changes to administrative provisions available through the consent petition process or decanting could also be accomplished by merger, including the addition of Investment Direction Adviser, Distribution Advisers and Trust Protectors.

Like decanting, merger is an exercise of the trustee’s discretion. While not required under the statute, best practices would suggest that the trustee obtain a release from the trust beneficiaries and other interested parties before effectuating a merger.

D. Nonjudicial settlement agreements

Another method for modifying trusts under Delaware law is through the use of a nonjudicial settlement agreement. In 2013, the State of Delaware enacted a nonjudicial settlement agreement statute⁴⁷ modeled closely after Section 111 of the Uniform Trust Code. As with the other methods that are available under Delaware to modify trusts without court involvement, the Delaware nonjudicial settlement agreement statute is available to any trust that is governed by Delaware law with respect to matters of administration.

What matters may be resolved and what type of modifications may be accomplished pursuant to a Delaware nonjudicial settlement agreement? The statute is quite new in Delaware, and, therefore, as of yet there is no judicial guidance interpreting its provisions. The language of the statute is quite broad, and provides that *any* matter involving a trust (with certain restrictions relating to charitable trusts and special purpose trusts) can properly be the subject of a Delaware nonjudicial settlement agreement.⁴⁸ The statute also provides a nonexclusive list of six matters that may be resolved by a nonjudicial settlement agreement: (i) the interpretation or construction of the terms of the trust; (ii) the approval of a trustee’s report or accounting; (iii) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power; (iv) the resignation or appointment of a trustee and the determination of a trustee’s compensation; (v) the transfer of a trust’s principal place of administration; and (vi) the liability of a trustee for an action relating to the trust.⁴⁹

A Delaware nonjudicial settlement agreement is “only valid to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the Court of Chancery under this title or other applicable law.”⁵⁰ What constitutes a “material purpose” is not defined under Delaware’s trust code, and there is no direct guidance in the model UTC provisions or the UTC’s commentary. However, the intent of the settlor in creating

46. DEL. CODE ANN. TIT. 12, § 3325(29) (2013).

47. DEL. CODE ANN. TIT. 12, § 3338 (2013).

48. DEL. CODE ANN. TIT. 12, § 3338(B) (2013).

49. DEL. CODE ANN. TIT. 12, § 3338(D) (2013).

50. DEL. CODE ANN. TIT. 12, § 3338(C) (2013).

the trust, express or implied, would likely be relevant in determining the “material purpose” of the trust. Interestingly, any interested person to a trust may seek judicial determination to interpret, apply, enforce or determine the validity of a nonjudicial settlement agreement,⁵¹ which opens the door for future judicial determinations of what constitutes a “material purpose” of the trust. As a practical matter, if the settlor of the trust is living at the time that entering into a nonjudicial settlement agreement is contemplated, then the issue of whether a material purpose of the trust is being violated may be largely moot. The settlor could be asked to provide an affidavit stating that the subject of the nonjudicial settlement agreement and any attendant changes to the trust do not violate a material purpose of the trust and are consistent with the settlor’s intentions in creating the trust. The settlor may also sign the nonjudicial settlement solely for the purpose of indicating the settlor’s non-objection or stating that the settlor takes no position with respect to the matters set forth in the nonjudicial settlement agreement.

All “interested persons” must be parties to the nonjudicial settlement agreement. Under the statute interested persons” means “persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the Court of Chancery.”⁵² As such, in determining who must sign the nonjudicial settlement agreement, the parties must look to the Delaware Court of Chancery Rules governing consent petitions, specifically Rule 101(a)(7) which sets forth a list of who must provide a consent or statement of non-objection in connection with a consent petition. This means that the same parties who must take part in a consent petition relating to a trust would also have to sign a nonjudicial settlement agreement relating to that trust. This requirement, along with the other protections and safeguards inherent in the nonjudicial settlement agreement statute, including the ability for any interested person to seek judicial approval of the matter at any time, may make a nonjudicial settlement agreement more attractive to the parties seeking to modify a trust as compared to decanting or merger, which involve a pure exercise of discretion on the part of the trustee and do not require the consent of or notice to any trust beneficiaries.

Since the enactment of the statute, some practitioners have questioned whether a Delaware nonjudicial settlement agreement can be used to modify or amend the administrative provisions of a trust that is governed by Delaware law as to its administration. The broad scope of the statute’s wording of the statute strongly suggests that modifying the administrative provisions of a trust is permissible as long as all other requirements are met. The interested persons may enter into a binding agreement with respect to *any* matter involving a trust, except with respect to charitable trusts and purpose trusts described in the Delaware Code.⁵³ The phrase “any matter” is inclusive rather than restrictive, suggesting that the presumption should be that a particular matter will fall within the proper scope of a nonjudicial settlement agreement rather than not. Indeed, jurisdictions that have adopted similar versions of a nonjudicial settlement agreement statute based upon Section 111 of the Uniform Trust Code, but did not wish for nonjudicial settlements agreements to be used to modify trusts, have seen the need to explicitly state such a restriction on the use of nonjudicial settlement agreement to counteract the otherwise permissive language contained in Section 111 of the Uniform Trust Code.⁵⁴

Further, the non-exclusive list of matters that can be resolved by a nonjudicial settlement agreement includes the “grant to a trustee of any necessary or desirable power.”⁵⁵ The use of a nonjudicial settlement agreement to expand a

51. DEL. CODE ANN. TIT. 12, § 3338(E) (2013).

52. DEL. CODE ANN. TIT. 12, § 3338(A) (2013).

53. DEL. CODE ANN. TIT. 12, § 3338(B) (2013).

54. See IOWA CODE, § 633A.6308.1; MICH. COMP. LAWS, § 700.7111(2).

55. DEL. CODE ANN. TIT. 12, § 3338(D)(3) (2013).

trustee's power would logically include the granting of a necessary or desirable power not already granted by the trust's governing instrument (otherwise the use of the nonjudicial settlement agreement to grant such powers would be unnecessary), and, as such, would effectuate a *de facto* modification of the trust's governing instrument. A nonjudicial settlement agreement may also be used to determine a trustee's liability for an action relating to a trust.⁵⁶ It has been suggested that use of a nonjudicial settlement agreement to limit or define a trustee's liability for particular actions (or inactions) through the use of a nonjudicial settlement agreement, in conjunction with the appointment of a trustee (which is also specifically permitted under the statute⁵⁷), could permit the appointment of a special trustee with certain exclusive powers that would otherwise be exercised by the existing trustee of the trust, and set forth the standard of liability that will apply to such special trustee.⁵⁸ This is another example of adding operative provisions to a trust's governing instrument that the governing instrument does not currently contain, which can only be properly described as a modification to the trust.

In light of the foregoing, Delaware nonjudicial settlement agreements can certainly be considered another valuable tool that interested parties can use to modify the administrative provisions of a trust, including common modifications that are desired such as the addition of Advisers under Delaware's directed trust statute⁵⁹ with the authority to direct the trustee as to distribution decisions or decisions relating to the investment and management of trust assets.

IV. CONCLUSION

Through the *Peierls* decisions, the Delaware Supreme Court has provided much needed clarity regarding the administrative, choice-of-law, and jurisdictional issues relating to the migration and modification of trusts under Delaware law. Practitioners now have four clear tools with which to assist their clients in their planning objectives.

56. DEL. CODE ANN. TIT. 12, § 3338(D)(6) (2013).

57. DEL. CODE ANN. TIT. 12, § 3338(D)(4) (2013).

58. Todd A. Flubacher and Kenneth F. Hunt, *The Non-Judicial Settlement Agreement Wrapper*, TRUSTS AND ESTATES, DECEMBER 2013, AT 42-44.

59. DEL. CODE ANN. TIT. 12, § 3313 (2014).

AUTHENTICATING SOCIAL MEDIA EVIDENCE AT TRIAL: INSTRUCTION FROM *PARKER v. STATE*

Douglas J. Cummings, Jr.*

On February 5, 2014, the Supreme Court of the State of Delaware articulated the standard against which trial courts must measure the sufficiency of a proffered authentication of social media evidence.¹ In resolving this matter of first impression in Delaware, the Court evaluated two contrasting approaches employed by courts of other jurisdictions and, ultimately, determined that the more flexible alternative comports with the requirements of the Delaware Rules of Evidence and the roles of judges and juries in Delaware.² As the Supreme Court did not limit the scope of its holding to criminal cases, this decision may also be relied upon to resolve authentication disputes in civil matters.

I. PROFFER OF SOCIAL MEDIA EVIDENCE TO SUPERIOR COURT

In *Parker v. State*, the defendant, Tiffany Parker (hereafter “Defendant” or “Appellant”), was charged with, *inter alia*, Assault Second Degree for punching the victim. At trial, the State sought to introduce Facebook comments, allegedly made by the defendant, regarding details of the physical altercation. The State elicited testimony from the victim that she was “told about a Facebook posting by the Defendant on the Defendant’s Facebook page [which] prompted her to look at [] and subsequently ‘share[]’ this post on her own Facebook page with her Facebook friends.”³ The defendant purportedly commented on this “shared” post by stating that the victim “hit her first.”⁴ Over the defendant’s objection as to authenticity, the Superior Court allowed the State to display a screenshot of the subject Facebook posts to the jury.⁵

Within its written decision resolving the defendant’s objection, the Superior Court acknowledged that Delaware, like many jurisdictions, had not yet developed a standard for the authentication of social networking sites such as Facebook, Twitter and MySpace.⁶ Notwithstanding, the Superior Court ruled that the Facebook post at issue was properly

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1. *Parker v. State*, 85 A.3d 682 (Del. 2014).
2. The Supreme Court adopted a broad definition of “social media” as “forms of electronic communications ... through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos).” *Id.* at 685 (citations omitted). “Often these posts will include relevant evidence for a trial, including party admissions, inculpatory or exculpatory photos, or online communication between users.” *Id.*
3. *State v. Parker*, C. A. No. 1112001354, Mem. Op. at 1 (Del. Super. Oct. 9, 2012) (hereafter “*Parker Trial Op.*”).
4. *Id.* The State sought to introduce these posts, which were allegedly authored after the altercation, to demonstrate Defendant’s role in the incident and discredit Defendant’s self-defense argument. *Parker*, 85 A.3d at 683.
5. *Parker Trial Op.*, at 1. *The screenshot was redacted as to the comments of persons other than Defendant.*
6. *Id.* at 2, 4-5. The Superior Court also reviewed case law from jurisdictions that had developed such a standard, including the Maryland and Texas cases that the Supreme Court would examine on appeal. See *id.* at 3-4 (citing *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011)); *id.* at 4-5 (citing *Tienda v. Texas*, 358 S.W.3d 633 (Tex. Crim. App. 2012)). See also *infra* at 3-9 (discussing Supreme Court’s evaluation of Maryland and Texas approaches).

authenticated based upon its “distinguishing characteristics,”⁷ where the content and context was sufficient circumstantial evidence that the posting was indeed what the State claimed that it was.⁸ The Court supported its ruling with the victim’s testimony as to how she (1) accessed the defendant’s Facebook posting, (2) “shared” the defendant’s posting directly, and (3) was able to view the defendant’s comments to that shared posting.⁹ The Superior Court included within its consideration that the “parties did not dispute that the posting was fabricated,” and, notably, that “[a]ny further inquiry was for the jury to decide.”¹⁰

The defendant appealed the resulting conviction based upon the alleged abuse of discretion of the Superior Court in admitting the Facebook evidence.¹¹

II. COMPETING AUTHENTICATION APPROACHES CONSIDERED BY THE SUPREME COURT

On appeal, each party asked the Supreme Court to recognize the approach to authentication of social media evidence that it advocated as the standard in Delaware. Specifically, the Appellant contended that the approach employed by courts in the State of Maryland should govern and, therefore, the Superior Court erred when it did not apply that standard in admitting the subject Facebook evidence. Conversely, the State contended that the comparatively flexible approach utilized by courts in the State of Texas should control and, therefore, the judgment of the Superior Court should be affirmed.

A. “The Maryland Approach”

The Delaware Supreme Court discussed the rationale employed by the Court of Appeals of Maryland in *Griffin v. Maryland* as an example of “The Maryland Approach” a comparatively higher standard for the authentication of social media evidence.¹²

7. The Superior Court applied the “distinguishing characteristics” rationale, which has been implemented to authenticate a handwritten letter sent from inside prison that included nicknames of the parties and references to the crime (*Parker Trial Op.*, at 5 (citing *Smith v. State*, 902 A.2d 1119, 1125 (Del. 2006)), as well as an e-mail based upon the sender’s purported e-mail address. *Id.* (citing *Paron Capital Mgmt., LLC v. Crombie*, Civ. A. No. 6380-VCP, 2012 WL 214777 (Del. Ch. Jan. 24, 2012)).

8. *Parker Trial Op.*, at 5 (citations omitted). This proposition, the trial court reasoned, was consistent with DELAWARE RULE OF EVIDENCE 901(B)(4). That rule provides that “[a]pppearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances” is an example of an acceptable authentication method. DEL. R. EVID. 901(B)(4) (“*Distinctive Characteristics and the Like*”).

9. *Parker Trial Op.*, at 5 (referencing *People v. Valdez*, 135 Cal. Rptr. 3d 628, 632 (Cal. Ct. App. 2011)).

10. *Id.* (citing *Tienda*, 358 S.W.3d at 646 (finding that the likelihood and weight of any alternative scenario that MySpace postings were “concocted” by someone else was for the jury to assess once a prima facie showing was made that the postings belonged to the purported creator)). *See also infra* at 5-8 (discussing how the Delaware Supreme Court recognized the *Tienda* matter as representative of “The Texas Approach”).

11. *Parker*, 85 A.3d at 682-83.

12. *Id.* at 686 (citing *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011)).

In *Griffin*, the Maryland high court was presented on appeal with, *inter alia*, the issue of whether the “trial court err[ed] in admitting a page printed from a MySpace profile alleged to be that of [Griffin’s] girlfriend.”¹³ At trial, the prosecution sought to introduce Griffin’s girlfriend’s MySpace profile to demonstrate that, prior to trial, she had allegedly threatened another witness called by the prosecution.¹⁴ The prosecution neither asked Griffin’s girlfriend to authenticate the MySpace page as her own, despite having called her to the stand, nor sought to introduce electronic records that definitively showed that Griffin’s girlfriend had authored the post.¹⁵ Rather, the prosecution elected to attempt to authenticate the social media evidence through the testimony of its lead investigator.

Griffin objected to this attempt. Griffin’s counsel was then permitted to *voir dire* the investigator outside of the presence of the jury. This resulted in the trial judge’s decision to permit the investigator to testify in support of authentication of redacted portions of the MySpace profile.¹⁶ Following conviction, Griffin appealed and lost at the intermediate appellate level.¹⁷

The Maryland Court of Appeals, however, held that the prosecution failed to properly authenticate the MySpace post pursuant to Maryland Rule 5-901,¹⁸ that is, the prosecution did not adequately link both the profile and the “snitches get stitches” posting to Griffin’s girlfriend.¹⁹ The Maryland high court also found that the intermediate appellate court “failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the [subject] posting.”²⁰

The court then articulated the basic tenets of the Maryland approach. To properly authenticate social media posts in Maryland, the admitting party should either (1) ask the purported creator if she created the profile and added the post in question, (2) search the internet history and hard drive of the purported creator’s computer to determine whether that computer was used to originate the social networking profile and posting in question, or (3) obtain information directly from the social networking site to establish the identity of the creator and link the posting in question to the person who initiated it.²¹ The *Griffin* court explained that an underpinning of the Maryland approach is the concern that social media content may have been fraudulently created.²²

13. *Griffin*, 19 A.3d at 417.

14. *Id.* at 418. The specific MySpace profile was in the name of “Sistasouljah,” and contained various information describing Griffin’s girlfriend. It also displayed a photograph of an embracing couple and contained a post “Free Boozy!!! Just Remember Snitches Get Stitches!! U Know Who You Are!!” *Id.* (capitalizations altered from original). *See also infra* n.16.

15. *Griffin*, 19 A.3d at 419.

16. The investigator was permitted to testify as to the profile photograph “of a person that looks like [Griffin’s girlfriend]” and Griffin, content that referred to the defendant by his nickname (“Boozy”) and the comment that “snitches get stitches.” While maintaining its objection, defense counsel agreed to a stipulation in lieu of the investigator’s testimony.

17. The Maryland Court of Special Appeals affirmed the trial court, but that decision would be reversed. *Griffin v. Maryland*, 995 A.2d 791 (Md. Ct. Spec. App. 2010), *rev’d*, *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011).

18. The specific subsections of the Maryland rule cited by the Maryland Court of Appeals (MD. RULE 5-901(a), (b)(1) and (4)) are substantially similar to Del. R. Evid. 901(a), (b)(1) and (4).

19. *Griffin*, 19 A.3d at 423.

20. *Id.* (citations omitted).

21. *Id.* at 427-28 (citations omitted).

22. *See, e.g., Griffin*, 19 A.3d at 422 (“The potential for fabricating or tampering with electronically stored information on a social networking site, thus, poses significant challenges from the standpoint of authentication of printouts of the site, as in the present case.”).

B. “The Texas Approach”

The Delaware Supreme Court recognized “The Texas Approach” as an alternative method of authenticating social media evidence at trial. Specifically, the Court recognized the matter of *Tienda v. Texas* as exemplifying this comparatively flexible alternative.²³

In *Tienda*, the Court of Criminal Appeals of Texas addressed the issue of whether sufficient evidence was presented to establish a *prima facie* showing that the social networking webpages proffered by the prosecution were authored by the defendant.²⁴ At trial, the prosecution sought admission into evidence of three MySpace profile pages, which contained postings relevant to the commission of the charged offense,²⁵ as being registered to and maintained by the defendant.²⁶ To accomplish that task, the prosecution called the decedent’s sister to sponsor the MySpace pages and related content as indicative of the defendant’s culpability.²⁷ Over the defendant’s authenticity objection, the trial court admitted into evidence the print-outs of the MySpace profile pages, as well as MySpace “subscriber reports” and accompanying affidavits.²⁸

The intermediate appellate court found sufficient “individualization” in the comments and photos on the MySpace profiles to satisfy Texas Rule of Evidence 901(b)(4),²⁹ then admitted the evidence as a “conditional fact of authentication” to support a “finding that the person depicted supplied the information.”³⁰ Upon higher appellate review, the Texas Criminal Court of Appeals affirmed the rulings of both the intermediate appellate and trial court that the social media evidence was sufficiently authenticated and properly admitted.³¹

23. *Tienda v. Texas*, 358 S.W.3d 633 (Tex. Crim. App. 2012) .

24. *See Tienda*, 358 S.W.3d at 634.

25. The State of Texas prosecuted the defendant, Ronnie Tienda, Jr., for the shooting-related murder of the victim, David Valadez.

26. *Tienda*, 358 S.W.3d at 634-35.

27. The content of the MySpace profile pages included quotes, such as, “You aint BLASTIN You aint Lastin” and “RIP David Valadez”, as well as a link to a song that was played at Valadez’s funeral. *See Tienda*, 358 S.W.3d at 643-46. Additionally, instant messages sent from the subject MySpace accounts “complained about the author’s electronic monitor, which was a condition of [Tienda’s] house arrest while awaiting trial.” *Id.* at 636. *See also id.* at 645.

28. *Tienda*, at 634-35. The subscriber reports are business records that contained information about the MySpace accounts in question. Specifically, these reports indicated that the subject accounts were created with identity information that included: name of “Ron Mr. T”; residence of “[D]allas”; and e-mail accounts including “ronnietiadajr@”. *Id.* at 635. The prosecution also introduced photographs that were “tagged” to the subject accounts that depicted a person who “at least resembled the defendant.” *Id.*

29. TEX. R. EVID. 901(b)(4) is analogous to DEL. R. EVID. 901(b)(4). Both rules provide that presenting indicia of distinctive characteristics is an acceptable method of authentication.

30. Interestingly, the Texas intermediate appellate court premised its decision upon the intermediate appellate decision in *Griffin*, which was subsequently reversed. *See Griffin v. Maryland*, 995 A.2d 791 (Md. Ct. Spec. App. 2010), rev’ d, *Griffin v. Maryland*, 19 A.3d 415 (Md. 2011). *See also supra* n.17.

31. *Tienda*, 358 S.W.3d at 647.

The high court in *Tienda* began its recitation of the applicable law with the proposition that “whether [] to admit evidence at trial is a preliminary question to be decided by the court.”³² It then explained that authentication, as a condition precedent to admissibility, required the proponent to make a threshold showing that would be sufficient to support a finding that the matter in question is what its proponent claims.³³ Whether that threshold has been met,³⁴ the court explained, is one of the preliminary questions of admissibility contemplated by Texas Rule of Evidence 104(a) and properly decided by the judge in performance of an evidentiary gatekeeping function.³⁵

After discussing the role of the judge in determining the authenticity of proffered social media evidence, the court underscored the flexibility of the Texas approach. Specifically, the court reasoned that social media evidence, like other forms of evidence, may be authenticated in a number of different ways, “including by direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence.”³⁶ “As with the authentication of any kind of proffered evidence, the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case.”³⁷ The court continued to explain that, despite the rapid pace at which electronic communications technology develops, “the rules of evidence already in place for determining authenticity are at least generally adequate to the task,”³⁸ and that “there is no single approach to authentication that will work in all instances.”³⁹

The court then compared its approach to the Maryland approach. After recognizing that information security on social media is a legitimate concern, the Texas court reasoned that such a concern “is an alternate scenario whose likelihood and weight the jury was entitled to assess once the [prosecution] had produced a prima facie showing that it was the appellant, not some unidentified conspirators or fraud artists, who created and maintained these MySpace pages.”⁴⁰ Ultimately, the court concluded that affirmance of the lower courts was appropriate “[b]ecause there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be – MySpace pages the contents of which the appellant was responsible [for]...”⁴¹

32. *Id.* at 637-38 (citing TEX. R. EVID. 104(a)). The Texas evidentiary rule is analogous to DEL. R. EVID. 104(a).

33. *Id.* at 638 (citing TEX. R. EVID. 901(a)). The Texas evidentiary rule is analogous to DEL. R. EVID. 901(a).

34. In other words, “whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence proffered is authentic.” *Id.* at 638 (citations omitted).

35. *Id.*

36. *Id.* (citing TEX. R. EVID. 901(b)(1), (3), (4)). The Texas rules of evidence are analogous to DEL. R. EVID. 901(b)(1), (3), (4).

37. *Id.* at 639 (citations omitted).

38. *Id.* at 638-39 (internal quotations and citations omitted).

39. *Id.* at 639 (citations omitted).

40. *Id.* at 646.

41. *Id.* at 647.

III. STANDARD FOR AUTHENTICATION OF SOCIAL MEDIA EVIDENCE IN DELAWARE

Upon evaluating these alternatives, the Delaware Supreme Court agreed with the Superior Court and concluded that the flexible rules of the Texas approach better comport with the Delaware Rules of Evidence and roles of judge and jury.⁴² In rejecting the Maryland approach, the Court acknowledged the concern that social media content could be falsified,⁴³ however, it concluded that the “existing Rules of Evidence provide an appropriate framework for determining admissibility.”⁴⁴

The Supreme Court highlighted the feature of flexibility in the Texas rationale because the best or most appropriate method of authenticating electronic evidence is often case-dependent.⁴⁵ In further validating this approach, the Court recognized that “[t]he premise of the Texas approach is that the jury – and not the trial judge – ultimately resolves any factual issue on the authentication of social media evidence.”⁴⁶

The Supreme Court clarified that in Delaware “social media evidence should be subject to the same authentication requirements under the Delaware Rules of Evidence Rule 901(b) as any other evidence.”⁴⁷ “The requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁴⁸ The Court instructed that the methods of authenticating social media evidence are flexible:

[w]here a proponent seeks to introduce social media evidence, he or she may use any form of verification available under Rule 901 – including witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated the evidence in question – to authenticate a social media post.⁴⁹

42. *Parker*, 85 A.3d at 688 (acknowledging that the Superior Court “specifically rejected the Maryland approach and adopted the Texas rule.”).

43. The Delaware Supreme Court noted that the Maryland approach is comparatively less flexible, because “social media evidence is only authenticated and admissible where the proponent can convince the trial judge that the social media post was not falsified or created by another user.” *Parker*, 85 A.3d at 683.

44. *Id.* at 687.

45. *Id.* (citing *Tienda*, 358 S.W.3d at 639).

46. *Id.* See also *id.* at 684 (citing DEL. R. EVID. 104(a) (“Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of paragraph (b) of this rule. In making its determination it is not bound by the rules of evidence except those with respect to privileges.”)).

47. *Id.* at 687.

48. *Id.* (citing DEL. R. EVID. 901(a)).

49. *Id.* at 687.

Thus, the Court made clear that (a) the methods for authenticating social media evidence are flexible, pursuant to the existing evidentiary rules, and (b) the trial judge is the gatekeeper, who “may admit the social media post when there is evidence sufficient to support a finding by a reasonable juror that the proffered evidence is what its proponent claims it to be.”⁵⁰ Accordingly, the Supreme Court affirmed the judgment of the Superior Court.⁵¹

50. *Id.* at 688 (internal quotations and citations omitted).

51. The Supreme Court provided additional guidance in a footnote, stating that although “a photograph and a profile name alone may not always be sufficient evidence to satisfy the requirements of Rule 901, they are certainly factors that the trial court may consider.” *Id.* at 688, n.43.

RECENT DEVELOPMENTS IN CRIMINAL LAW: 2013 DELAWARE SUPREME COURT DECISIONS

Michael F. McTaggart*

In 2013, the Delaware Supreme Court issued a number of opinions that covered various criminal law issues. This article will briefly summarize some of those decisions in the areas of evidence, search and seizure, and other areas of significance or first impression. Readers are directed to the Court's opinions for the complete statement of the facts and legal analysis of the Court.

I. EVIDENCE DECISIONS

A. Sufficient Proof Of "Physical Injury" For Assault Conviction-*Kulowiec v. State*

In *Kulowiec v. State*,¹ the Court held that evidence that the defendant repeatedly bit the victim on the wrist and victim required hospital treatment was sufficient to establish the element of "physical injury" for the charge of assault third degree.²

The defendant Ewelina Kulowiec appealed from a Superior Court conviction of Assault Third Degree. The defendant was tried for an incident involving her former husband in which the two were discussing the details of their impending divorce. The defendant was upset about learning of her ex-husband's new girlfriend and family and she pulled a gun and threatened him. During a struggle for the gun, she bit the victim several times. The defendant was convicted after a two day bench trial and contended that there was insufficient evidence of physical injury as defined by 11 *Del. C.* § 222(23).³

The defendant relied on *Harris v. State*⁴ in which the Supreme Court had previously ruled that a police officer who sustained a scraped knee and was elbowed in the head by a suspect did not sustain physical injury to support the charge of Assault Second Degree.⁵ The Court found the evidence of physical injury more substantial than was present in *Harris*. The defendant admitted that she struggled with the victim and bit him because she was frantic. The medical records also indicated that the victim had multiple areas of tenderness along with red bruising, abrasions, and swelling.⁶ This evidence was consistent with cases decided after *Harris* which found similar injuries to constitute physical injury under § 222(23). In *Moye v. State*,⁷ the Court ruled that a single bite injury could suffice to establish physical injury

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1. 74 A.3d 600 (Del. 2013).

2. *Id.* at 603.

3. *Id.* at 601-02.

4. 965 A.2d 691 (Del. 2009).

5. *Id.* at 693-94.

6. 74 A.3d at 603.

7. 988 A.2d 937 (Del. Jan. 20, 2010) (table).

under the statute.⁸ Similarly, in *McKnight v. State*,⁹ the Court held that a bite could establish physical injury even without proof of any pain to the victim.¹⁰ The Supreme Court ruled that the *Moye* and *McKnight* cases were directly on point and there was sufficient evidence that the victim's injuries were significant to a degree to establish physical injury and prove the Assault Third Degree offense.¹¹

B. Discovery Of Police Dispatch Recordings—*Valentin v. State*

In *Valentin v. State*,¹² the Court held that the police dispatch recording of the police chase of the defendant charged with several motor vehicle offenses was within the scope of the defense's discovery request and should have been produced as it was central to the credibility of a testifying officer.¹³

Defendant *Valentin* was tried and convicted on charges of Failing to Stop at the Command of a Police Officer, Reckless Driving, and related offenses. The offenses arose from a midnight chase of *Valentin* by DNREC officers who spotted the defendant's car in the Horsey Pond Wildlife Area. The officers were in an unmarked pickup truck that had emergency lights. They tried to approach defendant's car in the wildlife area but he fled. The DNREC officers then followed *Valentin* down Route 24 where he was reported to have committed a number of motor vehicle violations. After he drove into a residential area, the officers attempted to block him but *Valentin* escaped. He was later trapped a second time, with a DNREC officer stating that he yelled "Police, Stop!" At trial, one DNREC officer testified that he had activated his truck's siren as soon as he initiated the pursuit.¹⁴

In discovery, the defense requested disclosure of all information relating to the credibility of any prosecution witness and "[a]n opportunity pursuant to [*Jencks*...] to review reports and statements, whether oral, written, or recorded..." During trial, after the DNREC officer had testified about the dispatch recording, defense counsel argued that the recording was within the scope of her request. The trial judge denied the request. *Valentin* testified at trial that he saw a truck but did not know it was a police vehicle because he never saw emergency lights or heard a siren. The jury convicted the defendant on all charges except Failure to Give a Signal.¹⁵

On appeal, the Court ruled that the dispatch recording clearly fell within the scope of the defendant's request for "other information relating to the credibility of any prosecution witness." The absence of the siren on the dispatch recording was evidence that the defense could use to challenge the credibility of the officer who testified that his siren was on for the whole chase. The Court also ruled that the dispatch recording fell within the scope of DEL. SUPER. CT. R. 16(a)(1)(C) as it was a tangible object that was within the State's custody and was material to the preparation of the defense.¹⁶

8. *Id.* at *1.

9. 753 A.2d 436 (Del. 2000).

10. *Id.* at 437-38.

11. 74 A.3d at 605.

12. 74 A.3d 645 (Del. 2013).

13. *Id.* at 650-51.

14. *Id.* at 646-47.

15. *Id.* at 647-48.

16. *Id.* at 650.

The Court found prejudice to the defense from the lack of production of the dispatch tape and reversed the convictions. The tape was central to the case and the charge of Failing to Stop at the Command of a Police Officer. The Court also noted that the State's case was based almost entirely on the testimony of the two officers and there was not any other independent significant evidence before the jury.¹⁷

C. Sixth Amendment Confrontation Clause—*Martin v. State*

In *Martin v. State*,¹⁸ the Court held that the defendant has the right to confront the testing analyst who obtained the toxicology results when a certifying analyst did not observe the actual testing process.¹⁹

Defendant Martin was stopped by the Delaware State Police for speeding and erratic driving. The police collected a blood sample which was sent to the Medical Examiner's Office. The sample was tested by chemist Heather Wert. At the jury trial, the Chief Forensic Toxicologist Jessica Smith testified about the results of the blood tests. Smith certified the final results of the tests but did not see the tests performed.²⁰

The Court reviewed the defendant's challenge to Smith's testimony at trial. The Court noted "substantial uncertainty" under existing caselaw on whether a statement is "testimonial" or otherwise subject to the Confrontation Clause of the Sixth Amendment.²¹ In *Melendez-Diaz v. Massachusetts*,²² the United States Supreme Court held that notarized certificates of forensic analysis by a state laboratory were testimonial statements for Sixth Amendment purposes. The *Martin* Court also relied on the decision in *Bullcoming v. New Mexico*²³ where the United States Supreme Court held that the accused had the right to confront the non-testifying analyst who certified the testing report.²⁴

The *Martin* Court found that the testing chemist's results in her batch report were testimonial.²⁵ Although those reports were not admitted, Smith relied on those reports and Wert's statements were introduced through Smith. The Wert report was created solely for an "evidentiary purpose" as part of a police investigation and the Court deemed it to be testimonial.²⁶ The Court then held that the defendant has the right to confront the testing analyst as well as the analyst who certifies the report if they are two different persons.²⁷ In a footnote, the Court noted that a solution would be to have

17. *Id.* at 650-51.

18. 60 A.3d 1100 (Del. 2013).

19. *Id.* at 1109.

20. *Id.* at 1101.

21. *Id.* at 1102.

22. 557 U.S. 305, 308-09 (2009).

23. 131 S. Ct. 2705 (2011).

24. *Id.* at 2710.

25. 60 A.3d at 1106 (citing *Bullcoming*, 131 S. Ct. at 2714-15).

26. *Id.* at 1107 (citing *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (plurality opinion)).

27. *Id.* at 1109.

the same chemist prepare and certify the report.²⁸ The Court found that the defendant's Sixth Amendment rights were violated and reversed the conviction.²⁹

II. SEARCH AND SEIZURE DECISIONS

A. Police Authority To Subpoena Inmate Prison Records-*Whitehurst v. State*

In *Whitehurst v. State*,³⁰ the Court held the State's subpoena of an incarcerated defendant's phone calls was not subject to probable cause but a showing of reasonableness under the Fourth Amendment.³¹

Defendant Whitehurst was tried for the shooting of a victim in the parking lot of the Budget Inn in New Castle County. During the trial, the State introduced evidence that Whitehurst had engaged in witness tampering. At trial, the defendant conceded that he tampered with witnesses. Whitehurst explained that he believed witness tampering was his best way to approach his situation and make sure certain witnesses did not appear at trial. Prior to trial, a State investigator had obtained the defendant's recorded prison phone calls. The calls were obtained by way of an Attorney General's subpoena served on the prison for the defendant's calls. The police had concerns early on in the case that Whitehurst was actively involved in tampering with witnesses. On the calls, Whitehurst can be heard speaking about certain witnesses not appearing at trial. During the trial, the State played nine of these phone calls.³²

In a pretrial ruling, the Superior Court denied the defendant's suppression motion after finding that the State had a legitimate and reasonable interest in trying to obtain the defendant's prison records.³³ The Supreme Court found no Fourth Amendment violation in the State's obtaining the phone records by subpoena.³⁴ Prisoners are notified that their calls will be monitored and they have no expectation of privacy under the Fourth Amendment. The Court noted that probable cause was not required for the State to record a prisoner's calls or to subpoena the recordings.³⁵

The Court reviewed the reasonableness of a subpoena under the test set forth in *Procurier v. Martinez*.³⁶ This test required review of whether "(1) the contested actions furthered an important or substantial government interest..., and (2) the contested actions were no greater than necessary for the protection of that interest."³⁷ The Court found that

28. *Id.* at 1109 n. 74.

29. *Id.* at 1109.

30. 83 A.3d 362 (Del. 2013).

31. *Id.* at 367-68.

32. *Id.* at 363-66.

33. *Id.* at 366.

34. *Id.* at 367-68.

35. *Id.* at 367 (citing *Johnson v. State*, 53 A.3d 302, 2012 WL 3893524, at *1 (Del. 2012) (citing *Rowan v. State*, 45 A.3d 149, 2012 WL 1795829, at *2 (Del. 2012); *Johnson v. State*, 983 A.2d 904, 919 (Del. 2009)).

36. 416 U.S. 396, 423 (1974), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

37. 83 A.3d at 367 (quoting *Johnson*, 983 A.2d at 921).

the State had an interest in seeking Whitehurst's records as part of its investigation into the crime for which he was arrested and for the potential subsequent crime of witness tampering. The State had demonstrated a sufficient governmental interest to investigate criminal activity and there was no probable cause requirement, but merely a need for a showing of reasonableness.³⁸ For the same reasons, the Court found that the State's conduct did not violate the defendant's First Amendment rights.³⁹

B. Sufficiency Of Affidavit For Probable Cause For Search Warrant-*State v. Holden*

In *State v. Holden*,⁴⁰ the Court ruled that a search warrant for defendant's house was supported by probable cause in light of information from two past proven reliable informants that defendant was still selling drugs and the police officers' arrest of a drug buyer shortly after leaving defendant's house which partially corroborated the informants' tips.⁴¹

In February 2010, defendant Michael Holden's car was stopped by a Drug Enforcement Administration Task Force which seized 12 pounds of marijuana. The evidence was suppressed in Superior Court based on the warrantless use of a GPS device by the police to track the defendant.⁴²

In a subsequent investigation, the Wilmington Police Department received information from two past proven, reliable confidential informants that Holden was dealing drugs. The first informant advised that Holden was selling marijuana and oxycodone from his house in Newark, and provided the address of the house, the name of Holden's girlfriend, the vehicle driven by Holden, and that Holden had a male roommate. This informant advised that Holden had never stopped selling marijuana after the first arrest. The second informant told police that Holden had also continued selling marijuana of multiple pounds at a time, along with ounces of cocaine and oxycodone. This informant stated that Holden was selling from his Newark house, and also provided the make of Holden's car with a Maryland registration, and a description of Holden's girlfriend.⁴³

The DEA officers conducted surveillance on Holden's house and observed a man pull into the driveway at the house. Holden returned to the house within minutes, accompanied the driver into the house, and the driver then left the house within ten minutes and drove off. The officers followed the vehicle and stopped it. They found six oxycodone pills in the driver's hand. The driver was also deceptive when asked his whereabouts. An officer then prepared a search warrant for Holden's house which was signed by a Justice of the Peace magistrate. The police executed the warrant and recovered 59.47 grams of cocaine along with cocaine residue and empty prescription bottles for oxycodone. The Superior Court granted a suppression motion ruling that the affidavit did not establish probable cause for the search.⁴⁴

38. *Id.* at 367-68.

39. *Id.* at 368.

40. 60 A.3d 1110 (Del. 2013).

41. *Id.* at 1115-16.

42. *Id.* at 1112.

43. *Id.*

44. *Id.* at 1112-13.

On appeal, the Supreme Court ruled that the affidavit contained evidence that would allow the issuing magistrate to conclude that evidence of a crime would be found in Holden's house.⁴⁵ The police had information from two past proven reliable confidential informants that Holden was selling drugs from his house including oxycodone. The police also stopped a subject immediately after leaving Holden's house and that person was in possession of oxycodone. In past cases, the Court has held that the accurate prediction of future movements can adequately corroborate a tip from even an anonymous informant.⁴⁶ The discovery of the oxycodone on the driver leaving Holden's house corroborated the two informants' tips.

The Court noted that role of the issuing magistrate to "make a common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."⁴⁷ The Court held that this rule applied, even if part of an informant's tip was not corroborated, and found that probable cause existed under the totality of the circumstances, reversing the ruling of the Superior Court.⁴⁸

III. OTHER SIGNIFICANT DECISIONS

A. Prior Convictions Under Similar Statutes In Other State For Habitual Offender Statute-*Sammons v. State*

In *Sammons v. State*,⁴⁹ the Court ruled that the defendant's prior conviction under a substantially similar Florida burglary statute permitted that out of state conviction to be counted as a prior burglary conviction for purposes of the habitual offender statute.⁵⁰

Defendant broke into a residence and was attempting to steal a large television when he was confronted by the homeowner. Defendant was eventually charged with and convicted of Burglary in the Second Degree, Robbery in the Second Degree, and Criminal Mischief. After completion of a presentence report, the trial court granted the State's motion to declare Sammons an habitual offender and he was sentenced to life in prison.⁵¹

Defendant conceded on appeal that he was convicted in 1991 of Burglary in the Second Degree. He contended that the trial judge erred in counting his prior Florida conviction as a prior Burglary conviction for purposes of the Habitual Offender statute, 11 *Del. C.* § 4214(b). In 1994, Sammons had been convicted in Florida for the burglary of a structure/conveyance/dwelling. The Court found that the unambiguous language of the Florida burglary statute is substantively

45. *Id.* at 1115.

46. *Id.* (citing *Cooper v. State*, 32 A.3d 988, 2011 WL 6039613, at *6 (Del. Dec. 5, 2011); *Tolson v. State*, 900 A.2d 639, 643 (Del. 2006); *Miller v. State*, 25 A.3d 768, 771-73 (Del. 2011)).

47. *Id.* at 1116 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

48. *Id.*

49. 68 A.3d 192 (Del. 2013).

50. *Id.* at 195-96.

51. *Id.* at 194.

similar as a matter of law to the Delaware burglary statute.⁵² The Florida statute was entered into the record as part of supplemental briefing in the trial court. The Court ruled that it was not necessary for the trial court to consider the underlying facts and circumstances involved in the defendant's Florida conviction.⁵³

The Court also found from the record that the State showed there was a sufficient period to permit rehabilitation between each conviction.⁵⁴ There was nine months between the completion of the defendant's 1991 sentence and his arraignment on the 1994 Florida charge. Sammons was released for some significant period of time prior to the final burglary conviction. The defendant's habitual life sentence was affirmed.⁵⁵

B. Collateral Estoppel-*Peterson v. State*

In *Peterson v. State*,⁵⁶ the Court held that a defendant's acquittal on an Assault First Degree and related weapon charge did not preclude his conviction under collateral estoppel principles for the charge of Possession of a Firearm by a Person Prohibited.⁵⁷

The defendant Peterson was tried for shooting at an individual, Brown, who was planning to buy crack cocaine in Wilmington. Brown saw a person turn the corner and walk toward him. Brown admitted that he had been using crack cocaine for "maybe two days" leading up to the date of the incident. Brown, seeing that the suspect had a gun, began to walk away. Brown saw "fire" in his peripheral vision and testified that he had been shot in the back. Brown initially told the responding police officers that he did not know the shooter. Two weeks after the shooting, Brown identified the shooter as "Kal" and was able to identify him from a photo array.⁵⁸

Peterson was arrested and tried first on the charges of Assault First Degree and Possession of a Firearm During Commission of a Felony. The defendant relied on an alibi defense at trial and the jury acquitted him on both charges. After the jury trial, the trial judge issued a bench ruling convicting the defendant on the charge of Possession of a Firearm by a Person Prohibited.⁵⁹

Peterson appealed his conviction and contended that the trial judge's ruling was barred by 11 *Del. C.* § 208 and the double jeopardy protections of the State and Federal Constitutions.⁶⁰ The Court ruled that the jury's acquittal did not necessarily rest on a finding that Peterson did not possess a weapon on the date in question. The Court noted that

52. *Id.* at 195 (citing 11 *Del. C.* § 825(a); FLA. STAT. ANN. § 810.02).

53. *Id.* at 195-96 (citing *Stewart v. State*, 930 A.2d 923, 926 (Del. 2007)).

54. *Id.* at 196 (citing *Ross v. State*, 990 A.2d 424, 431 (Del. 2010); *Stanley v. State*, 30 A.3d 782, 2011 WL 2183712, at *3 (Del. Mar. 15, 2011)).

55. *Id.*

56. 81 A.3d 1244 (Del. 2013).

57. *Id.* at 1247-48.

58. *Id.* at 1245.

59. *Id.* at 1245-46.

60. *Id.* at 1246.

identity was not the only factual issue before the jury, as the jury could have found that: i) Peterson unintentionally injured Brown; ii) Peterson did not injure Brown; iii) Peterson did not possess the firearm; or iv) Peterson was not present at the shooting.⁶¹ The prior decisions of the Court have held consistently that a jury's acquittal of PFDCF and the underlying felony did not bar a conviction of PFBPP.⁶² The Court affirmed the defendant's conviction.

C. Lesser-Included Instruction-*Mays v. State*

In *Mays v. State*,⁶³ the Court held that the defendant, who was found with a prohibited cell phone in prison, possessed the *mens rea* for the felony crime of Promoting Prison Contraband and was not entitled to a lesser included instruction for the misdemeanor offense.⁶⁴

Defendant Mays was tried for the charge of Promoting Prison Contraband after a Correctional Officer found Mays hiding a knotted sock containing a cell phone in his underwear. Mays was charged with a single count in violation of 11 *Del. C.* § 1256. Under this statute, the offense is a misdemeanor unless the prison contraband is a deadly weapon or mobile phone, cell phone, or other electronic device which raises the crime to a class F felony.⁶⁵

At trial, defendant requested an instruction on the lesser-included instruction for the misdemeanor charge. The trial judge denied the request and the defendant was convicted. Mays contended on appeal that the trial presented a fact question about whether he possessed the *mens rea* to commit the felony offense. Mays asserted that the State was required to prove that "he knew he was in possession of the specific contraband, namely a cell phone."⁶⁶

The Court rejected the defendant's argument regarding the *mens rea* necessary to commit the offense.⁶⁷ Mays admitted to hiding an object in the sock that was found by prison officials in his underwear. This evidence proved that Mays was knowingly in possession of prison contraband.⁶⁸ The Court also found that the trial judge properly denied the defense request for a lesser-included instruction. The trial judge correctly found that the *mens rea* was identical for the misdemeanor and felony crime of Promoting Prison Contraband. The Court found sufficient evidence in the record to support the ruling of the trial judge and the defendant's conviction was affirmed.⁶⁹

61. *Id.* at 1247.

62. *Id.* (citing *Tucker v. State*, 2012 WL 4512900, at *1; *Westcott v. State*, 2009 WL 3282707, at *3-5; *Goodwin v. State*, 2006 WL 1805876, at *3-4 (Del. June 29, 2006), *abrogated by* *Lecates v. State*, 975 A.2d 799 (Del. 2009) and *abrogated by* *Lecates v. State*, 987 A.2d 413 (Del. 2009); *Register v. State*, 2013 WL 497991, at *1 (Del. Feb. 9, 2013) (TABLE).

63. 76 A.3d 778 (Del. 2013).

64. *Id.* at 779-80.

65. *Id.* at 778-79.

66. *Id.* at 779.

67. *Id.*

68. *Id.* The Court noted that the crime of Promoting Prison Contraband, 11 *Del. C.* § 1256, prohibits the possession of any contraband, and the *mens rea* for both the felony and the misdemeanor charge is "knowingly."

69. *Id.* at 780.

D. Sixth Amendment Right To An Impartial Jury-*Schwan v. State*

In *Schwan v. State*,⁷⁰ the Court held Delaware Superior Court Criminal Rule 24 provides the procedures for the trial court to follow for issues of potential juror bias uncovered after the jury is sworn but before the start of the trial.⁷¹

Defendant Schwan went to trial on charges of Rape in the Second Degree, Unlawful Sexual Conduct by a Sex Offender Against a Child, Rape in the Fourth Degree, and two counts of Providing Alcohol to a Minor. Schwann was acquitted on the rape charges and the charges of Providing Alcohol to a Minor. He was convicted of two counts of Unlawful Sexual Contact in the Second Degree and the severed charge of Unlawful Sexual Conduct by a Sex Offender Against a Child. Schwan appealed his conviction based on the seating of one juror challenged during *voir dire*.⁷²

In *voir dire*, all potential jurors were asked the standard question, “Do you know the attorneys in this case, or any other attorney or employee in the offices of the Attorney General or defense counsel?” The jury was selected and sworn on the first day of trial. Prior to the start of the second day of trial, the trial prosecutor advised the trial judge that juror #11 was a day care provider to another non-trial prosecutor in the Attorney General’s Office. The trial court made inquiries of the juror in the presence of counsel and the juror advised that she misunderstood the *voir dire* question which she thought only applied to prosecutors assigned to the actual trial. Juror #11 admitted that she was the director of a local day care and knew the non-trial prosecutor. Juror #11 denied that she had ever talked to the non-trial prosecutor about jury duty. The defense counsel moved to strike juror #11 based on her untruthful answers. The non-trial prosecutor then testified that she did have a conversation with juror #11 prior to her reporting for service and told her to mention that she knew a prosecutor in the Attorney General’s Office. Defense counsel made two more applications to strike juror #11 which were denied.⁷³

On appeal, the Court considered the unusual case where the potential juror bias was discovered after the completion of *voir dire* but before the start of the trial. The Court held that, even though Delaware Superior Court Criminal Rule 24 applies to *voir dire* during the jury selection process, the same procedures should be followed after the jury has been seated and there are issues raised about a juror’s impartiality.⁷⁴ In this case, the Court found that the trial judge did not make a sufficient inquiry into potential juror bias. Juror #11 was never asked if she could render a fair and impartial verdict, in light of her ongoing business relationship with a non-trial prosecutor in the Attorney General’s Office. The Court also ruled that juror #11 should have been asked about the inconsistency between her statements about not discussing her jury service with the non-trial prosecutor and the testimony of that prosecutor.⁷⁵ Relying on *Jackson v. State*,⁷⁶ the Court stated that the “impartial administration of justice is severely compromised when the juror’s failure to honestly answer a

70. 65 A.3d 582 (Del. 2013).

71. *Id.* at 590.

72. *Id.* at 585.

73. *Id.* at 586-87.

74. *Id.* at 590.

75. *Id.*

76. 374 A.2d 1, 2 (Del. 1977).

material question during *voir dire* is deliberate.⁷⁷ The Court ruled that the presence of juror #11 on the panel violated the defendant's Sixth Amendment right to a fair trial by an impartial jury and reversed the conviction.⁷⁸

E. Gang Participation Statute-*Taylor v. State*

In *Taylor v. State*,⁷⁹ the Court held that the Delaware gang participation statute was not unconstitutionally vague and rejected a challenge to the statute on overbreadth grounds.⁸⁰

The *Taylor* appeal involved appeals from a number of convictions from crimes including murder, attempted murder, assaults, and weapons offenses. The offenses related to the activities of a Wilmington rap group and gang named the TrapStars that sold drugs. The TrapStars fought with the rival gang known as Pope's Group, a subset of the Latin Kings, who sold drugs and participated in other illegal activities in Wilmington. The fighting escalated with a murder and a series of shootings in 2010. A number of members of the TrapStars were arrested and subsequently tried on those charges and the felony of illegal gang participation, 11 *Del. C.* § 616.⁸¹

Defendants Taylor and Rasin challenged the gang participation statute, contending that it was vague and overbroad. The Supreme Court noted that other states have rejected similar challenges to their gang participation statutes including California in *People v. Castenada*.⁸² The Delaware Supreme Court ruled that the terms "actively participates" and "pattern of criminal activity" were not unconstitutionally vague.⁸³ A person who actively participates in any criminal street gang performs a role to benefit the gang and the definition is not unconstitutionally vague. Section 616(a)(2) lists the specific crimes that establish the "pattern of criminal activity" under the statute and a person must knowingly promote the gang's involvement.⁸⁴ The defendants' overbreadth challenge was also rejected. The defendants' claim of a right to freedom of association does not permit a person to associate with a gang for the purpose of engaging in criminal activity.⁸⁵

77. 65 A.3d at 592 (citing *Jackson*, 374 A.2d at 2).

78. *Id.* (citing *Knox v. State*, 29 A.3d 217, 221 (Del. 2011)).

79. 76 A.3d 791 (Del. 2013).

80. *Id.* at 798-99.

81. *Id.* at 795-97.

82. 3 P.3d 278, 285 (Cal. 2000).

83. 76 A.3d at 798. The *Taylor* Court noted that the California decision in *Castenada* upheld the California Street Terrorism Enforcement and Prevention Act (STEP Act) against a challenge for vagueness. After the *Castenada* decision, many other states passed gang participation statutes that were modeled after the California statute. 76 A.3d at 798 (citing *People v. McGlotten*, 166 P.3d 182, 191 (Colo. App. 2007) (upholding challenge to Colorado Organized Crime Control Act (COCCA), COLO. REV. STAT. ANN. § 18-17-103(2)); *In re K.R.S.*, 672 S.E.2d 622, 624-25 (Ga. 2009) (rejecting challenge to Georgia Street Gang Terrorism and Prevention Act, GA. CODE ANN. § 16-16-3(1)(1)); *Klein v. State*, 698 N.E.2d 296 (Ind. 1998) (IND. CODE ANN. § 35-45-9-1 held constitutional); *State v. Walker*, 506 N.W.2d 430 (Iowa 1993) (IOWA CODE ANN. §§ 723A.1 et seq. held valid against vagueness challenge); *State v. Mireles*, 619 N.W.2d 558 (Minn. Ct. App. 2000) (MINN. STAT. ANN. § 609.229 upheld against overbreadth challenge); *State v. Woodbridge*, 791 N.E.2d 1035 (Ohio 7th Dist. 2003) (OHIO REV. CODE ANN. § 2923.42(A)(B) upheld against vagueness challenge)).

84. *Id.* (citing 11 *Del. C.* § 616(a)(2)).

85. *Id.* at 799 (citing *Scales v. United States*, 367 U.S. 203 (1961); *Wien v. State*, 882 A.2d 183, 186-87 (Del. 2005)).

The Court affirmed a ruling by the trial court admitting a TrapStars rap video. The video contained evidence proving that the TrapStars were a criminal street gang and it was admissible under the co-conspirator exception as it was performed by one of the gang members.⁸⁶ The Court also affirmed a ruling that admitted the prior convictions of defendant Rasin in the State's case-in-chief. The convictions were admissible to prove his "pattern of criminal activity" under the gang participation statute.⁸⁷

APPENDIX

DELAWARE SUPREME COURT 2013 CRIMINAL LAW OPINIONS

Burns v. State, 76 A.3d 780,786-90 (Del. 2013) (trial counsel fully explained risks of possible plea and possible trial; defendant failed to show any prejudice from passing comment by detective that he tried to interview defendant or from passing reference to two complaining witnesses as victims; trial counsel made tactical decision to waive requirements for admission of section 3507 statements; trial counsel did not have basis to object to prosecutor's closing argument that did not express a personal belief of the defendant's guilt).

DeJohn v. State, 60 A.3d 1089, 1092 (Del. 2013) (trial court incorrectly sentenced the defendant on a violation of probation to a sentence in excess of his original sentence; case would be remanded for resentencing before a different judge based on comments made during the sentencing hearing).

Guy v. State, 82 A.3d 710, 714 (Del. 2013) (defendant's postconviction claim that he was entitled to a modified *Bland* instruction at this murder trial was procedurally barred as *Brooks* did not announce a new rule and the rule was not to be applied retroactively).

Hamilton v. State, 82 A.3d 723, 726 (Del. 2013) (trial court's curative instruction adequately corrected any error from testimony of prosecution expert who misstated the law on voluntary intoxication).

Kulowiec v. State, 74 A.3d 600, 603 (Del. 2013) (evidence that defendant repeatedly bit victim on the wrist and victim required hospital treatment was sufficient to establish the element of "physical injury" for the charge of assault third degree).

Martin v. State, 60 A.3d 1100, 1107-09 (Del. 2013) (defendant had the right to confront the chemist who performed the blood analysis as the blood analysis report was testimonial under *Crawford*).

Mays v. State, 76 A.3d 778, 779-80 (Del. 2013) (defendant who was charged with promoting prison contraband for concealing cell phone inside a sock in his underwear was not entitled to the lesser included misdemeanor jury instruction).

Oliver v. State, 60 A.3d 1093, 1099-1100 (Del. 2013) (trial court erred in only allowing defense counsel a twenty-four hour continuance after State failed to produce notes of testifying chemist).

Peterson v. State, 81 A.3d 1244, 1247-48 (Del. 2013) (defendant's acquittal on charges of assault and PFDCF did not bar subsequent prosecution on charge of Possession of Firearm by Person Prohibited).

Ploof v. State, 75 A.3d 811, 815 (Del. 2013) (allegation that trial counsel failed to consult expert forensic pathologist or toxicologist, failed to present more evidence regarding victim's dominant hand, and failed to investigate ballistics issues, and refusal to object to jurors indicating an unwillingness to impose the death penalty did not prejudice the

86. *Id.* at 802.

87. *Id.* at 801-02.

defendant; remand to trial court to reweigh aggravating and mitigating evidence in light of issue whether trial counsel failed to present additional mitigating evidence).

Ploof v. State, 75 A.3d 840, 844 (Del. 2013) (trial counsel should have investigated evidence of sexual abuse of other foster children in defendant's home but any error found did not prejudice the defendant).

Sabin v. State, 72 A.3d 111, 115 (Del. 2013) (trial counsel's deficient performance was reviewed under the *Strickland* standard, and none of defense counsel's negative comments about his client created an objective appearance of bias by the trial judge against the defendant).

Sammons v. State, 68 A.3d 192, 195-96 (Del. 2013) (defendant's Florida conviction for burglary of a structure/conveyance/dwelling was substantially similar to the Delaware burglary statute and the Florida conviction would count toward calculation of defendant's habitual offender sentence).

Schwan v. State, 65 A.3d 582, 592-93 (Del. 2013) (trial judge erred in failing to strike juror who had business relationship with a member of the State Department of Justice where there was no finding that the juror could be fair and impartial).

State v. Abel, 68 A.3d 1228, 1230 (Del. 2013) (trial court properly found under the totality of the circumstances that police had no particularized, reasonable suspicion that Hells Angel member stopped for speeding was presently armed and dangerous).

State v. Houlden, 60 A.3d 1110, 1115 (Del. 2013) (police presented magistrate with sufficient evidence to support search warrant for defendant's residence based on statements of two past proven reliable informants).

State v. Wright, 67 A.3d 319, 322-25 (Del. 2013) (Superior Court lacked jurisdiction to admit defendant convicted of capital murder to bail; Superior Court had no basis to reconsider the admissibility of defendant's confession; there was no Brady violation when State failed to disclose evidence of a prior similar robbery that occurred forty minutes before the murder).

Taylor v. State, 76 A.3d 791, 799 (Del. 2013) (Delaware gang participation statute was not unconstitutionally vague).

Whitehurst v. State, 83 A.3d 362, 367-68 (Del. 2013) (State did not violate the First or Fourth Amendment by issuing subpoena for defendant's prison communications to support claim of witness tampering).

Whittle v. State, 77 A.3d 239, 241 (Del. 2013) (held that prosecutor erred in stating in closing argument that witnesses were "right" or "correct").

Valentin v. State, 74 A.3d 645, 646 (Del. 2013) (State erred in failing to produce police dispatch tape that fell within scope of defense discovery request and the error was prejudicial, requiring reversal).