

# A NEW PARADIGM FOR THE TEACHING OF BUSINESS LAW AND LEGAL ENVIRONMENT CLASSES

by

Marc Lampe\*

Since first teaching an undergraduate business law class in the mid-1980's, the author has believed that there is a need to develop curriculum and materials on law-related topics better designed for business students planning a career in business. Except incidentally, business school legal faculty are not teaching future lawyers or paralegals. The world of the business practitioner is very different from that of the lawyer. For most business people the law and lawyers are a necessary nuisance. Furthermore, the legal world is changing. For example, so called methods of "alternative" dispute resolution have become mainstream. Opportunities for "self-help law" have proliferated. These trends, and other opportunities considered in this article, offer substantial benefits to the business community. To meet the needs of today's business person, college business law and legal environment courses must stress economical, intelligent *prevention of legal problems and resolution of conflict*. This article is about empowering future business managers by utilizing their class time to educate them to directly meet these goals. Topical coverage and pedagogical approaches for implementing a new paradigm in a business school introductory law course are detailed. We should not allow fear of change from deterring a needed overhauling of the curriculum as such procrastination could harm our profession's future standing.

## I. INTRODUCTION

When I was given my first opportunity to teach undergraduate business law 20 years ago, I was very surprised at the degree to which textbook materials followed a law school type of approach. Business Law texts were heavy on cases and coverage of black letter law. Maybe my surprise was, at least in part, because in addition to having a J.D., I also hold an M.B.A. and had experience in non-legal business consulting. Therefore, in addition to bringing a lawyer's perspective to the curriculum, I was also considering the class from a businessperson's vantage.

It seemed to me at that time-and still does today-that those individuals responsible for creating business law and legal environment curriculum and textbooks were thinking like former law students and lawyers.<sup>i</sup> They, and those who have followed, seem to mimic what is most familiar and therefore most comfortable rather than creating an approach that would best serve the students.<sup>ii</sup> This situation may also exist because many in the field have neither educational nor professional backgrounds in business (except, possibly within the context of legal study or law practice).<sup>iii</sup> As Morgan assessed the predicament, "Our calling *is not now nor has it ever been* to train our students to become lawyers. . . . our professional obligation . . . to serve undergraduate and graduate business students calls for something not provided by our professional training."<sup>iv</sup>

As we all know, most business students are not going to become paralegals or lawyers. They are preparing for a career as *business practitioners*. Moreover, most students taking an introductory law class at a business school are not going to be taking the CPA exam. Accounting students with that goal should not dictate class coverage for the introductory law course, and do not do so in the legal environment format. The law portion of the CPA exam has been shrinking (it is now less than 3 hours), and it is rumored that in the future that legal coverage might be abandoned altogether.<sup>v</sup> Furthermore, much of the exam's legal content is not typically covered in a first business law course anyway.<sup>vi</sup> One approach is a separate custom class for pre-CPA exam students.<sup>vii</sup> Alternatively, since the "new paradigm" discussed in this article suggests inclusion of traditional legal topics found on the CPA exam such as contract, tort and agency law, details of subjects left out of business school law curriculum, which might be on the exam, can be learned in a CPA examination preparation program.

Though some business law and legal environment textbooks have become more user friendly<sup>viii</sup> (e.g., improved summarization of judicial opinions), a law school-like approach still exists. In her 1997 treatise, Lawton is critical of using decided cases and legal rules to teach law to business students, describing business law texts as "massive compendiums of black letter law . . ."<sup>ix</sup> Ingulli notes the "positivist bent" of texts, treating law "as a series of black letter rules . . ."<sup>x</sup> Moreover, the selected text commonly provides structure and all the materials to be used in the basic law course.<sup>xi</sup> In my opinion, the current crop of textbooks and the approach business school law faculty take to courses might, at best, be dubbed "law school lite." The result is that classes are commonly taught as "mini" or "modified" law school courses. Again, our courses have evolved this way because of the educational and professional backgrounds of most textbook authors and

---

\* Professor, University of San Diego, San Diego CA

faculty members.<sup>xii</sup> Subject matter typically found in our texts (and therefore course content) may be a particularly poor fit for future small businesspeople and entrepreneurs.<sup>xiii</sup>

One example of just how difficult it is to break out of the case law mold is a textbook for business students on

alternative dispute resolution (ADR) and negotiation, useful as a supplement in a business law or legal environment class. The lawyer authors of this text (which I use in my class) seem compelled to provide numerous case law opinions to make certain points.<sup>xiv</sup> In discussions with business textbook representatives and editors, I have been told that publishers do not want to take the risk of deviating too far from what is familiar and comfortable in the market (also known as resistance to change). (Notwithstanding their reluctance to deviate from the standard approach, these non-lawyers have frequently given me positive feedback stating that the concept and ideas discussed in this article make good sense.)

Our current approach to teaching law to business students remains too legalistic. This legal emphasis encompasses both the content of business law courses, and the process used to teach these classes (i.e., legal casebook with judicial opinions). This approach is more appropriate for law students, and possibly pre-law students and paralegals, but is not the best way to teach the subject to business students. Lawton posits that our current “litigation driven model is an anachronism . . .”<sup>xv</sup> To best serve the needs of our students, the introductory course in law should offer a managerial approach that is realistic and practical for *future business practitioners*. As Collins points out, “business students will be making business decisions, not legal decisions. Thus in business schools students should learn about law in a way that better enhances their abilities as business decision makers.”<sup>xvi</sup> Sacasas and Cava believe that traditional law courses in business schools “frequently omit the practical considerations of managing legal implications, not to mention those costly providers of the legal service, lawyers.”<sup>xvii</sup> While legal academics may view the intricacies of law and legal process as interesting and challenging, businesspeople are likely to see them as a “necessary nuisance.”

From real estate to high-technology, international business to e-commerce, the business world has become very diverse with business students entering many different fields. We need to be realistic in respect to how we can prepare a classroom of students who will face different legal challenges based upon their career choices. As Nation and Melone see it: Once a student becomes a manager at a specific business, the type of legal rules and issues with which that manager needs to be familiar can be specifically defined. Moreover, the people who are likely to understand that set of issues and rules best are the business people and lawyers who work in that industry. Thus, students are likely to get the best exposure to the many legal issues/risks important to their industry on the job.<sup>xviii</sup> Nation and Melone argue for a broad, but “brief and general exposure to various legal topics.”<sup>xix</sup> We should impress upon our students that preventive law includes training themselves and employees they supervise in relevant legal aspects of their jobs and industry. Such training will provide specific and timely knowledge not available in a general business school law class. Meanwhile, the new paradigm proposed here will provide students with general knowledge and skills with broad applications across the business world.

Dr. Robert Sullivan, former dean of the Kenan-Flagler Business School at the University of North Carolina, has argued that “we do a lot of things in business schools today . . . because that is the only way we’ve ever done it.”<sup>xx</sup> Dr. Sullivan was recently hired by the University of California - San Diego to develop a new business school. He believes that if we were not burdened with past legacy and difficulty of change, business schools would look to a new model.<sup>xxi</sup> This paper suggests that there is a better model for our introductory law classes than continuing to do things the way we have in the past. This new paradigm emphasizes strategic management of the legal function through prevention of legal problems and cost-effective resolution of conflict. Memorization of legal rules and utilization of judicial process are de-emphasized. I currently teach such a course and call it Business Law I: Preventing Legal Problems and Resolving Conflict.<sup>xxii</sup>

In the new paradigm, topics not commonly taught in business law courses—negotiation, risk management\insurance, hiring and managing an attorney, legal audits, business dispute resolution systems, small claims court, self- help law, and basic legal research—are added. The subjects of mediation, arbitration, other forms of alternative dispute resolution (e.g., minitrials), and the relationship of ethics to law, are expanded from their typically minuscule coverage. Substantive topics currently covered (e.g., contract and tort law), as well as the courts and procedure, are condensed and presented in a practical manner that emphasizes prevention rather than memorization of legal rules and civil procedure. These traditional topics remain major components of the class. However, by making them more practical and appropriate for our audience, time becomes available for the new and expanded subjects described above. This article is not about the value of teaching public as opposed to private law, a “business law” versus “legal environment” approach, or which areas of substantive law should be taught. The focus here transcends that discussion so that one can integrate the present recommendations into any traditional model.

With law has so pervasive in modern business, it is crucial that a well-educated business student enter the business world with knowledge of law and the legal system. The question posed and answered by this article is what should be the form and content of that knowledge. The goal here is to provide a method to prepare students to manage their legal exposures in an efficient, cost-effective and ethical manner. The final result is a course that is more appropriate in preparing future managers for the legal environment of business than the current approach. A 1991 committee report on “The Role of Law in the Business School Curriculum,” written by Allison, concludes in respect to business law courses:

They are, and should be, quite different than courses taught in law schools. They are ‘business school courses about law.’ Their goal is to give students a *working knowledge* [emphasis added] of the structure of both the law generally and the particular legal area under consideration. They are and should be taught from the perspective of planning, prevention and managerial participation in the resolution of legal problems.<sup>xxiii</sup>

This article is also about *empowerment*. Empowerment means our students know what steps to take to prevent disputes from arising and can make educated choices about resolving conflict. Empowerment is about providing students with the ability and confidence to take greater control of processes of conflict avoidance and resolution than is typically the norm. The new paradigm replaces learning legal details and rules that change with skills such as negotiation, hiring and managing an attorney, and legal research.<sup>xxiv</sup> Some lawyers may, consciously or unconsciously, oppose such empowerment. But, business school teachers have a central responsibility to provide their students with the knowledge and tools to most efficiently and effectively manage the legal function and succeed in business.<sup>xxv</sup>

In her article, on the pedagogy of inclusion, Ingulli writes: “Only a visionary could hope to transform business law. Despite more than two decades of debate about its role in the undergraduate curriculum, there is little consensus about the nature of business law.”<sup>xxvi</sup> More than a decade later this statement continues to ring true. Although advocating a different vision than this author, Ingulli also urges change in our courses and the exploration of new topics.<sup>xxvii</sup> While not as noble and extensive a vision as Ingulli’s, this article offers an important, practical, student-oriented vision and direction for the transformation of business law and legal environment classes.

## II. LITERATURE REVIEW

Legal studies in business literature is replete with ideas about how undergraduate business law and legal environment should be taught. In general, these articles focus on teaching business law or legal environment using traditional methods: learning and application of legal rules in the context of an adjudicatory legal system emphasizing traditional topics (e.g., contract law, corporate law). Authors criticize aspects of traditional business school legal education making recommendations for improvements, but these critiques normally remain within the framework of the current paradigm. An exception is Ingulli who seeks to “re-vision” the discipline integrating “‘new’ scholarship on women and ethnic studies into the curriculum.”<sup>xxviii</sup> The two most common scholarly approaches in the literature to what should be taught in business school law classes are survey data and author recommendations.

Articles based upon research data survey preferences of a particular group for topical coverage in an introductory law class. Examples of groups queried include chamber of commerce members and corporate executives.<sup>xxix</sup> These surveys provide useful information and guidance, but are frequently biased in favor of the traditional topics and approach to the curriculum. Problems with these studies include:

1. Responses being preordained and limited: For example, one study pre-selected specific subjects to be prioritized by executives from business law and legal environment textbooks.<sup>xxx</sup> The result of such instruments is a prioritized rank order of only the “closed-ended” topics those surveyed had been offered to rank or rate. Even if there is an additional open-ended option (i.e., “add your own”), bias still exists in favor of specified choices on the list researchers provide. These surveys, for example, make the selection of topics such as risk management or small claims court unlikely or impossible.<sup>xxxi</sup>
2. Sample group unfamiliarity with topics: For example, even if the survey offers the topic of ADR as an option, without having studied the subject businesspeople may not be in a position to appreciate its importance in comparison to traditional areas such as contracts.<sup>xxxii</sup>
3. Academics as the sample group: As Massin points out, researchers use of those who teach the classes has “inherent bias” and is inferior to surveying business professionals.<sup>xxxiii</sup> Those who teach a subject will typically want to stay with what is familiar and comfortable. It is unlikely that *most* insiders will opt for new ideas and directions.

The other popular type of article considering what should be taught in business school law courses is based upon the ideas and predilections of the author(s). “Putting Business into Business Law: The Integration of Law and Business Strategy” published in *The Journal of Legal Studies Education* falls into this category.<sup>xxxiv</sup> Similar articles include suggestions that we teach lawmaking,<sup>xxxv</sup> economic analysis,<sup>xxxvi</sup> in-depth contract law,<sup>xxxvii</sup> event study.<sup>xxxviii</sup> There is also the ever-popular logic and critical thinking,<sup>xxxix</sup> which in this author’s opinion should be a part of most business school classes, but is ultimately best taught as a topic unto itself by someone with knowledge and training in formal logic. Although these suggestions are not part of this article’s “new paradigm,” they are all generally compatible with the approach discussed here. Furthermore, support from both surveys and author suggestions is found in the literature for many individual topics central to the new paradigm this article proposes. An example is negotiation. Such support is discussed and referenced with specific topics to follow.

## III. THE ESSENCE OF BUSINESS SCHOOL LAW CLASSES

As instructors of law, what is our *essential* role? We teach our students law so they may *prevent legal problems*<sup>xli</sup> and *resolve conflict*<sup>xli</sup> in their professional and, as a byproduct, personal lives. We are allocated a block of time, typically 3-4 hours per week for a semester or quarter. Are we utilizing class time as well as we might to meet the primary goal of educating future business practitioners for preventing legal problems and resolving conflicts? I do not believe that to be the case. This article challenges my colleagues to use class time to meet that goal. It is not the first article to ask business school law faculty to “reconsider the nature of our discipline, to define the core of business law.”<sup>xlii</sup>

The next section of this article details a new paradigm for teaching business law and legal environment classes. There, advantages and benefits of suggested modifications to the standard structure of classes are discussed. Problems exist with the traditional emphasis of teaching substantive rules of law and adjudicatory process that can be a hindrance to meeting essential goals. These issues include:

1. **Variations of law by jurisdiction:** “Majority” and “minority” rules can burden and confuse business students. Furthermore, even with attempts to teach the most prominent rules, with so many jurisdictions the law they learn may not be applicable in the state where they ultimately work.
2. **Changes in the law over time:** As Inguilli notes: “In ten, five, maybe two years the legal problems will change as new rights are created by courts and legislatures and old rights are winnowed down.”<sup>xliii</sup> Not being lawyers, businesspeople are unlikely to be aware of most changes.
3. **Complexity of law, especially exceptions:** The law has been represented as a tree. Even the most ambitious instructor cannot go too far out on the “branches” of any given topic. Moreover, exceptions will be difficult for students to retain over time.
4. **Multi-jurisdiction and international complications:** Conflict of Law is typically a 2-3 unit class in law school, International Law normally three.
5. **Differences between law and ethics:** Following the law may result in behavior that is technically legal, but unethical or not socially responsible. Many lawyers have never taken an ethics course (with the exception of “professional ethics” which is, essentially, the law governing lawyers) and have no background in the subject. A fundamental principle of business ethics is that to *truly* be ethical one must be willing to do more than the law requires and less than it allows.<sup>xliv</sup>

Lawyers know well just how complex the topic of law can be. One can find contradictions between legal textbooks regarding particular rules of law. Textbook authors and instructors advise students to contact an attorney regarding a legal problem. It’s frequently been argued that learning the law can help a businessperson know when they have a potential legal problem and need to contact an attorney.<sup>xlv</sup> But how much detail do students have to know to be aware that such an issue has arisen? Considering the aforementioned limitations, how much law should our students be taught? Rather than delving into details of substantive or procedural law, are there not better ways to spend class time such as by covering how to hire and manage an attorney or use negotiation to avoid or resolve a conflict? Petty and Mandel believe that business law and legal environment classes should take a more practical, business practitioner oriented approach.<sup>xlvi</sup> Inguilli argues that “As teachers we must extend our goals beyond imparting the ‘rules of law’ and how they currently function.”<sup>xlvii</sup> The next section of this article offers suggestions on the directions business law and legal environment curriculum should be taking.

#### **IV. A NEW PARADIGM FOR TEACHING BUSINESS LAW AND LEGAL ENVIRONMENT CLASSES: PREVENTING LEGAL PROBLEMS AND RESOLVING CONFLICT IN BUSINESS**

Businesses normally benefit most by preventing legal problems from ever arising (priority number one), shifting legal liability outside the firm, and resolving disputes inexpensively and rapidly. Great value can be added to our classes by including or enhancing topics that will educate our students on best practices to *prevent, shift* and *resolve disputes*. These topics include the relationship of ethics to law; risk management and insurance; hiring and managing an attorney; legal audits; alternative dispute resolution including negotiation, mediation and arbitration; business dispute resolution systems; and self-help law including small claims court and basic legal research.

Traditional subjects such as contract and tort law, the courts and procedure, remain important components of the class. To accommodate the new and expanded areas, and to better meet the needs and goals of business students, these subjects are simplified and shortened. Prevention and practicality are emphasized.

##### **A. Relationship of Law to Ethics**

An important way businesses and individuals can prevent legal liability is by practicing ethical behavior. As a popular traditional business law textbook puts it “In preparing for a career in business, you will find that a background in business ethics and a commitment to ethical behavior is just as important as a knowledge of the specific laws that you will read about in this text.”<sup>xlviii</sup> Or, as simply stated by Paine, “ethics has *everything* to do with management.”<sup>xlix</sup> In one study, Fortune 500 CEOs, or a representative they selected to complete the questionnaire, were asked to evaluate the importance of

34 different legal subject titles drawn from business law and legal environment textbooks. “Ethical issues” ranked 4<sup>th</sup>, just behind “contract law,” with “agency law” 16<sup>th</sup> and “torts” 26<sup>th</sup>.<sup>1</sup> Today’s business environment warrants that managers go beyond bare legal compliance. Society increasingly demands, and successful businesspeople see the wisdom of “integrity-based” management, which combines a concern for the law with an emphasis on ethics.<sup>li</sup> The Federal Sentencing Guidelines bring law and ethics together by basing fines on whether proactive ethics activities and programs were undertaken by the defendant organization.<sup>lii</sup> An organization that has been compliant with the guidelines’ ethical behavior incentives can reduce the fine for a criminal conviction up to 80 fold.<sup>liii</sup> Ethical behavior by an organization is an intelligent and socially responsible long-term strategy to save on the cost of legal bills and liability. Business law faculty have the opportunity to educate students on the wisdom of such an approach for decreasing potential legal costs, not to mention other benefits such as boosting a firm’s reputation and sleeping well at night. Too often members of the legal and business community argue that “if it’s legal, it’s ethical.” Characterizing the shortcomings of that philosophy Harvard Business School professor of management ethics Lynn Sharp Paine writes:

The law does not generally seek to inspire human excellence or distinction. It is no guide for exemplary behavior-or even good practice. Those managers who define ethics as legal compliance are implicitly endorsing a code of moral mediocrity for their organizations.<sup>liv</sup>

*Law is a starting point or minimum for ethical behavior.* But lawyers are trained to go to “the edge of the law” on behalf of clients. College faculty are not hired to be “zealous advocates” or to teach students to take a lawyer’s approach to conduct when it involves questionable ethics. Business school law faculty must get beyond their own training to effectively incorporate business ethics in their courses. This means adopting the concept that just because something is legal doesn’t mean it’s ethical. For example, in many circumstances it is legal to lie to one’s family or friends, but it usually is unethical. A pharmaceutical company selling drugs banned by wealthier countries because of side effects in poor nations is an example of legal but unethical business conduct.<sup>lv</sup> Such examples of unethical but legal conduct are all too common in our society.

In an article on “the Miami Model,” Sacasas and Cava discuss the emphasis in their program on the importance of ethics in business decision-making.<sup>lvi</sup> They acknowledge that traditionally law classes in business have focused on the “legal limits of conduct.”<sup>lvii</sup> Their program “challenges students to consider the ethical as well as the legal bottom line. . .”<sup>lviii</sup> In his committee’s report, Allison finds that “Business school courses about law present a unique opportunity to raise and explore ethical issues in business situations.”<sup>lix</sup>

Ostapski explains that “law and ethics are inextricably intertwined.”<sup>lx</sup> Moral values of society give rise to law. Moss quotes Marty Taylor, a vice president at the Institute for Global Ethics, who describes the relationship as such, ““When people are unethical there’s a vacuum of ethics, then law steps in.””<sup>lxi</sup> Allison’s committee report states: “Many laws have a moral content, and many serious legal problems begin as ethical problems.”<sup>lxii</sup> To a great extent, law is a subset of ethics. The two substantially overlap. Taylor points out that ““Law is no different than ethics, it’s just codified.””<sup>lxiii</sup> Laws are frequently formal and “complex” versions of ethical principles. For example, business students probably won’t remember the elements of misrepresentation or fraud for very long. But, if they are honest and forthright in their dealings, it is unlikely they will violate those rules. If a person does not take advantage of, or overreach others, he or she can never properly be accused of duress or undue influence. In essence, fraud and misrepresentation are based upon the ethical values of honesty and fairness. Undue influence and duress are about fairness and caring. Allison’s committee report makes a similar point with several pertinent examples:

The fiduciary duties of a corporate manager to the company and its shareholders include both legal and ethical dimensions. The same is true of the fiduciary obligations owed by agents to their principals or those existing between partners. Failing to keep a commitment carries with it clear moral implications in addition to the possibility of a breach of contract claim. Concealing the truth from the other party to a business transaction, trading securities on the basis of inside information, substantially exaggerating the attributes of a product or service, and countless other behaviors embody both legal and ethical implications.<sup>lxiv</sup>

From the savings and loan scandal to Enron and WorldCom, the daily news tells us that ethics is truly “easier said than done.” Even if students are covering ethics in other classes, students can only benefit from repeatedly learning how to put ethics into practice. Furthermore, because law is an outgrowth of ethics and there is such a big overlap between law and ethics, the pair can provide a learning synergy for each other.

A common misconception about ethics is that it is a “common sense” subject. One need only to look at oneself and the world around us for empirical evidence of how difficult it is to be moral (e.g. student cheating, tax evasion, fraud by businesspeople and lawyers). Another pitfall is viewing ethics as relative (subjective). There are theories and approaches to morality that are well-accepted by those with expertise in the field. As Shermer documents, the Golden Rule “can be found in countless texts throughout recorded history and from around the world—a testimony to its universality.”<sup>lxv</sup> Furthermore, if ethics are relative, the law itself is undermined and we are left with the potential for chaos.

Typically, business school law faculty have little or no formal training in ethics, business ethics, or business and social responsibility. There is much to learn. It is crucial that instructors become knowledgeable in these topics and comfortable teaching them as an integral part of an introductory business school course in law.<sup>lxvi</sup>

The ethics unit in a law class should provide a practical overview of ethical theories, approaches and values particularly as they apply to business. Students need to learn the relationship of ethics to law, and that ethical, responsible behavior is an excellent first line of defense for avoiding legal problems (and may also be beneficial in dispute resolution). It is particularly important that they leave the class with an understanding that obeying the law is a minimum standard for ethical behavior. As stated earlier, an ethical person *does more than the law requires and less than it allows*.<sup>lxvii</sup> Other topics for coverage might include:

- The many reasons businesses and other organizations should behave ethically (including saving legal fees, reputation implications, and a discussion of the *Federal Sentencing Guidelines* and its consequences);
- Practical suggestions for ethical decision-making in business<sup>lxviii</sup>;
- Social responsibility in business;
- Stakeholders and stakeholder analysis;
- The ethical and social dimensions of corporate influence on government policymaking-including the courts (e.g., lobbying, campaign contributions, hiring the “best” lawyers).

Finally, students and faculty alike need to be reminded that ethics is easier said than done. Doing the right thing at difficult times, especially when honesty may have a high cost or there is little chance of penalty for unethical conduct, takes willpower and determination!

Beyond this module on ethics, the topic should be woven across the course curriculum. Previous examples of ethics as it relates to fraud, misrepresentation, duress and undue influence demonstrate how ethics can help with avoidance of legal problems in contract law.<sup>lxix</sup> An example of a practical application of ethics and preventive law for discussion in agency law is ethical problems businesspeople face in an agency relationship such as conflicts of interest and “gifts.” A unit on negotiation ethics can inform students about ethical issues in dispute resolution processes.

## **B. Risk Management and Insurance**

Educating our students in order to help them protect themselves and their organizations from legal liability is a big part of what we do in business law and legal environment classes. Simply put, proactive risk management, including the purchase of appropriate insurance coverage, is an effective way to limit legal costs.<sup>lxx</sup> The field of risk management can provide students with excellent tools to prevent or shift legal liability and guard against other common risks (e.g., fire, theft, loss of key person). Learning law and practicing “preventive law” are part of risk management. But risk management is much more. Attorney Milton Bordwin notes that “The function of risk management has much in common with the practice of preventive law.”<sup>lxxi</sup>

In a 1991 survey business people were given a list of 35 “legal issues” and asked which they encountered on a regular basis. The overall results scored “insurance and issues related to risk reduction” among those at the top.<sup>lxxii</sup> Allison’s committee’s report listed “insurance law” as commonly associated with three out of five functional areas of business: accounting, management and finance.<sup>lxxiii</sup>

Business is about risk. Making decisions about how to handle risk is a basic task of every business person. This section of the class provides information on how a business might best manage some of the risks it confronts. Risk management aims to protect the assets and profits of an organization by reducing the potential for loss before it occurs.<sup>lxxiv</sup> The process includes risk assessment, loss control, risk transfer and risk monitoring (i.e., control and follow-up).<sup>lxxv</sup> Risk management may draw upon technical and legal expertise, knowledge of insurance, business ethics and common sense to aid an organization in minimizing losses. Through risk assessment and preventive action a firm can reduce the frequency and severity of losses.

Risk Management is a big topic on which some business schools offer complete courses. All business students should be familiar with basic strategies for preventing legal liability. Students should understand the roles and functions of those professionals who can assist with the risk management process including the risk manager, insurance agent or broker, attorney, and ethics officer. Coverage of risk assessment, the process of identifying and evaluating the exposures that threaten an organization’s assets and profitability, should include a discussion of legal audits. An organization will normally want to prioritize loss control, with risk transfer, particularly insurance, a second choice. The goal of loss control is to reduce the frequency and severity of losses through preventive measures. Whether through equipment maintenance, repair of a safety or environmental hazard, or careful personnel hiring and training, this is a good way to prevent legal liability from ever arising. Loss control is superior to insurance defense because making a claim can increase premiums (or will be a direct cost to companies that self-insure) or lead to cancellation. Furthermore, there are deductibles (i.e., risk retention) and not all risks

can be insured against. Most important, loss control is the ethical way. Utilitarian calculations aside, inflicting injury to person or property is a strategy that raises serious ethical issues, notwithstanding how profitable such a strategy may be.<sup>lxxvi</sup>

Risk transfer shifts financial burden of loss outside the organization. The most important and prevalent method of risk transfer is insurance. Purchasing insurance is a way to protect against many different risks including tort liability of the firm. In addition to paying damages insurance normally provides the insured with a legal defense. Often, a businessperson facing a legal liability issue will contact their insurance carrier, *not their lawyer*. Therefore, students would benefit from a practical understanding of insurance coverages and how to handle claims, including a practical discussion of insurance law. Other examples of methods to transfer risk, that are typically discussed in contract law but could be considered here, are indemnity agreements and exculpatory clauses.<sup>lxxvii</sup>

Risk management is a proactive and ongoing process that never ceases so long as the firm is in business. At its best, risk management results in prevention that avoids the businessperson's nightmare scenario: potential liability, lawyers, and time wasted by the legal system (of course there is still alternative dispute resolution, but better not to have the dispute arise at all). When Joseph Wharton established the Wharton School of Finance and Commerce in 1881, law was one of five required subjects in the curriculum. Insurance law was one of the topics to be taught in the law area.<sup>lxxviii</sup> In today's complex business world he might broaden that charge to risk management. Certainly the value of learning about risk management and insurance rivals the benefits of learning tort law and may be more important in the real world of business.<sup>lxxix</sup>

### **C. *Hiring and Managing an Attorney and Legal Audits***

Too often our societal norm is to hire an attorney *after* a legal problem arises. Usually, the better long term strategy, particularly for businesses, is to prevent the legal problem from ever arising. Prevention will normally be cheaper and easier than dispute resolution.

Whether it's because of a class in law, advice of another, or common sense, most people will contact a lawyer when a legal question or problem arises. Therefore, we can impart to our students important practical information on when and how to hire an attorney and how to manage one. The ability to work well with counsel can be critical to avoiding legal problems and staying out of court.<sup>lxxx</sup> In discussing the results of their 1984 survey, Klayman and Nesser indicate that the largest gulf between business practitioner topical preferences and what was actually being taught in business school at that time was the subject of selecting and dealing with an attorney.<sup>lxxxi</sup> They blame the problem in part on the lack of available materials (and based upon this author's ongoing review of textbooks, little has changed). They urge faculty to "rise to the challenge to produce teaching materials designed to aid the business person to better relate to attorneys."<sup>lxxxii</sup> Other surveys of business people also support the importance of knowing how to work with an attorney.<sup>lxxxiii</sup> Sacasas and Cava stress attorney management and relations in their recommended approach to legal education of business students.<sup>lxxxiv</sup> In a survey primarily of small businesspeople and entrepreneurs, Thomas and Usry found that those questioned were more prone to have annual contact with the topic of "selecting an attorney" than torts or product liability. UCC issues scored only slightly higher than attorney selection.<sup>lxxxv</sup> Rather than teaching sets of rules, Donnell sees greater value in providing students with "information and attitudes that will make it easier to work effectively with lawyers to accomplish a firm's business goals."<sup>lxxxvi</sup> He mentions three studies in which the topic of "effective cooperation between business people and attorneys was ranked of great importance" in respect to business law course design.<sup>lxxxvii</sup>

Topics for discussion in respect to hiring an attorney include forms of law practice; finding an attorney and consulting such sources of information as Martindale-Hubbell (books and website); specialties; legal fees, costs, retainers and billing practices; how to interview an attorney; role of the State Bar; and hiring considerations including credentials and references. Students should be prepared to have an intelligent discussion with potential attorneys regarding a *preventive approach* to avoidance of legal problems and each lawyer's experience with, and willingness to use, alternative dispute resolution if a dispute arises.

Business school law classes should help students become knowledgeable and critical consumers of legal services. They should not feel intimidated by the legal system or attorneys. Individuals and organizations work closely with attorneys. The relationship may continue over a long period of time. Therefore, it is important that clients feel comfortable and compatible with their lawyer as they would be with their dentist or doctor. For example, students should understand that if an attorney has not been both punctual and polite, they should consider terminating his or her services. Additional topics to help students become savvy consumers of legal services include benefits of utilizing paralegals; self-help law and "unbundled" legal services; realities of lawyer advertising (e.g., when to trust "specialization" claims and lawyer referral services, and how to recognize marketing schemes); avoiding "cost" billing surprises; and fee negotiation including discounting.

Of course, once an individual or business hires a lawyer the fun has just begun. After teaching students how to hire an attorney, the next responsibility is to orient them on managing those legal services. A well-educated business practitioner and good consumer needs to know how to get the most out of his or her lawyer while keeping costs down.

The first lesson is that any agreement with an attorney should be in the form of a contract, which details services to be rendered, fees and costs, regardless of whether the State Bar mandates a written attorney-client fee agreement. Where the client is to be billed at an hourly rate, the client should get a maximum charge for the work to be done or, at least, set an amount of time after which the attorney must contact them to authorize further work. Students need to be informed to request detailed monthly bills itemizing work done with all fees and costs specified if such is not the practice of their legal service provider. Because of the high cost of legal fees, fraud and errors, some companies hire auditors to scrutinize legal bills.<sup>lxxxviii</sup> Students should understand that these issues make it important to establish a review process for law firm charges. Another tip is for clients to request periodic reports on their legal work including copies of important documents. Students should understand the basics of the rules that govern an attorney's professional conduct and relationships including attorney-client privilege.

If an attorney isn't behaving properly (e.g., doesn't return calls) students should be advised that they need to be assertive, complain and, at some point, consider getting a new attorney. In extreme cases, their options include a complaint to the state bar or a consultation with a legal malpractice specialist.<sup>lxxxix</sup>

Hiring and managing an attorney is, of course, related to risk management and preventive law. The topic of legal audits provides an excellent bridge between these areas of coverage. A legal audit provides a good first step in practicing preventive law.<sup>xc</sup> It involves a review by a lawyer of some or all areas of a business in search of legal risks that some refer to as "legal time bombs."<sup>xc</sup> Legal audits should be part of an organization's overall risk management program. Examples of what might take place in a legal audit include review of contracts; insurance coverage and indemnity agreements; hiring practices; and employment materials.<sup>xcii</sup>

What is a lawyer's role with respect to issues of business ethics and social responsibility that may effect a businessperson? A discussion of this question links the topics of business ethics and social responsibility to managing an attorney. Future business practitioners need to know that their lawyer has a professional duty to be a zealous advocate on their behalf and defend them to the limits of the law. This duty may exist even if the lawyer's action has a result that is viewed by society as unethical (e.g., relieving a responsible individual from liability based upon clever legal tactics that harm someone else). As discussed earlier, law provides only an ethical minimum: a businessperson who wants to be ethical must go beyond the law and do less than it allows and more than it requires. Students must understand that lawyers normally provide legal, but not necessarily "ethical" advice and options. And, that a lawyer may even advocate methods to dodge or circumvent the law or truth that are legal but unethical (e.g., tax "avoidance" schemes). Therefore, it may be up to clients to tell their attorney that they want to do the right thing. Clients don't have to follow advice that may be legal, but not ethical or socially responsible. We can encourage our students to show such courage when they enter the professional world. Following an ethical approach in our competitive business culture often takes moral courage!

#### **D. *Alternative Dispute Resolution and Business Dispute Resolution Systems***

Still popularly known as "alternative" methods of dispute resolution or ADR, what was once alternative has become mainstream. "Entire industries have incorporated ADR processes into their business routine."<sup>xciii</sup> I tell my students to consider these processes for resolving disputes to be "additional" or "other" methods for resolving disputes. As defined by Ponte and Cavenagh "ADR is any formal or semiformal process other than litigation used to resolve a business dispute."<sup>xciv</sup>

Applications of ADR in our society have become ubiquitous. The business community has embraced ADR for the many potential benefits discussed below. Hayford believes that ADR's "continued ascendancy" is "virtually assured."<sup>xcv</sup> Use of ADR clauses in business contracts are prolific.<sup>xcvi</sup> Businesspeople and consumers who read their agreements will see such clauses on a regular basis. And, as every business law instructor should know, the vast majority of conflicts are settled through negotiation or another method of dispute resolution and not resolved by a court decision.<sup>xcvii</sup> A study of 2002 federal court cases found that only 1.8% ultimately went to trial.<sup>xcviii</sup> An important reason given for the trend of decreasing trials is "the rise of arbitration and other less formal means of resolving disputes."<sup>xcix</sup> "Increasingly, federal and state courts are requiring parties to participate in various forms of ADR as part of the formal litigation process."<sup>xc</sup>

It is our responsibility to let business students know of the opportunities for, and advantages of, using ADR to settle disputes. Lawton believes that "Teaching students about the alternatives to litigation and how to design workable in-house alternative dispute resolution programs is an important way to prepare future managers for the realities of conducting business in the 21<sup>st</sup> century."<sup>cci</sup> She is critical of business law texts which give little space to ADR related subjects.<sup>cii</sup> Oppenheim sees the importance of providing future managers with knowledge of the range of alternatives available for resolving a dispute.<sup>ciii</sup> In her article, "Negotiation: An Idea Whose Time Has Come," Rominger advocates for business law faculty to train their students in conflict resolution skills. She states that "legal coursework is not complete without instruction in dispute resolution skills. A pedagogy that addresses only the cognitive elements of the law may no longer be sufficient to prepare students for the emerging, ADR-based legal environment."<sup>cciv</sup> Dunfee also supports coverage of dispute resolution and negotiation, in particular, within our classes.<sup>cv</sup> In a chart of "law topics associated with the functional areas of business" (i.e.,

accounting, information systems, management, marketing, finance), found in Allison's committee report, "dispute resolution" is listed as a law topic "commonly associated" with *all* five areas. By comparison, antitrust law and commercial paper were listed under three areas.<sup>cvi</sup>

Because litigation is confrontational, often requiring aggressive tactics to win, hostility between the parties frequently increases using this process. Bad feelings can become intensified. ADR provides a tremendous opportunity for organizations to handle conflict in a way that has numerous *potential* benefits such as saving time and money, privacy, salvaging important relationships, protecting one's reputation and trade secrets, simplicity and flexibility as opposed to judicial process.<sup>cvi</sup> Important, potential psychological benefits of utilizing ADR for dispute resolution include greater control, empowerment, and "satisfaction" for the parties than typically available using an attorney and the court system.<sup>cvi</sup> The Allison committee report stresses the importance and value of teaching ADR processes. Their report says, "On the average ADR produces resolutions faster, cheaper, more privately and even more creatively than traditional litigation."<sup>cix</sup>

Support for ADR has come from the highest level of our judicial system. In his *1984 State of the Judiciary Address*, United States Supreme Court Chief Justice Warren Burger stated:

The entire legal profession, lawyers, judges, law teachers . . . has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be 'healers of conflict.' For many claims, trial by adversarial contest must go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, to inefficient for a truly civilized people.<sup>cx</sup>

In a 1988 speech critical of the excesses of the American justice system, U.S. Supreme Court Chief Justice William Rehnquist said that our legal system as it exists poorly serves many Americans. He noted that so-called alternative methods may in the future become usual and customary because of drawbacks to the traditional system.<sup>cx</sup>

Methods of ADR include negotiation, mediation, arbitration, minitrials, summary jury trial, early neutral case evaluation, mediation-arbitration, and private judging. Negotiation, mediation and arbitration are the most common forms of mediation, and to varying degrees, a basis for the other ADR methods. Therefore, I emphasize these three methods in my class, but provide students with a basic understanding of each approach.

There is value in teaching students the strengths and weaknesses of negotiation, mediation, arbitration and judicial process so they can make an educated decision on which process to use when a conflict arises. Each process has advantages and disadvantages and is better suited to different circumstances and goals of the party. In comparing these four methods consider these criteria: cost; speed; privacy; chances of reaching a result; privacy/opportunity for publicity; empowerment and control; satisfaction with process and results; opportunity to salvage relationship; maximization of award; ability to set precedent; procedural rights, including availability of discovery and appeal.

An introduction to this subject can include a discussion of how and why our legal system supports, promotes, and sometimes requires the use of ADR rather than courts to resolve disputes.<sup>cxii</sup> International and cross-cultural considerations should be mentioned. Students should understand that ADR, particularly negotiation and mediation, often "shift risk." Both parties can reduce the chance of an extreme negative result, more common in litigation and to some extent arbitration, by using party-driven ADR methods and compromising. (This also means the disputants will likely forego their chance for a big victory.) The nature of party-driven ADR is such that more often the result may be "win-win" rather than "win-lose." Of course, the class should also be aware that in utilizing ADR a party forfeits certain constitutional and civil procedure protections.<sup>cxiii</sup> This is most problematic when the ADR process is mandatory and binding. Reference can be made to the topic of hiring and managing an attorney in a discussion of the appropriate role of attorneys in ADR. Considerations include how to retain an attorney who is supportive of, and knowledgeable in ADR, and how to know when an attorney may be helpful or harmful with different ADR processes. One hopes that in the future law schools will put greater energy into training lawyers to be peacemakers, as well as advocates. Then businesspeople will not have to be as concerned about how a particular lawyer might handle non-traditional methods of dispute resolution.

### ***1. Negotiation***

The topic of negotiation provides an opportunity for law faculty in business schools to teach students a crucial business and life skill that is typically neglected in the required undergraduate curriculum. As Ponte and Cavenagh put it, "Negotiation forms the basis for effective non-adjudicative dispute resolution and therefore is a key business skill. The business professional must become comfortable with the process and the many ways in which it is practiced."<sup>cxiv</sup> Allison's committee report agrees, "Every accomplished business manager must be a good negotiator."<sup>cxv</sup> "Negotiation informs all aspects of business life. . . in some languages the same term is used for both 'business' and 'negotiation.'"<sup>cxvi</sup> Aspiring business people can benefit from more training in conflict management and persuasion.<sup>cxvii</sup>

Applications of negotiation in business are closely related to the law in business curriculum including bargaining, contract negotiation and dispute resolution.<sup>cxviii</sup> This relationship makes the introductory course in law an ideal place to teach

this subject. Good negotiation skills can provide a business practitioner with the ability to resolve a conflict at its earliest stages without having to resort to lawyers. Done properly, negotiation can be the simplest, least expensive, quickest and most private form of dispute resolution.

I recommend that the unit on negotiation be practical and applied and include skill training with exercises. The unit provides an opportunity to teach students theory and skills in communications, conflict resolution and persuasion. Rominger believes that a negotiation component in business school law classes “can teach a wide variety of cognitive skills including issue and interest definition, critical reasoning, analytical proficiency, creative thinking and synthesis of multiple interests and options . . . assertive presentation of interests, collaborative group behavior, a preference for expanding options instead of narrowing them, and empathy for another’s point of view.”<sup>cxxix</sup> A goal of the curriculum should be for students to gain confidence in their ability to negotiate. Students should also be made aware as to when it would be better to have someone else, normally an attorney, negotiate on their behalf. For example, situations involving intense emotions or legal complexity make it advisable to use an attorney.

The popular, classic book on negotiation, “Getting to Yes,” by Roger Fisher and William Ury, and related materials such as audiotapes, provide an excellent introduction and overview to the topic.<sup>cxx</sup> “Getting to Yes” elaborates on two different negotiation styles, the competitive or positional bargaining and collaborative or principled negotiation.<sup>cxxi</sup> It teaches the tenets of principled negotiation such as to “separate the people from the problem,” and “focus on interests, not positions.”<sup>cxxii</sup> Fisher and Ury offer problem solving ideas for more difficult bargaining scenarios. A goal of these materials is to provide a student with knowledge and skills on “how to negotiate agreement without giving in.”<sup>cxxiii</sup> Several articles have appeared in the *Journal of Legal Studies Education* suggesting methodology for teaching negotiation and dispute resolution in the business school law curriculum.<sup>cxxiv</sup>

Additional topics for discussion in respect to negotiation include negotiation ethics; international/cross-cultural negotiation; and drafting and enforcement of a negotiated agreement. An added benefit of learning negotiation skills is that some of these same skills are useful in mediation and other party-driven dispute resolution processes.

## 2. Mediation

Mediation may be defined as a facilitated negotiation where a third-party neutral assists disputants to reach a mutually acceptable resolution to all or part of their conflict. It has been argued that mediation offers an ethical approach to conflict resolution compatible with a caring and fair approach to stakeholder management.<sup>cxxv</sup>

As Ponte and Cavenagh note, “Mediation is perhaps the fastest growing form of alternative dispute resolution (ADR) in business today.”<sup>cxxvi</sup> Research indicates that mediation is popular with corporate counsel, particularly in-house.<sup>cxxvii</sup> Studies have shown that mediation can result in tremendous money savings for business.<sup>cxxviii</sup> Mediation is increasingly being taught in law schools.<sup>cxxix</sup> As discussed earlier in respect to the potential benefits of ADR generally, in addition to saving time and money, the advantages of mediation may include privacy, salvaging a business relationship, and protection of reputation and business secrets.<sup>cxxx</sup>

Students should become familiar with the steps in a generic mediation process and common variations. For example, some providers of mediation services rely heavily on the use of caucuses while others may dispense with them entirely. Other topics of value to students include mediator role and ethics; finding and selecting a mediator including qualifications, preparation for mediation; drafting and enforcing a mediated agreement. Students should be made aware of the reasons why it may not be necessary, or even wise, to have an attorney present at a mediation session. In any case, as noted earlier, it is a good idea to retain an attorney who is knowledgeable in, and supportive of, mediation.<sup>cxxxi</sup> Finally, students should understand “mandatory mediation,” and its growing use in the court system.

Students should know that studies indicate high satisfaction levels with mediation.<sup>cxxxii</sup> Parties have a positive response to mediation because it is a process that empowers them with a great deal of control over the process and its outcome. There is evidence that parties are *more* likely to comply with a mediation agreement than a court judgment.<sup>cxxxiii</sup>

## 3. Arbitration

Arbitration is an adjudicative process in which a third-party arbitrator hears a dispute and renders a judgment on the issues. Today arbitration is a common way to resolve disputes. Demand for arbitration has skyrocketed.<sup>cxxxiv</sup> Recognizing the growing popularity and importance of arbitration (and other forms of ADR), Edelstein believes that it is “essential” we give it greater attention than the “second rate treatment” it currently receives in business school law materials and classes.<sup>cxxxv</sup>

Because arbitration takes different forms (e.g., formal labor arbitration) I suggest that the class be focused on “commercial arbitration.” This concentration will have relevance to students in their lives as business practitioners, employees and consumers.

Students should understand the meaning and uses of voluntary, compelled, binding and non-binding arbitration.

They should be familiar with basic rules and procedures governing arbitration. This includes the role and responsibilities of, and limitations on, arbitrators. Specific topics for discussion include pre-dispute arbitration agreements (PDAAs); submission agreements; arbitrator qualifications and how to choose an arbitrator; self-representation and representation by counsel; arbitrator ethics; court annexed arbitration; appeal and enforcement of arbitral decisions; the Federal Arbitration Act and state preemption.

Use of PDAAs has become very common. For example, they can be found in many real estate, employment and medical service agreements. There is a great deal of controversy today surrounding these clauses when included in consumer and employee contracts.<sup>cxv</sup> In some cases courts have found such clauses, or certain provisions within such clauses, to be unconscionable, particularly in the case of adhesion contracts.<sup>cxvii</sup> Students should be familiar with the legal and ethical issues that have arisen with the proliferation of these clauses. Issues include use of fine print; legalistic language; onerous requirements to arbitrate such as high costs or an inconvenient location; arbitrator selection provisions that benefit the business drafting the agreement; loss of procedural and constitutional rights such as discovery and jury trial; limitations on damages and ability to appeal; and other “lopsided” provisions.<sup>cxviii</sup> The class might construct a legal and ethical PDA that benefits the company by requiring ADR, but treats the other party fairly. This exercise provides an opportunity for lessons on ethics, due process, contracts, and arbitration, from a managerial perspective.

#### **4. Implementation and Management of Business Dispute Resolution Systems**

The topic, implementation and management of business dispute resolution systems, focuses on how an organization can cost effectively prepare for and manage the inevitable conflict and disputes that *will* arise. Business dispute resolution systems combine ADR with preventive law. They involve mechanisms a business implements in advance so that when a dispute arises the possibility is increased that it will be resolved relatively quickly and inexpensively.

A good starting point is to discuss utilization of ADR clauses in contractual agreements with third parties including consumers, employees and suppliers. I recommend the students consider a “med-arb” clause requiring arbitration to follow mediation, if mediation fails. Students should also know that in general, any method of ADR may be attempted at any point after a dispute has arisen, even during the civil litigation process. As previously mentioned, legal and ethical issues in regard to contract clauses that require ADR, especially arbitration, should be discussed.

Business dispute resolution systems can be divided into internal and external programs.<sup>cxix</sup> The internal system is designed primarily for disagreements that arise with employees, franchisees, product dealers, and business partners. An external mechanism is primarily for customers and suppliers. Methods include provisions for dispute resolution in contractual agreements; ombuds and peer review programs; and training in conflict resolution techniques for managers and other appropriate personnel. Dispute resolution processes should be outlined in company materials, including employee handbooks. Companies that have successfully used business dispute resolution processes, Toyota, with dealers, and UPS, with employees, can be part of the discussion.<sup>cxl</sup> Discussion of dispute resolution systems can be linked to the topic of hiring and managing an attorney since lawyers should assist with the implementation of dispute resolution systems. Also, the practical topic of locating and hiring ADR service providers can be covered with mention of options such as the American Arbitration Association, “rent-a-judge” (e.g., Judicial Arbitration and Mediation Service, JAMS), and community dispute resolution centers.

Students should understand that organizations can be creative in fashioning internal or external processes that fit their needs, so long as the processes are legal and ethical (e.g., fair, reasonable cost). A related ethics issue is the use of confidentiality in settlements. Confidentiality is relevant to these agreements whether they result from ADR or judicial process. Such agreements have become controversial, particularly when environmental contamination or a dangerous product, such as the Ford Explorer - Firestone Tire cases, is kept secret from the public.<sup>cxli</sup> Confidentiality of settlements is an evolving area of law, and although courts or statutes may require disclosure,<sup>cxlii</sup> it sometimes comes down to the willingness of a party to do the right thing when not legally required.<sup>cxliii</sup>

Finally, students can construct a general priority order for utilization of primary conflict resolution methods. Such an exercise, having students prioritize methods and give their reasoning, including exceptions to the “general rule,” is a good way to review and summarize the material.

#### **5. ADR- Conclusion**

The two passages below are powerful messages with which to begin or conclude the ADR materials. In *The Art of War*, written in 6<sup>th</sup> Century B.C., Sun Tzu states: “So to win 100 victories in 100 battles is not the highest excellence, the highest excellence is to subdue . . . without fighting at all.”<sup>cxliiv</sup> In a 1985 speech, former Chief Justice Warren Burger quoted a distinguished lawyer, Abraham Lincoln:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how

the nominal winner is often a real loser in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good [person]. . . .

Never stir up litigation. A worse [person] can scarcely be found than one who does this.”<sup>cxlv</sup>

### **E. Self-Help Law**

“Doing it yourself,” with little or no help from an attorney, can be an economical and self-empowering way to go. Benjamin believes “That sense of empowerment is shared by the millions who have turned to self-help legal manuals and online services that aim to put neophytes on an equal footing with brandishing law degrees and, in the process, save them money.”<sup>cxlvi</sup> Learning how to handle one’s own simple legal tasks and problems will be especially helpful to students who become entrepreneurs or small business owners and may have limited resources to hire a lawyer. Knowledge of self-help law will also benefit students in their personal lives. Topics of coverage can include self-help sources and materials; legal research; small claims court; the limitations of self-help law, for example, when and how to get professional assistance.

Students should be made familiar with self-help materials and their sources such as the Nolo Press in Berkeley, California. Nolo offers a variety of self-help materials designed for the layperson, including books and software with many legal forms and documents.<sup>cxlvii</sup> One can write a contract, draft a will, prepare incorporation documents or file for a patent with the aid of these materials. Students should become acquainted with the law library. The ability to do basic legal research will be a useful skill for many in business. The Internet offers a convenient source for self-help law and legal research available on a businessperson’s desk.<sup>cxlviii</sup>

Small claims court provides the layperson with a convenient, relatively inexpensive, fast, arbitration-like option for handling disputes. In cases involving lesser amounts of money, the cost of hiring an attorney may not be economical even with a successful outcome. Every business student should understand how small claims court works if they later want to bring an action or are sued there. Ask students to share any experience they have had with this court. Beyond small claims court, with the high cost of legal services the number of parties handling their cases *pro se* has increased dramatically.<sup>cxlix</sup>

Self-help law is only appropriate for certain individuals and particular circumstances. The limits of self-help law need to be discussed. “Middle-ground” possibilities such as hiring an attorney, or paralegal supervised by an attorney, for consultation or review of the layperson’s work should be considered. Instructors should convey that there are attorneys offering “unbundled” legal services providing discrete tasks for a client rather than full representation. Goldberg writes in *Business Week* of an inventor who saved \$50,000 to \$60,000 on patents using *Patent it Yourself* (Nolo Press) and the unbundled assistance of an intellectual property lawyer.<sup>cl</sup> Economical options such as “legal form” services and law school clinics are also viable options.

As the cost of legal services continues to rise, and self-help materials become easier to access and utilize, self-help law is bound to continue gaining in popularity. We owe it to our students to empower them by teaching about this useful resource and option.

### **F. Traditional Topics: A Practical, Preventive Approach**

The new paradigm for teaching law to business students requires modification of the traditional way law topics such as civil procedure, contracts and torts are taught. The new approach has two goals: (1) to orient these subjects more to the needs and realities of future business practitioners than is presently the case; (2) to condense these materials so there will be time to cover the new and expanded topics previously discussed. These goals can compliment and support each other as I hope will become apparent below.

Business students should be able to respond when a common legal problem in a field of law they have studied (e.g., contract law, anti-trust) may be present. They should also understand basic vocabulary in the areas of law they have studied and in respect to procedure and dispute resolution alternatives to improve communications with their attorney. We teachers should be able to accomplish this by providing the students with, in the language of Allison’s committee, “. . . fundamental knowledge of relevant legal principles.”<sup>cli</sup> Based upon his survey of Fortune 500 executives, Massin suggests that respondents were looking for employees to have a general familiarity with the law. He adds that the data suggests these executives look to legal staff for application of legal principles and handling of legal matters.<sup>clii</sup> I concur with Donnell who believes that “students do not retain sets of rules long in their memories. They may retain, however, enough in the way of legal principles to provide a basis for intuitive recognition of a related legal problem at a later time.”<sup>cliii</sup> An advanced or complex approach to the law in an introductory class is not needed. Going into depth or detail may unnecessarily distract or confuse students.<sup>cliv</sup>

Faculty who teach a “legal environment” as opposed to “business law” approach to the required first class in law for business students believe one or two textbook chapters provides adequate coverage of contract law. Certainly a reduction in

material from the typical nine or ten chapters in contract law covered by many business law texts should pose neither a hardship nor a significant loss to students at programs that take a business law approach. The Ford Foundation report of 1959 by Gordon and Howell, "Higher Education in Business," that began the movement towards replacement of business law classes with a "legal environment" approach, was critical of the traditional emphasis on contract law describing it as "narrow."<sup>clv</sup> Whether a program teaches legal environment or business law, all of the traditional law topics should be *intelligently simplified* so they are practical and oriented toward prevention. This section of the article provides guidance and a model for remaking a traditional course by using subjects typically found in both business law and legal environment classes.

Just because law faculty in business schools were taught law with casebooks and case method does not make that method an appropriate way to teach business students. The challenge is for us to move away from our zone of comfort and find a better way. I suggest that it may be useful for business students to read one or two complete judicial opinions of short length. This can provide an introduction to judicial opinions, process and related terminology. We might explain a method of case analysis such as IRAC (issue, rule, application, conclusion) and have them try applying it. But, recalling that our audience is not here for legal training, use of case materials should be minimized. Frequently, a few sentences explaining a court opinion will suffice.<sup>clvi</sup> At most, cases should be condensed summaries or briefs of actual opinions.

There is value in teaching business students *the fundamentals* of the federal and state court systems including some basic terminology such as "jurisdiction" and "venue." These topics will help them to understand the legal system generally, and make them more aware, knowledgeable and, one hopes, better citizens. But, do they really need to understand the details of "certiorari" or "in-rem jurisdiction"? Very brief coverage will suffice for the steps in civil procedure, pleadings through appeal. Should students later find themselves involved in civil litigation, except for small claims court, it is likely they will have an attorney to handle the matter. In a survey of Fortune 500 CEOs, or representatives they selected, each was asked to rate the importance of legal subjects taken from business school law texts. "Legal system and civil procedure" ranked 30<sup>th</sup> out of 34 choices.<sup>clvii</sup> This study, and a separate study concerning which topics should be included in business school law classes, indicate that subjects such as "the legal system and civil procedure" (and other "traditional areas of instruction") are "largely in the domain of legal professionals" and that there is "no need for managers to develop expertise in these areas."<sup>clviii</sup>

Several examples of how the new paradigm's approach might be applied to traditional substantive law topics can be drawn from the tort law curriculum. The following rhetorical questions should be considered in respect to what knowledge of tort law will be most useful to future business practitioners. Aren't ethical behavior, risk management and insurance the best ways to prevent tort liability? If businesspeople are confronted with a tort liability issue aren't they likely to contact their insurance agent or attorney who will handle the matter? Surely understanding the basics of torts and its terminology will be beneficial. But, do we really need to cover the "doctrine of last clear chance"? Could not "causation," especially "proximate cause," be condensed and simplified so as to utilize less class time and energy? Intentional torts such as assault, battery and false imprisonment can be abbreviated since they will likely have little "real-world" relevance for many businesses. A practical, preventive example, such as the handling of a suspected shoplifter, is one good way to discuss intentional torts. To help students prevent liability it is important that they understand the basics of negligence. In particular, they should understand the duty of due care and what constitutes a breach of that duty in different professional contexts.

Especially in the business law course format, the topic of contract law provides numerous opportunities for simplification to a practical, preventive approach that is appropriate for future business practitioners. Reed is highly critical of the business law approach to contracts in which contract law dominates the introductory law course. He believes that this focus "fails to serve students well and threatens the relevancy of the course in the contemporary business curriculum."<sup>clix</sup> Reed cites previous surveys in the business literature as indicating "contracts and sales study should occupy no more than 12% of the introductory business law course."<sup>clx</sup> He reinforces these surveys with his own study of the frequency of contract law in three different sources of judicial literature, *West's General Digest*, *Index to Legal Periodicals* and *Business Index*. In each of these sources he finds comparable percentages, to the earlier studies, of pages on contract law.<sup>clxi</sup> Petty and Mandel argue for a practical orientation to the teaching of contract law.<sup>clxii</sup>

The following subjects are strong contenders for content streamlining and reduction. Is it necessary that the topic of "rewards" be considered at all? Possibly interesting to some, rewards is not pertinent to the everyday business life of most. Capacity to contract can be made brief and to the point since this topic is likely to have limited "real-world" relevance to most business school graduates. Students should learn that although exceptions may exist, it is best not to contract with a minor, an intoxicant or a mentally disabled person. The "business wise" option is to have a parent or guardian sign on behalf of the party lacking capacity. Discussion of exceptions (e.g., necessities) and ancillary issues (e.g., return of consideration) can be minimized. After surveying the needs of business people, Klayman and Nesser concluded that limited coverage of capacity to contract (and product warranties) would be appropriate: "The value of anything more than a summary treatment of this area is suspect *especially in light of other undertreated topics competing for time* [emphasis added]."<sup>clxiii</sup> The "battle of the forms" is

a topic that begs to be made simple and practical. Students should be made familiar with the problem and advised to hire an attorney who can set up a preventive system for the contracting process that protects them within these UCC provisions. In addition to being very time-consuming to teach, the complexity of this topic is far beyond what most business students are going to be able to retain and apply in their business careers, if they need this information at all. The Statute of Frauds is another example of an area prime for simplification. Business students are unlikely to remember, and business practitioners don't need to be bothered with, the detailed rules. I provide an example below of what textbook material on the Statute of Frauds might cover:

Generally, if proven, courts will uphold oral contracts as valid. There are several exceptions to this general rule where a contract must be in writing or a court *may* find the oral agreement to be invalid. These exceptions come from a law called the "Statute of Frauds." All of the contracts that fall under the Statute of Frauds, and therefore must be in writing to be enforced by a court, deal with substantial subject matter. One would want such agreements to be in writing irrespective of the legal requirements. Examples of contracts that generally must be in writing include contracts for real estate and contracts for the sale of goods for \$500 or more (UCC rule).

All contractual agreements should normally be put into writing to provide proof if later needed that an agreement did in fact exist, and what the terms of the agreement were. A writing protects both parties against later disagreements, misunderstandings or fraud. As noted, the Statute of Frauds only applies to certain specific types of contracts. Even for the types of contracts which the Statute of Frauds requires a writing, courts have made many exceptions and may still uphold an oral agreement. Therefore, if you make an oral agreement with another party for which the other party is attempting to renege because the understanding was oral, it is worth contacting an attorney to ascertain your chances of having the agreement upheld by a court.

Discussion of the Statute of Frauds provides another opportunity to interweave ethical principles with the discussion of law. A question one might pose to the class is whether it is ethical to use the Statute of Frauds to escape oral promises one has made to another party.

In fact, there probably isn't any area of contract law that can't be revised and simplified, particularly when taught in a business law class format. As Reed has noted, "To begin with, most business law texts teach classical contracts concepts about offer, acceptance, consideration, legality and capacity in a depth of detail that far exceeds their marginal utility."<sup>clxiv</sup> He supports this position by citing studies that indicate the limited importance of legal doctrines of classical contract in real-world business.<sup>clxv</sup>

Business law textbooks can have as many as 10 chapters on contract law without ever showing students what an actual contract looks like! A practical application of contract law for future business practitioners is for them to read, understand, and draft a simple contract. This coverage can be tied to the chapter on self-help law mentioned above.

The previous discussion was meant to provide the reader with a sampling of potential for "business-practitioner oriented" reductions and modifications in the contract law curriculum. I could go on with many more examples, "remedies," "third parties," etc., and elaborate the possibilities, but I hope the point has been adequately made.<sup>clxvi</sup>

Revising traditional procedural and substantive law topics for the new paradigm will take commitment, perseverance and creativity on the part of textbook authors and faculty. It requires a major transition from the law school education and law practice mentality that has forever been the basis of traditional business law and legal environment classes. It means being realistic about our business students, their identity, interests, capabilities, and future needs. What they will gain from the new paradigm's emphasis on preventing legal problems and resolving conflict in business make the trade-offs worthwhile.

## V. CONCLUSION

If our discipline is to succeed in the future I believe the concerns this article raises about how our subject is taught need to be addressed. We must never forget that we have not been hired to teach future law students or future lawyers.

Might this article be arguing lawyers out of a job in business schools? Emphatically not, business law and legal environment are still, and will always be, law classes. They can only be taught competently by someone with a law degree. The new and expanded topical coverage recommended here integrates well with the traditional topics. Individuals with law backgrounds are well-suited to the task of teaching this curriculum. Either they currently have the requisite knowledge to teach the new materials, or, with reasonable time and effort, can gain it. The opportunity exists for law faculty to integrate these important topics, especially dispute resolution and negotiation, into their course before they are adopted into other required courses. Massin rejects the proposition that our classes be left to faculty from other disciplines. Stressing the need for teachers to "possess a strong legal background," he adds:

However, we must seriously consider the necessity to wean ourselves from traditional law school pedagogy. We may need to find a new and as yet untested approach to our disciplines, which is significantly unlike anything previously attempted. It may indeed be a road less traveled- but that does not, and should not, presuppose

that our journey will be any less fruitful.<sup>clxvii</sup>

James Jurinski, a former editor of the *Journal of Legal Studies Education*, is one of many individuals who has raised concerns about the future of full-time law faculty in business schools. He argues that if we are not “proactive” and “relevant,” law classes “will be eliminated.”<sup>clxviii</sup> There are many demands being made on business education today. A dynamic environment of change exists with technological innovation and financial pressures as two leading factors. Under the circumstances, and considering that most of us do not hold a traditional Ph.D. degree, the profession may be in a precarious position. We need to make our courses more relevant, practical and useful for future business practitioners, or face possible extinction.

The response to the new paradigm by business students, non-legal business faculty, businesspeople and business law book publishers has been very positive. I am repeatedly told by individuals from these groups that this approach makes good sense. Predictably, the greatest resistance to change comes from business school law faculty members who are comfortable with teaching the material the way they learned law and have been teaching law in the past. In 1984, Dunfee bemoaned the fact that change comes very slowly to our field.<sup>clxix</sup> In 1997, Brack implored our profession to go “beyond the safe and familiar legal surroundings” urging adoption of a “managerial paradigm.”<sup>clxx</sup> This article has been an effort to offer a comprehensive model for change. It is long overdue.<sup>clxxi</sup>

### Footnotes

---

i. Scholars have made a similar point many times before, often in articles advocating change in the way business law or legal environment classes should be taught. See Nancy Oppenheim, *Cognitive Bridges: Law Courses Structured for Application and Knowledge Transfer*, 17 J. LEGAL STUD. EDUC. 17 (1999); John Collins, *Learning to Make Business Decisions in the Shadow of the Law*, 17 J. LEGAL STUD. EDUC. 117 (1999); Richard P. Mandel et al., *Integrating Law Into an Integrated MBA Program: The Experience of the F.W. Olin Graduate School of Business at Babson College*, 14 J. LEGAL STUD. EDUC. 17 (1996); Ross D. Petty & Richard P. Mandel, *Putting Business Into Business Law: The Integration of Law and Business Strategy*, 10 J. LEGAL STUD. EDUC. 205 (1992).

ii. Collins, *supra* note 1, at 117-118.

iii. Elaine D. Ingulli, *Transforming the Curriculum: What Does the Pedagogy of Inclusion Mean for Business Law?*, 28 AM. BUS. L. J. 605, 619 (1991).

iv. James F. Morgan, *Imagining the Law: Common Law and the Foundations of the American Legal System* by Norman F. Cantor, 18 J. LEGAL STUD. EDUC. 183, 186 (2000) (book review).

v. Christine Neylon O'Brien & John G. Neylon, *The Role of Business Law in the 150 Hour Educational Requirement for CPA Certification*, 18 J. LEGAL STUD. EDUC. 1, 8-9 (2000); Guy Jentz & Sally Gunz, *The New CPA License Examination Information*, ALSB NEWSL. (Publication of the Am.Bus.L.Ass'n.), Fall 2003, at 14, 15-16; James John Jurinski, *Will Law Have a Place in the 21<sup>st</sup> Century Business School Curriculum?*, ALSB NEWSL. (Publication of the Am.Bus.L.Ass'n.), Spring 1997, at 4, 23.

vi. See Jentz & Gunz, *supra* note 5, at 16-17

vii. Cf. O'Brien, *supra* note 5, at 19 (suggesting that business schools use custom courses to address the special needs of these students).

viii. Petty & Mandel, *supra* note 1, at 206; E.g. such textbooks include JEFFREY F. BEATTY & SUSAN S. SAMUELSON, *ESSENTIALS OF BUSINESS LAW* (Jack W. Colhoun et al. eds., W. Legal Stud. in Bus. 2<sup>nd</sup> ed. 2005); ROGER LEROY MILLER & GAYLORD A. JENTZ, *BUSINESS LAW TODAY THE ESSENTIALS* (Rob Dewey & Jan Lamar eds., W. Legal Stud. in Bus. 6<sup>th</sup> ed. 2003).

ix. Anne Lawton, *Using a Management Driven Model to Teach Business Law*, 15 J. LEGAL STUD. EDUC. 211, 215 (1997).

x. Ingulli, *supra* note 3, at 625.

xi. *Id.* at 636.

xii. In addition to the fact that legal faculty received their graduate school training in law, have passed an intense test in law to get their license and then practiced law, our classes are often taught by adjunct faculty who are also presently practicing attorneys. Moreover, some full-time faculty members continue to spend *substantial* time practicing law—a convention the author of this article believes is wrong and detrimental to our profession and will result in full-time positions being replaced with adjuncts as, inevitably, budgets grow tighter. The point is that

- 
- decisions regarding how to teach the class are overwhelmed by faculty socialization in the legal culture.
- xiii. See Daphne S. Thomas & Mark L. Ustry, *Entrepreneurship Classes Must Include More Legal Topics*, 16 BUS. FORUM 10, 11 (1991).
- xiv. LUCILLE M. PONTE & THOMAS D. CAVENAGH, *ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS* (South-Western Coll. Publ'g Co. et al. eds., 1999).
- xv. Lawton, *supra* note 9, at 212.
- xvi. Collins, *supra* note 1, at 118.
- xvii. Rene Sacasas & Anita Cava, *A Legal Studies Major: The Miami Model*, 9 J. LEGAL STUD. EDUC. 339, 340 (1991).
- xviii. George A. Nation III & Matthew Melone, *For the Introductory Law Course Consider an In-Depth Study of Contract Law in an Integrated Business Context*, 17 J. LEGAL STUD. EDUC. 283, 297 (1999).
- xix. *Cf., Id.*, (advocating the in-depth study of a single topic, contract law, an approach that differs from the “new paradigm” proposed here).
- xx. Steve Mayberry, *Raising the Bar*, LA JOLLA LIGHT, Feb. 13, 2003, at 18.
- xxi. *Id.*
- xxii. At my university, we have changed the catalog description for the Business Law I course so that all faculty follow an approach similar to the one this article discusses. The new course description reads: “Covers the fundamentals of United States law and legal system, relationship of law to ethics, criminal law, torts, contracts, agency, risk management, insurance, and hiring and managing an attorney. Special emphasis is given to preventing legal problems and resolving conflicts in business for business practitioners. Systems and methods of dispute resolution are considered including negotiation, mediation, arbitration, and the U.S. judicial system including small claims court.”
- xxiii. John R. Allison, *The Role of Law in the Business Curriculum*, 9 J. LEGAL STUD. EDUC. 239, 246 (1991).
- xxiv. Based upon the notion that it is better to provide our students with a fishing rod and instructions for its use, rather than a fish dinner.
- xxv. See Nation III & Melone, *supra* note 18, at 285; See also, Collins, *supra* note 1, at 117; Sacasas & Cava, *supra* note 17, at 339-340.
- xxvi. Ingulli, *supra* note 3, at 606 (citing numerous articles that support this point).
- xxvii. *Id.* at 605-606.
- xxviii. *Id.* at 605.
- xxix. Michael W. Little & William H. Daughtrey, Jr., *Survey of Virginia Corporate Executives on the Role of Law in Business Curricula*, 13 J. LEGAL STUD. EDUC. 147, 150-151 (1995) (providing an excellent chronological chart summarizing research studies of this type).
- xxx. S. Scott Massin, *Corporate Perspectives on Business Law Curricula: An Empirical Study*, 8 J. LEGAL STUD. EDUC. 71, 75 (1989). The author of this study characterizes the list offered to the sample group as being “comprehensive as possible.” But, the choices were characteristic of the field’s limited, traditional universe. Such studies should open the status quo to challenge if they are seeking to, as this article states, find what subjects should ideally be included in the curriculum.
- xxxi. See Little & Daugherty, *supra* note 29, at 150-151.
- xxxii. See Elliot Klayman & Kathleen Nesser, *Eliminating the Disparity Between the Business Person’s Needs and What is Taught in the Basic Business Law Course*, 22 AM. BUS. LAW J. 41, 43-51 (1984). It is unlikely that any of the Ohio State University business school graduates surveyed for this 1984 article had significant exposure to, or understanding of the usefulness and benefits of “arbitration and mediation” (a survey option), as opposed to contract law and other traditional business law topics that scored higher in the study.
- xxxiii. Massin, *supra* note 30, at 73.
- xxxiv. Petty & Mandel, *supra* note 1.
- xxxv. Jack A. Raisner, *Teaching Lawmaking in the Post-“New Deal” Era Business Law Course*, 15 J. LEGAL STUD.

---

EDUC. 31 (1997).

xxxvi. Susan Willey & Donna Anderson, *Incorporating Economic Analysis into Undergraduate Business Law and Legal Environment Courses: Employer Liability for Sexual Harassment as a Model*, 18 J. LEGAL STUD. EDUC. 197 (2000).

xxxvii. Nation III & Melone, *supra* note 18.

xxxviii. Steven E. Abraham, *Using Event Study Research in a Legal Environment of Business Course*, 17 J. LEGAL STUD. EDUC. 57 (1999).

xxxix. *E.g.*, Nancy Kubasek & M. Neil Browne, *Integrating Critical Thinking into the Legal Environment of Business Classroom*, 14 J. LEGAL STUD. EDUC. 35 (1996).

xl. Oppenheim, *supra* note 1, at 38.

xli. *See* Anna S. Rominger, *Negotiation: An Idea Whose Time Has Come*, 13 J. LEGAL STUD. EDUC. 101 (1995).

xlii. Ingulli, *supra* note 3, at 607.

xliii. *Id.* at 625-626.

xliv. MICHAEL JOSEPHSON, *MAKING ETHICAL DECISIONS 27* (Wes Hanson ed., Josephson Institute of Ethics 2002 ed. 2002).

xlv. *See, e.g.*, Allison, *supra* note 23, at 242; Nation III & Melone, *supra* note 18, at 285-286.

xlvi. *See, e.g.*, Petty & Mandel, *supra* note 1, at 207.

xlvii. Ingulli, *supra* note 3, at 607.

xlviii. MILLER & JENTZ, *supra* note 8, at 53.

xlix. Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106, 106.

l. Massin, *supra* note 30, at 80.

li. *See* Paine, *supra* note 49.

lii. *See id.*

liii. Itamar Sittenfeld, *Federal Sentencing Guidelines. (for Organizations)*, INTERNAL AUDITOR, Apr. 1, 1996, at 58.

liv. Paine, *supra* note 49, at 111.

lv. Miller & Jentz, *supra* note 48, at 55.

lvi. Sacasas & Cava, *supra* note 17, at 340.

lvii. *Id.*

lviii. *Id.*

lix. Allison, *supra* note 23, at 244.

lx. S. Andrew Ostapski et al., *The Legal and Ethical Components of Executive Decision-Making: A Course for Business Managers*, 15 J. Bus. Ethics 571, 571 (1996).

lxi. Mark Richard Moss, *Spreading the Ethical Word*, INFO. MGMT. J., July-Aug. 2002, at 42, 43.

lxii. Allison, *supra* note 23, at 244.

lxiii. Moss, *supra* note 61.

lxiv. Allison, *supra* note 23, at 244. I would exclude the word “substantially” in Allison’s phrase: “*substantially* exaggerating the attributes of a product or service.” An exaggeration alone is likely to be unethical, how substantial the exaggeration is may determine whether it is legally actionable.

lxv. MICHAEL SHERMER, *THE SCIENCE OF GOOD AND EVIL: WHY PEOPLE CHEAT, GOSSIP, CARE, SHARE, AND FOLLOW THE GOLDEN RULE 25-26* (2004).

lxvi. For an article offering practical suggestions faculty might find helpful see: Marc Lampe, *Increasing Effectiveness in Teaching Ethics to Undergraduate Business Students*, 1 TEACHING BUS. ETHICS 3 (1997).

lxvii. Josephson, *supra* note 44.

- 
- Ixviii. The Josephson Institute for Ethics in Marina del Rey, CA, offers excellent practical materials and training programs on ethics <<http://www.josephsoninstitute.org/>>.
- Ixix. See Marc Lampe & Craig B. Barkacs, *Adding an Ethical Dimension to the Teaching of Contract Law*, 11 J. LEGAL STUD. EDUC. 227, 233 (1993) (discussing how to integrate ethics into various contract law topics with examples provided).
- Ixx. See STEVEN C. BRANDT ET AL., *STAY OUT OF COURT AND IN BUSINESS* 159 (1997).
- Ixxi. Milton Bordwin, *Practicing Preventive Law*, RISK MGMT., May 1994, at 79, 79.
- Ixxii. Thomas & Usry, *supra* note 13, at 11 (emphasizing small business persons and entrepreneurs in sample).
- Ixxiii. Allison, *supra* note 23, at 249.
- Ixxiv. JAMES LAM, *ENTERPRISE RISK MANAGEMENT: FROM INCENTIVES TO CONTROLS* 8 (2003).
- Ixxv. See CHRISTOPHER L. CULP, *THE ART OF RISK MANAGEMENT* 200-205 (2002).
- Ixxvi. Ford Pinto and other examples where there is a perception that substantial harm was the result of a consciously calculated cost-benefit analysis remain in the public psyche for a long time. Such behavior is the stuff that continues to harm the reputation of specific companies and the business community generally.
- Ixxvii. See BRANDT, *supra* note 70, at 145-159. Along with employment discrimination, contracts and other common business law topics, the author of this business trade book dedicates a chapter of this book (9) to “Risk Management.” With permission from the author, I include chapters from the Brandt book on this and other topics in my Business Law I class reading materials.
- Ixxviii. O. Lee Reed et al., *The Status of Law in Academic Business Study: 1998 Report of the President’s Task Force*, ACAD. LEGAL STUD. IN BUS. (2001), available at <http://www.alsb.org/statusoflaw.html>.
- Ixxix. Instructors may find the following publication useful in teaching this topic: INSURANCE INFORMATION INSTITUTE, *RISK MANAGEMENT AND BUSINESS INSURANCE* (1983).
- Ixxx. See Nation III & Melone, *supra* note 18, at 286.
- Ixxxi. Klayman & Nesser, *supra* note 32, at 57.
- Ixxxii. *Id.* at 59.
- Ixxxiii. See William G. Elliott & Arthur Wolfe, *The Need for Legal Education by Persons in Business*, 19 AM. BUS. L. J. 153 (1981); John D. Donnell, *The Businessman and The Business Law Curriculum*, 6 AM. BUS. L. J. 451 (1968).
- Ixxxiv. Sacasas and Cava, *supra* note 17, at 347.
- Ixxxv. Thomas and Usry, *supra* note 13, at 11.
- Ixxxvi. John D. Donnell, *Redesigning the Required Undergraduate Business Law Course*, 2 J. LEGAL STUD. EDUC. 1, 13 (1984).
- Ixxxvii. *Id.* at 7.
- Ixxxviii. Ellen Joan Pollock, *Auditors of Corporate Legal Bills Thrive*, WALL ST. J., Feb. 13, 1991, at B1.
- Ixxxix. See TANYA STARNES ET AL., *MAD AT YOUR LAWYER?* (Nolo Press et al. eds., 1996). Students may feel empowered just knowing such a book exists.
- xc. Michael A. Verespej, *How to Avert a Trip to Court; A Company Needs to Audit its Entire Operation to See Where the Risks Are-And Then Practice Preventative Law*, INDUSTRY WK., Mar. 5, 1990, at 74, 74.
- xc. Michele Galen, *Personal Business: The Law An Ounce of Legal Prevention*, BUS. WK., Mar. 26, 1990, at 106, 106.
- xcii. See BRANDT, *supra* note 70, 175-180. The appendix section, “Conducting a Legal Audit.” contains a sample legal audit checklist
- xciii. Steven L. Schwartz, *Mediation a Magnet for Positive Change*, DISP. RESOL. J., Aug.-Oct. 2003, at 49, 51.
- xciv. PONTE & CAVENAGH, *supra* note 14, at 3.
- xcv. Stephen L. Hayford, *Alternative Dispute Resolution*, BUS. HORIZONS, Jan.-Feb. 2000, at 2, 2-4.

- 
- xcvi. See Stephanie Schroeder, *Alternative Dispute Resolution Resources*, RISK MGMT., June 1998 at 10, 10.
- xcvii. E.g., Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get To Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1.
- xcviii. *Id.*
- xcix. *Id.*
- c. Carrie Menkel-Meadow, *ACCESS TO JUSTICE: THE SOCIAL RESPONSIBILITY OF LAWYERS: When Litigation is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 56-57 (2002).
- ci. Lawton, *supra* note 9, at 214.
- cii. *Id.* at 215.
- ciii. See Oppenheim, *supra* note 1 at 23.
- civ. Rominger, *supra* note 41, at 103.
- cv. See Thomas W. Dunfee, *The Future of Legal Studies: Prospects and Problems*, 2 J. LEGAL STUD. EDUC. 23, 24 (1984).
- cvi. Allison, *supra* note 23, at 249.
- cvii. See generally, e.g., Marc Lampe, *Mediation as an Ethical Adjunct of Stakeholder Theory*, 31 J. BUS. ETHICS 165 (2001); Marc Lampe & Seth R. Ellis, *Resolving Small Business Disputes Through Mediation*, 6 J. SMALL BUS. STRATEGY 85 (1995) (reviewing the literature and discussing the advantages of ADR generally and mediation specifically); National Arbitration Forum, *Business-to-Business Arbitration vs. Litigation*, F.Whitepaper Series 2003, available at <http://www.arb-forum.com/articles/index.asp> (focusing on arbitration data); PONTE & CAVENAGH, *supra* note 14, at 27-56. (providing a detailed discussion of the advantages and disadvantages of ADR).
- cviii. *Id.*
- cix. Allison, *supra* note 23, at 244.
- cx. C.J. Warren Burger, Annual Report on the State of the Judiciary, American Bar Association (February 12, 1984).
- cxii. C.J. William Rehnquist, *1953-88: The Chief Justice Looks Back*, 9 LEGAL REFORMER 3 (1989).
- cxiii. See, e.g., Hayford, *supra* note 95.
- cxiiii. See, e.g., PONTE & CAVENAGH *supra* note 14, at 34-50; Lewis Maltby, *Private Justice Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, (1998) (focusing on arbitration); Don Carper, *Fundamental Attributes of American Litigation: What might you give up when deciding not to litigate?* (April 2000) (paper delivered at Western Academy of Legal Studies in Business Conference, Pacific Grove, CA).
- cxv. PONTE & CAVENAGH, *supra* note 14, at 84.
- cxvi. Allison, *supra* note 23, at 245.
- cxvii. Interview, *Negotiating Without a Net - A Conversation with the NYPD's Dominick J. Misino*, HARV. BUS. REV., Oct. 2002 at 49, 49.
- cxviii. N. Lamar Reinsch, Jr. & Annette N. Shelby, *What Communication Abilities do Practitioners Need? Evidence From MBA Students*, BUS. COMM. Q., Dec. 1997, at 7.
- cxviiii. Resolving a dispute with negotiation or any other party-driven method of ADR is essentially a contract negotiation. Ultimately the terms of agreement should be reduced to a written contract.
- cxix. Rominger, *supra* note 41, at 120.
- cxx. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., Penguin Books 1987) (1981).
- cxxi. *Id.* at 1-14.
- cxxii. *Id.* at 13.
- cxxiii. See *id.*; See also, WILLIAM URY, *GETTING PAST NO* (Bantam Books 1993) (1991).
- cxxiv. See, e.g., Lucy Katz, *The Case of the Alarming Enchilada: A Dispute Resolution Exercise for a Legal*

---

*Environment of Business Course*, 18 J. LEGAL STUD. EDUC. 143 (2000) (noting, “The exercise provides a far richer, integrated experience of the legal environment than the abstract, linear and discrete presentation of specific course segments such as jurisdiction, procedure, ADR and torts.” *Id.*, at 145); Rominger, *supra* note 41.

cxxv. *See* Lampe, *supra* note 107.

cxxvi. PONTE & CAVENAGH, *supra* note 14, at 89.

cxxvii. *See id.* at 105.

cxxviii. *E.g., Id.* at 34.

cxxix. Carolyn Kleiner, *The Action Out of Court Programs in ‘Alternative Dispute Resolution’ are on the Rise*, U.S. NEWS & WORLD REPORT, Mar. 29, 1999, at 90.

cxxx. *See generally* Lampe & Ellis, *supra* note 107; PONTE & CAVENAGH, *supra* note 14.

cxxxi. *Cf.* Hon. D. Brooks Smith, The Lawyer as Peacemaker, Remarks delivered to the University of Pittsburgh Law Review and Journal of Law Commerce banquet (March 20, 2002), in 63 U. Pitt. L. Rev. 909. (stating judges are promoting alternative dispute resolution and lawyers have an affirmative obligation to advise their clients of alternatives). In the author’s opinion this is an ethical responsibility of all attorneys. Many clients won’t know about, or understand, these possibilities.

cxxxii. *See, e.g.,* Lampe, *supra* note 107, at 171; Lampe & Ellis *supra* note 107, at 93-94.

cxxxiii. *Id.*

cxxxiv. Linda Goodspeed, *Litigation’s Rising Price Tag Boosts Arbitration’s Appeal*, BOSTON BUS. J., OCT. 4, 2002, available at <http://boston.bizjournals.com/boston/stories/2002/10/07/>.

cxxxv. Peter M. Edelstein, *Using an Authentic Arbitration as a Teaching Model*, 17 J. LEGAL STUD. EDUC. 325, 325 (1999).

cxxxvi. *See, e.g.,* Maltby, *supra* note 113; *The Arbitration Trap, How Consumers Pay for ‘Low Cost’ Justice*, CONSUMER REPS., August 1999 at 64; *Congress Should Ban Use of Mandatory Arbitration in Consumer Contracts*, PUBLIC CITIZEN, Mar. 1, 2000, at <http://www.citizen.org/Press/pr-arb1.htm>.

cxxxvii. *See, e.g.,* Samuel Estreicher & Rene M. Johnson, *Arbitration; Full Ninth Circuit Rejects ‘Duffield’s Bar*, NEW YORK L.J., Nov. 3, 2003, at 3 n.36; Ogletree, et al., *The Uncertain World of Arbitration—especially in California*, 13 CAL. EMP. L. LETTER 9, Jul. 7, 2003; GOODSPEED, *supra* note 133.

cxxxviii. *See, e.g.,* Little v. Stiegler, Inc., 29 Cal. 4th (Cal. Supr. Ct. 2003) (holding that a provision in the arbitration agreement permitting either party to appeal an award of more than \$50,000 to a second arbitrator was unconscionable, since it inordinately benefitted the employer).

cxxxix. *See* PONTE & CAVENAGH, *supra* note 14, at 295-316.

cxl. *Id.* at 185-186, 297.

cxli. *E.g.,* Michael McCauley, *Court Secrecy Threatens Public Safety*, SAN DIEGO UNION TRIB., June, 6, 2001, at B9.

cxlii. *E.g.,* Jeffrey Collins, *New Rules Limiting Secret Court Settlements Take Effect*, ASSOC. PRESS NEWSWIRE, May 5, 2003; Dave Zweifel, *It’s Time to Ban Secret Court Settlements*, CAP. TIMES & WIS. ST. J., Nov. 12, 2003, at 10A; Sanford M. Jaffe & Linda Stamato, *Settlement Secrecy Wrongly Hurts the Public’s Right to Know*, ALTERNATIVES, Oct. 2000.

cxliii. Jaffe, *supra* note 142; McCauley, *supra* note 141.

cxliv. SUN-TZU, THE ART OF WAR, (Roger T. Ames trans., 1993) (6<sup>th</sup> Century B.C.).

cxlv. C.J. Warren Burger, Using Arbitration to Achieve Justice, Remarks before the American Arbitration Association and the Minnesota State Bar Association (Aug. 21, 1985), in 40 ARB. J. 4, Dec. 1985, at 3, 4.

cxlvi. Matthew Benjamin, *Legal Self-help: Cheap Counsel for Simple Cases*, U.S. NEWS & WORLD REPORT, Feb. 12, 2001, at 54, 54.

cxlvii. Mick O’Leary, *Self-Lawyer with Nolo.com*, INFO. TODAY, Feb. 2002, at 12, 12.

---

cxlviii. There are numerous useful Internet cites including: Nolo, *Law for All*, available at [www.nolo.com](http://www.nolo.com) (last modified 2003); FreeAdvice, *The Easy to use Site for Legal Information*, available at <http://www.freeadvice.com> (last modified 2003); FindLaw, available at <http://www.findlaw.com>; MyLawyer, *Legal Documents That Think*, available at <http://www.mylawyer.com>; Lawguru, available at <http://www.lawguru.com>.

cxlix. Edward Baig, *Do You Really Need That Lawyer*, BUS.WK., Aug. 22, 1994, at 76, 76.

cl. Stephanie B. Goldberg, *Do-It-Yourself*, BUS.WK., Jan. 31, 2000, at F20, F20.

cli. Allison, *supra* note 23, at 240.

clii. Massin, *supra* note 30, at 91.

cliii. Donnell, *supra* note 86, at 13.

cliv. I challenge instructors to do an honest and open minded examination of the textbook they are currently using for depth or details that may unnecessarily distract or confuse students. I believe you will find such dispensable materials to be commonplace and widespread.

clv. Reed, *supra* note 78.

clvi. I challenge instructors to see how many cases in the textbook they currently use can be eliminated or reduced to a maximum of two paragraphs and provide their business students with the essential information they need.

clvii. Massin, *supra* note 30, at 80.

clviii. *Id.* at 84; See Gary A. Moore & Stephen E. Gillen, *Managerial Competence in Law and the Business Law Curriculum: The Corporate Counsel Perspective*, 23 AM. BUS. L.J. 351, 380 (1985).

clix. O. Lee Reed, *King Contract Wears no Clothes: The Volume of Judicial Decisions, Scholarly Legal Literature, and Business Trade Publications as Suggesting the Importance of Various Business Law Subjects*, 9 J. LEGAL STUD. EDUC. 31, 36 (1990).

clx. *Id.* at 31-32.

clxi. *Id.* at 32-33.

clxii. Petty & Mandel, *supra* note 1, at 207.

clxiii. Klayman & Nesser, *supra* note 32, at 62. Capacity offers the opportunity for simplification through an emphasis on ethics. One can avoid entering into a voidable or void contract by not doing business directly with someone who appears to have a significant mental incapacity. Such conduct applies the ethical values of caring and fairness.

clxiv. Reed, *supra* note 159, at 34.

clxv. *Id.* at 32-35.

clxvi. Don't get me started again.

clxvii. Massin, *supra* note 30, at 91.

clxviii. Jurinski, *supra* note 5, at 24 (excerpted from a paper presented at the April 1997 meeting of the Western Academy of Legal Studies in Business, this article includes comments by participants of a round table discussion at that meeting).

clxix. Dunfee, *supra* note 105, at 26.

clxx. Antoni Brack, *The Paradigm of Managerial Law*, 15 J. LEGAL STUD. EDUC. 237, 244 (1997).

clxxi. Special thanks to my graduate assistants, Vanessa Lucas and Jason Weller, J.D.-M.B.A. joint program students, for their assistance with this article. Both were very supportive of the concept: Jason, who had taken business law as an undergraduate business student, and Vanessa, who recently passed the bar exam, and whose last words to me on the subject were: "Law school is so old fashioned. It is remarkable so much of it has crept into business school law classes."