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- THE EDITORS,
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- ARTICLES -

BOSTOCK, ZARDA, AND *HARRIS FUNERAL HOMES, INC.*: FINALITY AT LAST IN SEX DISCRIMINATION

EDWARD J. SCHOEN [*]

I. INTRODUCTION

Bostock v. Clayton County, Altitude Express, Inc. v. Zarda, and *R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC* are three different Title VII sex discrimination claims that began in the same way, were resolved inconsistently in three different circuits, and were finally decided by the U.S. Supreme Court.[1] In each of the three cases, "[a]n employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."[2] In Bostock's case, the Eleventh Circuit decided that Title VII does not prohibit employees from firing employees because they were gay and dismissed his suit as a matter of law.[3] In Zarda's

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[1] Bostock v. Clayton County, 140 S. Ct. 1731, 1737-738 (2020).

[2] *Id.* at 1737.

[3] *Id*. at 1738.

case, the Second Circuit decided that sexual orientation discrimination violates Title VII and permitted his case to proceed.[4] In *Harris Funeral Homes, Inc.*, the Sixth Circuit held that Title VII prohibits employers from firing employees because of their transgender status.[5] The U.S. Supreme Court granted certiorari "to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons."[6]

In its 6-3 decision handed down on June 15, 2020, the U.S. Supreme Court ruled that firing an individual for being homosexual or transgender violated Title VII:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision; exactly what Title VII forbids.[7]

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[4] *Id*.
[5] *Id*.
[6] *Id.*
[7] *Id*. at 1737. Justice Neil M. Gorsuch wrote the majority opinion. He was joined by Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan. Justice Alito filed a dissenting

This article (1) assesses the impact of the U.S. Supreme decision, (2) closely examines the decisions of the Eleventh, Second, and Sixth Circuits, (3) reviews four precursor U.S. Supreme Court decisions which greatly expanded the definition of sex discrimination in advance of *Bostock*; (4) addresses how the U.S. Supreme Court resolved the circuit court differences and the multiple arguments advanced by the employers in defense of their discriminatory employment actions, and (5) assesses five significant implications of the Court's decision, namely (a) the expansion of protection from discrimination on the basis of sexual orientation or transgender to over 100 federal statutes prohibiting discrimination on the basis of sex; (b) the potential viability of the Religious Freedom Restoration Act that may permit employers to discriminate against homosexual and transgender individuals, (c) the bilateral manner in which homosexual and transgender orientation was resolved (which may diminish employment discrimination protections against those that identify as bisexual, pansexual, or asexual), (d) fissures among the textualist justices in employing textualism to interpret Title VII; and (e) the possibility *Bostock* will upend employer dress and appearance codes if applied differently to males and females.

II. SIGNIFICANCE OF *BOSTOCK*

opinion in which Justice Thomas joined. Justice Kavanaugh filed a dissenting opinion.

This momentous decision was "a simple and profound victory" for civil rights" and allayed the fears of many observers "that the court was poised to gut sex discrimination protections and allow employers to discriminate based on sexual orientation and gender identity."[8] The question for the U.S. Supreme Court was whether the discrimination against sex prohibition of Title VII of the Civil Rights Act of 1964 applies to many millions of gay and transgender workers, and the Court determined that it did.[9] The U.S. Supreme Court's decision "will have considerable impact on the nation."[10] A recent poll indicates that "4.5 percent of adults in the United States - or about 11.3 million people - are gay, lesbian, bisexual or transgender, so it's like asking whether the population of the state of Ohio is protected by the federal employment discrimination laws."[11] Indeed, "42 percent of gay, lesbian and bisexual individuals have faced employment discrimination based on their sexual orientation, and 90 percent of transgender individuals have experienced harassment or

[8] Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, THE NEW YORK TIMES, June 15, 2020, accessed on March 6, 20201, at https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html, quoting the statement of Suzanne B. Goldberg, a law professor at Columbia University.
[9] *Id.*
[10] Loren AliKhan, *Symposium: A trio of cases, a lot at stake*, SCOTUSBLOG (Sep. 9, 2019, 3:26 PM), https://www.scotusblog.com/2019/09/symposium-a-trio-of-cases-a-lot-at-stake/.
[11] *Id.*

mistreatment on the job.[12] Moreover, while "21 states and the District of Columbia expressly prohibit discrimination on the basis of sexual orientation and gender identity by statute or regulation," Title VII is the "only safeguard LGBT individuals have to protect their livelihood" in about half the country."[13]

Notably, "[o]ver three dozen separate briefs were filed in support of Bostock and Zarda, including

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[12] *Id.*

[13] *Id.* ("For example, LGBT individuals in Alabama, Florida, Georgia and Indiana currently have no recourse against employment discrimination under their state laws but can maintain discrimination claims under Title VII based on rulings from their federal courts of appeals. Should the Supreme Court reach a different conclusion, millions of LGBT individuals will be left without any protection from discriminatory employers.) *See* Vanita Gupta and Sharon McGowan, *Symposium: Let's talk about sex: why Title VII must cover sexual orientation and gender identity*, SCOTUSBLOG (Sep. 5, 2019, 3:53 PM), https://www.scotusblog.com/2019/09/symposium-lets-talk-about-sex-why-title-vii-must-cover-sexual-orientation-and-gender-identity/ ("[I]t would be a gross oversight to ignore the devastating harm that would result from a decision retracting federal nondiscrimination protections. For example, LGBT people living in states like Georgia, Alabama and Florida would lose protections against discrimination based on gender identity and transgender status which have been in effect since 2011 as a result of the 11th Circuit's decision in *Glenn v. Brumby* . . . . Likewise, LGBT workers in Indiana would return to a world of fear and uncertainty should the court carve out an exception to the protections against sex discrimination that Title VII has been providing since the U.S. Court of Appeals for the 7th Circuit's 2017 decision in *Hively v. Ivy Tech Community College,* which held that Title VII prohibits employers from discriminating on the basis of sexual orientation.)

one brief by 206 companies – including business giants such as Apple, Facebook, Uber, Walt Disney and Coca-Cola," advising the U.S. Supreme Court "that a ruling that Title VII bans discrimination based on sexual orientation would not be 'unreasonably costly or burdensome' for employers" and that determining Title VII prohibits sexual-orientation discrimination "would create benefits for businesses, from providing 'consistency and predictability' nationwide to making it easier to 'recruit and retain top talent.' "[14] As William Eskridge, Professor of Jurisprudence at Yale Law School, observed, this decision "purge[s] the workplace of criteria that Congress found unrelated to an employee's 'ability or inability to work,' " and "outlaw[s] job decisions based upon 'stereotyped conceptions of the sexes,' including 'prescriptive' sex-stereotypes, through which the employer dictates appropriate gender roles for its female or male employees."[15]

Moreover, the reversal of employment discrimination protections courts have carved out for transgender individuals – those who have "an internal and deeply held sense of one's sex that is different from the sex assigned at birth"[16] – either

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[14] Amy Howe, *Symposium: Justices to consider federal employment protection for LGBT employees*, SCOTUSBLOG (Sep. 3, 2019, 12:33 PM), https://www.scotusblog.com/2019/09/symposium-justices-to-consider-federal-employment-protection-for-lgbt-employees/.
[15] William Eskridge, *Symposium: Textualism's moment of truth*, SCOTUSBLOG (Sep. 4, 2019, 2:30 PM), https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth/.
[16] Gupta *supra* note 13.

because of the sex stereotyping analysis of *Price Waterhouse*[17] or because courts over the past twenty years have finally acknowledged that it is simply impossible to discriminate against an individual for being transgender without relying on impermissible sex-based considerations,[18] would be especially devastating for LGBT people of color:

> [F]or LGBT people of color, the loss of these protections will only exacerbate their already higher levels of vulnerability to workplace discrimination. There are nearly two million LGBT people of color in America's workforce, and they are twice as likely to report discrimination as their white colleagues. Should the court carve out LGBT people from our federal employment discrimination statute, employers could much more easily avoid accountability for discrimination based on race by simply packaging their adverse actions as based on an employee's sexual orientation or gender identity.[19]

In short, the U.S. Supreme Court decision is "a simple and profound victory for L.G.B.T. civil

[17] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), discussed *infra* at notes 107-110.
[18] Gupta *supra* note 13.
[19] *Id.*

rights."[20] By declining the Trump Administration's invitation to rule against gay and transgender workers, the Court "achieved a decades-long goal of gay rights proponents."[21]

III. *BOSTOCK V. CLAYTON COUNTY*

In the first case, Gerald Bostock worked for over a decade as a child welfare advocate, earning good performance evaluations and national accolades for his work as the Clayton County Court Appointed Special Advocate (CASA).[22] Georgia CASA recognized Clayton County CASA with its "Established Program Award of Excellence," National CASA commended Bostock for his program expansion efforts, and he served on the National CASA Standards and Policy Committee in 2011-2012.[23] In January 2012, Bostock started to play softball in a gay recreational league, and he actively promoted Clayton County CASA to members of the league as a good volunteer opportunity.[24] His participation triggered criticisms and disparaging comments from individuals "with significant influence on Clayton County's decision-making" about his joining the league and his sexual orientation.[25] Soon thereafter, Clayton County fired

[20] Liptak *supra* note 8, quoting the statement of Suzanne B. Goldberg, a law professor at Columbia University.
[21] *Id.*
[22] Bostock v. Clayton County, 2017 WL 4456898 (N.D. Ga. 2017)
[23] *Id.* at 1
[24] *Id.*
[25] *Id.*

Bostock for conduct unbecoming a county employee.[26] Alleging discrimination on the basis of sexual orientation, Bostock initiated a Title VII action against Clayton County with the Equal Employment Opportunity Commission (EEOC).[27] Bostock filed a *pro se* complaint alleging sexual orientation discrimination with the federal district court, and after obtaining counsel Bostock filed amended complaints alleging discrimination on the basis of sexual orientation and sexual stereotyping.[28] The U.S. Magistrate Judge issued a preliminary Recommendation and Report ("R&R") indorsing the dismissal of Bostock's complaint with prejudice, because (1) Title VII does not encompass claims of sexual orientation discrimination, (2) there were insufficient factual allegations to support a gender stereotyping claim, and (3) not having raised the gender stereotyping claim with the EEOC, Bostock failed to exhaust his administrative remedies.[29] Making a *de novo* review of the R&R and noting that the Eleventh Circuit had recently ruled that Title VII does not prohibit discrimination on the basis of sexual orientation,[30] the Federal District Court dismissed Bostock's complaint with prejudice,

[26] *Id.*
[27] *Id.*
[28] *Id.* at 2.
[29] *Id.*
[30] Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) ("[Appellant] next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent forecloses such an action." *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)).

because Title VII did not protect Bostock from sexual orientation discrimination and Bostock failed to state any facts to support his gender stereotyping claim.[31] Bostock then appealed to the 11th Circuit Court of Appeals, which issued a *per curiam* decision affirming the District Court opinion, because Bostock abandoned his gender stereotyping claim by not specifically addressing it in his appeal and because Title VII does not prohibit sexual orientation discrimination.[32] The 11th Circuit subsequently denied rehearing *en banc*.[33]

IV. *ZARDA V. ALTITUDE EXPRESS, INC.*

In the second case, Donald Zarda, a gay man, worked in the summer of 2010 as a sky-diving instructor at Attitude Express and regularly participated in tandem skydives in which he was strapped in close physical proximity (shoulder-to-shoulder and hip-to-hip) with his students.[34] Because of the close physical proximity in tandem skydives, Zarda's co-workers frequently made sexual jokes and routinely referenced sexual orientation with their clients.[35] Zarda sometimes told his female students that he was gay to assuage their worries they might have about being strapped to a

[31] *Bostock*, 2017 WL 4456898 at 2-3.
[32] Bostock v. Clayton County Bd. of Comm'rs, 723 Fed.Appx. 964, 965 (11th Cir. 2018).
[33] Bostock v. Clayton County Bd. of Comm'rs, 894 F.3d. 1335 (11th Cir. 2018).
[34] Zarda v. Attitude Express, Inc., 883 F.3d 100, 108 (2018)
[35] *Id*.

man for the tandem dive.[36] In June, Zarda told a female student with whom he was preparing for a tandem skydive that he was gay and "ha[d] an ex-husband to prove it."[37] While Zarda claimed he made this statement to alleviate any discomfort she may have had about being strapped to him during the skydive, the female student accused him of inappropriately touching her during the dive and disclosing his sexual orientation to excuse his behavior.[38] The female student told her boyfriend about Zarda's behavior, and he complained to Zarda's boss, who shortly thereafter fired Zarda.[39] Zarda denied the female student's accusation and insisted he was fired because of his sexual orientation.[40] In July 2010, Zarda filed a complaint with the EEOC, in which he claimed he was discriminated against because of his sexual orientation and his gender.[41] Zarda contended all of the skydiving instructors made light of the intimate nature of the tandem skydive and he was fired because he honestly disclosed his sexual orientation and did not conform to the "straight male macho stereotype."[42]

In September 2010, alleging he was the victim of sexual stereotyping and sexual orientation discrimination in violation of Title VII, Zarda filed a

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 109.
[41] *Id.*
[42] *Id.*

complaint in federal court.[43] Attitude Express filed a motion for summary judgment on the grounds (1) Zarda repeatedly claimed he was the victim of sexual orientation discrimination, (2) gender stereotyping discrimination cannot be predicated on sexual orientation, and (3) sexual orientation discrimination is not protected by Title VII.[44] In March 2014, the district court granted the motion for summary judgment on Zarda's Title VII sexual stereotyping claim, because Zarda failed to establish a prima facie case of gender stereotyping, but determined Zarda had produced sufficient evidence to permit his sexual orientation claim to go forward under Title VII.[45] Zarda's sexual orientation discrimination claim based on New York law went to trial; the jury found that Attitude Express had not discriminated on the basis of sexual orientation; and judgment was entered for Attitude Express.[46] Zarda filed an appeal with the Second Circuit, which in a panel decision decided that his sexual orientation discrimination claim was properly before it, but declined to revisit a prior Second Circuit precedent[47] holding that Title VII did not prohibit sexual orientation

[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000). The plaintiff claimed he was the victim of abuse and harassment suffered by reason of his sexual orientation, but the Second Circuit declined to change its "well settled precedent that 'sex' refers to membership in a class delineated by gender" and Title VII does not prohibit discrimination based on sexual orientation. *Id*. at 36.

discrimination.[48] The Second Circuit subsequently ordered *en banc* rehearing of Zarda's appeal to revisit its prior holding that sexual orientation discrimination claims are not cognizable under Title VII, [49] and concluded "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination" prohibited by Title VII,[50] and Zarda was entitled to bring a Title VII claim for discrimination based on sexual orientation.[51]

V. *R.G. AND G.R. HARRIS FUNERAL HOMES, INC. V. EEOC*

In the third case, Amiee Stephens, a transgender woman, on or about July 31, 2013, informed her employer, R.G. & G.R. Harris Funeral Home, Inc. ("the Funeral Home") and her coworkers that she was undergoing a gender transition from male to female, intended to dress in appropriate business attire at work as a women, and asked for their support and understanding.[52] On or about August 15, 2013, the Funeral Home fired Stephens, telling her that her transition from male to female was "unacceptable."[53] On September 25, 2014, the Equal Employment Opportunity Commission (EEOC) initiated an employment discrimination

[48] *Zarda*, 833 F.3d at 110.
[49] *Id*.
[50] *Id*. at 112.
[51] *Id*. at 132.
[52] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F.Supp.3d 594, 596 (E.D. Mich. 2015).
[53] *Id*.

action on behalf of Stephens against the Funeral Home in which it claimed that the Funeral Home's decision to fire Stephens was motivated by sex-based considerations, namely her transition from male to female and her failure to conform to the Funeral Home's "sex- or gender-based preferences, expectations, or stereotypes."[54]

The Funeral Home filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), claiming the EEOC failed to state a claim on which relief can be granted with respect to the first claim.[55] The District Court concluded that the EEOC's complaint stated a Title VII claim against the Funeral Home and denied the motion to dismiss.[56] The Court noted that, if the Funeral Home had fired Stephens because she was a transgender person, there would be no claim under Title VII, because "like sexual orientation, transgender or transsexual status is currently not a protected class under Title VII."[57] While discrimination on the basis of transgender status was not a valid claim, Stephens' allegation that the Funeral Home fired Stephens because she failed to conform to the Funeral Home's "sex- or gender-based preferences, expectations, or stereotypes" was sufficient to constitute a valid Title VII claim.[58] The

[54] *Id*. at 595, 604.
[55] *Id*. at 595.
[56] *Id*.
[57] *Id*. at 598, citing Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir.2006) ("sexual orientation is not a prohibited basis for discriminatory acts under Title VII."); and Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir.2007) ("transsexuals are not a protected class under Title VII").
[58] *Harris Funeral Homes*, 100 F.Supp.3d at 599.

Court explained that, "[e]ven though transgender/transsexual status is currently not a protected class under Title VII," Title VII nevertheless "protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender."[59]

While Stephens' gender non-conformity discrimination claim survived the motion to dismiss, it succumbed to the Funeral Home's subsequent motion for summary judgment. The district court determined (1) that the Funeral Home was entitled to protection under the Religious Freedom Restoration Act of 1993 ("RFRA"), which the district court emphasized applies to the EEOC, a federal agency;[60] (2) that the Funeral Home met its initial burden of showing a substantial burden on its ability to conduct

[59] *Id*.

[60] *Id*. at 854-855. "RFRA prohibits the 'Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability' unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" 42 U.S.C. §§ 2000bb–1(a), (b). In reaching this decision, the district court relied on Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), in which the U.S. Supreme Court decided that the United States Department of Health and Human Services' (HHS) requirement that closely held corporations provide health-insurance coverage for methods of contraception, which were contrary to the genuine religious beliefs of the companies' owners, violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq. (2016).

its business in accordance with its religious beliefs,[61] because Rost sincerely believes that he would violate

[61] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F.Supp.3d 837, 855 (E.D. Mich. 2016). ("Rost has been a Christian for over sixty-five years. The Funeral Home's mission statement is published on its website, which reads "R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life." *Id*. "Rost believes that God has called him to serve grieving people and that his purpose in life is to minister to the grieving, and his religious faith compels him to do that important work. Rost believes that the 'Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex.'") *Id*. ("Rost believes 'that the Bible teaches that God creates people male or female.' He believes that 'the Bible teaches that a person's sex is an immutable God-given gift and that people should not deny or attempt to change their sex.' Rost believes that he 'would be violating God's commands' if he were to permit one of the Funeral Home's funeral directors 'to deny their sex while acting as a representative of [the Funeral Home]. This would violate God's commands because, among other reasons, [Rost] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.' Rost believes that 'the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman.' Rost believes that he 'would be violating God's commands' if he were to permit one of the Funeral Home's biologically-male-born funeral directors to wear the skirt-suit uniform for female directors while at work, because Rost 'would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.'") *Id*. at 855-856.

"God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at the funeral home because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift";[62] and (3) that the Funeral Home faced serious economic consequences in the form of "back and front pay to Stephens" and Rost "would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner."[63] The district court then concluded that EEOC failed to meet its burden of proof to demonstrate that it was advancing a compelling government interest in the least restrictive means possible,[64] and therefore that the Funeral Home was entitled to a RFRA exemption from Title VII.[65] Hence, the district court granted the Funeral Home's motion for summary judgment with respect to Stephens' wrongful termination claim.[66]

On appeal, the Sixth Circuit reversed the district court. First, the Circuit Court held the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex, because the district court "correctly determined that Stephens was fired because of her failure to conform to sex stereotypes in violation of Title VII." The district court "erred, however, in finding that Stephens could not alternatively pursue a claim that she was

[62] *Id*. at 856.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 870.

discriminated against on the basis of her transgender and transitioning status."[67] The Court noted:

> Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.[68]

Since Root fired Stephens because she would no longer present as a man and would dress as a woman, the Sixth Circuit decided that the district court correctly ruled "that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.[69]

The Sixth Circuit also held "that discrimination on the basis of transgender and transitioning status violates Title VII,"[70] because (1) "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex,"[71] and (2) Stephens would not have been fired "if Stephens had been a woman who sought to comply with the women's dress code," which "in and of itself, confirms that Stephens' sex

[67] EEOC v. R.G. and G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018).
[68] *Id.*
[69] *Id.*
[70] *Id.* at 574-575.
[71] *Id.* at 575.

impermissibly affected Rost's decision to fire Stephens."[72] Hence the Sixth Circuit decided that "the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity."[73]

Finally, the Court decided that the Funeral Home had not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home was not entitled to a defense under RFRA. In reaching this decision, the Sixth Circuit first determined that "the Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes."[74] Treating Rost's assertion that he considered the running of a funeral home to be a religious exercise,[75] the Court stated the question to be resolved was "whether the Funeral Home identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners."[76] The Funeral Home identified two burdens: (1) permitting a funeral director to wear the uniform for members of the opposite sex would create distractions and hinder their clients' healing process, and (2) Rost's faith would compel him "to

[72] *Id.*
[73] *Id.* at 580.
[74] *Id.* at 581.
[75] *Id.* at 585.
[76] *Id.* at 585-586.

leave the funeral industry and end his ministry to grieving people."[77] The Sixth Circuit rejected the first identified burden, because "a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."[78] More particularly, the Sixth Circuit reasoned, if business organizations were not permitted to "credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a 'bona occupational qualification' for a given position,"[79] courts should not permit those same prejudices to support the existence of a substantial burden on a religious practice.[80]

The Sixth Circuit rejected the second identified burden, because there was no indication that providing attire to funeral directors is either legally or religiously compelled or that providing a clothing allowance to funeral directors is necessary to attract workers.[81] Hence Rost is not required to

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[77] *Id*. at 586.
[78] *Id*. at 586.
[79] *Id*. at 586-587, citing Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (airline customers' preference for female attendants cannot support existence of BFOQ); Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795, 799 (8th Cir. 1993) (grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-shaven); and Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (defendant's claim that promoting a female employee to vice president would damage defendant's business because South American clients would not want to work with a female vice president was insufficient to establish a BFOQ).
[80] *Harris Funeral Homes*, 884 F.3d at 587.
[81] *Id*. at 587-588.

provide Stephens with a clothing benefit (and in fact did not provide any such benefit to his female employees), and is not "forced to choose between providing Stephens with clothing or else leaving the business."[82] Rather, Rost asserts "a predicament of [his] own making."[83] Furthermore, the Sixth Circuit noted, permitting Stephens to wear attire that reflects her conception of gender is not a substantial burden under RFRA, because "tolerating Stephens' understanding of her sex and gender identity is not tantamount to supporting it" and "requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views."[84] In short, "the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so."[85]

The Sixth Circuit also ruled that preventing discrimination in employment on the basis of sex – "an invidious practice that causes grave harm to its victims"[86] - is a compelling interest in combating discrimination in the workplace, that "[f]ailing to enforce Title VII against the Funeral Home means

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[82] *Id*. at 588.
[83] *Id*.
[84] *Id*. at 588-589 ("Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII—without actually assisting or facilitating Stephens's transition efforts—does not amount to an endorsement of Stephens's views.")
[85] *Id*. at 589.
[86] *Id*. at 591.

the EEOC would be allowing a particular person – Stephens - to suffer discrimination," and that "the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex."[87]

Lastly, the Sixth Circuit examined the district court's suggestion that permitting Stephens to dress in a gender neutral manner was a least intrusive means of accommodating Rost's religious exercise, and noted that this suggestion, "while appealing in its tidiness," was endorsed by neither party and for good reason.[88] Crucially, the Sixth Circuit noted, the discrimination against Stephens extended well beyond her attire.[89] Rost stated that he fired Stephens because she was not going to present as a man and that Stephens' presenting as a female would disrupt clients' healing process because female clients would have to share a bathroom with a man dressed up as a woman.[90] Thus Rost's concerns encompassed not only Stephens' attire but also her "appearance and behavior more generally,"[91] and the latter concern was not addressed by the district court in its consideration of its proposed less restrictive alternative.[92] Likewise, the Funeral Home's

[87] *Id.* at 591-592.
[88] *Id.* at 593.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 594 ("[M]erely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire 'to represent [her]self as a [wo]man.' ").

alternative proposal to enforce sex-specific dress codes for employees only while they are at work was "equally flawed," because (1) it failed to advance "the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify,"[93] (2) it failed to ensure "that the Funeral Home does not discriminate against its employees on the basis of their sex,"[94] and (3) "Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace."[95] "In short," the Sixth Circuit ruled, "the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace."[96] The Sixth Circuit concluded:

> Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to

[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id*. at 596.

> summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore REVERSE the district court's grant of summary judgment in favor of the Funeral Home and GRANT summary judgment to the EEOC on its unlawful-termination claim.[97]

VI. PRECURSOR U.S. SUPREME COURT DECISIONS

Although the inclusion of sex discrimination in Title VII was originally conceived to equalize the treatment of men and women in the workplace,[98] four

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[97] *Id.* at 600.

[98] Alix Valenti, *LGBT Rights in an Evolving Legal Landscape: the Impact of the Supreme Court's Decision in* Bostock v. Clayton County, Georgia, 33 EMPLOYEE RESPONSIBILITIES AND RIGHTS JOURNAL 3, 4 (2021). ("Title VII ha[s] been interpreted to encompass much broader issues including sexual harassment, sex-based stereotypes, and same-sex harassment than its original intent, protecting women from discrimination in a male-dominated workplace.") Michael Conklin, *Good for Thee, but Not for Me: How Bisexuals are Overlooked in Title VII Sexual Orientation Arguments*, 11

previous U.S. Supreme Court decisions had expanded those original boundaries to include sexual harassment, sexual stereotyping, hostile work involvement, and same-sex sexual harassment. Notably, unlike *Bostock*, none of those decisions was resolved by textualism, discussed below Part VIII.

In *Meritor Savings Bank v. Vinson*,[99] the U.S. Supreme Court ruled that sexual harassment was a violation of Title VII's prohibition of employment discrimination based on sex.[100] The Court advanced three reasons for this conclusion. First, Title VII "makes it 'an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' "[101] Such broad language - "terms, conditions, or privileges of employment" – demonstrates a congressional intent "to strike at the entire spectrum of disparate treatment of men and women in employment."[102] Second, the Court relied on the EEOC's guidelines which specified sexual harassment was a form of sex discrimination

UNIVERSITY OF MIAMI RACE & SOCIAL JUSTICE LAW REVIEW 34, 45-46 (2020) ("It is unlikely that, in 1964, the legislature that passed Title VII intended for it to be applied to LGBT individuals - especially considering that even the act of extending protections from gender discrimination was so controversial.")

[99] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[100] *Id.* at 73.

[101] 42 U.S.C. § 2000e–2(a)(1).

[102] *Vinson*, 477 U.S. at 64.

prohibited by Title VII.[103] While these guidelines were not binding on the courts, the Court noted, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[104] and were supported by "a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[105] Likewise, since the guidelines were issued, "courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[106]

In *Price Waterhouse v. Hopkins*,[107] Ann Hopkins, a female senior manager was denied a

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[103] *Id.* at 65.
[104] *Id*.
[105] *Id*.
[106] *Id.* at 66. "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Id*. at 67.
[107] Price Waterhouse v. Hopkins, 490 U.S. 228, 239-240 (1989): "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,' or to 'limit, segregate, or classify his employees or applicants for employment in any way which would deprive

partnership in the firm because, as she was advised by the man who "bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold," she failed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[108] In a plurality decision, the U.S. Supreme Court decided that Hopkins had a valid claim for sex discrimination under Title VII, because "she prove[d] that her gender played a motivating part in an employment decision.[109] The Court noted:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' (citations omitted). An employer who objects to

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or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex." 42 U.S.C. §§ 2000e–2(a)(1), (2) (emphasis added). We take these words to mean that gender must be irrelevant to employment decisions. The U.S. Supreme Court also emphasized that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251.

[108] *Hopkins*, 490 U.S. at 235.

[109] *Id.* at 258.

> aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[110]

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[110] *Id.* at 251. *Accord* Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004). In *Smith*, a male employed by the Salem Fire Department was diagnosed with Gender Identity Disorder, began expressing a more feminine appearance at work, and informed his supervisor that his treatment would eventually include a complete transformation from male to female. *Id*. at 568. Smith's supervisors concocted a plan to terminate Smith's employment by making him undergo three separate psychological evaluations in the hope he would quit his job. *Id*. Smith filed a sex-stereotyping employment discrimination claim against the City of Salem. *Id*. at 569. The District Court decided that Smith failed to state a claim of sex stereotyping and that Title VII protection is unavailable to transsexuals, and dismissed his complaint. *Id*. The Sixth Circuit reversed, explaining that Smith's "failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions," *id*. at 572, that Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination," *id*. at 575, and that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms," *id*. at 573 because "the discrimination would not occur but for the victim's sex." *Id*. at 574. Moreover, the Sixth Circuit noted, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." *Id.* at 574-575.

In *Harris v. Forklift Systems, Inc.*,[111] Teresa Harris was employed as a manager at Forklift Systems, Inc., an equipment rental company. Charles Hardy, the company president, insulted her because of her gender, made her the target of unwanted sexual innuendos, called her a "dumb ass woman," suggested they negotiate her next raise at the Holiday Inn, asked her to get coins from his front pants pocket, and made sexual innuendos about her clothing.[112] Harris complained about his conduct, and Hardy expresses surprise that she was offended, claimed to be joking, apologized, promised to stop, and then resumed his offensive conduct. Harris collected her paycheck, quit her job, and, claiming Hardy created an abusive environment for her because of her gender, sued Forklift.[113] The district court, adopting the report of the Magistrate, concluded Hardy's conduct, while offensive, did not create an abusive environment, because it was not "so severe as to be expected to seriously affect [Harris'] psychological well-being" and did not rise "to the level of interfering with that person's work environment."[114] The Sixth Circuit affirmed.

The U.S. Supreme Court granted certiorari to determine "whether conduct, to be actionable as 'abusive work environment' harassment . . . must 'seriously affect [an employee's] psychological well-being" or lead the plaintiff to "suffe[r] injury.' "[115]

[111] Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).
[112] *Id*. at 19.
[113] *Id*.
[114] *Id*. at 20.
[115] *Id*

The Court noted that the sweep of Title VII - to "[make] it 'an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin' " – "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment.' "[116] Further, the Court determined, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' (cit. omitted), that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' (cit. omitted), Title VII is violated."[117] Moreover, the Court determined, a hostile work environment may exist in the absence of injury or damage to the employee's psychological well-being.[118] "[T]the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."[119] Hence the district court applied the wrong test in ruling in favor of Forklift Systems, and the U.S. Supreme Court reversed the judgment of the Court of Appeals

[116] *Id*.
[117] *Id*. at 21.
[118] *Id*. at 22.
[119] *Id*.

In *Oncale v. Sundowner Offshore Services, Inc.*,[120] Joseph Oncale, employed as a roustabout in an eight-man crew working on a Chevron U.S.A., Inc., oil platform in the Gulf of Mexico, was "forcibly subjected to sex-related, humiliating actions" by three members of the crew "in the presence of the rest of the crew," was "physically assaulted . . . in a sexual manner," and was "threatened with rape."[121] Fearing he "would be raped or forced to have sex," Oncale quit his job and filed a complaint against Sundowner in which he alleged "he was discriminated against in his employment because of his sex."[122] The federal district court decided that Oncale had no cause of action under Title VII for harassment by male co-workers, and the Fifth Circuit, relying on its previous decision in *Garcia v. Elf Atochem North America*,[123] affirmed.[124]

The U.S. Supreme Court reversed the Fifth Circuit, and ruled "nothing in Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[125] The Court noted:

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[120] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).
[121] *Id*. at 77.
[122] *Id*.
[123] Garcia v. Elf Atochem North America, 28 F.3d 446, 451,452 (1994) (harassment by male supervisor against male subordinate was not cognizable under Title VII, even if harassment had sexual overtones).
[124] *Oncale*, 523 U.S at 77.
[125] *Id*. at 78.

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.[126]

VII. U.S. SUPREME COURT DECISION IN *BOSTOCK*

The U.S. Supreme Court began its analysis by construing the word "sex" as it appears in Title VII at the time it was enacted in 1964 and as it has been interpreted in subsequent court decisions.[127] As

[126] *Id*. at 79-80.
[127] Bostock v. Clayton County, 140 S. Ct. 1731, 1738-739 (2020).

a starting point, the Court assumed that "sex" referred to "biological distinctions between male and female,"[128] and noted that Title VII "prohibits employers from taking actions 'because of ' sex," the ordinary meaning of which is "by reason of" or "on account of."[129] Hence, an employer cannot avoid liability for employment discrimination by citing other factors that contributed to the employment decision; as long as the plaintiff's sex was "one-but-for cause of that decision, that is enough to trigger the law."[130] Nor, the Court noted, did Congress add the descriptor "solely" to indicate a confluence of multiple factors do not violate the law, or "primarily because of" to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision.[131] Rather, Congress "has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice."[132] Hence, if an employer intentionally treats an employee worse because of sex - for example, firing a person for actions or attributes it would tolerate in an individual of another sex – the employer discriminates against that person and violates Title VII.[133] Furthermore, the Court noted, the focus of Title VII is on the individual and

[128] *Id*. at 1739.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *Id*. at 1740.

that individual's sex, rather than categorically on groups.[134] Hence, "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it."[135]

Second, the Court noted, the ordinary public meaning of Title VII's language at the time of the law's adoption produces a straightforward rule: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex."[136] An individual's homosexuality or transgender status is irrelevant to that employment decision, however, because "homosexuality and transgender status are inextricably bound up with sex" and "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[137] Hence,

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[134] *Id*. ("[Title VII] tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or ... discharge any individual, or otherwise ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's... sex.")

[135] *Id*. at 1741.

[136] *Id*.

[137] *Id*. at 1741-742 ("Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other

whenever an employer discriminates against employees for being transgender or homosexual, that employer intentionally discriminates against those employees in part because of sex.[138] Three leading U.S. Supreme Court cases confirm this conclusion: (1) refusing to hire women with young children but hiring men with children the same age is discrimination based on sex, regardless of whether the company favored hiring women over men[139]; (2) requiring women to make larger pension fund contributions than men to compensate for the fact that women tend to live longer and are likely to receive more from the pension fund over time is discrimination based on sex, regardless of whether the company's purpose was to achieve equality between the sexes[140]; and (3) it is immaterial that the members of the same sex perpetrated sexual

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than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.")

[138] *Id*. at 1743.

[139] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[140] Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978).

harassment against a male employee, because the plaintiff alleged that the harassment would not have taken place but for his sex and the plaintiff would not have been the victim of the sexual harassment if he were female.[141]

Three lessons emerge, the U.S. Supreme Court instructs us, from these cases: (1) what an employer calls its discriminatory practice, how others might label it, and what else motivated it is irrelevant: if an employer fires an employee for being homosexual or transgender, it necessarily discriminates against that individual in part because of sex[142]; (2) the plaintiff's sex need not be the sole or primary cause of the employer's adverse action and hence the existence of another factor (such as the sex to which the plaintiff is attracted or presents) is immaterial[143]; and (3) "an employer cannot escape liability by showing it treats females and males comparably as groups."[144]

Hence employers who claim that discrimination against homosexual or transgender employees is not sex discrimination for the purposes of Title VII are wrong: an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-

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[141] *Oncale*, 523 U.S. at 79-80.

[142] *Bostock*, 140 S. Ct. at 1744.

[143] *Id*.

[144] *Id*. ("[A]n employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.")

based rules.[145] Likewise, employers who claim homosexuality and transgender status are not included in the list of protected classes – race, color, religion, sex, and national origin – that Congress wanted to protect, and therefore are conceptually distinct from sex, are correct in the sense that homosexuality and transgender status are distinct concepts from sex.[146] Nevertheless, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[147] Indeed sexual harassment is conceptually distinct from sex discrimination, but falls within Title VII's sweep, because "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[148]

The employers also contended "that few in 1964 would have expected title VII to apply to discrimination against homosexual and transgender persons," and the Court therefore should refrain from inserting that type of discrimination into the statutory text.[149] Not so, the U.S. Supreme Court responded. "[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts

[145] *Id*. at 1745 ("An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.")
[146] *Id*. at 1746-747.
[147] *Id*. at 1747.
[148] *Id*.
[149] *Id*. at 1749.

might disregard its plain terms based on some extratextual consideration."[150] "[T]o be sure," the Court insisted, "the statute's application in these cases reaches 'beyond the evil' legislators may have intended or expected to address. But 'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply demonstrates the breadth' of the legislative command."[151]

Furthermore, the Court noted, it is not really true that no one in 1964 would have anticipated prohibition of discrimination on the basis of sexual orientation or transgender status.[152] "Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least some people foresaw this potential application."[153] Moreover, "less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language - which was strikingly similar to Title VII's - might also protect homosexuals from discrimination."[154] The Court stated "whether a specific application was anticipated by Congress" is irrelevant in the context of an unambiguous statutory text,[155] and because of

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[150] *Id*.
[151] *Id.*
[152] *Id*.
[153] *Id*. at 1750-751 (citing Smith v. Liberty Mut. Ins. Co., 395 F.Supp. 1098, 1099 (ND Ga. 1975) (addressing claim from 1969); and Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (CA9 1977) (addressing claim from 1974).
[154] *Id*. at 1751 (citing Note, *The Legality of Homosexual Marriage*, 82 YALE L. J. 573, 583–584 (1973)).
[155] *Id*.

the broad language prohibiting discrimination based on sex, "many, maybe most, applications of Title VII's sex provision were 'unanticipated' at the time of the law's adoption."[156] The Court noted:

> Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices - to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries - virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.[157]

The bottom line, the U.S. Supreme Court ruled, is that judges cannot "overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."[158] Congress employed strong language prohibiting discrimination based on an employee's sex when the employer chooses to fire an

[156] *Id*. at 1752.
[157] *Id*. at 1753.
[158] *Id*. at 1754.

employee,[159] and the Court does "not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."[160] Hence the Court affirmed the judgments of the Second and Sixth Circuit, and reversed the judgment of the Eleventh Circuit.[161]

VIII. Response to and Implications of *Bostock*

High praise quickly followed the U.S. Supreme Court decision in *Bostock*. ABA President Judy Perry Martinez issued a statement in which she said: "The American Bar Association celebrates today's landmark U.S. Supreme Court decision vindicating the civil rights of transgender workers, and lesbians, gay men, and bisexual workers. The court affirmed the right to work in this country free of discrimination because of gender identity or sexuality."[162] Erwin Chemerinsky, dean of the

[159] *Id*.
[160] *Id*.
[161] *Id*.
[162] Debra Cassens Weiss, *In Gorsuch opinion, SCOTUS rules gay and transgender workers are protected by Title VII*, ABA JOURNAL, June 15, 2020, accessed on June 19, 2020, at https://www.abajournal.com/news/article/in-gorsuch-opinion-supreme-court-rules-gay-transgender-workers-protected-by-title-vii?utm_source=salesforce_227437&utm_medium=email&utm_campaign=weekly_email&utm_medium=email&utm_source=salesforce_227437&sc_sid=00001392&utm_campaign=&promo=&utm_content=&additional4=&additional5=&sfmc_j=227437&sfmc_s=50724387&sfmc_l=1527&sfmc_jb=181&sfmc_mid=100027443&sfmc_u=7324471.

University of California at Berkeley School of Law, declared: "By any measure, *Bostock* is an enormously important case. It certainly is the most important opinion written by Gorsuch since coming on to the court three years ago. It is a huge step to protecting gay, lesbian and transgender individuals from discrimination."[163] Maryland assistant attorney general Sarah Rice agrees: "the confirmation of Title VII's sweep immediately cements protections for federal government workers, no matter their state of residency, and for individuals who work in states that have not yet specifically prohibited discrimination on the basis of sexual orientation and gender identity."[164]

Bostock also portends several important implications. The first implication is that "other federal laws that prohibit discrimination because of sex also [prohibit] discrimination based on sexual

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[163] Erwin Chemerinsky, *Gorsuch wrote his 'most important opinion' in SCOTUS ruling protecting LGBTQ workers*, ABA Journal, July 1, 2020, accessed on July 3, 2020, at https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion?utm_source=salesforce_233915&utm_medium=email&utm_campaign=weekly_email&utm_medium=email&utm_source=salesforce_233915&sc_sid=00001392&utm_campaign=&promo=&utm_content=&additional4=&additional5=&sfmc_j=233915&sfmc_s=50724387&sfmc_l=1527&sfmc_jb=182&sfmc_mid=100027443&sfmc_u=7490958.

[164] Sarah Rice, *Symposium: The strength of the written word fulfills Title VII's promise*, SCOTUSblog, June 15, 2020, accessed on March 8, 2011, at https://www.scotusblog.com/2020/06/symposium-the-strength-of-the-written-word-fulfills-title-viis-promise/.

orientation or gender identity."[165] In his dissenting opinion, Justice Alito lists citations to over 100 federal statutes prohibiting sex discrimination.[166] The Obama administration adopted rules and issued guidance letters stating the statutes should be interpreted to also prohibit discrimination based on sexual orientation or gender identity.[167] The Trump administration rescinded most of them.[168] With *Bostock* "there is a strong argument that the statutes must be interpreted to protect gay, lesbian and transgender students from discrimination."[169] Hence the Court has likely permanently restored the Obama administration's protections against sexual orientation or gender identity discrimination.

The second implication of *Bostock* is its potential impact on challenges brought under the Religious Freedom Restoration Act, which as noted above prohibits the federal government from substantially burdening a person's exercise of religion unless the Government demonstrates it is advancing a compelling governmental interest in least restrictive means possible.[170] The Sixth Circuit eviscerated Rost's RFRA claim by ruling that his religious exercise would not be substantially burdened by continuing to employ Stephens, that the

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[165] Chemerinsky *supra* note 163.
[166] *Bostock*, 140 S. Ct. at 1791-797. *See e.g*., Amy Post et al., *Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights after* Bostock, 11 CAL. L. REV. ONLINE 545 (2021).
[167] Chemerinsky *supra* note 163.
[168] *Id*.
[169] *Id*.
[170] 42 U.S.C. §§ 2000bb–1(a), (b). *See* discussion of RFRA *supra* note 60 and notes 74-85.

EEOC has a compelling interest in ensuring the Funeral Home complied with Title VII, and that the enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest.[171]

The U.S. Supreme Court, however, did not address the RFRA claim. The Court explained:

> But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us. So, while other employers in

[171] *Harris Funeral Homes*, 884 F.3d at 567. "RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination." *Id*. at 600. *See* Katherine McKeen, *When Courts Play God, Whose Religion Matters?, THE REGULATORY REVIEW*, February 2, 2021, accessed on June 28, 2021, at *https://www.theregreview.org/2021/02/02/mckeen-when-courts-play-god-whose-religion-matters/* ("A pending bill, known as the Do No Harm Act, would block RFRA claims against laws that protect Americans against civil rights discrimination, provide access to health care, and target child exploitation, for example. The bill seeks to restore RFRA to its original, bipartisan-endorsed purpose: to provide a 'protective shield for religious minorities.' ")

> other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.[172]

Because "[e]mployers who wish to discriminate based on sexual orientation and gender identity may invoke the Religious Freedom Restoration Act,"[173] *Bostock* "is likely to lead to litigation over the ability of employers to discriminate based on their religious beliefs."[174] As noted by Professor Ann McGinley:

> [T]he Court states that the Religious Freedom Restoration Act (RFRA) acts as a "super statute" and may therefore "supersede Title VII's commands in appropriate cases. . . . Thus, private employers who operate secular businesses may use RFRA to argue that it is permissible to discriminate against LGBTQ+ individuals or even cisgender/heterosexual women because hiring these individuals violates the employers' religious beliefs. If these arguments are successful, they would seriously dampen the feminist project to avoid

[172] *Bostock*, 140 S. Ct. at 1754.
[173] Chemerinsky *supra* note 163.
[174] *Id*.

> gender as a basis for decision making in employment.[175]

The third implication of *Bostock* arises from the "bilateral" manner in which the Court addressed sexual orientation and transgender status employment discrimination. Firing Bob, a male employee who is attracted to other males, but not firing Hanna, a female employee who is attracted to males, constitutes employment discrimination against Bob on the basis of his sexual orientation. Firing Hannah because she is insufficiently feminine and firing Bob because he is insufficiently masculine constitutes illegal employment discrimination against Hannah and Bob because of sexual stereotyping. Firing Bob because he wants to present as a woman but not firing Hannah who is content to present as a woman is employment discrimination against Bob on the basis of transgender status. Firing Bob because he wants to present as a woman and firing Hannah because she wants to present as a man constitutes employment discrimination against both Bob and Hannah on the basis of transgender status. In each of these examples the Court posits discrimination on the basis of sex by trading off one gender against the other. This potentially poses problems for individuals who are bisexual ("people who're attracted to both men and women")[176],

[175] Ann C. McGinley et al., *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. ONLINE 1, 18-19 (2020).

[176] Planned Parenthood, *Sexual Orientation*, accessed on June 2, 2021, at https://www.plannedparenthood.org/learn/sexual-orientation/sexual-orientation.

pansexual ("people whose attractions span across many different gender identities," such as "male, female, transgender, gender queer, or intersex")[177], and asexual ("people who don't experience any sexual attraction for anyone").[178] Because a bisexual employee is attracted to both males and females, firing a bisexual employee is not necessarily employment discrimination based on sexual orientation, because the employee's sexual partners are both male and female. Likewise, firing a pansexual employee is not necessarily employment discrimination based on sexual orientation, because the employee's sexual orientation is blended across different gender identities and the employee's sexual partners may possess a variety of gender identifications. And firing an asexual employee is not necessarily employment discrimination based on sexual orientation, because the employee does not experience sexual attraction to any gender. Hence in the case of employment discrimination against bisexual individuals, pansexual individuals, and asexual individuals there is no tradeoff of one gender over the other, and the employment discrimination cannot easily be squeezed into the definition of sex discrimination employed by *Bostock*.[179] This is illustrated by slightly modifying a hypothetical Justice Alito used to demonstrate discrimination on the basis of sexual orientation. Assume an employer has a policy of firing any employee who is attracted to individuals of the same sex and that the employer

[177] *Id.*
[178] *Id.*
[179] Conklin *supra* note 98 at 45-46.

invites model employees to bring their spouses to a social gathering.[180] Among the attendees are (a) a man who is attracted to men and has a male spouse, (b) a woman who is attracted to men and has a male spouse, (c) a woman who attracted to women and has a female spouse, and (d) a man who is attracted to women and has a female spouse. Employees (a) and (c) would be fired; employees (b) and (d) would not be fired. Justice Alito argues that the discharged employees have one thing in common: their sexual orientation, which he argues "is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex – in a word, sexual orientation,"[181] which is a distinct and separate class of individuals who are not included in the protected class of sex.[182] In short, Justice Alito's argument can be applied to prevent bisexual individuals, pansexual individuals, and asexual individuals from having their status included in the definition of sex.

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[180] *Bostock*, 140 S. Ct. at 1763.

[181] *Id.*

[182] Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 Federalist Soc'y Rev. 158, 162 (2020) ("The discharged employees have something in common, but it is not their sex. Nor is it an attraction to men, or an attraction to women. Both individuals were discharged because of their homosexuality. Neither was discharged because of being a man or because of being a woman, or because of any characteristic of the sex to which they belong.") Similarly, suppose an executive is fired because she had consensual sex with a subordinate. The employee would have lost her job because she engaged in sexual relations, not because she was female. *Id.* at. 163.

The fourth implication of *Bostock* is the lack of uniformity in which the justices employed textualism[183] in reaching their decision. The initial responses of commentators praised the application of textualism in *Bostock*. In advance of *Bostock*, Yale Law Professor William N. Eskridge, Jr., framed the outcome of the case by saying:

> Based on its text, Title VII's purpose is to purge the workplace of criteria that Congress found unrelated to an employee's 'ability or inability to work.' From the very first case in 1971, the court has ruled that the congressional plan was to outlaw job decisions based upon "stereotyped conceptions of the sexes," including "prescriptive" sex-stereotypes, through which the employer dictates appropriate gender roles for its female or male employees.[184]

Likewise, Assistant Attorney General Sarah Rice observes that *Bostock* fulfills the best promises of

[183] As a general proposition, textualists (1) insist that, in interpreting statutes, judges must adhere to the specific terms of the statute, because the passage of legislation encompasses compromises, (2) reject "strong purposivism" in interpreting statutes, because that permits judges to insert their preferences into the law, and (3) are suspicious of legislative history, because it is "so vast and mixed that a judge could virtually always find something to support a given interpretation." Tara Leigh Grove, *Which Textualism*?, 134 HARVARD LAW REVIEW 265, 273-274 (2020). In short, judges should access the statute, read it, and apply it.

[184] Eskridge *supra* note 15.

textualism by confirming "all people have the right to be given the full measure of protection afforded to them by laws having meaning anchored in the written word."[185]

Rutgers University law professor Katia Eyer notes: "This ruling . . . makes clear why progressive textualism, *i.e.*, progressive arguments for the centrality of legal text, is important for the future of equality change," and "Gorsuch's opinion for the majority embraces this straightforward textualist logic, and rejects the numerous contra-textual arguments that were offered by the employers and the government in *Bostock*."[186] Professor Eyer quotes the following language from Gorsuch's opinion:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[187]

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[185] Rice *supra* note 164.

[186] Katia Eyer, *Symposium: Progressive textualism and LGBTQ rights*, SCOTUSblog, June 16, 2020, accessed on March 8, 2021, at https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/.

[187] *Id*. *Bostock*, 140 S. Ct. at 1737.

She continues:

> This reasoning written by a conservative justice in service of an opinion recognizing historic equality rights, is important to note. Although textualism has often been viewed as a tool of conservative legal advocacy, it need not and ought not be viewed that way. . . . Indeed, as the *Bostock* opinion notes, textualism properly understood can serve as a bulwark against the exclusion of politically unpopular groups from the law's protections."[188]

Likewise, Tennessee chief deputy attorney general, Jonathan Skrmetti, assesses the extent to which the Court has adopted textualism:

> *Bostock*'s textualism represents perhaps the apotheosis of judicial minimalism in statutory interpretation: Open the code, read the statute, rule. Absent linguistic ambiguity or evidence that the meaning of terms in the statute have changed over time, statutory interpretation is purely a matter of parsing the statute and analyzing its semantics and grammar."[189]

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[188] Eyer *supra* note 186.

[189] Jonathan Skrmetti, *Symposium: The triumph of textualism: Only the written word is the law*, SCOTUSblog, June 15, 2021, accessed on March 8, 2021, at

Indeed, Skrmetti notes, the majority opinion and the two dissenting opinions "are a master class in defining and applying textualism . . . [and *Bostock*] leaves no doubt that textualism is the predominant method of statutory interpretation for the current court."[190]

A careful reading of *Bostock*, however, uncovers significant differences in the application of textualism in Gorsuch's majority opinion and in Alito's dissenting opinions.[191] In the majority opinion, Justice Gorsuch (1) initially assumed the term "sex" in 1964 referred to "biological distinctions between male and female,"[192] (2) found that Title VII prohibits employers from engaging in intentional discrimination "because of" sex, the ordinary meaning of which is "by reason of or on account of sex, or, in other words, a "but-for" cause of the discrimination[193]; (3) applied that test to all three cases and decided "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"[194]; and (4) rejected the employers' argument that prohibiting discrimination on the basis of sexual orientation or transgender status would result in "any number of undesirable

https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/.

[190] *Id*.

[191] Grove *supra* note 183 at 281-285.

[192] Grove *supra* note 183 at 281. *Bostock*, 140 S. Ct. at 1739.

[193] Grove *supra* note 183 at 281. *Bostock*, 140 S. Ct. at 1739.

[194] Grove *supra* note 183 at 281-282. *Bostock*, 140 S. Ct. at 1740.

policy consequences."[195] In short, Justice Gorsuch stitched three basic definitions together – sex, causation, and discrimination – focused on a basic and simple hypothetical, and developed a basic proposition to resolve the case:

> [A]n employer who intentionally treats a person worse because of sex--such as by firing the person for actions or attributes it would tolerate in an individual of another sex--discriminates against that person in violation of Title VII. A much more literal interpretation of Title VII's prohibition against sex discrimination is hard to imagine."[196]

In contrast, in his dissenting opinion, Justice Alito (1) urged the court to determine how the terms of the statute would "have been understood by ordinary people at the time of enactment"[197]; (2) claimed that a focus on social and cultural context was mandated by textualist theory, because that context may have an important bearing on what its words were understood to mean at the time of enactment[198]; (3) insisted that "the answer could not be clearer," because in 1964 "ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant

[195] Grove *supra* note 183 at 282. *Bostock*, 140 S. Ct. at 1753.
[196] Justin Blount, *Sex-Differentiated Appearance Standards Post*-Bostock, 31 Geo. Mason U. Civ. Rts. L.J. 217, 220-221 (2021).
[197] Grove *supra* note 183 at 283. *Bostock*, 140 S. Ct. at 1755.
[198] Grove *supra* note 183 at 284. *Bostock*, 140 S. Ct. at 1767.

discrimination because of sexual orientation, much less gender identity," and the ordinary meaning of discrimination on the basis of sex was discrimination on the basis of "a person's biological sex"[199]; and (4) scolded the Court for its "arrogance" in asserting Title VII was unambiguous, a determination that was contrary to decades of circuit precedents, subsequent attempts by Congress to add "sexual orientation" as a separate discrimination category, and various other federal statutes, state laws, and presidential directives.[200]

Perhaps, then, textualism works better in theory than in practice, and in future statutory interpretation cases not involving discrimination on the basis of sexual orientation or transgender status, judges applying textualism will have to choose whether to make an initial assumption about the meaning of a term or apply a definition that includes the meaning ordinary folks would have understood at the time the legislation was enacted.

A final and much more mundane implication of *Bostock* is its effect on employer mandated rules dictating how employees dress, groom, and present themselves in the workplace, in order to express professionalism, instill customer confidence, and enhance a brand image. These rules are frequently sex-differentiated, *i.e.* different requirements are imposed on males than are imposed on females, which have triggered prior claims of sex

[199] Grove *supra* note 183 at 284. *Bostock*, 140 S. Ct. at 1767.
[200] Grove supra note 183 at 284-285. *Bostock*, 140 S. Ct. at 1757-1758.

discrimination.[201] For example, in *Earwood v. Continental Southeastern Lines, Inc*.,[202] Continental Southeastern Lines, Inc. ("Continental"), required its bus drivers to "report for work cleanly shaved with a trim haircut, a clean shirt, shoes polished, and a clean, neat uniform."[203] Other employees were subject to a less stringent dress and grooming regulation which required them to be "neat and clean and groomed in a manner commensurate with their jobs."[204] The conflicting standards permitted employees other than bus drivers to have longer hair than the drivers.[205] Ronald Earwood, a bus driver, was removed from several runs in October and December 1972 because of his long hair (described by the district court as "modishly full," "combed over his ears," and "thick on his neck").[206] Earwood filed suit in district court under Title VII, and the district court held that he was the victim of sex stereotyping discrimination.[207] The Fourth Circuit reversed the district court, and held that Continental's "sex-differentiated hair length regulation . . . is not utilized as a pretext to exclude either sex from employment [and] does not constitute an unlawful employment practice as defined by Title VII because "[h]air length is not an immutable

[201] Blount *supra* note 196 at 228 (2021)
[202] *Earwood v. Cont'l Southeastern Lines, Inc*. 539 F.2d 1349 (4th Cir. 1976)
[203] *Id*. at 1350.
[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] *Id*.

characteristic for it may be changed at will."[208] The Court observed that "the right to wear long hair is clearly protected against government interference"[209]; nevertheless:

> [A]s against an employer, even a government employer, a grooming regulation will be sustained unless the decision to enact the regulation or the regulation itself 'is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest in freedom to choose his own hair style."[210]

Similarly, in *Willingham v. Macon Telegraph. Publishing Co*.,[211] Alan Willingham applied for job as a display or copy layout artist with Macon Telegraph Publishing Co. ("Mason Telegraph"), a newspaper publishing company in Macon, Georgia,[212] Mason Telegraph refused to hire him because of the length of his hair.[213] Claiming that Macon Telegraph permits female employees to wear their hair at any length they choose but requires male employees to limit their hair length, Willingham pursued a sex discrimination claim in federal district court.[214] The district court ruled that

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[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975)
[212] *Id*. at 1087.
[213] *Id*.
[214] *Id*.

Macon Telegraph's dress and grooming policy did not discriminate on the basis of sex, and Willingham appealed to the Fifth Circuit.[215]

The Fifth Circuit observed initially that Mason Telegraph developed its dress and grooming codes because the Macon community, reacting to a raucous, unruly annual "International Pop Festival" held on July 3, 4 and 5, 1970, in the nearby town of Byron, during which crowds of between 400,000 and 500,000 people gathered: "Bearded and longhaired youths and scantily dressed young women flooded the countryside. Use of drugs and marijuana was open. Complete nudity by both sexes, although not common was frequently observed."[216] Sensitive to the Mason community's "indignation over the excesses during the Byron Pop Festival" and the "wide publicity" given to the festival in [Macon's] own newspaper," Mason Telegraph was reluctant to hire employees with long hair.[217] The Fifth Circuit also observed Macon Telegraph's business depended on the business community it served (including its advertisers) which "was particularly sour on youthful long-haired males."[218] Hence Mason Telegraph prudently developed its employee grooming code, which "required employees (male and female) who came into contact with the public to be neatly dressed and groomed in accordance with the standards customarily accepted in the business community."[219]

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[215] *Id*.
[216] *Id*.
[217] *Id*.
[218] *Id*.
[219] *Id*.

The Fifth Circuit affirmed the district court, ruling that Title VII bars employees from "discriminating against employees on the basis of immutable characteristics, such as race and national origin."[220] While employers cannot have one hiring policy for men and another for women if the difference is based on some fundamental right, employers are permitted to adopt a hiring policy that distinguishes on a different ground, such as grooming codes or length of hair, which is more closely related to choices the employer makes in determining how to run his business rather than equality of employment opportunity.[221]

A more recent example of a contested grooming policy is *Jespersen v. Harrah's Operating Co., Inc*.,[222] in which plaintiff, Darlene Jespersen was terminated from her job as a bartender in the Harrah's Reno Casino's sports bar for her failure to conform to the Casino's new "Personal Best" grooming policy. This policy required all bartenders, male and female, to "wear the same uniform of black pants and white shirts, a bow tie, and comfortable black shoes."[223] In addition, female bartenders, were required to wear facial makeup and male bartenders were prohibited from wearing any.[224] The female requirement stated: "Make up (face powder, blush and mascara) must be worn and applied neatly in

[220] *Id*. at 1091.
[221] *Id*.
[222] Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, (9th Cir. 2006)
[223] *Id*. at 1105-1106.
[224] *Id*.

complimentary colors. Lip color must be worn at all times."[225] Jespersen, who did not wear makeup on or off the job and who found the makeup requirement to be offensive, refused to wear makeup. Not qualifying for any other open positions with the Casino with comparable compensation, Jespersen left her job with the Casino.[226]

Claiming the Personal Best policy discriminated against women because it (1) subjected women to terms and conditions of employment not imposed on men and (2) required women to conform to sex-based stereotypes, Jespersen filed an employment discrimination lawsuit in federal district court.[227] In her deposition testimony, Jespersen testified that being compelled to wear makeup made her feel "very degraded and very demeaned" and "prevented her from performing her job."[228] Nonetheless, because there was no evidence in the record demonstrating either that compliance with the Personal Best policy fell unequally on men or women or that the Personal Best policy was motivated by gender stereotyping the female bartenders, the district court granted the Casino's motion for summary judgment.[229]

The Ninth Circuit affirmed, ruling that, while the Personal Best requirements related to the employee's hair, hands, and face were gender different, none of those requirements were more

[225] *Id*. at 1107.
[226] *Id*. at 1107-1108
[227] *Id*. at 1108.
[228] *Id*.
[229] *Id*.

onerous for one gender than the other. Further, while Jespersen asked the Court to take judicial notice that it is more expensive for women to comply with the Personal Best requirements, the Court declined to do so, ruling that judicial notice is reserved for matters "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned."[230] The Court determined that the cost of makeup did not fall into that category, and hence was not subject to judicial notice.[231]

The Ninth Circuit also addressed Jespersen's gender stereotyping claim, ruling:

> [The Personal Best] policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the non-skid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own

[230] *Id*. at 1110.
[231] *Id*.

> subjective reaction to the makeup requirement.[232]

Professor Justin Blount suggests that the literalist approach to interpreting Title VII in *Bostock* may prevent courts from allowing "reasonable" discrimination in gender-based appearance standards, such as those noted above in *Earwood*, *Willingham*, and *Jesperson*.[233] He notes:

> *Bostock* boiled sex discrimination down to a very simple proposition--if one changes the gender of the employee, does one get a different employment outcome? If an employer holds an employee to any type of different appearance standard based upon the employee's sex, then this definition of sex discrimination is clearly met."[234]

Hence, in the above noted Harrah's Reno Casino case, firing a male bartender for wearing makeup and firing a female bartender for refusing to wear makeup would constitute double discrimination.[235] In the future, employers who require employees to adhere to sex-based appearance standards may be found to engage in illegal sex discrimination contrary to Title VII if the response to one simple question is yes: is the appearance standard in any way predicated upon the employee's sex? That would certainly be "yes" in the case with Harrah's Personal Best policy.

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[232] *Id*. at 1111-1112.
[233] Blount *supra* note 196 at 236.
[234] *Id*. at 237.
[235] *Id*. at 238.

Professor Blount further opines that nothing in Bostock prevents an employer from requiring professional dress, grooming, and appearance "so long as professional dress is not defined or enforced differently for men and women."[236]

CONCLUSION

Clearly *Bostock* is a remarkable, momentous, and intriguing decision by the U.S. Supreme Court which provides Title VII protection to many millions of gay and transgender workers. This article (1) assesses the significant impact of *Bostock* in providing a profound victory for gay and transgender employees in the battle against sex discrimination; (2) provides detailed analysis of *Bostock*, *Zarda*, and *Harris Funeral Home* circuit court decisions which shows how convoluted and disparate Title VII's protection from sexual orientation and transgender discrimination had become and why it was so important for the U.S. Supreme Court to straighten it out; (3) examines how precursor U.S. Supreme Court decisions – *Vinson*, *Hopkins*, *Harris*, and *Oncale* – opened the door to *Bostock*'s protection of gay and transgender employees by expanding the scope of prohibited sex discrimination to cover sexual harassment, sexual stereotyping, hostile work environment, and same-sex sexual harassment; (4) contains a detailed analysis of *Bostock* showing how the U.S. Supreme Court resolved the circuit court differences and crushed the arguments raised by the employers of Gerald Bostock, Donald Zarda, and

[236] *Id*. at 241.

Aimee Stephens in support of their decisions to fire their employees for being gay or transgender; and (5) claims that, while *Bostock* was greeted with cheers and profound relief, it raises several important implications, namely: the expansion of Title VII protection against sexual orientation and transgender discrimination to over 100 federal statutes; the potential viability of employers' utilizing the Religious Freedom Restoration Act as a defense to their sexual orientation and transgender discrimination; the possibility bisexual, pansexual, or asexual individuals are not provided *Bostock* protections because of the bilateral manner in which the majority opinion includes sexual orientation and transgender status in the definition of sex; the fissures between the application of textualism in the majority and dissenting opinions that may complicate the resolution of statutory interpretation in future cases; and the possibility *Bostock* will upend prior circuit court decisions permitting employer dress and grooming codes to be applied differently to male and female employees.

LEGAL ENVIRONMENT DE-DENSIFIED: MAKING IT WORK BY LETTING THEM GO

MICHAEL R. KOVAL*

INTRODUCTION

The provost's email came in June: start planning to de-densify your fall courses. De-densify? By now we all know what it means. The pandemic that is COVID-19 has turned our world upside down and no individual, family, business or institution has been unaffected. In higher education we all had to pivot from in-person classrooms to the virtual world last spring,[1] and further transition from emergency mode to pedagogically sound practices for the fall semester.[2] Suddenly the online-education evangelists and flipped classroom proponents are

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[1] Lee Gardner, *Covid-19 Has Forced Higher Ed to Pivot to Online Learning. Here Are 7 Takeaways so Far*, 66 CHRONICLE OF HIGHER EDUC. (2020).

[2] Beth McMurtrie, *The Worst of Both Worlds: Hybrid Courses, Taught in Person and Online, Are Being Touted As the Best Option for the Fall. Why Do They Have so Many Critics?*, 66 CHRONICLE OF HIGHER EDUC. (2020).

poised to shine, and the rest of us are looking to them for guidance and inspiration. As is the case in most crises, there is opportunity to reflect on how and what we teach and to improve both the content of our courses and the processes through which we deliver them.

Fortunately, the Legal Environment of Business course by its nature lends itself to hybrid and/or online instruction because of the availability of resources that are relevant to the subject matter. The business world is our textbook, and course content can take many different forms. With some reconstruction of our existing traditional courses, instructors can transition their delivery mode from two meetings per week to one (or none) without sacrificing the quality of the course. But why stop there? In one of the author's many online training courses this summer, one course designer shared the following inspirational advice: Transforming a traditional course to online is like adapting a novel to a screenplay. The story is the same, but the way we tell it is quite different. With a little forethought and a lot of hard work, we can do more than just change the delivery modes of our courses. We can transform them into shining examples of quality hybrid or online education.

The purpose of this article is to share the author's journey in de-densifying his course and to provide specific examples of activities and projects created to leverage hybrid and online instruction methods. Part I describes the extraneous parameters imposed on the course, the

pedagogical strategies the author is using to satisfy those parameters, and four guiding principles—Coach, Curate, Customize, Collaborate—used to implement the strategies. Part II provides three examples of assignments created specifically for Legal Environment De-densified (hereinafter the "Course") in the areas of Civil Procedure and Litigation, Contract Law, and Tort Law that utilize these guiding principles. The unifying theme is to equip our students with the necessary structure and tools and set them free to learn.

I. COURSE REQUIREMENTS DURING THE PANDEMIC

The process of deconstructing and rebuilding the Course began with identifying the required external parameters brought on by the pandemic. Based on these parameters, the author had to choose the pedagogical strategies he wished to employ based on the substantive and procedural needs of the course as well as his own teaching style and preferences. Once these choices were made, the creative work of reconstructing the course content could begin.

A. Externally Imposed Course Parameters

With the help of the provost's foreboding email, the author identified four external parameters imposed by the pandemic. First, classrooms would be de-densified. This means, in

order to ensure social distancing, classrooms that previously could accommodate 36 students, for example, could now only serve 15. Practically, students would at most be able to attend class in person once per week, unless enrollments were very small. Second, student in-person attendance would be fluid, as students move in and out of quarantine as a result of the university's COVID-19 testing and tracing protocols. This means that using attendance and classroom participation as part of a grading rubric had to be revisited. Third, students could choose not to attend classroom meetings in person, for whatever reason, and would have to be accommodated. The Course content therefore would have to be made available to them in some other way. Finally, the Course should be easily converted to eliminate classroom meetings if the campus is forced to shut down due to the pandemic.

The provost also stated that faculty could choose their mode of course delivery[3] as long as the above criteria were met, and urged faculty to consider their own personal wellness and family needs as well as the needs of their students. This

[3] The author's institution provided four alternatives: 1) Traditional in person with limited class size: 2) Hybrid with a reduced number of in-person meetings: 3) Online asynchronous where students work remotely on their own schedules: and 4) Remote synchronous where students attend scheduled class meetings remotely. Regardless of the choice, non-attending students must be accommodated, and technology to allow for remote synchronous attendance, such as zoom, would be available.

flexibility gave the author the ability to reflect upon which pedagogical strategies would best fit the Legal Environment content and the author's own abilities and preferences.

B. Pedagogical Strategies to Meet the New Parameters

Given the flexibility offered by the institution, the first decision involved the mode of delivery. Because the author's enrollment was already above the maximum for continuing with the traditional in-person format (because students had registered for classes before the pandemic), the best choice was hybrid, where students would meet in person once per week, and work through online content on their own during the remainder. There were several reasons for this decision. Pedagogically, the alternatives all have disadvantages that the author felt were disqualifying. Remote synchronous delivery loses the lively engagement with students that the author enjoys, and it also puts the instructor and students in a risky position of being completely reliant on properly functioning technology at a given time.[4] Asynchronous instruction loses the

[4] *See* Macy Bayern, *Connectivity Issues Hamper Remote Learning during COVID-19 Crisis*, TECHREPUBLIC.COM (May 12, 2020, 9:46 AM), https://www.techrepublic.com/article/connectivity-issues-hamper-remote-learning-during-covid-19-crisis, stating 10 million American households have no broadband access, and rural Americans in particular are struggling with connectivity. The author's institution is in a rural area.

personal touch, and even though there are ways to personalize asynchronous online instruction,[5] the author had found it difficult in previous semesters to meaningfully connect with students and have them connect with each other in this format. In the author's experience, asynchronous instruction has its advantages for older and more disciplined students, but younger students, which comprise the author's Course enrollment, seem to struggle with the motivation it requires[6] and isolation it engenders.[7] In addition, according to the provost, student polls conducted by the university after the spring shutdown showed that students strongly preferred in-person classes over both remote synchronous and online asynchronous delivery.[8]

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[5] *See* Christopher Pappas, *7 Best Practices For Developing Personalized eLearning Courses*, eLearning Industry (October 8, 2016), https://elearningindustry.com/best-practices-developing-personalized-elearning-courses, providing examples such as Create Learner-Centered Goals and Objectives, and Incorporate Online Resource Libraries. *See also* The Sheridan Center, *Asynchronous Strategies for Inclusive Teaching*, BROWN UNIVERSITY, https://www.brown.edu/sheridan/asynchronous-strategies-inclusive-teaching, for advice about using Discussion Forums to connect with students asynchronously.

[6] Nicholas Croft, Alice Dalton & Marcus Grant, *Overcoming Isolation in Distance Learning: Building a Learning Community through Time and Space*, 5 J. FOR EDUC. IN THE BUILT ENV'T. 27, 32 (2010).

[7] *Id.*at 33.

[8] This result mirrors the findings of national polls. *See* Scott Jaschik, *What Students Want this Fall*, INSIDE HIGHER ED (May 20, 2020), https://www.insidehighered.com/admissions/article/2020/05/20/survey-results-15-fall-scenarios-suggest-what-students-want,

Finally, from a selfish perspective, being in a classroom, even with a mask, is much more enjoyable for the author than delivering a course online. The energy of the classroom and interaction with students is the reason he entered teaching profession to begin with.

There are two disadvantages to the hybrid format—aside from being exposed to students who are possibly infected with COVID-19[9]—that had to be considered as the Course was designed. First, it would be more work to convert the Course to fully online if the campus shuts down. Second, students who are unwilling or unable to come to class in person, even once per week, will have to be accommodated. Both of these drawbacks, however, can be minimized with thoughtful design, and are outweighed for the author by the advantages of physically meeting with students once per week.

The decision to deliver the Course in a hybrid format necessitated the second important

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stating that 78% of over 10,000 students surveyed in a poll by Niche, a website that reviews colleges for prospective students, found in person classes appealing, while only 53% said the same about courses that are in person and online simultaneously, and 29% found online learning appealing. The author was also influenced by his own three children going off to college for the first time, desperately hoping to have at least one class in person.

[9] Jaweed Kaleem, Molly Hennessy-Fiske & Richard Read, *I Can't Teach when I'm Dead.' Professors Fear COVID-19 as College Campuses Open*, L.A. TIMES (Aug. 13, 2020, 5:00 AM), https://www.latimes.com/world-nation/story/2020-08-13/university-college-openings-professors-coronavirus.

pedagogical strategy, and that is to "flip" the class. Flipping takes the traditional method of presenting material during a lecture and having students apply the material at home, and flips it: content is presented to students outside of class, using a variety of methods, and students then apply the concepts in class in a way that promotes experiential and active learning.[10] Several articles have been published recently about the benefits of flipping business law courses.[11] The primary benefit over traditional in-person lectures is it frees up limited class time to give students the opportunity to practice their analytical skills.[12] This technique is a perfect fit for a hybrid mode of delivery when students will be in the classroom only once per week and the instructor does not care to lecture wearing a mask.

Not only does the technique of flipping work well with the content of Legal Environment,[13] it also fits nicely within the new process parameters. Students will be working on small-group activities during class time. With no lectures, students who are remote will not feel like second-class citizens. They can be working in virtual breakout rooms at

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[10] Tanya M. Marcum & Sandra J. Perry, *Flips and Flops: A New Approach to a Traditional Law Course*, 32 J. LEGAL STUD. EDUC. 255, 256 (2015).

[11] *Id. See also* Mystica M. Alexander, *The Flipped Classroom: Engaging the Student in Active Learning*, 35 LEGAL STUD. EDUC. 277 (2018); Matt Hlinak, *Flipping and Moocing Your Class Or: How I Learned to Stop Worrying and Love the MOOC*, 33 LEGAL STUD. EDUC. 23 (2016).

[12] Alexander, *supra* note 11.

[13] Alexander, *supra* note 11, at 282.

the same time as their in-person counterparts and not feel like they are being ignored. The challenge is to design activities that meaningfully reinforce the concepts learned outside of class[14] and to provide enough incentive to have students properly prepare for the work sessions before class.[15]

Together, these two strategies—hybrid delivery and flipped classroom—allow the Course to meet the provost's parameters. Once per week meetings allow for de-densified classrooms. Fluid in-person attendance can be accommodated through asynchronous posted content without any degradation in quality of instruction or reduction in peer interaction. Participation in activities, in the classroom or remotely, is encouraged rather than demanded through the use of carefully planned projects. And the Course will be easy to take fully online if necessary, as the content is already posted and available and small student work groups can continue remotely. The next challenge is to implement these strategies by transforming the traditional lecture-based Legal Environment course into a Course that is engaging, effective, and adaptable to our uncertain times.

C. Pedagogical Tactics to Transform the Course

[14] *See* Part II, *infra*.

[15] One of the difficulties of running a successful flipped class is ensuring students have adequately prepared to participate. Alexander, *supra* note 11, at 281.

At the author's institution, the Legal Environment of Business Course contains six core topics: The Court System, Contracts, Torts, Constitutional Law, Employment Law, and Criminal Law. In his traditional in-person course, the author would generally lecture about these topics twice per week and supplement the lectures with activities and projects. Assessment was a mix of tests, papers, online homework, and attendance/participation, with tests counting for 60% of the total grade. As the author began to rebuild the course, it was readily apparent that much of it would have to change to meet the new parameters and implement the hybrid and flipped strategies.

Many instructors tweak and nudge their courses each semester to keep them current and engaging and aligned with our societal norms and culture. For the author, though, and probably for most instructors, this semester-by-semester change is slight and gradual. A course taught in 2019 is startlingly different from the same course delivered in 2009. But when compared to a 2018 course, the difference is hardly noticeable. Rarely do instructors perform a complete overhaul, and before the author began the process, realizing that there were hundreds of decisions to be made, he decided to formulate some guiding principles that would ensure the result would not just satisfactorily deliver content, but would do it in a way that makes sense for the way his students learn and the skills they need to develop in these

uncertain times of 2020 and beyond. The principles the author identified as guideposts for the Course reconstruction are the 4 Cs: Coach, Curate, Customize, and Collaborate. These four principles in turn influence the choice of pedagogical tactics used to build the Course. Taken together, they require a loosening of instructor control and shifting of responsibility to the students.

1) Coach: Don't Just Teach—Help Them Learn

The first principle the author decided to implement as he transformed the course is to take on the role of Coach rather than Instructor. Gone are the days where we are the "Sage on the Stage," the gatekeepers controlling the flow of information, the respected last word regarding what is right and true, the final authority.[16] (The author cannot even effectively require attendance anymore, according to the provost.) As with many other industries, power has shifted to the consumer, and that power shift demands a shift in how we relate to students.[17] "Coaching is

[16] For a defense of the 'Sage on the Stage' *see* Marianne M. Jennings, *In Defense of the Sage on the Stage: Escaping from the "Sorcery" of Learning Styles and Helping Students Learn How to Learn*, 29 LEGAL STUD. EDUC. 191 (2012). Professor Jennings' results-oriented approach to 'Helping Students Learn' rather than 'Teaching' Legal Environment meshes with the authors view of 'Coach.'

[17] For a fascinating look at student attitudes toward professors, *see* Jill A. Singleton-Jackson, Dennis L. Jackson & Jeff

unlocking a person's potential to maximize their own performance. It is helping them to learn rather than teaching them."[18] Many good instructors, in the spirit of serving our students, take on this role of coach without even thinking about it, but by intentionally embracing the role, course decisions both procedural and substantive are viewed in a different light.

This subtle shift in thinking from "teaching" students to "helping them to learn" leads to some simple but easily overlooked procedural tactics

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Reinhardt, *Students As Consumers of Knowledge: Are They Buying What We're Selling?*, 35 INNOVATIVE HIGHER EDUC. 343, 352 (2010), finding that students liken professors to front-line customer service representatives:

> "One student commented that, "They [professors] should devote all day to students. They get summers off." Another said, "Professors' only job is to teach. They should be available and flexible about meeting times." With regard to expectations about expertise, one participant indicated that, "Professors need to be totally focused on students. It's like they are hired experts who need to do their job." Another student put it more succinctly by commenting, "I paid for an expert." We noted that on seven occasions respondents said, "Professors work for us." Interestingly one participant spoke of professors working for her in the sense that she was praising the professor for doing this as a helpful and appropriate service to the student."

[18] JOHN WHITMORE, COACHING FOR PERFORMANCE: GROWING HUMAN POTENTIAL AND PURPOSE: THE PRINCIPLES AND PRACTICE OF COACHING AND LEADERSHIP, 10 (Nicholas Brealey 5th) (2009).

for the Course. First, when building the Course on the institution's Learning Management System ("LMS"), the author organized instruction by week rather than by topic.[19] Preparation assignments are clearly labelled and numbered, and "Work Session Agendas," for our weekly in-person meetings, are also provided. A student view of Week 4 is shown in Appendix A.

Another way to help them learn is to give students more control over their schedule. Our students are juggling a myriad of personal and family responsibilities during the pandemic, often under stressful or anxiety-producing circumstances. Rates of depression and anxiety among college students are at an all-time high due to the pandemic.[20] Any amount of control we can give them over when they can view content and assignments, submit homework, and take tests will be appreciated. Conversely, imposing meaningless deadlines and locking information until it is scheduled to be covered creates frustration and bad will. With that in mind, the author decided to publish the entire course on the LMS a week before the first day of class,

[19] For flipped classrooms to work, clear and organized instructions for pre-class preparation is critical. Alexander, *supra* note 11, at 281.

[20] Lauren Lumpkin, *Coronavirus Has Made Already-Stressed College Students Even More Anxious and Depressed, Study Finds*, WASH. POST (July 24, 2020 at 4:25 PM), https://www.washingtonpost.com/local/education/coronavirus-has-made-already-stressed-college-students-even-more-anxious-and-depressed-study-finds/2020/07/24/75608c50-cdb6-11ea-bc6a-6841b28d9093_story.html.

including course content and due dates for every assignment and test, so students could access all content at their convenience and plan their schedules to suit their personal needs.[21] This is a big change from the author's traditional teaching method, where PowerPoints were only available as they were covered in class. It also required a large time commitment before the semester began.[22]

Finally, to coach is to encourage continual improvement, and this means deemphasizing high-stakes test results like those used in law school and rather giving students the opportunity to learn from their mistakes. The author decided the Course would have more tests to cover the same content (class time is no longer an issue, as the tests will be online), and he would give students two chances at each test, with only the higher-grade counting. This practice was suggested by the institution's Instructional Design and Delivery experts. It was recommended because it significantly reduces the stress of taking timed online tests, and also reduces the chance of the instructor having to intervene because of technology failure. To minimize the opportunity for cheating the author adopted best practices from those same experts: questions are

[21] A few work session activity items are being saved for class periods to ensure student collaboration during meetings.

[22] The author estimates that he spent approximately 140 hours deconstructing and reconstructing the Course prior to the start of the fall semester. Very little time was needed to prepare for the spring semester.

application-based; students are permitted to use any course material they wish; questions are selected at random from a test bank; the tests are timed at 90 seconds per question; the order of questions is shuffled; the answer choices are shuffled; and students cannot return to a question once the answer is submitted. Students have a two-day window to complete each test. Upon completion they will know their score, but they cannot access the questions or correct answers.[23] Based on their score, they can decide whether to review the course content and try again, based on their own academic performance goals. As any effective coach would, the author is giving students the opportunity to improve their performance, but they have to put in the work to succeed.[24] In addition, as discussed below, the weight of each test as well as the total weight of all tests is made lower than in the traditional course.

2) Curate: The World is our Textbook

[23] These suggestions are available on our Institution's Department of Instructional Design and Delivery webpage, which is available through login only. Many institutions now provide similar resources.

[24] The author tried this double-testing method after courses went online last spring. Surprisingly, 89% of students opted to take the test a second time. Their scores increased by an average of 9%. How much of the increase is the result of cheating is unknown.

The second guidepost used to transform the Course is Curate: carefully and intentionally choose the content to include in the Course. In order to flip a class, content must be available to the students before class using the LMS.[25] As anyone who teaches Legal Environment already knows, ideas about course content come at us all day, every day, simply by reading newspapers, watching movies[26] and television,[27] listening to NPR and podcasts, checking our inboxes, and even scrolling through social media. The challenge is not finding enough material, but choosing wisely from innumerable sources that match the learning objectives and will help the students learn. There are instructional videos available on YouTube for almost every topic,[28]

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[25] *See* Marcum & Perry, *supra* note 10, at 264, describing the necessary components of an online course management system for flipping a course.

[26] Shelley McGill, *"The Social Network" and the Legal Environment of Business: An Opportunity for Student-Centered Learning*, 30 J. LEGAL STUD. EDUC. 45 (2013), describing the building of a Legal Environment Course around the film.

[27] Michael R Fricke, *HBO for ADR: Using Television's Silicon Valley to Teach Arbitration*, J. LEGAL STUD. EDUC. 359 (2019); Michael R Koval, *Step Away from the Syllabus: Engaging Students on the First Day of Legal Environment*, 30 J. LEGAL STUD. EDUC. 179 (2013) (describing a first day activity based on the television show "24").

[28] Marcum & Perry, *supra* note 10, at 266. In building the Course, the author embedded 151 videos across the six legal topics covered in the course into the LMS. The videos range from explanations of legal principles to current events and application to popular culture. The videos most often used come from Professor Jason Gordon's extremely valuable law

and cases, podcasts, news articles and video clips, movie clips, songs, and interviews with experts are available with a click or a touch. The possibilities are overwhelming! By distilling each lecture to its essential points, as if plotting the filming of a movie, and then embarking on an internet treasure hunt, the author was able to find relevant and engaging videos for most topics in the Course. In the few instances where content could not be found to meet the author's needs, he created his own short videos.[29]

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section of his website, THE BUSINESS PROFESSOR (https://thebusinessprofessor.com/home/business-law/). However, the author also used this opportunity to ensure that a diverse representation of voices appear. The author's Legal Environment YouTube playlist, which includes many of the videos embedded in the Course, is available at https://youtube.com/playlist?list=PLh5GowuPDLw_hr84TebW0JRkyFrX-nyhL.

[29] The three short video recordings the author made himself are Substantive v. Procedural Law, and Contractual Capacity of Minors, Mentally Impaired, and Intoxicated Individuals, and Agency Law of Intentional Torts. The author's video recording tool of choice is Prezi Video, which allows the flexibility of recording on camera while sharing PowerPoint with a split screen effect. The videos can then be easily uploaded to YouTube and embedded in an LMS Course page. The author's ID&D specialist recommends any video you record should be less than 5 minutes because students will stop watching otherwise, and the author's own experience bears this out. Others concur in this recommendation. Marcum & Perry, *supra* note 10, at 266.

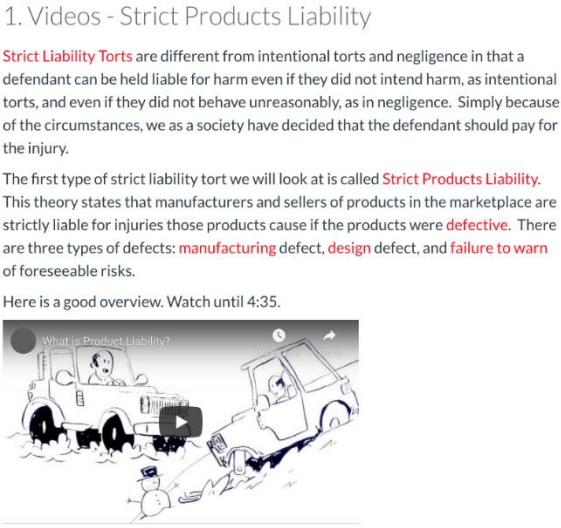
Many of the author's colleagues, in crisis-mode last spring, chose to provide content by creating videos of their lectures. This arguably does not take advantage of the online medium, and it also often results in videos that have poor production values and are, quite frankly, boring and seldom viewed by

Finding the content was only the first (very big) step. As any good curator knows, the display is as important as the artwork.[30] Because students will be viewing and reading the content without the benefit of a lecture, the author wanted to do more than provide links to videos and other content. It was important to provide context, and to that end the author created "Video Storyboards" for each topic. A Video Storyboard recreates each lecture topic on one LMS Page with a combination of text, pictures, video, PowerPoint slides, and links to other internet sources as described above. Taken as a whole, as the student scrolls down the page, the effect is similar to attending a traditional lecture. The project took many hours, but the author predicts the logical presentation and engaging content will help students learn, understand, and maybe even remember the legal concepts of the Course. A series of screenshots capturing the author's Video Storyboard for the topic of Strict Products Liability is shown below. While it is difficult to recreate a LMS page in print, try to imagine the

students. While students were understanding during the unexpected shutdown, their expectations, the author believes, will be higher going forward.

[30] Henri Neuendorf, Art Demystified: What Do Curators Actually Do? The Influence of Curators, Explained, ARTNET NEWS (November 10, 2016), https://news.artnet.com/art-world/art-demystified-curators-741806.

following series of pictures as one continuous page on the LMS.[31]



[31] Because the author's Video Storyboards reside within his institution's LMS, they are not publicly accessible. However, the author is happy to present them upon request.

Here is some practical information as to how lawyers handle these types of cases.

So what does a plaintiff have to prove? Remember, this is common law, so different states have slightly different requirements. (Recall your Module A Project, where you researched the prima facie case for strict products liability in your assigned state.) Most states require some version of the following:

1. Strict Products Liability

   A. Product must be in a **defective condition** when the defendant sells it
   B. The defendant must be in the business of **selling the product**
   C. The product must be **unreasonably dangerous** to the user because of the defect
   D. Plaintiff must incur **physical harm** to self or property
   E. The defective condition must be the **proximate cause** of the injury or damage (foreseeable)
   F. The goods must **not** have been **substantially changed** by the user

People often make fun of warnings on products. But the reason they are there is because as soon as one person is injured by doing something dumb, that injury is now foreseeable to the company, and if they don't warn against it, they now have a defect!

One of the most famous Products Liability lawsuit is the McDonald's Hot Coffee Case, which was predicated on the theory that McDonald's Failure to Warn about the danger made their coffee defective. There is a lot of misinformation out there about this case. Here is a good summary.

So how can companies make sure they have adequate warnings? For Business to Business suppliers, there are generally accepted industry standards to follow.

For consumer products companies, it is a little more difficult, and the lawyers are often at odds with the marketers to ensure the warnings are adequate.

Why? Because a woman who was using her hairdryer as a sleeping aid was injured when her bedding caught fire! People do strange things.

In addition to the richness of the content, an added benefit of the Video Storyboard approach is the ability to add timely topics that previously

would have taken too much class time to present. Specific to this year the author was able to include material on racial justice and COVID-19 legal issues into the Video Storyboards, as well as old favorites, like McDonald's Hot Coffee,[32] that had been eliminated over the years for lack of time. Rather than trying to squeeze a few minutes into a tight lecture schedule, the flipped hybrid Course can easily absorb this additional topical material to provide students with more relatable and engaging stories.[33]

Once the decision was made to create and use Video Storyboards, the next question facing the author was, should he use a textbook at all? A recent study has found students perceive open-source textbooks to be more useful, better quality, and much cheaper than traditional textbooks.[34] Some instructors have done away with textbooks altogether by either assembling their own material, or using shareable open-source

[32] For more about using the McDonald's Hot Coffee case as a vehicle for critical thinking, *see* Rosemary Hartigan, Monica Sava & Daniel T. Ostas, *Critical Thinking and the McDonald's Hot Coffee Case: A Pedagogical Note*, 24 SOUTHERN L. J. (2014).

[33] Telling stories is important, but in these changing times the method might have to change. *See* Donna M. Steslow & Carolyn Gardner, *More than One Way to Tell a Story: Integrating Storytelling into Your Law Course*, 28 J. LEGAL STUD. EDUC. 249 (2011).

[34] Carrie Cuttler, *Students' Use and Perceptions of the Relevance and Quality of Open Textbooks Compared to Traditional Textbooks in Online and Traditional Classroom Environments*, 18 PSYCHOL. LEARNING AND TEACHING, 65, 77-79 (2019).

courses.[35] The author's University System also encourages the use of open educational resources through an Open-Source Textbook Initiative. Despite the obvious benefit to students of lowering their costs, the author is not quite ready to give up the textbook for several reasons. First, in the author's experience a textbook (hard copy or eBook) is comforting to many students who need a security blanket.[36] Second, students are more likely to use textbooks for an online course than a traditional in-person course.[37] Third, publishers have steadily improved the online learning platforms and enrichment tools that come with their eBooks. Moving to a hybrid format makes student preparation and accountability critical,[38] and these platforms allow for graded homework problems to be completed before coming to class with no effort on the part of the instructor other than the initial setup work.[39] Fourth, the price of textbooks have dropped

[35] For a comprehensive free open-source Legal Environment Course, *see* Susan Willey and Zoe Salloom, *Legal and Ethical Environment of Business Modules (Open Course)* BUSINESS ADMINISTRATION, MANAGEMENT, AND ECONOMICS ANCILLARY MATERIALS (2016) https://oer.galileo.usg.edu/business-ancillary/2.

[36] The author usually has a handful of students each semester who say they buy the hard copy of the textbook in addition to the eBook.

[37] Cuttler, *supra* note 34, at 79.

[38] Marcum & Perry, *supra* note 10, at 257.

[39] The author currently uses KENNETH W CLARKSON & ROGER L MILLER, BUSINESS LAW: TEXT AND CASES (Cengage Learning Fifteenth) (2019).

precipitously with the advent of online platforms,[40] and with the publishers offering "Inclusive Access" programs, the price can be folded into the student's university account seamlessly, so students don't have to "pay extra" during the first week of class when money might be tight. Today's textbook offerings, in the author's opinion, provide an important and cost-effective one-stop shop for the relevant Course materials. They serve as the foundational structure upon which the students can gain solid footing as they are given greater responsibility for their own learning paths.

3) Customize: Choose Your Own Adventure!

The third guiding principle the author used to reconstruct the Course is Customize. While curating involves choosing and displaying the preparatory content, customizing is focused on the projects the students will be working on. It means designing assignments and assessments that give students as much choice and control as possible over their learning paths by sending them out into the real (online) world to see how the principles they are studying apply. When students can connect their study of law to businesses or issues in which they are personally interested, they more

[40] The price of the online learning package used by the author is $75.00 per student for the semester. The textbook alone costs over $200.

readily see the value of the Course.[41] Real-world problem-based learning engages students and helps them develop skills they will need as they progress into their careers.[42]

To implement customization, the author first had to critically examine and modify his grading rubric to deemphasize test-based assessment and more heavily focus on other types of customizable projects. The importance of tests, which students can prepare for but really have no control over, was reduced from 60% to 40% of their grade. Conversely, the author added three projects, for a total of six, now worth 45% of their grade.

Assessment Type	**Traditional Course**	**De-densified Course**
Tests	4 tests worth 60%	6 tests worth 40%
Projects	3 projects worth 20%	6 projects worth 45%
Homework	weekly worth 10%	weekly worth 15%
Attendance/Participation	10%	0%

[41] Ryan C. Grelecki & Susan L. Willey, *Applying Legal Concepts to Business in a Legal and Ethical Environment of Business Course: The Build-a-Business Project*, 34 J. LEGAL STUD. EDUC. 89, 90 (2017).
[42] Marcum & Perry, *supra* note 10, at 261.

The Customization process required creating projects that allow students to exercise choice when completing their projects. The author was able to create customizable projects in various ways, and three of the Course projects are described in detail in Part II, *infra*. *Mad Libs Litigation* has students choose, among other facts, the state in which they will analyze the law and prepare for a civil lawsuit. *Draft Your Own Contract* allows the students to choose a service business to prepare a standard customer contract. *The Tort Lawsuit Competition* requires students to find and analyze a current complaint for negligence against a business that has been filed but has not yet gone to trial. The goal for all the projects is for students to choose the subjects they will be analyzing, and to have each student be working toward the same learning objectives, but with different source material and research requirements. While this decision to increase customization and student choice while decreasing traditional testing in the Course significantly increases the time needed for grading, as there are no easily identifiable "right answers" to blindly assign to all submissions, the author believes it results in a more engaging course for all students and a fairer assessment of mastery and performance.[43]

[43] "Participants who are assessed by methods which require their active involvement view assessment as a fairer and more effective process than students who are assessed by more traditional methods such as examinations and written tests."

4) Collaborate.

The final guiding principle the author followed in reconstructing the Course is a renewed focus on collaboration. Collaboration has social, psychological, and academic benefits for students,[44] and the pandemic has provided educators with mainstream tools for collaboration that were unknown to many of us just months ago, such as Zoom. There are many strategies instructors traditionally use to encourage collaboration, from think-pair-share[45] during class time to full-blown end-of-term presentations. In

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Maria Assunção Flores, Ana Margarida Veiga Simão, Alexandra Barros & Diana Pereira, *Perceptions of Effectiveness, Fairness and Feedback of Assessment Methods: A Study in Higher Education*, 40 STUDIES IN HIGHER EDUC. 1523 (2015).

[44] Marjan Laal & Seyed Mohammad Ghodsi, *Benefits of Collaborative Learning*, 31 PROCEDIA - SOCIAL AND BEHAVIORAL SCIENCES, 486, 487 (2012). Social benefits include helping to develop a social support system for learners, building diversity understanding among students and staff, and establishing a positive atmosphere for modelling and practicing cooperation. Psychological benefits include increased student self-esteem and reduction in anxiety through cooperation. Academic benefits include the promotion of critical thinking skills, more engagement in the learning process, and modelling of problem-solving techniques. *Id.*

[45] "With this technique, students first work on an activity individually and then, after a short interval, in pairs. Finally, after partners have had some time to compare ideas, the entire class discusses the activity as a large group." Kristine Prahl "Best Practices for the Think-Pair-Share Active-Learning Technique," THE AMERICAN BIOLOGY TEACHER 79(1), 3 (2017).

the author's experience in Legal Environment, the end products of these more complex group collaborations show that they are not collaborations at all, but rather the result of a "divide and conquer" approach, where the team assigns different parts of the project to individuals, who come together at the last minute to try to form some cohesive whole. It is often more like tag team wrestling than a well-planned and executed deliverable. Exacerbating the issue is the free rider problem[46] that all instructors who assign collaborative group projects have to manage to some extent.

To address these concerns while promoting collaboration, the author decided to not only flip the classroom, but to try to flip the projects as well. This means students work together in small groups during the class Work Session to discuss, analyze, research, and solve various legal dilemmas set forth in the projects, but each student is then required to take the results of this collaborative effort and create their own submission. The individual submission requirement makes it in each student's best interest to fully engage and participate in the group analysis and discussion, whether physically in class or meeting remotely in Zoom breakout

[46] The free rider fails to contribute to group projects, realizing they will nevertheless reap the benefit of the group's efforts. This is one of the most significant challenges with collaborative learning. William B. Joyce, *On the Free-Rider Problem in Cooperative Learning*, 74 J. OF EDUC. FOR BUS. 271 (1999).

rooms, as they will have to understand the concepts in order to create and submit their individual work product.

The author has also added peer reviews to some of the projects. Despite the documented benefits of the practice,[47] the author was initially skeptical that the benefit would outweigh the logistical complication. An experiment last spring when classes were moved online, however, showed their value. The author expected perfunctory reviews at best, but was pleasantly surprised at the thoroughness and candor expressed by the student reviewers. Anecdotally, some students said they benefited from comments made by peers, but more benefitted from seeing and critically evaluating their peers' work. As instructors grading hundreds of papers per semester, we often forget that students see only theirs, and the wide range of quality in submissions can be leveraged to help students improve when they see they are not measuring up to their peers. The author's LMS makes the

[47] Peer review encourages students to take an active, reflective role in learning, which promotes critical thinking, allows student-reviewers to develop problem-solving skills because they must analyze, clarify and correct each other's work, shows students what counts as good quality work, helps them to clarify their understanding of the material, and permits meaningful interactions with their peers. All of these can in turn contribute to a more collaborative and participatory learning environment. Raul A. Mulder, Jon M. Pearce & Chi Baik, *Peer Review in Higher Education: Student Perceptions Before and After Participation*, 15 ACTIVE LEARNING IN HIGHER EDUC. 157, 158 (2014).

process of assigning and managing peer review quite simple, and this collaboration after the fact is, in the authors opinion, a valuable tool that will work well in both the hybrid and online course format. By having the peer review grade actually count, the author is once again turning more control over to the students.

II. COURSE ASSIGNMENTS USING THE 4 Cs

The Course has six required projects that have been created using the strategies and tactics discussed in Part I. Three of the assignments, all created by the author, are presented here: *Mad Libs Litigation*, which reinforces civil procedure and litigation concepts; *Draft Your Own Contract*, which allows students to see the big picture of the importance of contracts while studying the technical details of contract law; and the *Tort Lawsuit Competition*, which shows the wide range of business circumstances that can result in a negligence lawsuit.[48] All the projects meet the

[48] In the interest of space, the author has chosen the projects that are most universally applicable to a Legal Environment of Business course. The other three projects not described in this article are "Con Law in the News," where students apply simplified legal tests about the Commerce Clause, the Dormant Commerce Clause, the Free Exercise Clause, Political Speech, Commercial Speech, Student Speech, Equal Protection, and Due Process to current events taken from the news; Sex, Beer and Hooters, where students explore employment discrimination protections through a myriad of lawsuits brought against the restaurant chain; and a final project adapted from Ryan Grelecki's Build a Business activity, with which he won the 2016 Master Teacher

external Course parameters: amenable to de-densified classrooms, accommodating to students in person and remote, and easy to convert to remote instruction. In addition, the author has incorporated the three applicable Cs into the project process: Coach, Customize, and Collaborate.[49]

A. Mad Libs Litigation: Civil Procedure Project

The objective of this project is to reinforce the civil procedure concepts of subject matter jurisdiction, personal jurisdiction, prima facie case, components of a complaint, discovery, and jury selection. The project begins when students open the assignment file from the LMS on their laptops. Through the use of macros in the Word document,[50] before they can see the document they will be asked to submit examples in various categories, such as "outdoor recreation activity" and "type of food" in the manner of the children's game Mad Libs.[51] The initial pop-up window is shown below.

Competition in San Juan, Puerto Rico. *See* Grelecki & Willey, *supra* note 41. The author would be happy to share any and all of these projects upon request.

[49] "Curate" is not applicable here, as it serves in preparation of the online Course content rather than in the project process.

[50] Many thanks to Abigail L. Ebron, the author's administrative assistant, who turned this idea into a reality.

[51] Mad Libs began as a word game book for children in which players are asked to submit words of certain categories that are then dropped into a pre-written story, with often silly and absurd results. The game has expanded in the digital age to

Students are asked to work in groups of three to complete the list using the same answers. Different groups will obviously have different answers. Upon clicking the 'Let's Go' button, the assignment document will appear, with the groups' answers dropped into a litigation scenario. While the scenario is the same for everyone, the different answers will lay the groundwork for a customized learning experience. The document, with sample answers automatically appearing in red, is shown below.

Module A Project Assignment

> Mad Libs, you may remember, is a children's word game where the player is asked to give a

web-based alternatives as well. For more information about the modern Mad Libs world, visit madlibs.com.

specific example that fits into a general category, one after another. Upon completion, the answers are dropped into a pre-written story, and the result is often amusing. We are going to use the same premise to set the parameters of the research you will be doing for this project. To that end, in class we have answered the following:

Scenario

In the summer of 2019, **Karen** and her eight-year-old twins, **Tia** and **Tony**, were returning home to **Florida** from their annual **Surfing** vacation in **Phoenix**. For two weeks they had a lovely time. After being on the road for hours, they were getting hungry, and decided to stop for a snack. In the middle of **California**, they saw a huge billboard advertising **Xavier**'s **Taco Chalet**, which was a small mom and pop restaurant owned by **Xavier Smith** as an LLC organized in **California**. **Xavier** had invested his life savings in this business, and had become moderately successful by catering to traffic near the busy interstate. **Karen** and the twins placed their orders. The twins ordered **Vanilla Taco**s, and **Karen** ordered an extra-large **Strawberry Taco**.

The family enjoyed their food at the outside picnic tables and then returned to their car and proceeded on their way home. Several hours later, **Karen** began to feel ill. Her heart started racing, she started sweating, and her vision began to close in. She panicked as vomiting and diarrhea were imminent, and realizing she was about to pass out she quickly pulled over to the side of the highway. When she came to, she was in a hospital bed. Her daughter had called 911 after she fainted, and an ambulance had taken her and the children to the nearest

emergency room, where she was diagnosed with severe food poisoning.
Karen was in the hospital for 9 days recovering from her illness. Her **great uncle** came to care for the kids. She missed two weeks of work and was fired from her job as a **plumber**. Her medical bills that were not covered by insurance totaled **85** thousand dollars, and it took her 4 months to find another job.

Assignment

Karen has hired you as her lawyer to sue **Xavier**'s **Taco Chalet** LLC. You have reached out to try to settle the case but are being ignored. You now have five tasks for this analysis, and each task is worth 20 points:
First, present the options of **where you can file a lawsuit**. Federal court or state court? Which state? Explain, and cite your sources. Keep in mind the concepts of subject matter and personal jurisdiction.
Second, you know that **Karen**'s claim will be based on the legal theory of strict product liability. **Find the elements that you must prove to win this case against the defendant**. The state law of **California** will apply.
Third, **draft a complaint** that contains all the required procedural and substantive elements to begin the lawsuit in the state of **California**.
Fourth, **prepare a list of discovery questions** that you will ask **Xavier Smith** before the trial to help you determine your likely success in winning this case. That is, to help you prove the necessary elements of strict products liability, and to help you determine the likelihood of recovering the amount of any potential winning judgment.
Fifth, **describe the ideal juror** that you would want to decide this case. What types of views,

> traits, characteristics do you think would be most favorable for **Karen**? Also, **prepare a list of voir dire questions** that you will ask the prospective jurors to ensure that they are not biased against your client in the event this case goes to trial. Explain why you have included each question, and keep *Batson* in mind.

As shown, the assignment document presents to the students a customized litigation scenario based on strict products liability, and five groups of questions that the students must answer. One further piece of information is given to students in response to the racial justice issues that are swirling through our society today, and that is a picture of the hypothetical plaintiff and defendant.[52]

[52] These are stock photos the author found on the internet that are used for educational purposes only; no rights to the images are claimed.

Students will then spend class time doing the research together, with the author available to answer questions and guide the research. Several days later, students will submit their individual analyses. This project checks the three applicable Cs: coaching during the class meeting; customized through the fun Mad Libs game; and collaboration in the research with individual execution of the project requirements.

B. Draft Your Own Contract: Contract Law Project

This project is designed to show students what a business service contract looks like and give them insight into how a contract is drafted.[53] The objective of this project is to show students how

[53] This project is adapted from one described in Michael R. Koval, *Not Too Hot and Not Too Cold: A Contract Negotiation Activity That May Be 'Just Right,'* 20 ATLANTIC L.J. 35 (2018).

.

the common law contract principles covered in the Course connect to real-world business situations. Upon completing the project, the student should be able to: 1) analyze a business scenario to determine critical contractual components and create a contract that properly includes those components; 2) recognize how the legal concepts of performance and breach can be defined by the parties to a contract; 3) understand the limitations of contracts to anticipate every possible problem; and 4) understand how common law rules define and shape the language that is included in a contract.

The project starts with a simple negotiation during a work session. Students are placed in small groups and then choose from one of five service-based business scenarios: Wedding Planner, Personal Trainer, Rock Band, House Painter, and Pet Sitter. The scenarios are shown in Appendix B. The students assume the roles of service providers and clients, and during class they negotiate the terms of an agreement based on the facts of the scenarios, paying particular attention to the important contractual aspects of performance, price, quality, and payment. The scenarios do not contain significant obstacles to reaching agreement, and the students are asked simply to write down the outline of their deal to share with the class. Sharing takes place using Google Slides, so that each group can quickly create a shareable summary, and both in-person and remote students can easily participate.

The following week, students are presented with the project description, which is to prepare a standard form contract that their selected business could use with all future clients. They are given a generic services contract, shown in Appendix B, and asked to work together, regardless of their role in the negotiation, to adapt it to their hypothetical business.[54] The assignment memo is shown below.

> **Module B Project Assignment**
> You have already negotiated the terms of a hypothetical business contract with your team. You will now take what you learned from that exercise and create a standard business contract for your hypothetical business.
>
> Please note, if you have already identified your BYOB business and it is a service business, you can substitute that for this Project. Otherwise, please use the business that you chose last week.
>
> Recall last week we focused on the substance and process of a business contract:
>
> · What services will you provide, exactly? How, when, and where?
> · What is the price? Do you charge hourly fee, flat fee, some combination?

[54] Students have the choice of using the business they are analyzing for their final project, Build Your Own Business, if that business happens to be service based. *See* Grelecki & Willey, *supra* note 41. The service-based requirement is to ensure that common law contract rules will apply. The author expects approximately half of the students to choose this option, based on past experience with the BYOB project.

· When will payment(s) be made? How? What if a payment is late or not made?
· In addition to services, price, and timing, are there other issues that are important to you?
· What happens if the client is not happy with the services? Changes their mind?
· What could possibly go wrong, and how can you minimize the risk with the contract? Are there circumstances beyond your control that could affect your ability to do the work?

We also thought about the process issues: Are there confidentiality requirements? Social media restrictions? Advertising needs? What happens if one party wants to modify the contract? How does that happen? How do you contact each other?

Now you will be creating a Standard Contract for your business. I have provided a generic Sample Contract that you will use as a template. Refer to the Sample Contract, download it, and modify it for your purposes.

Your Standard Contract will have four parts:

1. **The Recitals** describe the general nature of the deal and why the parties are entering into the contract. Note that you do not have to identify the parties as "Provider" and "Client." You can call them whatever makes sense, as long as you are consistent.

2. **Article 1** describes the substance, or "meat" of the deal. This is where all the promises about the transaction should be described, including exactly what services are being provided, when they will be provided, and how and when payment will be made. This is also where any performance standards and penalties should be included, describing what happens if promises are not kept.

3. **Article 2** addresses the process of the deal, and describes how the parties will work with each other in completing the promises described in Article 1. Where Article 1 describes the **substance**, Article 2 describes the **process**. Pay particular attention to how the parties are to notify each other, and whether the contents of the contract are to remain confidential or can be used for advertising purposes.

4. **Article 3** is the "legalese." It describes how the parties would want a judge to interpret the contract if there is a dispute at a later date. Without these provisions, a judge would rely on common law rules that may not be what the parties want. Businesspeople usually don't involve themselves with Article 3. They leave it to the lawyers. However, you may have to adapt the Sample Contract to your needs here if appropriate for your situation. Pay particular attention to whether or not the contract is **assignable**.

The Sample Contract was created by adapting a generic online form. It is meant to show you how a contract is put together, and help you think about issues you need to agree on with your partners. You will have to modify the Sample Contract to your specific situation. This requires thought and effort. Some of the paragraphs will require no editing, some will have to be adapted to your situation, and some may need to be deleted altogether. You may also have to add additional paragraphs to address your specific situation. You will need to think critically about what each paragraph in the Sample Contract means in order to determine which ones you should use "as is," which need to be changed or deleted, and what other issues unique to your situation should be added. Please use Word's tracking feature for all of your deletions, modifications, and additions for ease of identification.

You are encouraged to search for examples of contracts in your industry, to obtain ideas and gain

> insight about what is important. However, your final Standard Contract must take the form of the Sample Contract, so be sure to incorporate any outside language appropriately. You must also include any outside contracts that you use with your submission.

Students are encouraged to search the internet for sample contracts that might be available for their particular business. If they find some, they can incorporate the ideas into their standard form contract, but the final document should follow the template provided.

As with the *Mad Libs Litigation* project, students spend class time doing research and working together, and the previous week's practice negotiation provides insight into issues they may not have thought about otherwise. The instructor is available to answer questions, guide research, and organize thoughts, and the students will later submit their individual contracts. This project also incorporates the three applicable Cs: coaching during the class meeting; customized by letting students choose the business to examine and the freedom to search for and incorporate other sources; and collaboration in the form of the preparatory negotiation and research for the contract, but with the flipped individual submission requirement.

C. Tort Lawsuit Competition: Negligence Project

This project has been adapted to the Course parameters from the author's Master Teacher

presentation at the 2019 ALSB conference in Montreal entitled "*You've Been Chopped: Energize Those End-of-term Presentations with Some Friendly Competition*." The project deliverable has been changed from live student presentations to videos submitted by the teams to allow for maskless and remote competition. The project requires students to find and analyze a current lawsuit based in negligence that has been filed against a business or organization.[55] Each student completes this task individually and submits a paper. In groups, the students then choose the most engaging lawsuit and together create a video to present to the class. There will be a viewing party during one of the class periods, whether remote or in person, and the class will vote for the winning submissions. Winners will receive extra credit bonus points.

The learning objectives for this project are as follows: 1) identify a legal complaint and understand the components; 2) understand how the prima facie case of negligence can be applied to a wide variety of business situations; 3) analyze how common law defenses to negligence may apply, and understand how those defenses vary by state; 4) understand how the threat of litigation informs business policies and practices; 5) recognize the difficulty in measuring damages; and 6) practice their leadership, interpersonal,

[55] In the interest of synergy, bonus points are awarded if the business being sued is the same type or similar to the one the student is analyzing for their final project, Build Your Own Business. *See* Grelecki & Willey, *supra* note 41.

communication, and presentation skills The assignment memo is shown below.

Module D Project: Tort Lawsuit Competition

Part 1 – Individual Paper – 50 points

For this assignment, you will individually research and prepare an analysis of a current tort lawsuit of your choosing. Your 2-3 page paper, worth 50 points, will describe the legal nature of the dispute from both the plaintiff's and the defendant's perspective, and will focus on the ***prima facie*** **case of negligence** and any applicable **defenses**, and perhaps other torts as well. A good (although not perfect) example submitted by a previous student, along with this rubric and the Turnitin link can be found in MyClasses in the Unit 4 Module.

Content

1. Find a **current** lawsuit that has been filed in the United States against a corporation, business, or organization in which the plaintiff is suing for **negligence**. The lawsuit should **not yet have gone to trial**. You can search internet news sites and legal sites for possibilities. You must locate the actual *complaint* that was filed by the plaintiff. Many courts now provide electronic access to such court documents. (Please don't tell me you can't find any. I will tell you to keep looking.) **(5 points)**
2. Describe the circumstances surrounding the case: Who, what, where, when, why? If the complaint contains counts in addition to negligence, what are they? **(5 points)**
3. Analyze the lawsuit from the plaintiff's perspective. From what you can discover about the facts, **does the plaintiff establish a *prima facie* case**? Which element of the

prima facie case do you believe will be most difficult for the plaintiff to prove? **(15 points)**
4. What types of ***damages*** is the plaintiff seeking? What is the amount? (Be careful here – often the complaint will state the minimum amount required to prove proper subject matter jurisdiction, but the plaintiff's actual damages are much more). How does the plaintiff measure and calculate the amount of damages to seek? Do you agree with the calculation? If there are no damages specified, or only a minimal jurisdictional amount, how much would you ask for and why? **(5 points)**
5. Analyze the lawsuit from the defendant's perspective. From what you can discover about the facts, **which element(s) of the plaintiff's prima facie case will the defendant most likely dispute**? If the plaintiff is found to be negligent, **do they have a *legal defense***? Which defenses are recognized in the state in which the lawsuit was filed? Which element of the defense would be most difficult for the defendant to prove? **(10 points)**
6. What do you believe a fair and just outcome of this case should be? Explain. **(5 points)**
7. **5 BONUS POINTS** if the complaint is against a company that is in the same or similar business as the one you are exploring in your BYOB papers. Explain how the lawsuit would affect how you manage your business.

Format
Your paper should be in memo format, single-spaced, Calibri 10 point, with 1-inch margins, just like this memo. The length should be a minimum of 2 full pages, and a maximum 3 full pages, excluding Works Cited. Use headings (**Facts, Prima Facie Case,**

Damages, Defense, Outcome, and BONUS) and short paragraphs for ease of reading. **Use this memo as a guide**. Please cite and link your sources. Also, if you can, paste the *complaint* into the end of your document. (If you can't, send the complaint info to me via email. A sample case and paper from a previous year are posted in MyClasses for your guidance. Please note, however, this paper has several important errors and omissions, so make sure you follow the rubric above. Points will be deducted for spelling and grammatical errors, and lack of coherent sentence structure and flow. Please utilize the Writing Center if you need help with basic writing skills. **(Professional Presentation 5 points)**

Part 2 – Team Video Competition – 50 Points

For this part of the assignment, you will work in teams of three to create an engaging video presentation about one of the individual lawsuits from your team.

During our Week 10 work session, each team will submit the case name they will be presenting. Over the next week, you create a 4-5 minute video that explains to the class the details of the lawsuit. Tell the story about what happened. You should explain the facts, do a jurisdiction analysis, dig into the prima facie elements of the various causes of action, and provide a damage analysis and estimate from the Plaintiff's point of view. Then, if you have time, take on the perspective of the defendant, and explain why this lawsuit should fail. Be creative! No more than 3 slides if you choose to use PowerPoint in your video, and no more than 10 words per slide. Use pictures, memes, graphics, props, costumes,

> role-play – anything you need to do to win! All group members should appear in the video if possible.
> We will view the videos during our Week 11 work session. After we have watched all the videos, the class will choose the winning team, which will receive 20 Extra Credit Points. Voting will take place anonymously. The second-place team will receive 10 points, and the third-place team will receive 5 points. All video submissions will be graded based on accurate analysis, creativity, and professional execution.

There is a lot going on with this project. It differs from the previous projects in the collaboration component, as it follows the more traditional pattern of individual student research followed by group creativity. As with the previous projects, students will spend the work session working together, and the author will be there as a coach. Providing a previously submitted student analysis as a model is an important choice in the design of this project, as it gives students the opportunity to see what a good analysis looks like and establishes the instructor's quality expectations. The choice of a video competition allows for a change of pace from written assignments as well as the ability for the class to enjoy their classmates' work remotely if meeting in person is not feasible at the time. The voting provides an opportunity for low-stakes peer review. And allowing students to find their own negligence complaint to analyze brings the

real-world into the classroom in a very immediate way that engages and motivates most students.[56]

CONCLUSION

Having to adapt the way we teach because of the COVID-19 pandemic is an opportunity to re-examine our objectives, methods, biases and blind spots so as to reconstruct our courses to be better for all students. As we go about improving our courses, there are some parameters which are externally imposed, such as class size limitations and remote capability, that must be met. But there is also much that we as business law educators can intentionally change. Our discipline is rich with real-world resources, and by choosing them wisely to align with the needs of our newly designed courses, we can not only adapt; we can improve our students' learning experience.

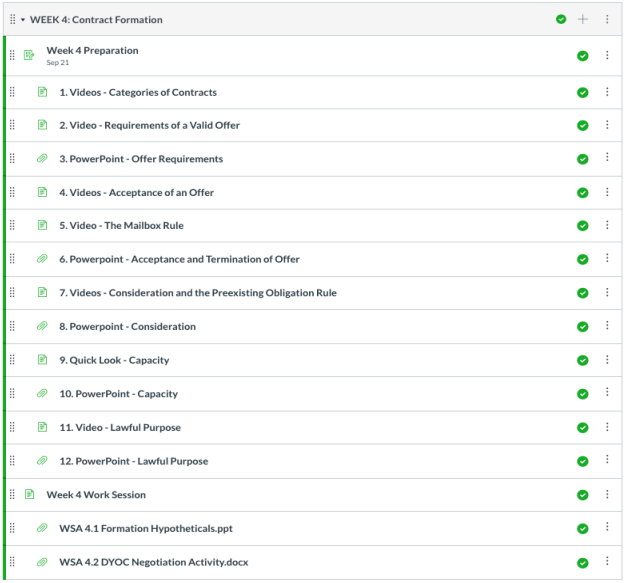
There is no doubt that deconstructing and rebuilding a course requires a lot of time and energy. The author's Course has 161 pages in the LMS! He spent over 150 hours on the transformation. But by thoughtfully designing the Course with a pedagogical philosophy that takes into consideration our pandemic and post-pandemic situation, we can do more than teach our students. We can let them go. We can help them learn both the concepts of business law and, more

[56] In pre-pandemic adaptations of this project, the author has seen students go to great lengths to find original complaints. Some have even contacted the plaintiffs' lawyers directly.

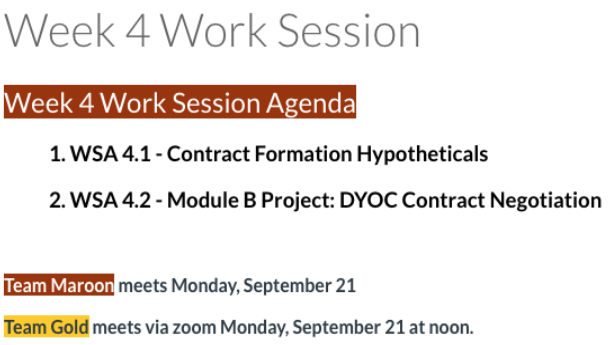
importantly, about the need to take ownership of their own education. Flipping the classroom will show them that learning is an active skill. Coaching, Curating, Customizing and Collaborating will help them recognize that they are in charge of their academic and professional future, and we are here to help them as best we can. Providing projects that allow students to intellectually roam will prepare them for the disruptive times ahead, and help them begin to build the skills necessary to succeed after they graduate regardless of the adventure they choose. And when we are gathering again with our students in bustling classrooms, these strategies and tactics that have allowed them to thrive during this pandemic will be no less valuable or useful.

APPENDIX A

LMS Example of Detailed Preparation Instructions



LMS Example of Work Session Agenda Page



APPENDIX B

Draft Your Own Contract: Negotiation Instructions

For this Project, you will be working in teams of four. Two of you will play the role of a businessperson providing a service and two will play the role of the client purchasing the service. Today's goal is to negotiate and create the outline of an agreement. Each team will be given one of five business scenarios, and together you will decide on the necessary terms of the contract. For next week, you will be building upon today's activity to create and submit an actual contract template.

The purpose of the agreement is to manage the risk inherent with any business relationship and ensure that the results of the business transaction are acceptable to you. If you are the business provider, you should address issues such as:

- What services will you provide, exactly? How, when, and where?
- What is the price? Do you charge hourly, flat fee, some combination?
- When will payment(s) be made? How? What if a payment is late or not made?
- In addition to services, price, and timing, are there other issues about this job that are important to you?
- What happens if the client is not happy with the services? Changes their mind?
- What could possibly go wrong, and how can you minimize the risk with the contract? Are there circumstances beyond your control that could affect your ability to do the work?

If you are the client, it should address issues such as:

- What services do you want to be provided, exactly? How, when, and where?

- Are there quality requirements? Timing deadlines? Scheduling issues?
- How much are you willing to pay? When will you pay it?
- In addition to the service you want, are there other issues about this job that are important to you?
- What happens if the provider doesn't complete the project as promised?
- What could possibly go wrong, and how can you minimize the risk with the contract?

Finally, in addition to the above substantive terms, both sides should consider process issues, which focus on how you work with each other. Are there confidentiality requirements? Social media restrictions? Advertising needs? What happens if one party wants to modify the contract? How does that happen? How do you contact each other? Think about describing all important relationship needs.

You will have approximately 30 minutes to reach agreement about the terms of the contract, at which time each group will report their results to the class.

Draft Your Own Contract: 5 Business Scenarios

Scenario 1: "Happily Ever After"
WEDDING PLANNER

You are a successful and sought-after wedding planner, and you and your assistant are meeting with a couple to work out the details about signing them on as clients. You have met with them several times already, and are confident about closing the deal to plan every aspect of their wedding, from invitations to rehearsal, rehearsal dinner, and wedding day. You want to sign them on, but have some nagging doubts as to whether this wedding will really take place after seeing the couple interact with each other. Also, they seem to be very demanding, and while you welcome the challenge, you aren't sure about the profitability of this job, given the amount of time you will have to spend trying to satisfy their every whim. Therefore, you want to make sure your contract contains an hourly rate for your

time spent. You also want to make sure the clients pay all vendors directly, rather than you being reimbursed.
Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

HAPPY COUPLE
You and your fiancé are meeting with an A-list wedding planner to work out the details about hiring her company to plan every aspect of your wedding, from invitations to rehearsal, rehearsal dinner, and wedding day. You have verified her references, and this planner is by far the most professional one you have met. You want to hire her, but have some nagging doubts about her ability to provide you with exactly what you want. You are afraid she will take too much control and turn your "perfect day" into whatever works for her bottom line. Given her exorbitant fee, you feel your every desire should be met perfectly. You have also been fighting with your fiancé lately, and aren't even 100% sure that you are going to actually go through with the wedding, so you want to make sure you don't lose too much money if the wedding is cancelled.
Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Scenario 2: "A Dog's Life"

PET-SITTER
You are a sole proprietor of a pet-sitting business. You have made a good living providing general pet care services to pet owners who need help caring for their pets. You provide dog-walking, feeding, home check-ins, exercise and play time; whatever the client needs to keep their pets happy and healthy. Your business is purely travel-based. You do not have a facility for caring for pets away from the client's home. You typically charge by the hour, including travel time, and your rate varies based on the amount of work and/or attention required by the client and their pet. You also provide dog training services, which, as a certified pet whisperer, you can charge a lucrative fee.

You are going to meet with a potential client who just bought two Labrador retriever puppies for his kids, and needs someone to check on them and let them outside during the day while he is at work. You sense from speaking to him on the phone that he is overwhelmed and could also use some training sessions, but you're not sure what his financial situation is. To that end, you want to get paid up front, preferably a month in advance, before agreeing to provide services for him. However, his home is adjacent to a current customer, and adding him to your daily route would be quite easy.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

DOG OWNER

You are a single dad of two young boys, and for Christmas you foolishly bought them each a Labrador retriever puppy. You are realizing that this was not a smart idea. You are a nurse and work shifts at the local hospital. While your mom is willing to take the boys to her house when you work nights, she refuses to help with the dogs. (She told you it was a bad idea.) You know you should get rid of the dogs, but the boys would be heartbroken.

You have contacted a local pet-sitting company to see if they can help you. You need someone dependable to come to the house while you are at work to check on the dogs and let them outside. Sometimes this will be in the mornings, and sometimes in the late evening. You also need someone to train the dogs, and are hoping that the pet-sitter could do some training while they are there, because right now they are destroying everything in sight. You do not have much disposable income right now, and are afraid to see how much this will cost, but you don't know what else to do.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Scenario 3: "Curb Appeal"

HOUSE PAINTER

You are a sole proprietor of a painting and handyman business that you have been operating for five years. You are going to talk to a potential client about painting the exterior of her old 1920s house. She said on the phone she is interested in having the house restored to its historically significant condition, and wants someone who will be true to its original look by using materials and colors appropriate to the time period. While you admire her vision, you have several concerns about working with this client. Your impression over the phone is that she will be very hard to please, and you fear the job could end up being less than profitable because of the time you will have to spend pleasing her. That being said, you have a big hole in your schedule, as a big job you were planning for was cancelled. If you take the job, however, you will have to be sure that you will be paid fairly for your work, and that the quality of your work will be objectively appraised. Also, you need to be able to assign the work to other painting companies if a more profitable job at Springfield University, which you are hoping to get, materializes.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

HOMEOWNER

You are a Springfield University history professor, and have recently purchased an old home that you are meticulously restoring to its 1920s original condition. Restoring old homes has become an obsession for you, and you can't wait to finish this project. All that is left is the exterior painting. You are meeting with a local painter with a good reputation to see if he is right for the job. While you want to keep the price reasonable, you are more concerned about hiring someone who is willing to restore the house to its historical significance, paying attention to colors, materials, and workmanship that would have been used in the 1920s. You want it to be perfect, and need someone who shares your vision.

In addition, you are on a rather tight time schedule, as your daughter is getting married on April 1 and you are planning to have the wedding and reception at your newly painted home. Therefore, the job MUST be completed by March 15. If it is

not, you will have to move the wedding on very short notice, and this could be quite costly. Finally, you have recently spent a lot of money on landscaping around your house and yard, and want to make sure that any painter you hire will not damage any of your new plants.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Scenario 4: "Let the Music Play"

BAND'S AGENT

You have been hired as an agent for the Traumatics, a popular local rock band that is just on the cusp of hitting the big time. They have been mentioned in all the right places, and club owners and promoters are starting to take notice. The band wants to capitalize on this new popularity as quickly as possible. To that end, you and your assistant are meeting with the owner of the 9:30 Club, a popular DC nightclub known for catapulting many local bands into famous careers.

Your band has instructed you to keep the gig in DC as short as possible – they want to be able to get to NYC quickly if the opportunity arises. Also, being a good agent, you recognize that the band is all about the music and the creative process; they do not have very good business judgment. The members are temperamental, and have often refused to play under circumstances they didn't like. Therefore, you always try to protect them when negotiating with club owners.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

CLUB OWNER

You and your assistant manager are meeting with the agent for an up-and-coming band, the Traumatics, to work out the details about having them play an extended gig at your nightclub in Washington DC, the 9:30 Club. This band is hot, and you really want to sign them, but you have heard rumors from other club owners that they are temperamental, unprofessional, demanding, and unreliable. On the other hand, they would pack your club with patrons for weeks so long as they actually

showed up and played. You are envisioning having them share each night with one or two other bands, in case they don't show. You also are not interested in a one- or two-night gig; to cover your costs of producing this show, you need at least a two-week commitment.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Scenario 5: "Sun's Out Guns Out"

PERSONAL TRAINER

You have recently completed your exercise science degree from Springfield University and are looking to start a career as a personal trainer. You have a meeting with the manager of Powerhouse Gym to explore the possibility of working there as a trainer. You don't yet have your professional certifications, but plan to obtain them in the near future, as soon as you have the money to pay for the courses and travel required. You want to work as an independent contractor so that you can have flexible hours, because you often have to take care of your disabled mother, with whom you live. Because you have grown up in the area and were active in high school athletics, you are confident you can attract clients pretty quickly. You are not sure yet what the going rate for personal training sessions is, but you want to make sure you keep at least 80% of each client payment for yourself, with no more than 20% going to the gym, since you will have to pay for your own liability and health care insurance, as well as self-employment taxes. You are also hoping for a relatively long-term relationship, because you know personal trainers need to be viewed as stable and reliable in order to grow their client base.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

GYM OWNER

You have been successfully operating Powerhouse Gym for 15 years, and business is good. You currently have a position open for a certified head trainer, and want to hire someone full-time.

The trainer would have his or her own clients, but would also manage the entire training program, including your 4 employee trainers. You have recently ended your relationship with two trainers who were independent contractors because they were unprofessional and undependable, and you suspected they were involved in illegal performance-enhancing drug use. You would rather have the extra expense of trainers as employees so that you can more closely control their schedule, behavior, and client interactions. You are meeting with a recent exercise science graduate from Springfield University (your alma mater) and are hoping she will be interested in the job, because finding good people has become more and more difficult, and your members are starting to complain about the lack of good trainers.

Before you begin the negotiation, take a few minutes to write down the goals you want to achieve from this relationship, and mark each one as "REQUIRED" or "DESIRED."

Draft Your Own Contract: Sample Services Agreement

Sample Service Agreement

This Agreement is made on <DATE> between
[the Client] ("Client") residing at <address>; and
[the Service Provider] ("Provider") headquartered at <address>, collectively referred to as the "Parties."

RECITALS
WHEREAS Provider is in the business of _____;
WHEREAS the Client wishes to be provided with the Services (defined below) by the Provider and the Provider wishes to provide the Services to the Client on the terms and conditions of this Agreement;
NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE 1. PERFORMANCE AND PRICE
1.1 Services to be Provided

The Provider shall provide the following services ("Services") to the Client in accordance with the terms and conditions of this Agreement:

[Insert a complete description of the Services here; list all details that are important to the Parties. This should include any quality standards, and who judges the quality. Use sub-headings for each important detail]

1.2 Delivery Schedule

Start date: The Provider shall commence the provision of the Services on [*insert date here*].

Completion date: The Provider shall complete/cease to provide (*delete as appropriate*) the Services by/on (*delete as appropriate*) [*insert date here*] ("Completion Date").

Milestone Dates: The Provider agrees to provide the following parts of the Services at the specific dates set out below: [*insert dates here*]

1.3 Price and Payment

As consideration for the provision of the Services by the Provider, the price for the provision of the Services is [*insert price here*] ("Price").

The Client agrees to pay the Price to the Provider on the following dates and in the following manner: [*if appropriate*]:

[Specify whether the price will be paid in one payment, in installments or upon completion of specific milestones. These details should be specified here. Also specify how payment should be made]

1.4 Quality Requirements

[Describe any specific quality requirements, if applicable]

1.5 Penalties

[Describe penalties for failure to perform by both parties, and how these penalties will be implemented, if applicable]

ARTICLE 2. REPRESENTATIONS AND COVENANTS

2.1 Warranties

The Provider represents and warrants that it will perform the Services with reasonable care and skill; and

[Describe any additional warranties, such as of quality of workmanship offered, or insurance coverage requirements by the Provider]

2.2 Organization

Provider represents that it is duly organized and operating in good standing under the laws of the state of its existence.

2.3 Best Efforts

Each of the Parties shall use its best efforts to take or cause to be taken, do or cause to be done, and assist and cooperate with the other Party in doing, all things necessary, proper, or advisable to consummate and make effective the transactions contemplated by this Agreement in the most expeditious manner practicable.

2.4 Changes or Modifications

Any additions to or changes to the Services as defined in Section 1.1 above that are requested by the Client shall be addressed as follows:

[Insert description of process for changes/additions, including writing and notification requirements]

2.5 Notices

Any notice or consent which may be given by a Party under this Agreement shall be deemed to have been duly delivered if delivered by hand, first class post, or electronic mail to the address of the other Party as specified in this Agreement: Any such communication shall be deemed to have been made to the other Party, if delivered by:

<List contact information for both parties>

2.6 Relationship of the Parties

The Parties acknowledge and agree that the Services performed by the Provider, its employees, agents or subcontractors shall be as an independent contractor and that nothing in this Agreement shall be deemed to constitute a partnership, joint venture, agency relationship or otherwise between the Parties.

2.7 Confidentiality

No Party shall issue any press release or other public announcement concerning this Agreement or the transac-tions contemplated hereby, except to the extent the Party shall be so obligated by Law; provided, that the Party obligated by law to make such disclosure shall, to the extent commercially reasonable, give the other Party prior notice of such press release or other public announcement.

ARTICLE 3. GENERAL PROVISIONS

3.1 Entire Agreement

This Agreement contains the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior written or oral agreements and understandings between the Parties.

3.2 Successors and Assigns

This Agreement is not assignable by either Party without the other Party's prior written consent. This Agreement is binding upon and inures to the benefit of the Parties and their successors and permitted assigns. Nothing in this Agreement, expressed or implied, is intended or will be construed to confer upon any Person other than the Parties and their respective successors and permitted assigns any right, remedy, or claim under or by reason of this Agreement.

3.3 Interpretation

Articles, titles, and headings in this Agreement are inserted for convenience of reference only and are not intended to be part of or affect the meaning or interpretation of this Agreement.

This Agreement has been mutually prepared, negotiated, and drafted by the Parties. The provisions of this Agreement shall be construed and interpreted against each Party in the same manner, and no provision shall be construed or interpreted more strictly against one Party on the assumption that an instrument is to be construed more strictly against the Party that drafted the Agreement.

3.4 Waivers

Any provision of this Agreement may be waived, or the time for its performance may be extended, pursuant to a written action by the Party or Parties entitled to the provision's benefit. Any waiver will be validly and sufficiently authorized for purposes of this Agreement if, as to any Party, it is authorized in writing by an authorized representative of that Party. The failure of either Party to enforce any provision of this Agreement shall not be construed to be a waiver of that provision, nor in any way to affect the validity of this Agreement or any of its parts or the right of any Party to subsequently enforce each and every provision. No waiver of any breach of this Agreement shall constitute a waiver of any other or subsequent breach.

3.5 Partial Invalidity

Whenever possible, each provision of this Agreement will be construed in a manner as to be effective and valid under applicable law, but in case any such provision is, for any reason, held to be invalid, illegal, or unenforceable in any respect, that provi-sion will be ineffective only to the extent of that invalidity, illegality, or unenforceability without affecting the remainder of that provision or any other provisions in this Agreement.

3.6 Mediation Requirement

In the event of any controversy or claim arising out of or relating to this agreement, or a breach thereof, the Parties shall first attempt to settle the dispute by mediation, administered by the American Arbitration Association under its Mediation Rules. If settlement is not reached within sixty days after service of a written demand for mediation, any unresolved controversy shall be settled by arbitration. Mediation and arbitration services will be administered by the Conflict and Dispute Resolution Center at Springfield University. <STATE> law shall apply. Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any costs associated with this requirement will be divided evenly by the parties.

3.7 Governing Law

This agreement is governed by and shall be construed in accor-dance with the internal laws of the State of <STATE>, without giving effect to its conflicts of law principles.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first written above.

CLIENT:	PROVIDER
_____	_____
<NAME>	*<NAME>* *<TITLE>* *<BUSINESS NAME>*

NEVADA AND SPORTS LAW

ADAM EPSTEIN*

I. INTRODUCTION

The purpose of this article is to demonstrate that the state of Nevada has much to offer for sports law enthusiasts. Found in the Ninth Circuit, with a relatively small yet rapidly growing population,[57] Nevada has often been the center of discussion and research in sports law circles particularly in relation to its decades-long federal exemption that enabled the state to offer legalized sports wagering.[58] While

*Professsor, Department of Finance and Law, Central Michigan University. Originally presented to the Sport and Recreation Law Association (SRLA) in Louisville, Kentucky, on March 5, 2020. Thank you to all attendees and those others who provided insights.

[57] *See* Michael Scott Davidson, *Nevada Population Surpasses 3M*, LAS VEGAS REV.-J. (Dec. 19, 2018), https://www.reviewjournal.com/local/local-nevada/nevada-population-surpasses-3m-1554861/

[58] PROF'L AND AMATEUR SPORTS PROT. ACT OF 1992, 28 U.S.C. §§ 3701-3704 (2018) (hereinafter PASPA); *see also, e.g*., Christopher Bret Alexander, *Comment: A Slam Dunk for States' Rights: The Impact on Constitutional Federalism and Federal Regulations Following the Supreme Court in Murphy v. NCAA*, 27 JEFFREY S. MOORAD SPORTS L. J. 25, 34 (2020) (offering that New Jersey was given the opportunity to legalize sports gambling under PASPA and it declined, and

this article does address that 1992 federal exemption, which was declared unconstitutional decades later by the U.S. Supreme Court in 2018,[59] the goal of this article is to deliver an expanded view of Nevada and how its people, decisions, and state statutes can be appealing for the sports law professor, law students and others who share an interest in state-specific research related to sport and the law.

Indeed, this article focuses on the issues tied to Nevada just as similar approaches in other published articles have addressed individualized state-based sports law research.[60] However, this article is not intended to be a comparative analysis to other state sports law cases and decisions. After reviewing the article, it is hoped that readers will agree that the Silver State has some law-related gems which have a profound, national impact well beyond

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that "Nevada has been the only state in the country that benefited from a monopoly on the law.").

[59] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

[60] *See, e.g.*, Adam Epstein, *Kentucky and Sports Law*, 30 MARQ. SPORTS L. REV. 117 (2019) ("The purpose of this article is to explore many of the prominent ethical and legal incidents, cases, laws, and other relevant material related to sports law emanating from Kentucky …"); Adam Epstein, *Michigan and Sports Law*, 24 J. LAW, BUS. & ETHICS, 1 (2018) ("The purpose of this article is to offer and explore sports law related cases, claims, and issues that have emanated from Michigan."); Adam Epstein, *Utah and Sports Law*, 28 MARQ. SPORTS L. REV. 107 (2017) ("The purpose of this article is to explore cases, statutes and incidents related to sports and the law that have emanated from the state of Utah.").

its borders.[61] The article addresses three federal cases and then moves primarily to Nevada state cases, scandals, and statutes. It begins with a brief exploration of the federal statute that enabled Nevada to be the center for sports wagering in the United States.

[61] There are a variety of additional subjects here not addressed in this article. For professional athletes and others who receive income, consider that Nevada has no state income tax along with Alaska, Florida, South Dakota, Texas, Washington, and Wyoming; both New Hampshire and Tennessee charge no tax on income, but they do tax dividend income and interest. *See* Kathryn Kisska-Schulze & Adam Epstein, *"Show Me the Money!"-Analyzing the Potential State Tax Implications of Paying Student-Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 35 (2014). For a trademark issue that was settled, *see* Emily Caron, *Golden Knights, U.S. Army End Trademark Dispute, Enter Coexistence Agreement*, SI.COM (July 19, 2018), https://www.si.com/nhl/2018/07/19/golden-knights-us-army-trademark-dispute-settled-agreement-reached ("Per the agreement, both parties will be allowed to continue their usage of the 'Golden Knights' name. The U.S. Army will continue to use the mark, name, and variations thereof in connection with its parachute exhibition team while the hockey team will also continue to use the marks and names 'Vegas Golden Knights' and 'Golden Knights' in connection with the newest NHL expansion team."). For a discussion of mascot concerns, *see* Mark Schlabach, *UNLV Removes Hey Reb! Statue, Eyes Changes to Mascot after Widespread Social Justice protests*, ESPN (June 17, 2020), https://www.espn.com/college-sports/story/_/id/29322452/unlv-removes-hey-reb-statue-eyes-changes-mascot-widespread-social-justice-protests; *see also* Ray Brewer, *UNLV Did Right by Retiring Hey Reb!-Now Let's Find Another Mascot*, LAS VEGAS SUN (Jan. 20, 2021), https://lasvegassun.com/news/2021/jan/20/a-mascot-creates-an-emotional-connection-with-fans/.

II. THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT OF 1992 (PASPA)[62]

The U.S. Supreme Court declared the federal Professional and Amateur Sports Protection Act of 1992 (PASPA)[63] unconstitutional in a 2018 decision.[64] Much has already been written on Nevada's federal exemption which had allowed it, Delaware, Montana, and Oregon, the ability to offer sports gambling.[65] This federal statute, also known as the *Bradley Act*, was originally enacted to stop the spread of state-authorized gambling and to protect the integrity of sporting events generally throughout the United States.[66]

Nevada, the only state at that time that had legalized a broad array of sports gambling, was granted immunity from PASPA also known as the

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[62] 28 U.S.C. §§ 3701-3704.

[63] *Id.*

[64] Murphy, 138 S. Ct. at 1485 ("Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not.").

[65] *See, e.g.*, Christopher Bret Alexander, *supra* note 2 (offering, "Montana, Oregon, and Delaware were also grandfathered into PASPA because these states had legalized limited forms of individualized sports gambling rather than casino-like sports gambling prior to the statutory time period.").

[66] ADAM EPSTEIN, SPORTS LAW 177 (2013); *see also generally* Aaron J. Slavin, *The "Las Vegas Loophole" and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling*, 10 U. MIAMI BUS. L. REV. 715 (2002).

Las Vegas loophole.[67] Nevertheless, the states of Delaware, Montana and Oregon were also exempt from the Act having been grandfathered in.[68] PASPA also exempted pari-mutuel betting and jai alai games.[69] Oregon discontinued sports gambling in 1997, but Delaware allowed sports betting in 2009.[70] In response to concerns over sports gambling, the National Collegiate Athletic Association (NCAA) approved a policy that banned Nevada and the other states from hosting NCAA championship events if the state allowed spectators to bet on single games though it did not apply to states that allowed parlay betting, lottery tickets, pull tabs and sports pools.[71]

However, the NCAA changed its championship event hosting policy in relation to Nevada in 2019 as PASPA was voided entirely in 2018 when the plaintiff-state of New Jersey, which changed its position and was now interested in offering sports gambling in the state, convinced the U.S. Supreme Court in *Murphy v. Nat'l Collegiate Athletic Ass'n*[72] that PASPA was inconsistent with the U.S. Constitution and that Congress is not authorized to direct a state's regulation of its

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[67] EPSTEIN, *supra*.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] Murphy, 138 S. Ct. at 1485. Phil Murphy was elected Governor of New Jersey, and the case, initially filed as Christie v. Nat'l Collegiate Athletic Ass'n, was renamed to Murphy v. Nat'l Collegiate Athletic Ass'n. The Supreme Court overturned PASPA in a 6-3 decision authored by Justice Alito.

citizens.[73] This Supreme Court decision paved the way for other states to legalize, tax, regulate and participate in the sports gambling industry. The *Murphy* decision resulted in the NCAA's changing in position to now allow all states, including Nevada, that have legal sports wagering to host NCAA championship events.[74] Subsequent to the decision

[73] *Id*. at 1484-85 (reversing the Third Circuit Court of Appeals, recognizing it violated the anti-commandeering rule (doctrine) of the Tenth Amendment, stating, "The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA 'regulate[s] state governments' regulation' of their citizens . . . .The Constitution gives Congress no such power.").

[74] *See* Michael McCann, *Why New Jersey Won Its Supreme Court Battle to Legalize Sports Betting*, SI.COM (May 14, 2018), https://www.si.com/more-sports/2018/05/14/sports-betting-legal-supreme-court-ruling-analysis ("PASPA was not designed to halt existing sports betting practices but rather to prevent new ones. Nevada, of course, gained the most from this exemption: Las Vegas is the country's undisputed leader in sports betting*."); see also* Dan Purdum, *NCAA Rescinds Ban on Title Events in Betting States*, ESPN (May 3, 2019), https://www.espn.com/college-sports/story/_/id/26662014/ncaa-rescinds-ban-title-events-betting-states; *see also* Eric Fisher, *New Jersey Sets Sports Wagering History with First Monthly Win over Nevada*, SPORT BUSINESS (June 27, 2019), https://www.sportbusiness.com/news/new-jersey-sets-sports-wagering-history-with-first-monthly-win-over-nevada/ (authoring, "New Jersey during May became the first US state to have more legal sports wagering than Nevada in any given month . . . .The totals help outline the sizable and still-growing impact of last year's US Supreme Court ruling striking down

and as of the time of this writing, twenty-four states have authorized legalized land-based sports betting and four states have passed legislation to allow it.[75]

Indeed, Nevada was not a party to this Supreme Court decision, but it was certainly impacted by it as other states now could offer the same and more legalized sports wagering opportunities that were essentially monopolized by Nevada, particularly in its casinos. Nevertheless, the invalidation of PASPA was not the first time that Nevada law was at the heart of the discussion involving litigation that reached the U.S. Supreme Court. Decades earlier in 1988, a Supreme Court decision emanated from a state issue in Nevada, the result of which applied to the NCAA colleges and universities. This occurred because of the

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the Professional and Amateur Sports Protection Act (PAPSA) of 1992 and allowing states beyond Nevada to offer legalized sports wagering.").

[75] *See* Legal Sports Betting, *US States with Legal Sports Betting*, LegalSportsBetting.com (Feb. 11, 2021), https://www.legalsportsbetting.com/states-with-legal-sports-betting/ (listing states with land-based sports betting to include Arkansas, Colorado, Delaware, Illinois, Indiana, Iowa, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, West Virginia and mentioning Washington, D.C. as well. The website continues by offering that North Carolina, Tennessee, Virginia, and Washington have passed sports betting legislation but have not yet launched land-based sports books. States that have online and mobile sports betting are also listed as of the time of this writing to include Colorado, Illinois, Indiana, Iowa, Michigan, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Tennessee, West Virginia, and Virginia).

termination of a Nevada college basketball coach named Jerry Tarkanian.

III. UNLV, THE NCAA AND "STATE ACTION"

After a lengthy investigation into the recruiting practices of the University of Nevada Las Vegas (UNLV) basketball team led by Coach Jerry Tarkanian, the NCAA's Committee on Infractions (COI) found that UNLV officials had committed thirty-eight rule violations, including ten by Tarkanian.[76] The COI investigation of UNLV began in late 1972, even before Tarkanian was hired.[77] UNLV reassigned Tarkanian rather than fire him.[78]

Tarkanian filed for an injunction in Nevada state court, alleging the NCAA violated his due process rights.[79] He succeeded in obtaining the injunction.[80] The trial court, Eighth Judicial District Court of Clark County, held the NCAA's actions violated his due process rights because both UNLV and the NCAA were deemed *state actors*.[81] The trial

[76] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 181 (1988).
[77] *Id*. at 185. Tarkanian was hired in 1973. *Id*. at 180.
[78] *Id*. at 187.
[79] *Id*. at 181-82 (alleging he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983).
[80] *Id*.
[81] *Id*. (referencing the Supreme Court of Nevada in Tarkanian v. Nat'l Collegiate Athletic Ass'n, 741 P.2d 1345 (Nev. 1987). That decision opined, "[T]e deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the

court ordered UNLV to not enforce the two-year suspension order of 1977.[82] The NCAA appealed the injunction.[83] The Nevada Supreme Court affirmed the decision of the trial court.[84] However, the case was appealed to the U.S. Supreme Court which granted certiorari.

In *Nat'l Collegiate Athletic Ass'n v. Tarkanian*,[85] a 5-4 decision,[86] the U.S. Supreme Court reversed, ruling ruled that the NCAA does not act under color of state law, thereby reversing the Nevada state supreme court decision.[87] Writing for the U.S. Supreme Court majority, Justice John Paul Stevens authored,

> "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action,

NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.").

[82] *Id*. at 187-88.

[83] *Id*. at 189.

[84] *Id*. (agreeing "[T]hat Tarkanian had been deprived of both property and liberty protected by the Constitution and that he was not afforded due process before suspension.").

[85] *Id*.

[86] Justice Stevens authored the opinion in which Rehnquist, Blackmun, Scalia, and Kennedy joined. Justice White authored the dissent in which Brennan, Marshall and O'Connor joined.

[87] *Id*. at 198-99. In reversing and remanding, the Court concluded, "It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." *Id*. at 199.

> which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be…As a general matter the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights."[88]

Justice Byron White wrote a brief dissenting opinion, "I would find that the NCAA acted jointly with UNLV and therefore is a state actor."[89]

Coach Jerry Tarkanian left UNLV in 1992 to work with the San Antonio Spurs.[90] He then sued the NCAA for harassment, and they reached a settlement agreement in 1998, thirteen years after their legal battle began.[91] At that time, he was coaching at

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[88] *Id*. at 191 (citing Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).
[89] *Id*. at 203.
[90] *See* Adam Kilgore, *Jerry Tarkanian a Pioneer in Taking Aim at the NCAA*, WASH. POST (Feb. 11, 2015), https://www.washingtonpost.com/news/sports/wp/2015/02/11/jerry-tarkanian-a-pioneer-in-taking-aim-at-the-ncaa/?utm_term=.1f8bae35a571.
[91] *Id*. (providing that Tarkanian lasted only twenty games because of a dispute with management and yet he was able to leave the organization with $1.3 million in severance); *see also* Jeff German, *Tark's Fight with NCAA Finally Over*, LAS VEGAS SUN (Mar. 15, 2002), https://lasvegassun.com/news/2002/mar/15/tarks-fight-with-ncaa-finally-over/ (describing how Tarkanian characterized the NCAA as having tried for two decades to drive him from college basketball, and quoting Tarkanian, "Even though I

Fresno State.[92] In 2010, he called the NCAA "the crookedest organization in our society."[93]

As of February 28, 2021, the Supreme Court's decision in *Tarkanian* declaring that the NCAA was not a *state actor* and therefore due process was not required prior to his termination has had a huge impact: it has been cited by 790 decisions and 923 other citing sources, including law reviews.[94] However, the *Tarkanian* decision then caused a multistate-based legislative reaction which resulted in another federal sports law case emanating from Nevada.

IV. NCAA V. MILLER

Almost immediately following the Supreme Court's decision in *Tarkanian*, Nevada and other states including Nebraska, Illinois, and Florida enacted state-based, due process statutes specific to the NCAA and to regulate the NCAA's enforcement

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won $2.5 million, it wasn't worth it," Tarkanian said this morning in a telephone conversation from Fresno. "The NCAA is so unfair and so vindictive. They never let up. If I had to do it all over again, I wouldn't fight them. It was a nightmare.").

[92] *Id.*

[93] Associated Press, *Tarkanian Rips NCAA at Luncheon*, ESPN (Jan. 11, 2010), https://www.espn.com/mens-college-basketball/news/story?id=4817186.

[94] Utilizing a Lexis Advance® database search. The case was also cited by two other prominent U.S. Supreme Court sports law decisions in Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) and Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999).

procedure.[95]In order to assure some measure of conformance to due process related to NCAA activity, the Nevada statute added procedural requirements applicable to the NCAA investigations even though such requirements were not found within the NCAA bylaws themselves.[96] The NCAA sued in response alleging a violation of the Constitution's Commerce Clause by essentially extending Nevada law beyond its own geographic boundaries, inter alia.[97]

In Nat'l Collegiate Athletic Ass'n v. Miller,[98] a case which was not granted certiorari to the U.S.

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[95] *See* Danny Robbins, *NCAA Fights Back, Challenges Nevada: Jurisprudence: Lawsuit Takes Aim at Statute that Requires Enforcement to Follow Due Process*, L.A. TIMES (Nov. 13, 1991), http://articles.latimes.com/1991-11-13/sports/sp-1325_1_legal-due-process.

[96] *Id*. The statute was signed into law by Governor Bob Miller.

[97] *Id*. (authoring, "According to the NCAA's reasoning, the Nevada statute: --Violates the interstate commerce clause of the U.S. Constitution by extending Nevada law beyond the state's border. --Violates First Amendment rights by depriving NCAA members of their right to associate and agree on procedures uniform to all members. --Deprives NCAA schools of their freedoms of association, contract, liberty, and property without the due process of law guaranteed by the 14th Amendment. --Unconstitutionally impairs the contractual obligations between the NCAA and Nevada schools that have agreed to abide by NCAA enforcement provisions and other rules of the association." Robbins also notes, "The NCAA hopes that its action will allow the organization to proceed with a four-year-old infractions case centering on UNLV's recruitment of former New York high school star Lloyd Daniels.").

[98] Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992); 10 F.3d 633 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994).

Supreme Court, the U.S. Court of Appeals for the Ninth Circuit held that the Nevada statute that required the NCAA to provide different "procedural due process protections" in Nevada than it provided in enforcement proceedings in other states violated the Commerce Clause because it directly regulated interstate commerce.[99] Opining that the NCAA required uniform enforcement procedures to operate effectively, the Ninth Circuit held that the practical effect of the Nevada statute was to require the NCAA "to apply Nevada's procedures to enforcement proceedings throughout the country."[100] Specifically, the statute required the NCAA:

> [T]to provide the accused with the procedural rights: 1) to a hearing after reasonable notice of the nature of the proceeding, the governing rules, and the factual basis for each alleged violation, Nev. Rev. Stat. § 398.155(1); 2) to be represented by counsel, *id.* § 398.155(2); 3) to confront and respond to all witnesses and evidence, *id.*; 4) to the exchange of all evidence 30 days before any proceeding, *id.* § 398.155(3); 5) to have all written statements signed

[99] *Id*. at 640.

[100] *Id*. at 639. The statutory framework is found at NEV. REV. STAT. ANN. §§ 398.155-398.255 (Imposition of Sanctions by National Collegiate Athletic Association) and was deemed invalid and unconstitutional by the Ninth Circuit Court of Appeals.

> under oath and notarized, *id.* § 398.155(4); 6) to have an official record kept of all proceedings, *id.* § 398.165; 7) to receive transcriptions of all oral statements upon request, *id.* § 398.175; 8) to exclude irrelevant evidence, *id.* § 398.185(1); 9) to have an impartial person presiding over the proceeding, *id.* § 398.195; 10) to have a decision rendered within a reasonable time, with findings of fact based upon substantial evidence in the record and supported by a preponderance of such evidence, *id.* § 398.205; and 11) to a judicial review under the Nevada Administrative Procedures Act, *id.* § 398.215.[101]

The court noted that the Nevada statute "could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders. That sort of extraterritorial effect is forbidden by the Commerce Clause."[102] This put the NCAA "…in jeopardy of being subjected to inconsistent legislation arising from the injection of Nevada's regulatory scheme into the jurisdiction of other states."[103]

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[101] *Id*. at 637 note 4.

[102] *Id*. at 639.

[103] *Id*. at 640. (continuing, "Because the Statute violates the Commerce Clause per se, we need not balance the burden on interstate commerce against the local benefit derived from the Statute."). *Id.*

In sum, the Nevada statute violated the U.S. Constitution's Commerce Clause, and the Ninth Circuit affirmed the District Court.[104] The court found that the statute violated Article I, Section 8, Clause 3 (the Commerce Clause) and Article I, Section 10 (the Contract Clause) of the U.S. Constitution and was invalid and unenforceable against the NCAA.[105]

This triumvirate of federal cases in *Murphy v. Nat'l Collegiate Athletic Ass'n*, *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, and *Nat'l Collegiate Athletic Ass'n v. Miller* all provide examples of impactful sport-related decisions related to the state in federal courts.[106] The following sections address

[104] Commerce Clause (Art. I, sec. 8, clause 3): The clause states that Congress has the power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes." This is VERY general and is often invoked by the government when there is doubt as to the legitimacy of a law. Interstate commerce is federal and is within Congress' power (*see* Gibbons v. Ogden, 22 U.S. 1 (1824), the steamboat case).
[105] *Id*. at 635.
[106] For an additional federal case emanating from Nevada, *see* Patraw v. Groth, 2011 Nev. Unpub. LEXIS 1309 (Dec. 12, 2011). Despite a complex and unsuccessful appellate history, the courts upheld the granting of summary judgment and dismissal of a lawsuit filed by the former coach of the University of Nevada, Reno (UNR) women's soccer team, Terri Patraw against its athletics director Cary Groth, opining that UNR was justified in firing her. According to the court, Patraw failed to show any direct evidence that the school retaliated against her because she filed discrimination complaints and other claims, including allegations of sexual harassment. In sum and as the Supreme Court of Nevada stated, "The district court concluded that Patraw's termination was proximately caused by Patraw's behavior during contract

sports-related state court decisions, incidents, and statutes from Nevada.

V. NEVADA AND THE LIMITED DUTY (BASEBALL) RULE

In *Turner v. Mandalay Sports Entm't, LLC*,[107] Supreme Court of Nevada affirmed the granting of summary judgment on behalf of the Las Vegas 51s baseball team after Kathleen Turner and husband Michael sued the team for being hit in the face in May 2002 with a foul ball.[108] She was sitting in the stadium's "Beer Garden," a concession-mezzanine beer area above the third base line at

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negotiations, her frequent threats of resignation dating back to July 2006, and her personnel problems with the university." *Id*. at *3-*4; *see also* Associated Press, *Ex-UNR Soccer Coach Rejects $151,000 Offer*, SAN DIEGO UNION-TRIB. (Apr. 27, 2009), https://www.sandiegouniontribune.com/sdut-nv-soccer-coach-042709-2009apr27-story.html (reporting that Patraw rejected UNR's offer to settle after she was terminated for reporting NCAA violations); Cy Ryan, *UNR Soccer Coach Loses Appeal*, LAS VEGAS SUN (Dec. 13, 2011), https://lasvegassun.com/news/2011/dec/13/unr-soccer-coach-loses-appeal/ (reporting that not only did the Nevada Supreme Court uphold Patraw's firing, but that she had to reimburse UNR $111,336 to cover its legal costs and that she had been legally banned from UNR's campus); *see also* Erin Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL'Y 1, 20-21 (2010) (authoring the only law review article even mentioning the case in the Lexis Advance® database).

[107] Turner v. Mandalay Sports Entm't, LLC 180 P.3d 1172 (Nev. 2008).

[108] *Id*. at 1174.

Cashman Field, which had no protective screen surrounding it when the incident occurred.[109]

In a 4-3 decision authored by Justice Ron Parraguirre, the court rejected Turner's appeal by affirming the district court.[110] The opinion stated that the team had a *limited duty* to Turner and that she failed to show that the concessions area posed an unduly high risk of injury.[111] The court framed the analysis of the incident:

> As Mrs. Turner sat in the Beer Garden, a foul ball struck her in the face. The force of the ball's impact rendered her unconscious, broke her nose, and lacerated her face. According to Mrs. Turner, she never saw the ball coming and had no opportunity to get out of the way. The Turners subsequently filed a complaint in district court against the Las Vegas 51s, alleging three causes of action: negligence, loss of consortium, and negligent infliction of emotional distress (NIED). While

[109] *Id*. She was sitting at one of the tables holding a sandwich that her husband had just purchased for her an allegedly unable to see any part of the field from that table.

[110] *Id*. at 1173.

[111] *Id*. (framing the issue as "[W]hether baseball stadium owners and operators have a duty to protect spectators against injuries caused by foul balls that are errantly projected into the stands. We conclude that stadium owners and operators have a limited duty to protect against such injuries and that respondent satisfied its duty as a matter of law under the facts presented in this case.")

> the negligence action pertained to Mrs. Turner's alleged injuries, the loss of consortium and NIED claims pertained to Mr. Turner's alleged injuries.[112]

However, the court also noted:

> Like most professional baseball teams, the 51s include a disclaimer on their tickets informing fans that the team is not responsible for injuries caused by foul balls. In addition, the public address announcer at Cashman Field warns the crowd about the danger of foul balls hit into the stands before each 51s home game. The 51s also post warning signs at every Cashman Field entry gate, cautioning fans to stay alert because of the risks posed by foul balls. The Turners acknowledge that they were aware of these warnings.[113]

In sum, Turner's claims failed as she chose "not to sit in a protected seating area."[114] From a

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[112] *Id*. at 1174.

[113] *Id*. In fact, they were season ticket owners from 2000-2002.

[114] *Id*. at 1176. The court also stated, "Because we affirm the district court's summary judgment on Mrs. Turner's negligence action, we also affirm its summary judgment on Mr. Turner's derivative claim for loss of consortium. In addition, because the 51s satisfied their legal duty in this case as a matter of law, we conclude that Mr. Turner's NIED claim

sports law perspective, however, the case is vitally important to Nevada because the court expressly adopted the *limited duty rule*.[115] The court stated:

> By defining the duty of a baseball stadium owner or operator with specificity, the limited duty rule shields the stadium owner or operator from the need to take precautions that are clearly unreasonable while also establishing the outer limits of liability. Once a stadium owner or operator complies with the rule's requirements by providing sufficient protected seating, the owner or operator has satisfied the legal duty of protection owed to its patrons. Having met this obligation, the stadium owner or operator simply has no remaining duty to protect spectators from foul balls, which are a known, obvious, and unavoidable part of all baseball games. This specificity with regard to the duty imposed on the baseball stadium owner or operator serves the important purpose of limiting expensive and protracted litigation

fails and that the district court did not err in granting summary judgment on that claim." *Id.* at 1178.

[115] *Id*. at 1176. ("Recognizing the importance of establishing parameters around personal injury litigation stemming from professional baseball in Nevada, we take this opportunity to expressly adopt the limited duty rule.").

> that "might signal the demise or substantial alteration of the game of baseball as a spectator sport."[116]

The three-justice dissent was authored by Justice Mark Gibbons.[117] Interestingly, both the dissent and the majority opinions referenced (in footnotes) a similar state case from New Jersey, *Maisonave v. Newark Bears*,[118] but with different perspectives on its impact and influence. The dissent's view was that *Maisonave* was persuasive because Turner was not sitting in the stands when she was hit in the Beer Garden and therefore there should have been a different duty of care owed to her,[119] whereas the majority disagreed with the potential persuasiveness of *Maisonave* by stating that only one duty of care should apply to the whole stadium, unlike the *Maisonave* decision which offered more than one duty of care.[120]

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[116] *Id*. at 1175-76 (quoting Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 223 (Mich. Ct. App. 2001)).
[117] *Id*. at 1178.
[118] Maisonave v. Newark Bears, 881 A.2d 700, 709 (N.J. 2005).
[119] Turner. 180 P.3d at 1178-79, notes 4-5 (dissenting opinion, citing *Maisonave* at 709).
[120] *Id*. at 1176-77, notes 17-18 (stating in note 17, "In our view, the defendant's duty should not change at the plaintiff's impulse, and only one duty of care should apply with respect to the general "peril of objects leaving the playing field." The court quoted Maisonave at 717). Note, however, that the *Maisonave* decision was legislatively overruled by the state of New Jersey the following year as it enacted the BASEBALL SPECTATOR SAFETY ACT OF 2006 (N.J. Stat. §2A: 53A-44, 2006) which granted immunity for owners and operators of

The adoption of the limited duty rule which addresses the duty of care that owners and operators of facilities owe spectators is not at all unique to Nevada.[121] Nevertheless, this decision represented the common law adoption of that legal principle.

VI. SPORT SCANDALS

Nevada, particularly Las Vegas, has had several incidents and scandals worthy of mentioning in the context of sports law though many of these scandals are without published, legal decisions. Some of the following examples might be used by the sports law or business law professor in the form of videos or Internet links especially for demonstrative, pedagogical purposes.[122]

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venues in which a spectator was hit if certain conditions are met. *See* ADAM EPSTEIN, SPORTS LAW 124 (2013).

[121] *See* Jennifer Beebe, *Note and Comment: Injuries from Foul Balls, Broken Bats, and Railing Fall-Overs: Who is Liable,* 8 N. ILL. U. L. REV. 65, 82 ("States that follow the Limited Duty Baseball Rule include California, Louisiana, Minnesota, Missouri, New York, North Carolina, Ohio, Utah, Washington, Texas, Michigan, New Jersey, Nevada, New Mexico, and Virginia.").

[122] *See* Adam Epstein, *Teaching Torts with Sports,* 28 J. LEGAL STUD. EDUC. 117, 141 (2011) (This article provided numerous examples of recent sports torts and videos that may be used in a legal studies course in an attempt to reach today's students and, perhaps, generate a few smiles or screams. Finding and incorporating sport-related illustrations, whether judicial decisions, Internet articles, or videos, is simple with today's technology.") However, for videos that involve acts of human violence, the professor should provide fair warning as to what is about to occur before showing to the class to avoid

For example, one of the most outrageous incidents involved James Miller, also known as "Fan Man," who on November 6, 1993, flew and crashed his parachute-fan contraption during the fight between Riddick Bowe and Evander Holyfield.[123] Miller plowed into the side of the ring at Caesar's Palace in Las Vegas during the heavyweight title.[124] Miller descended into the arena in the seventh round of the fight and became caught in the overhead lights as he was dangling on the top rope. A mêlée ensued, Miller was knocked unconscious by crazed fans and security, and he was charged with the crime of dangerous flying; he was released on $200 bail.[125]

In another boxing incident, also in Las Vegas (the MGM Grand Garden) and also involving Evander Holyfield, on June 28, 1997, boxer Mike Tyson made two attempts to bite an ear of Holyfield during the match.[126] Tyson was warned after the first bite then disqualified after for another attempt at biting Holyfield's ear in the third round.[127] Holyfield

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triggering a student response and to ensure that the classroom is a safe space for learning.

[123] EPSTEIN, *supra* note 10, at 170.

[124] *Id*.

[125] *Id*. (authoring, "Miller was also arrested in January 1994 for flying into the stadium during the Denver Broncos game against the Los Angeles Raiders at the Coliseum in Los Angeles. He was charged with interfering with a sporting event.").

[126] *See* Tom Friend, *Tyson Disqualified for Biting Holyfield's Ears*, N.Y. TIMES (June 29, 1997), https://www.nytimes.com/1997/06/29/sports/tyson-disqualified-for-biting-holyfield-s-ears.html.

[127] *Id*.; *see also* Tom Friend, *After Biting, Tyson Faces Trouble from All Corners*, N.Y. TIMES (June 30, 1997),

forgave Tyson who was fined $3 million plus legal costs by the Nevada State Athletic Commission, and Tyson had his boxing license revoked for one year.[128]

A few years earlier, several sports agents paid $6,000 to finance a shopping spree at a Footlocker store during the 1993 college football season.[129] Las Vegas-based Raul Bey financed the Florida State University (FSU) scandal using the services of a sports-agent runner named Nate Cebrun who enlisted the help of numerous individuals, including a Tallahassee high school football coach.[130] FSU suspended five players for at least two games in the 1994 season for accepting shoes, clothing and other gifts.[131] Neither filed with the state of Florida to register as an athlete agent, none paid the mandatory state fees, and both were charged with the crime of failing to register as an athlete agent ($250 at that time), which was a felony in Florida.[132] Bey was sentenced to one year in jail.[133]

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https://www.nytimes.com/1997/06/30/sports/after-biting-tyson-faces-trouble-from-all-corners.html.

[128] *See* Tim Kawakami, *Tyson License Revoked; He is Fined $3 Million*, L.A. TIMES (July 10, 1997), https://www.latimes.com/archives/la-xpm-1997-jul-10-mn-11357-story.html.

[129] EPSTEIN, *supra* note 10, at 16.

[130] *Id*.

[131] Associated Press, *Agent in Sentenced in Florida*, N.Y. TIMES (July 3, 1996), https://www.nytimes.com/1996/07/03/sports/sports-people-football-agent-is-sentenced-in-florida.html.

[132] EPSTEIN, *supra* note 10, at 16.

[133] Associated Press, *supra* note 75. This example is twenty-five years old, but it was one of the first scandals to expose the underworld of sports agents. The sports law or business law

In 2007, Nevada high school football player Kevin Hart (Fernley High School, east of the Reno-Sparks metropolitan area) took the concept of fraud to a level never seen during the recruiting process.[134] Though he had not been recruited to play college football, he was somehow able to convince his coaches, his high school, and the community at large that he was being recruited to play college football.[135] At his high school press conference in his high school gym on national signing day in 2008, he announced that he would play for the University of California-Berkeley even though in reality the school had not even recruited him.[136] Hart ended up

professor could put this into a larger context and compare it to more contemporary college sport-related scandals. This could include, for example, the *Operation Varsity Blues* college admissions fraudulent scheme-turned Netflix production. *See, e.g.*, Kelly Lawler, *College Admissions Scandal Gets Shlock-doc Treatment in Netflix's 'Operation Varsity Blues'*, USA TODAY (Mar. 17, 2021), https://www.usatoday.com/story/entertainment/tv/2021/03/17/netflix-college-admissions-scandal-doc-varsity-blues-review/4716472001/ (offering how the FBI brought down wealthy parents who were clients of Rick Singer, the mastermind behind the conspiracy, who was able to secure admission to elite universities nationwide for their high school children who were otherwise unable to gain entrance but for Singer's assistance. Singer used computer technology to have the students appear to be athletically gifted, but he also coordinated the effort to have an imposter take college entrance exams for the students. In some instances, the parents also had to make a large financial contribution to the college or university as part of the deal).

[134] EPSTEIN, *supra* note 10, at 139.

[135] *Id*.

[136] *Id*.

enrolling at Feather River College (a two-year college) in Quincy, California, where he was named a first-team All-California junior college lineman.[137] After Feather River College, Hart then signed a legitimate athletic scholarship for the two years of eligibility remaining to attend Division II Missouri Western State..[138]

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[137] *See* Tom Friend, *The Boy Who Cried Cal*, ESPN, http://www.espn.com/espn/eticket/story?page=kevinhart (last visited Apr. 28, 2021) (noting that despite Hart's fraud and the subsequent embarrassment for his misconduct, a coach from Feather River College reached out to Kevin and convinced him to continue his football career at a higher level with a "fresh start."). A sports law or business law professor could use this example as an extreme example of fraud somewhat similar to Operation Varsity Blues, discussed *supra*, note 77. An additional and more recent example of fraud could include the scandalous misconduct involving Adidas and agents and coaches to convince elite high school basketball players to attend particular Adidas-sponsored colleges after money changed hands. *See, e.g*., Mark Schlabach, *Three Sentenced in Adidas Recruiting Scandal*, ESPN (Mar. 5, 2019), https://www.espn.com/mens-college-basketball/story/_/id/26141993/three-sentenced-adidas-recruiting-scandal (reporting that U.S. District Court Judge Lewis A. Kaplan sentenced three men to prison who were convicted of pay-for-play schemes to include former Adidas executive James Gatto, former Adidas consultant Merl Code, and aspiring manager Christian Dawkins).

[138] *See* Tom Friend, *Kevin Hart to Sign with D-II school*, ESPN (Feb. 1, 2012), https://www.espn.com/college-sports/recruiting/football/story/_/id/7525340/kevin-hart-recruit-lied-california-golden-bears-sign-missouri-western-state (writing, "The same offensive lineman who staged a phony news conference four years ago to announce he was attending California -- even though Cal never recruited him -- will sign a legitimate letter of intent Wednesday with Division II Missouri Western State… Hart, who is 6-foot-4, 315

Finally, Las Vegas was the home of a sports memorabilia store that was involved in the sale of sports memorabilia with forged signatures. David "Doc" Scheinman and son Phillip each pleaded guilty to one count of wire fraud.[139] The Scheinmans operated a store in Las Vegas called "Smokey's Sportscards" which was raided by the F.B.I. in 1999.[140] They sold sports memorabilia from the store over the Internet to customers throughout the United States.[141] They were sentenced in 2006 in San Diego as U.S. District Judge Barry Ted Moskowitz sentenced Scheinman to six months home confinement and sentenced his son to six months in prison to be followed by four months in a halfway house.[142] They were charged in San Diego because a government informant initiated phone conversations from San Diego County and had items shipped

pounds, played prep football in Nevada, with the dream of becoming a Division I player. After his junior season at Fernley High School, he received recruiting letters from Washington, Oregon and Nevada and even nicknamed himself "D-1." But because he had a 1.8 grade point average- and thought it was of no use to take the SAT- those schools stopped recruiting him. Ashamed to let anyone know, he assured his coaches and classmates that he was still a national recruit -- and continued his lie throughout his senior season of high school.").

[139] *See* KeyMan Collectors Corner, *Las Vegas Father and Son Sentenced in Sports Memorabilia Fraud Case*, KEYMAN COLLECTIBLES (Mar. 22, 2006), http://www.keymancollectibles.com/forged.htm.

[140] *Id*.

[141] *Id*.

[142] *Id*.

there.[143] The defendants were also ordered to make joint restitution of $19,118.[144]

VII. SPORT-RELATED STATUTES

The state of Nevada offers various sport-related statutes worth exploring for the sports law professor seeking to conduct additional research. For example, if the professor were teaching a section on state laws related to regulation of sports agents, it is worth noting that effective July 1, 2017, Nevada enacted the Revised Uniform Athlete Agents Act thereby repealing the Uniform Athletes' Agents Act.[145] The Securities Division of the Office of the Secretary of State is responsible for the regulation of athletes' agents in the State of Nevada.[146]

For students and professors interested in aspects of the regulatory breadth of high school athletic associations, the Nevada Interscholastic Activities Association (NIAA) governs high school

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[143] *Id*.

[144] *Id*.; *see also* Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (2002) (referencing Phil Scheinman's Las Vegas memorabilia store and several other dealers, and their association with the allegations of the sale of forged, autographed memorabilia on eBay by failing to comply with California's "Autographed Sports Memorabilia" statute (Civ. Code, 1739.7) by failing to furnish a certificate of authenticity to persons who purchased autographed sports-related collectibles through its Web site).

[145] NEV. REV. STAT. ANN. § 398A.010-398A.440 (LexisNexis, 2019).

[146] *See* Nevada Secretary of State, *General Information*, https://www.nvsos.gov/sos/licensing/sports-agents/general-information (last visited June 29, 2019).

athletics,[147] and it is worth considering that Nevada is a state that allows homeschooled students to participate in interscholastic sports in the district in which the student resides.[148] However, a notice of intent (NOI) of a homeschooled child to participate in programs and activities must first be filed with the school district.[149]

One of the more interesting Nevada statutes involves addressing the issue of an unarmed combatant[150] who does not give their *best efforts*

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[147] NEV. REV. STAT. ANN. §§ 386.420-386.470 (LexisNexis, 2019). The entire section, however, was renumbered and moved on July 1, 2019 to NEV. REV. STAT. ANN. §§ 385B.010-385B.190 (LexisNexis, 2019); *see also* NIAA, http://www.niaa.com/information/about (last visited June 29, 2019).

[148] NEV. REV. STAT. ANN. § 385B.150 (LexisNexis, 2019) ("1. A homeschooled child must be allowed to participate in interscholastic activities and events in accordance with the regulations adopted by the Nevada Interscholastic Activities Association pursuant to NRS 385B.060 if a notice of intent of a homeschooled child to participate in programs and activities is filed for the child with the school district in which the child resides for the current school year pursuant to NRS 388D.070.").

[149] *Id*.

[150] NEV. REV. STAT. ANN. § 467.0108 (LexisNexis, 2019) ("1. "Unarmed combatant" means any person who engages in unarmed combat in a contest or exhibition, whether or not the person receives remuneration. 2. The term includes, without limitation: (a) A contestant; (b) An amateur boxer who: (1) Is registered with United States Amateur Boxing, Inc., or any other amateur organization recognized by the Commission; and (2) Participates in an amateur boxing contest or exhibition in this state that is registered and sanctioned by United States Amateur Boxing, Inc., or Golden Gloves of America. 3. The term does not include a person who participates in a contest or

during a licensed sports contest.[151] The specific subsection is found in (d):

> 467.110. Suspension, revocation and other disciplining of contestant and other participants; grounds for refusal to issue license.
>
> 1. The Commission may suspend or revoke the license of, otherwise discipline, or take any combination of such actions against any contestant, promoter, ring official or other participant who, in the judgment of the Commission:
>
> (a) Enters into a contract for a contest or exhibition of unarmed combat in bad faith;
>
> (b) Participates in any sham or fake contest or exhibition of unarmed combat;
>
> (c) Participates in a contest or exhibition of unarmed combat pursuant to a collusive understanding or agreement in which the contestant competes in or

exhibition that is exempt from the provisions of this chapter.").

[151] NEV. REV. STAT. ANN. § 467.110 (LexisNexis, 2019). This statute falls under the statutory framework governed by the Nevada Athletic Comm'n (NAC) [i.e., "the Commission"] found in NEV. REV. STAT. ANN. § 467.020 et seq. (2019). The Nevada Athletic Comm'n has a website at http://boxing.nv.gov/ and it temporarily suspended all combat sports in 2020 due to the coronavirus pandemic. *See* Chris Cwik, *Report: Nevada State Athletic Commission Suspends All Combat Sports until March 25 Due to Coronavirus*, Yahoo Sports (Mar. 14, 2020), https://sports.yahoo.com/nevada-state-athletic-commission-suspends-all-combat-sports-indefinitely-due-to-coronavirus-204310578.html.

terminates the contest or exhibition in a manner that is not based upon honest competition or the honest exhibition of the skill of the contestant;

(d) Is guilty of a failure to give his or her best efforts, a failure to compete honestly or a failure to give an honest exhibition of his or her skills in a contest or exhibition of unarmed combat;

(e) Is guilty of an act or conduct that is detrimental to a contest or exhibition of unarmed combat, including, but not limited to, any foul or unsportsmanlike conduct in connection with a contest or exhibition of unarmed combat; or

(f) Fails to comply with any limitation, restriction or condition placed on his or her license.

2. The Commission may refuse to issue a license to an applicant who has committed any of the acts described in subsection 1.

Along the same lines, and using similar, unique *best-efforts* language, bribes to influence the outcome of sporting event are considered a felony.[152]

[152] NEV. REV. STAT. ANN. § 207.290 (LexisNexis, 2019) ("A person who: 1. Gives, offers or promises to give, or attempts to give or offer, any compensation, gratuity or thing of value, or any promise thereof, to any participant or player or any judge, referee, manager or other official of a sporting event or contest; or 2. Asks or receives or offers to receive directly or indirectly any compensation, gratuity, reward or thing of value

Finally, Nevada has several statutes related to outdoor sports and recreation. This includes the Skier and Snowboarder Safety Act,[153] a statute that pertains to youth sport and concussions, in effect since 2011,[154] and a recreational use statute.[155] A *recreational use statute* is a general term given to legislation to promote the public, recreational use of privately-owned land and to provide some measure of immunity for the landowner.[156]

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or any promise thereof, as a participant or player, or as a judge, referee, manager or other official of a sporting event or contest, with the intention, understanding or agreement that the player or participant or judge, referee, manager or other official of the sporting event will not use **best efforts** to win, or will so conduct himself or herself as to limit his or her or his or her team's margin of victory, or will corruptly judge, referee, manage or otherwise officiate the sporting event or contest with the intention or purpose that the result of the sporting event will be affected thereby, is guilty of a category C felony and shall be punished as provided in NRS 193.130.").

[153] SKIER AND SNOWBOARDER SAFETY ACT, NEV. REV. STAT. ANN. §§ 455A.010-455A.190 (LexisNexis, 2019).

[154] NEV. REV. STAT. ANN. § 455A.200 (LexisNexis, 2019) (amended effective July 1, 2019) (offering in part, "2. The policy adopted pursuant to subsection 1 must require that if a youth sustains or is suspected of sustaining an injury to the head while participating in competitive sports, the youth: (a) Must be immediately removed from the competitive sport; and (b) May return to the competitive sport if the parent or legal guardian of the youth provides a signed statement of a provider of health care indicating that the youth is medically cleared for participation in the competitive sport and the date on which the youth may return to the competitive sport.").

[155] NEV. REV. STAT. ANN. § 41.510 (LexisNexis, 2019).

[156] *See, e.g.*, Michael S. Carroll, Dan Connaughton, & J.O. Spengler, *Recreational User Statutes and Landowner*

In *Boland v. Nevada Rock & Sand Co.*,[157] a Supreme Court of Nevada decision, Jonathan Boland was seriously injured on March 4, 1989, when he went over a drop-off while riding a dirt bike motorcycle through a 320-acre mining basin outside of Henderson, Nevada.[158] The district court granted summary judgment in favor of the defendants[159] and the Supreme Court affirmed.[160] Key to the analysis was that Boland did not fall into the excavation, but instead he fell off a hill after he was already inside the excavation.[161]

Boland claimed defendants had a duty to warn of the danger posed by the drop-off, but the defendants demonstrated that Nevada had a recreational use statute which provided a defense.[162] The Supreme Court stated,

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Immunity: A Comparison Study of State Legislation, 17 J. LEGAL ASPECTS OF SPORT 163 (2007).

[157] Boland v. Nevada Rock & Sand Co., 894 P.2d 988 (Nev. 1995).

[158] *Id*. at 989. Boland had driven to the location with some friends who took turns riding the dirt bike. He was a paraplegic as a result of the injury.

[159] *Id*. at 990.

[160] *Id*. at 993.

[161] *Id*. at 992.

[162] *Id*. at 990-92 (referencing NEV. REV. STAT. ANN. § 41.510 throughout the decision and providing, "NRS 41.510 states, in relevant part: 1. Except as otherwise provided in subsection 3, an owner, lessee or occupant of premises owes no duty to keep the premises safe for entry or use by others for crossing over to public land, hunting, fishing, trapping, camping, hiking, sightseeing, hang gliding, para-gliding or for any other recreational purposes, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes. 2. Except as otherwise

> All that is required in order for NRS 41.510 to apply is that (1) respondents must be the owners, lessees, or occupants of the premises where Boland had been injured; (2) the land where Boland had been injured must be the type of land the legislature intended NRS 41.510 to cover; and (3) Boland must have been engaged in the type of activity the legislature intended NRS 41.510 to cover. We conclude that the district court correctly applied NRS 41.510.[163]

Boland claimed that the conduct by the defendants was "willful or malicious," and therefore, the recreational use statute should not immunize the defendants under subsection 3 of the recreational use statute, but the Court disagreed.[164]

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provided in subsection 3, if an owner, lessee or occupant of premises gives permission to another to cross over to public land . . . or participate in other recreational activities, upon his premises: (a) He does not thereby extend any assurance that the premises are safe for that purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted. . . .3. This section does not: (a) Limit the liability which would otherwise exist for: (1) Willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity."). *Id*. at 990.

[163] *Id*.

[164] *Id*. at 992. Boland claimed that another statute, NEV. REV. STAT. ANN. § 455.010 ("Erection of fence or other safeguard around excavation, hole or shaft required.") was relevant and

VIII. CONCLUSION

As demonstrated above, the state of Nevada continues to offer plenty of cases, statutes, scandals and other pedagogical material for the sports law and business law professor. Focusing on Nevada, the article ventured into a discussion of the demise of the Professional and Amateur Sports Protection Act of 1992 (PASPA) which was declared unconstitutional by the U.S. Supreme Court in 2018. The article also explored two other federal decisions including the U.S. Supreme Court's ruling in *Nat'l Collegiate Athletic Ass'n v. Tarkanian* in 1988 in which the Court declared that the NCAA did not act as a *state actor*. Though another case, *Nat'l Collegiate Athletic Ass'n v. Miller*, was not granted certiorari, the impact of that decision was still profound because Nevada's attempt to legislatively require due process provisions in the NCAA decision-making process violated the Commerce Clause of the U.S. Constitution.

The article then explored Nevada-based sports law decisions including the express adoption of the limited duty (baseball) rule for injuries suffered from spectators hit by foul balls. A host of sport-related scandals are then provided which can

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therefore it showed malice [i.e., "willful or malicious" in subsection 3 of § 41.510] because he claimed the defendants breached their duty to Boland by not providing safeguards, but the Court also disagreed stating, "The land in question here, 320 acres of open desert where dirt bikers often ride, is the type of land contemplated in NRS 41.510 and not NRS 455.010.").

be very useful from a pedagogical perspective. Nevada has numerous sport-related statutes, including at least two which address the failure to use *best efforts* related to a sports contest. Other statutes presented include the Skier and Snowboarder Safety Act, a recreational use statute, and a statute that pertains to youth sport and concussions. Indeed, this article demonstrates that the Silver State provides gems for the sports law professor, law student or for others who appreciate Nevada and the confluence of state-based, legal research related to sports and the law.

RUNNING LAW LIKE A BUSINESS: APPLYING BUSINESS PERFORMANCE METRICS TO IN-HOUSE LEGAL DEPARTMENTS

EVAN A. PETERSON[*]

The chaotic nature of the business environment presents daunting challenges for in-house legal departments. In-house counsel, alongside supervising legal compliance and business transactions,[165] are facing increased calls to embrace future-oriented, proactive law perspectives that require greater integration of legal strategy with business strategy.[166] In-house counsel now find

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[165] Robert L. Haig, *Preliminary Materials*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2020).

[166] Gerlinde Berger-Walliser et al., *Using Proactive Legal Strategies for Corporate Environmental Sustainability*, 6 MICH. J. ENVTL. & ADMIN. L. 1, 3 (2016); Yi-Min Chen et al., *Information-and Rivalry-Based Perspectives on Reactive Patent Litigation Strategy*, 68(4) J. BUS. RESEARCH, 788, 788 (2015).

themselves facing, with increasing frequency, the harsh reality that legal departments are not immune to the economic pressures faced by other departments in the organization.[167] The demands placed on legal departments by evolving business models to meet growing challenges with innovation, expediency, and a "more-for-less" corporate mentality, are poised to alter the operational, structural, and relationship-management techniques of in-house legal departments in dramatic ways.[168]

Due to the magnitude of these growing trends, there is a critical need for legal departments to rethink approaches to company relationship management and to overhaul how legal matters are managed within their departments. Legal departments are increasingly being run with business discipline, as reflected in their growing embrace of relevant best practices from other business functions.[169] Business tools and approaches, including cost allocation, benchmarking, and strategic planning, are being utilized more and more

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[167] Markus Hartung & Arne Ga¨rtner, *The Future of In-House Legal Departments and Their Impact on the Legal Market: Four Theses for General Counsels, and One for Law Firms*, in *Liquid Legal* 275-286 (Kai Jacob, Dierk Schindler, & Roger Strathausen 1 ed. 2017); Craig B. Glidden et al., *Evaluating Legal Risks and Costs with Decision Tree Analysis*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2020).

[168] Hartung & Gartner, *supra* note 3; Haig, *supra* note 1; Glidden et al., *supra* note 3.

[169] Liam Brown et al., *Running the Legal Department with Business Discipline: Applying Business Best Practices to the Corporate Legal Function*, in *Liquid Legal* 397-421 (Kai Jacob, Dierk Schindler, & Roger Strathausen 1 ed. 2017).

frequently by in-house counsel.[170] The proper application of these tools and approaches, in turn, requires a system for better managing performance within the legal department. The pursuit of legal department decision-making in support of organizational strategic goals and objectives, for example, mandates the application of business performance metrics to departmental operations to track progress, monitor changes, and assess the need for improvements over time.[171]

Despite the growing importance of business performance metrics to in-house legal practice, there is a relative absence of in-depth academic scholarship focused specifically on managing the change connected to the implementation of performance measurement systems within legal departments. Any effort to inject new practices into the legal department, or modify existing practices, will face resistance from within the department itself.[172] This resistance, if left unaddressed, will

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[170] Lucy Fato & Mitchell J. Auslander, *Law Department Management*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2020).

[171] Brown et al., *supra* note 5; Pauleau et al., *Key Performance Indicators (KPIs): Run Legal with Business Metrics: Will the Legal of the Future Measure Everything It Does?* in *Liquid Legal* 111-128 Kai Jacob, Dierk Schindler, & Roger Strathausen 1 ed. 2017); Hartung & Gartner, *supra* note 3.

[172] Evan A. Peterson, Building Consensus Among General Counsel to Address Managerial Legal Strategy Perspectives (Dec. 2017) (unpublished Ph.D. dissertation, Walden University) (on file with ProQuest) (panel of general counsel expressed concerns in connection with legal department performance standards regarding feasibility, transparency, ease of measurement, and overall need).

ensure the inevitable failure of the planned change initiative. Considering the challenges posed by this resistance, there is a critical need for further scholarship on specific methods for managing resistance and supporting successful change initiatives within legal departments. The purpose of this article is to demonstrate how Kotter's stages of change model provides an effective means for addressing resistance to the application of business performance metrics to in-house legal practice from within the legal department itself.

This article was inspired by the redesign of the graduate legal environment course offered by the University of Detroit Mercy College of Business Administration. The redesigned course, Legal Issues in Organizational Strategy, is presented from the perspective that the study of business law and the legal environment, to reflect growing in-house legal practice trends noted above, must extend beyond the traditional Socratic delivery of black letter law. Course readings, by incorporating materials on organizational strategy, culture, decision-making and change management, support students' examination of how legal competencies are used to strategically manage risk, deploy resources, and maximize value in connection with course legal cases and materials.

This article contains four main sections. Section I examines the benefits of applying business performance metrics to legal departments, ways to determine which metrics are most appropriate for the department, and anticipated challenges to implementing those performance measurement

systems. Section II includes an overview of two relevant foundational management concepts, organizational change and organizational conflict, along with a more detailed examination of Kotter's stages of change model. A technique for reducing potential bias in applying Kotter's model (the four frames approach) is also discussed. Section III encompasses an illustration of how Kotter's stages of change model can provide a means for addressing resistance to the application of business performance metrics to in-house legal practice from within the legal department. Section IV concludes with a summary of the implications presented in this article.

I. BUSINESS PERFORMANCE METRICS AND LEGAL DEPARTMENTS

A. Benefits of Performance Metrics to Legal Departments

Growing transformations to the responsibilities of in-house counsel driven by the proactive law movement are prompting the need for legal departments to reconsider their perspectives on performance metrics. Proactive law, a growing area of scholarship focused on connecting legal strategy and business strategy, centers on the use of legal knowledge as an empowering mechanism to cultivate value, foster relationships, and manage future risk.[173] In-house counsel are now playing

[173] Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT'L. L. 418, 434 (2015).

greater roles in sustaining organizational strategic vision and are witnessing expansions to their roles and responsibilities in step with the growing recognition of law as a source of organizational value creation.[174] In-house counsel are serving as strategic planners and crisis managers in greater numbers,[175] requiring that they hold a mixture of talents alongside legal knowledge and acumen, such as developed understandings of project management, budgeting, marketing, and financial management.[176] In-house counsel and in-house legal departments, to excel fully in these expanded capacities, must understand organizational strategic objectives and champion solutions that best align with those objectives.[177] Legal departments, in merging legal resources with other company resources to achieve organizational strategic objectives, will need to engage in departmental strategic planning that is connected to overall company strategy. Legal department strategic

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[174] David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & BUS. 137 (2016).

[175] Constance E. Bagley & Mark Roellig, *The Transformation of General Counsel: Setting the Strategic Legal Agenda*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201246

[176] ASSOCIATION OF CORPORATE COUNSEL (December 9, 2013). *Skills for the 21st Century General Counsel*, https://www.acc.com/resource-library/skills-21st-century-general-counsel#; ASSOCIATION OF CORPORATE COUNSEL (January 30, 2019). *2019 ACC Chief Legal Officers (CLO) Survey*, https://www.acc.com/resource-library/2019-acc-chief-legal-officers-clo-survey

[177] Bjarne P. Tellmann & Susan R. Sneider, *The Relationship Between the Legal Department and the Corporation*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2020).

planning processes, to be effective, must accomplish the following: (a) communicate an accurate, comprehensive representation of the department's present condition; (b) articulate purpose and vision aligned with overall company strategy; (c) establish specific goals aligned with, and in support of, overall company goals; and (d) detect, assess, and rank initiatives and success measures needed to accomplish those goals.[178] Performance metrics are a critical mechanism for collecting the objective data needed to generate and monitor the results of these strategic blueprints.

A further attendant benefit of applying business performance metrics to the legal department is the possibility of reducing conflict, and thereby increasing collaboration, between the legal department and other departments within the organization. Conflict between managers and in-house counsel is, for instance, a consequence of many factors, including (a) embellished portrayals of attorneys as overly-aggressive fighters in popular culture;[179] (b) behavioral differences derived from differences in educational and training;[180] (c) contrasting perspectives toward risk and risk aversion;[181] and (d) perceptions that in-house

[178] Liam Brown et al., *supra* note 5.
[179] Mitchell Travis & Kieran Tranter, *Interrogating Absence: The Lawyer in Science Fiction*, 1 INT'L J. L. PROF. 23, 27 (2014).
[180] Ben W. Lewis et al., *Difference in Degrees: CEO Characteristics and Firm Environmental Disclosure*, 35 STRAT. MGMT. J. 712 (2014).
[181] Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary*

counsel are not team players.[182] Greater utilization of business performance metrics within the legal department may help to change the perception that in-house counsel are not team players, as well as reinforce the positioning of in-house counsel as real business partners within the company.[183] Given that negative perceptions concerning lawyers affect the organization's overall receptivity to legal strategy, attending to these considerations will position the legal department to better facilitate the delivery of traditional legal services,[184] to increase participation on strategic planning and crisis management teams,[185] and to champion hands-on approaches to legal strategy among managerial employees.[186]

B. Defining Appropriate Performance Metrics for Legal Departments

Advocates of the greater application of business performance metrics to legal departments, after outlining the associated benefits and returns, must then tackle an equally important consideration: what should legal departments measure? This question necessitates attention to the methods best

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International Framework, 39 N. C. J. INT'L L. & COMM. REG. 334, 335 (2014).

[182] Susie Lees et al., *Stop Putting out Fires and Start Working Proactively with your Client*, 31 ACC DOCKET 73, 77 (2013).

[183] Pauleau et al., *supra* note 7.

[184] Nancy B. Rapoport, *'Nudging' Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms*, 4 ST. MARY'S J. L. ETH. & MALPRACTICE 42, 42 (2014).

[185] Bagley & Roellig, *supra* note 11.

[186] I*d.*

suited to: (1) identifying relevant critical performance indicators, and (2) selecting which indicators to measure.[187] A relevant critical performance indicator must link to a department's fundamental purpose, which, in the case of in-house legal departments, consists primarily of (1) avoiding value destruction by managing risks; and (2) promoting value creation by managing opportunities.[188] Departmental responsibilities, in turn, serve as the means through which departmental purposes are accomplished. The legal department's foundational purposes of avoiding value destruction and promoting value creation are realized through sponsoring legal awareness within the company, creating legal solutions best suited to company needs, and implementing appropriate legal tools in responses to business risks. Legal departments, in examining their departmental responsibilities, can then pinpoint appropriate objective indicators.[189] Liam Brown et al. summarized the process of defining appropriate legal department performance metrics in the following terms: (a) the strategic plan connects organizational goals to legal department goals; (b) legal department goals lead to legal

[187] G. Sonny Cave & David D. Weinzweig, *Benchmarking*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2020).
[188] Pauleau et al., *supra* note 7 (avoiding value destruction can include managing intellectual property rights and implementing compliance and ethics programs, whereas promoting value creation can encompass direct contributions to financial value (obtaining cash via litigation) or indirect contributions via aiding new product development efforts).
[189] *Id. See also* Cave & Weinzweig, *supra* note 23.

department priorities; (c) legal department priorities lead to team and individual goals; and (d) team and individual goals lead to metrics for measuring performance.[190]

Performance measurement metrics cover a wide range of topics and functions. It is critical that the legal department establish appropriate and objective criteria for performance measurement.[191] Depending on the specific needs of the legal department, appropriate performance metrics may include internal and external resource allocation metrics, task metrics, litigation metrics, qualitative metrics (measures of the quality of legal services), non-litigation (transactional) metrics, and governance/compliance metrics.[192] Developing appropriate metrics for the legal department also necessitates an examination and breakdown of how it provides legal service to company business units.[193] Relevant efficiency metrics, for instance, are designed to measure a department's use of limited resources, whereas effectiveness metrics center on measuring the outputs of departmental functions.[194] Instituting efficiency and effectiveness metrics, together, in a legal department will provide a means for measuring the department's role in supporting the overall success of the organization.[195] Examples of

[190] Liam Brown et al., *supra* note 5.
[191] Fato & Auslander, supra note 6.
[192] Cave & Weinzweig, *supra* note 23.
[193] *Id.*
[194] Hartung & Gartner, *supra* note 3.
[195] *Id.*

efficiency and effectiveness metrics that legal departments may create are included in Table 1.[196]

Table 1

Legal Efficiency	**Legal Effectiveness**
• Productivity (ex. legal research, negotiation) • Planning, organizing and directing legal agreements • Extent to which department performed according to its budget • Cost savings related to engagement of outside counsel • Allocation of internal staff and external resources tasks for coverage of legal workload • Internal client satisfaction when involving or interacting with legal team members	• Impact of compliance programs on prevention/occurrence of legal risks • Settlement cycle times or litigation avoidance rate through settlement agreements • Raising legal awareness throughout organization • Impact of contractual deviations from standard terms or preferred contractual positions • Impact of increased legal awareness on compliance costs, quantity and degree of disputes/claims, and efficiency of business decision-making processes

C. Challenges to Implementing Performance Metrics

In the case of the legal department's adoption of business performance metrics, prior research sheds some light on how in-counsel may respond. Peterson (2017) conducted a Delphi study to build

[196] Pauleau et al., *supra* note 7.

consensus among a panel of in-house general counsel regarding techniques for altering unreceptive managerial viewpoints toward the strategic value of law within the corporate setting.[197] The results of Peterson's study revealed significant concerns among the panelists regarding the feasibility of the legal department adopting business performance metrics. Responses from the panelists included the following statements:[198]

- I am skeptical about the ability to put performance metrics on the role of counsel. "Not everything that can be counted counts, and not everything that counts can be counted."
- We struggle with identifying meaningful metrics for legal.
- Seems counter-intuitive that legal department members hitting performance metrics would contribute to strategic value vis a vis the business enterprise. Seems to confuse the basic role(s) of the legal department.
- I think performance metrics can be tough to identify for a legal department.
- Another of the modern legal department myths that you can create meaningful metrics in all situations.
- Metrics are nice when the work allows them to be objective and have a meaningful

[197] Peterson, *supra* note 8.
[198] *Id.*

> context. Not all legal situations or departments have that possibility.

The concerns raised in these statements reflect the reality that any form of organizational change does not come easy. Any proposition to introduce new practices, or modify existing practices, invites significant cultural change for the employees, the department, and the organization. For a change initiative to have any hope of success, change agents (general counsel or otherwise) must have a foundational understanding of how to execute the change process effectively. The next section will provide a foundational overview of two foundational areas of management that are critical to this issue: organizational change and organizational conflict.

II. FOUNDATIONAL MANAGEMENT CONCEPTS

Any proposition to introduce new performance metrics, or modify existing metrics, within a department invites significant cultural change for the employees, the department, and the organization. Most efforts to create change within a company fail. Causes of failed change attempts may include anything from lack of time and coordination to the anxieties, stresses, and tensions triggered by insufficient training and support, alongside any uncontrollable internal and external factors.[199] Feelings of disempowerment, chaos, confusion, and

[199] Lisa C. Barton & Veronique Ambrosini, *The Moderating Effect of Organizational Change Cynicism on Middle Manager Strategy Commitment*, 24 INT'L J. HUMAN RESOURCE MGMT. 721, 721 (2013).

instability among employees will lead them to ignore, or refuse to support, any behaviors and attitudes required for the desired change to succeed.[200]

The alteration of performance metrics within the legal department, like every organizational change, will face internal employee resistance in the form of organizational conflict.[201] Change agents endeavoring to modify departmental performance metrics have no choice but to recognize and address the associated conflict.[202] Failing to address organizational conflict connected to the change process, especially in cases involving changes among a department of diverse personalities, will only lead to catastrophe and disaster.[203] As a consequence, therefore, the dual consideration of organizational conflict and organizational change represents an appropriate starting point through which to begin developing implementation plans for expanding or altering legal department performance metrics.

A. Organizational Change

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[200] LEE G. BOLMAN & TERRENCE DEAL, REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP (2017).
[201] Afzalur M. Rahim, *Toward a Theory of Managing Organizational Conflict*, 13(3) INT'L J. CONFLICT MGMT. 206, 206 (2002).
[202] Geoffrey VanderPal & Victor Ko, *An Overview of Global Leadership: Ethics, Values, Cultural Diversity and Conflicts*, 11 J. LEADERSHIP, ACCOUNTABILITY & ETH. 166 (2014).
[203] *Id.*

An increased focus on the use of business performance metrics within the legal department likely represents a substantial change from past and present departmental practices. Organizational change, or the strategy to modify values, beliefs, attitudes, or structures within an organization in response to shifting conditions,[204] is an indispensable component of such dramatic revisions.[205] The works of Kanter, Kotter, and Luecke, reflected in Table 2, represent three focused, practical models for addressing the challenges connected to organizational change.[206]

[204] WARREN G. BENNIS, ORGANIZATIONAL DEVELOPMENT: ITS NATURE, ORIGINS, AND PROSPECTS (1969).
[205] TOM E. BURNS & G.M. STALKER, THE MANAGEMENT OF INNOVATION (1961).
[206] ROSABETH M. KANTER ET AL., THE CHALLENGE OF ORGANIZATIONAL CHANGE: HOW COMPANIES EXPERIENCE IT AND LEADERS GUIDE IT (1992); John P. Kotter, *Leading Change: Why Transformation Efforts Fail*, 73 Harv. Bus. Rev. 59 (1995); RICHARD LUECKE, MANAGING CHANGE AND TRANSITION (2003).

Table 2

Kanter	**Kotter**	**Luecke**
Analyze organizational change needs	Establish sense of urgency	Rally support and commitment through cooperative recognition of problems and solutions
Create common direction and shared vision	Create guiding coalition	Create shared vision
Break from past practices	Develop vision and strategy	Pinpoint key leadership
Produce sense of urgency	Communicate change vision	Institutionalize achievement through formal structures, policies, and systems;
Encourage strong leaders	Empower broad-based action	Emphasize results over actions
Amass political support	Generate short-term wins	Spread change from the sidelines
Construct implementation plan	Consolidate gains and produce more change	Observe and modify tactics as problems arise
Create enabling mechanisms	Anchor new approaches in culture	
Involve people, be honest, and communicate		
Reinforce and institutionalize change		

A comparison of these three models reveals key similarities and common themes. It is important to note, however, that these models should not be construed strictly from a linear perspective. Although each model reflects a general process to be undertaken over time, stages in the change management process can overlap in situations where it is necessary to revisit earlier stages in the change process.[207] As Kotter's eight stages of change model will guide the analysis in section III, the central elements of each stage are as follows:[208]

- **Stage 1: Establishing sense of urgency –** (a) examining market and competitive realities; (b) identifying crises (actual or potential) and/or major opportunities; and (c) communicating those crises and opportunities broadly and dramatically to motivate aggressive cooperation.
- **Stage 2: Creating guiding coalitions –** (a) pulling together a group with sufficient power to steer the change; and (b) making the group work together as a team.
- **Stage 3: Developing vision and strategy –** (a) creating vision to direct change efforts; and (b) cultivating strategies to achieve that vision.
- **Stage 4: Communicating change vision –** (a) using all possible tools to communicate new vision and strategies persistently; and (b) ensuring guiding coalition models behaviors expected of employees.
- **Stage 5: Empowering broad-based action –** (a) removing obstacles; (b) altering systems or structures that inhibit change vision; and (c) encouraging risk taking and nontraditional ideas.
- **Stage 6: Generating short-term wins –** (a) planning for wins (i.e., visible improvements in performance); (b)

[207] Bolman & Deal, *supra* note 36 at 381.
[208] Kotter, *supra* note 42 at 61.

producing wins; and (c) visibly recognizing/rewarding those who make wins possible.

- **Stage 7: Consolidating gains and producing more change –** (a) changing systems, structures, and policies that don't fit transformation vision using increased credibility; (b) attracting, retaining, and promoting those who can implement change vision; and (c) reinvigorating process with new projects, themes, and change agents.
- **Stage 8: Anchoring new approaches in culture –** (a) creating better performance through behaviors focused on customers and productivity, improved leadership, and more effective management; (b) expressing connections between new behaviors and organizational success; and (c) developing tools to ensure leadership development and succession.

B. Organizational Conflict

Any effort to modify existing practices within a department, regardless of the change model used, will face resistance. The in-house legal department is no exception. The driving force of this resistance, organizational conflict, reflects the potential for discord between (and among) individuals and groups within an organization.[209] Organizational conflict ensues in instances where the following driving forces are present: (a) unshared attitudes, values, skills, behaviors, or goals that direct another person's behavior; (b) obligations to perform an action that is unrelated to a person's needs; or (c) different behavioral preference in regards to a collective action.[210] Although conflict between in-house counsel and members of other departments is

[209] Rahim, *supra* note 37.
[210] *Id.*

well-documented, these same driving forces can also lead to conflict between members of the legal department itself. As noted by Dinovitzer et al., there are four types of in-house counsel: (a) the *team lawyer* places a priority on legal considerations over business considerations, but gives greater deference to personal experience in decision-making; (b) the *team player* places greater emphasis on experience rather than legal knowledge while demonstrating an appreciation of firm collectivity; (c) the *lawyers' lawyer* places primary emphasis on legal knowledge in decision-making, giving precedence to legal considerations over business considerations; and (d) the *lone ranger* references law in decision-making but places primary emphasis on personal experience. Any efforts by change agents to modify existing practices within the legal department must take these differences into account.

One of the central challenges in applying business performance metrics to in-house legal departments lies in finding a suitable mechanism for addressing these diverse viewpoints and the conflicts they will present within the change process. Bolman and Deal's four frames approach, which emphasizes consideration of structural, political, human resource, and symbolic factors in the change process, provides one such lens through which to undertake such a task. The next section will include a brief background on the foundational principles underlying the approach, along with a more detailed discussion of each frame.

C. The Four Frames Approach

As noted above, a central challenge in applying business performance metrics to in-house legal departments lies in finding a suitable mechanism for addressing these diverse viewpoints and the conflicts they will present within the change process. The structural, human resource, political, and symbolic frames (collectively referred to as the four frames) provide a means through which change agents can better contemplate and examine the diverse viewpoints, challenges, and conflicts within the change management process. Frames are mental models (set of ideas and assumptions) applied by individuals to aid in their understanding of complex situations.[211] Given that frames determine how decision-makers approach problems, as well as the options those decision-makers will take into consideration, recognition of perspective framing is central to the change process. Decision-makers must possess the critical capacity to shift between different points of view as the situation dictates.[212] Considering Kotter's model and the four frames approach in tandem promotes a deeper examination of the structural, human resource, political, and symbolic aspects of each stage in the change process, while also reducing the likelihood that the change agents applying Kotter's model will focus on one frame (to the exclusion of others) due to personal preferences or biases. Key assumptions connected to each frame, as well as attendant drawbacks, are as follows:

[211] Bolman & Deal, *supra* note 36 at 11.
[212] Bolman & Deal, *supra* note 36 at 14.

1. Structural Frame

The structural frame encompasses the role played by social architecture in organizational functioning. The potential negative consequences of relying exclusively on the structural frame center on the possible disregarding of considerations that do not fall within the scope of policies, procedures, tasks, and organizational charts. Change agents, by focusing too closely on structural assumptions, risk ignoring the human, political, and cultural factors that are necessary for effective action and successful change. Assumptions attached to the structural frame include:[213]

- Organizations exist to reach set goals and develop strategies to attain those goals.
- Specialization and division of labor enable organizations to increase efficiency and boost performance.
- Diverse efforts can fit together through coordination and control measures.
- Organizations thrive when prudent judgment overcomes individual agenda.
- Problem-solving and restructuring is the remedy to performance setbacks derived from structural flaws.

2. Human Resource Frame

The human resource frame examines what happens when people and organizations interconnect. A drawback of the human resource frame is that individuals who adhere too strongly to the belief that all employees yearn for growth and collaboration, and ignore the realities of organizational conflict, may have unrealistic expectations regarding assimilating individual and organizational needs.

[213] Bolman & Deal, *supra* note 36 at 48.

With respect to the human resource frame, the following assumptions apply:[214]

- Organizations exist to serve human needs; humans do not exist to serve organizational needs.
- Organizations and people need each other; people need careers, salaries, and opportunities, whereas organizations need ideas, energy, and talent.
- Exploitation can occur when there is poor fit between the individual and the organization.

3. Political Frame

The political frame showcases the competition of individuals and groups in pursuit of their respective interests in the face of power struggles, limited resources, and conflicting viewpoints. Use of the political frame comes with a note of caution: an excessive and narrow focus on politics can reinforce, rather than assuage, conflict and mistrust, as well as hinder any prospects for collaboration and optimism. Assumptions underlining the tenets of the political frame include:[215]

- An organization is a coalition of diverse interest groups and individuals.
- Coalition members perceive reality in different ways and possess diverse values, beliefs, and interests.
- Important decisions often include decisions involving the allocation of scarce resources.
- Conflict is the epicenter of day-to-day dynamics due to challenges posed by scarce resources and enduring differences.
- Goals and decisions arise from bargaining/negotiation between competing stakeholders competing for their interests.

4. Symbolic Frame

[214] Bolman & Deal, *supra* note 36 at 118.
[215] Bolman & Deal, *supra* note 36 at 184.

> The symbolic frame outlines organizational culture, as expressed in core symbolic elements, and displays its essential role in shaping performance. As the concepts linked to the symbolic frame are understated and vague, a challenge of the frame is that it's effective use is often heavily contingent on the skills of the person applying it. Assumptions shaping the symbolic frame include:[216]
>
> - Actions and events have multiple connotations as people observe situations in different ways.
> - Symbols help resolve confusion, provide direction, and anchor hope.
> - The meaning behind a process or event, rather than its intent or outcome, is often more important.
> - Culture encompasses the superglue that unifies the organization, brings people together, and supports efforts to achieve its goals.

III. APPLYING A FRAMEWORK FOR CHANGE

This section encompasses the application of Kotter's stages of change model to the task of creating or modifying business performance metrics within in-house legal departments. Readers, in examining the discussions of the eight stages below, are encouraged to keep several considerations in mind. First, individual approaches to each stage will differ depending on the frames (structural, human resource, political, symbolic) applied to that stage. Although not every frame is essential to each stage, all frames are critical to successful change.[217] Second, the examples and considerations that follow are designed to illustrate core concepts connected to each stage, and do not represent an exhaustive list of all possible considerations. Third, the examples and

[216] Bolman & Deal, *supra* note 36 at 241.
[217] Bolman & Deal, *supra* note 36 at 381.

considerations are not isolated to changes involving performance metrics within the legal department, and thus may be equally effective in facilitating other departmental changes. Fourth, several of the examples and considerations noted below have equal application in multiple stages of Kotter's model. Finally, the specific application of the tactics and practices noted below will depend on the specific, individual needs of the situation.

A. Establishing Urgency – Stage 1

Establishing a sense of urgency encompasses identifying crises and major opportunities through examining the competitive realities of the market. The process of crisis management, for example, provides general counsel with an opportunity to establish a sense of urgency for change within the legal department by facilitating engagement, communication, and collaboration between the legal department and other departments within the organization. Crisis management teams formed in response to a crisis routinely include managers, executives, directors, third-party consultants and outside counsel, alongside in-house counsel.[218] Placing members of the legal department on crisis management teams, in addition to showcasing the department's commitment to organizational goals and objectives, will lead to the exposure of new ideas and perspectives while providing opportunities to

[218] Robert Waterman and Bruce E. Yannett, *Crisis Management*, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2020).

develop networking relationships with key players throughout the organization.[219] Depending on the nature and level of change sought within the legal department, the position power and authority influence of the general counsel may be insufficient, by itself, to establish the sense of urgency among departmental members needed to enact the change. Networking connections with key organizational players established through participation on crisis management teams may serve as critical resources for connecting legal department changes to organizational goals and objectives.

B. Creating Guiding Coalitions – Stage 2

Creating guiding coalitions centers on pulling together a group with enough power to steer the desired change and making that group work together as a team. General counsel can create guiding coalitions by stacking the team with credible, influential members. Not all sources of power stem from position power (authority), which is reflected in control over rewards (jobs, money, support).[220] Coercive power, for instance, denoting an individual's ability to interfere, coerce, block, or penalize, need not be connected to a position of authority.[221] Individuals with developed reputations due to prior accomplishments, or individuals with the expertise needed to resolve critical questions and

[219] Tellmann & Sneider, *supra* note 13.
[220] Bolman & Deal, *supra* note 36 at 192.
[221] *Id.*

challenges, may also wield a great deal of power.[222] It is important to note, however, that determinations of the credibility and influence best suited to steering desired changes must account for differing views on teamwork, decision-making, and other factors. The types of in-house counsel, discussed above, represent four different illustrations in support of this key point. Individuals with a reputation for being the best, moreover, may be ill-suited for tasks requiring teamwork and collaboration with diverse parties.[223] Once the guiding coalition is formed, legal retreats provide an opportunity to foster cohesion and connections among coalition members through team-building exercises and activities.[224]

C. Developing Vision and Strategy – Stage 3

Developing vision and strategy focuses on creating a vision to direct change efforts and cultivating strategies to achieve that vision. Vision signifies a means of transforming a core ideology (sense of purpose) into an influential representation of future possibilities.[225] The plan for achieving the articulated vision must not only communicate the path forward but also acknowledge opposing internal and external forces in balancing stakeholder interests.[226] The general counsel, as a strategic business advisor, is positioned to set a tone for the

[222] *Id.*
[223] Fato & Auslander, supra note 6.
[224] Tellmann & Sneider, *supra* note 13.
[225] Bolman & Deal, *supra* note 36 at 244.
[226] *Id.*

legal department's delivery of legal services that is in line with the company's short-term and long-term strategic objectives.[227] The legal department's role and effectiveness hinges on the general counsel's ability to understand these strategic objectives, as well as their aptitude to encourage changes necessary for the department to add maximum value to the organization.[228] Although the general counsel may not have the ability to enact change on their own, without support (as noted above), the vision set by general counsel affects everything from department collegiality and respect to business partner service and preventive practices.[229] Tactics and practices that the general counsel may use to achieve the vision set for the legal department (delivery of legal services in line with short-term and long-term company strategic objectives) may involve an assessment and reconfiguration of organizational structures within the department, increased flexibility and self-direction for departmental teams, and a greater emphasis on servant-leadership by the general counsel.[230] A detailed description of each of these tactics and practices is included in the discussion of stage 5 below.

D. Communicating Change Vision – Stage 4

Communicating change vision involves using all possible tools to communicate the new

[227] Tellmann & Sneider, *supra* note 13.
[228] Fato & Auslander, supra note 6.
[229] Tellmann & Sneider, *supra* note 13.
[230] *Id.*

vision while ensuring the guiding coalition models the expected behaviors. Legal department retreats, in addition to fostering cohesion and connections among coalition members, also provide opportunities to unveil new departmental initiatives, including strategic planning, business partner satisfaction surveys, and performance metrics.[231] Enlisting the support of key networking relationships, alliances, and individuals with diverse sources of influence to spread the word is just as important to communicating change vision as it is to establishing urgency and creating guiding coalitions.[232] An effective technique for ensuring members of the guiding coalition continue to model expected behaviors centers on the practice of walkaround management by the general counsel. The general counsel, by making it a regular practice to engage with associates and colleagues within the department, will stand in a better position to understand the challenges, resistance, and other issues that may hinder the effectiveness of planned changes.[233] This will enable the general counsel to set the tone for the department's delivery of legal services, a critical element to both the development and communication of vision and strategy.

E. Empowering Broad-Based Action – Stage 5

This stage involves removing obstacles and altering systems or structures that inhibit change

[231] *Id.*
[232] Bolman & Deal, *supra* note 36 at 190.
[233] Tellmann & Sneider, *supra* note 13.

vision, often through the encouragement of risk-taking and innovative ideas. Although the legal department's structures and systems are driven by organizational needs,[234] facilitating broad-based action may involve reexamining existing departmental structures and processes. Legal departments organized along a hierarchical structure, resembling traditional corporate management structures with layers of reporting levels, face the possibility of: (a) lower productivity and inefficiency as counsel spend excessive amounts of time managing each other; and (b) delays in escalating matters up the chain due to evaluation and approval requirements at numerous levels.[235] Legal departments organized along a flat organizational structure, in contrast, attempt to avoid the inefficiencies and delays encountered in hierarchical structures by reducing the amount of reporting levels and job classifications within the department.[236] A flat organizational structure is not without its drawbacks, however, as they are susceptible to an increased risk of conflicts over tasks, assignments, and other departmental priorities. Organizational structures that are too rigid can hinder flexibility as employees try to outsmart the system, whereas too much autonomy can lead to feelings of separation and seclusion among employees.[237] The careful consideration of flexible and creative alternatives to responsibilities, chains of command,

[234] Fato & Auslander, supra note 6.
[235] *Id.*
[236] *Id.*
[237] *Id.*

communication, and relationships can have significant benefits for group performance.[238]

An innovative, alternative approach lies in the use of more agile legal teams within the legal department, similar to the special teams used by the military for extraordinary services.[239] Such teams are composed of highly adaptable, flexible individuals who can come together quickly and bring their specialized talents to bear on a specific task or issue.[240] Adherence to the servant-leader style of leadership by the general counsel may complement the increased flexibility and creativity generated using more agile legal teams. Servant-leadership, which represents a dramatic contrast to traditional organizational power structures, would center on the general counsel: (a) sharing power with subordinates; (b) giving subordinates any support needed for their success; and (3) helping them excel to their highest potential of performance.[241]

F. Generating Short-Term Wins – Stage 6

Generating short-term wins involves planning for visible improvements in performance, producing those improvements, and recognizing those who make the improvements possible. Recognition of those who make the improvements possible is a critical component of individual and

[238] Bolman & Deal, *supra* note 36 at 55.
[239] Tellmann & Sneider, *supra* note 13.
[240] *Id.*
[241] *Id.*

collective morale within the legal department.[242] The general counsel, as the chief morale builder for the legal department, must: (a) lead by example; (b) demonstrate concern for inclusion; (c) mentor and support the career development of all within the department; and (d) reward high achievers.[243] One possible means of recognizing improvements is for the general counsel to assign rotation opportunities (both inside and outside the legal department) based on efforts made by in-house counsel in connection with the desired changes. Rotations provide in-house counsel with opportunities to broaden their knowledge of product lines and market segments, collaborate with diverse individuals and groups across departmental and divisional lines, and develop reputations of prominence and respect throughout the department and organization.[244] Special projects present another opportunity for the general counsel to recognize individuals within the department who take leadership roles in advancing desired changes. Special projects, in contrast to the routine, daily tasks of the legal department, involve a unique array of complex, high profile challenges.[245]

G. Consolidating Gains and Producing More Change – Stage 7

Consolidating gains and producing more change involves several related elements: (a)

[242] *Id.*
[243] *Id.*
[244] Fato & Auslander, supra note 6.
[245] *Id.*

changing systems, structures, and policies that don't fit the transformation vision; (b) attracting, retaining, and promoting those who can implement the change vision; and (c) reinvigorating the change process with new projects, themes, and key players.[246] Many of the tactics and practices discussed in connection with stages 1 – 6, such as departmental rotations, spearheading special projects, and altering cumbersome hierarchies within the legal department, may help to eliminate legacy systems, structures, and policies while attracting key personnel who can bring fresh perspectives to the change process. A more all-encompassing approach, however, lies in the field of practice management. Legal department practice management, or managing the practice of law within the department, encapsulates the substantive elements and focus areas of overseeing legal practice, including quality control, training, task allocation, and supervision.[247] Legal practice group leaders, through their oversight of such diverse responsibilities, are positioned to boost morale, job satisfaction, and productivity within the department while facilitating the ability to recruit and retain essential talent.[248] More importantly, however, legal practice management provides the legal department with key opportunities to better integrate legal strategy with business strategy by helping to promote developed understandings of the connection between the delivery of legal services and organizational

[246] Kotter, *supra* note 42 at 61.
[247] Tellmann & Sneider, *supra* note 13.
[248] *Id.*

needs and to manage expectations regarding the nature of legal services.

H. Anchoring New Approaches in Culture – Stage 8

Anchoring new approaches in culture, as the final stage in Kotter's model, incorporates three foundational principles: (a) creating better performance through behaviors focused on customers and productivity, improved leadership, and more effective management; (b) expressing connections between new behaviors and organizational success; and (c) developing tools to ensure leadership development and succession.[249] One means of anchoring new approaches in culture is through creating culture teams,[250] teams of individuals possessing cultural intelligence (CQ).[251] Individuals with advanced cultural intelligence maintain a deeper understanding of organizational vision, mission and values, and are adept at instilling a similar understanding of these cultural elements in others. Cultural intelligence also encompasses a better appreciation as to how cultural differences affect how individuals approach leadership, disagreement, trust, and even reasoning.[252] In light of the potential disparities regarding how in-house counsel may approach an issue, given the different types of in-house counsel discussed above (team

[249] Kotter, *supra* note 42 at 61.
[250] Bolman & Deal, *supra* note 36 at 382.
[251] Tellmann & Sneider, *supra* note 13.
[252] *Id.*

lawyer, team player, lawyers' lawyer, lone ranger), the presence of a team with cultural intelligence is an essential component for managing change in every legal department.

IV. CONCLUSION

Many legal departments are overhauling how they manage legal matters in response to increasing internal and external pressures. One result of this overhaul is the growing trend to run legal departments with increased business discipline through a wide-ranging application of business tools and approaches. Doing so requires a system for better managing departmental performance. The purpose of this article was to demonstrate how change agents may use Kotter's stages of change model to address legal department resistance to the application of business performance metrics to in-house legal practice. Tactics and practices that support Kotter's model include: (a) placement on crisis management teams; (b) reconfiguration of departmental structures and increased flexibility/self-direction for departmental teams; (c) greater emphasis on servant-leadership by general counsel; (d) support from key networking relationships, alliances, and individuals with diverse sources of influence; (e) recognition of successes through rotation opportunities and special project leadership; (f) greater use of legal department practice management; and (g) deployment of a culture team. Any application of these tactics and practices, however, requires the consideration of several key concerns. First, individual approaches to Kotter's model will differ depending on the frames

(structural, human resource, political, symbolic) applied to any given stage in the model. Second, the tactics and practices are designed to illustrate core concepts connected to each stage and do not represent an exhaustive list of all possible devices and methods. Third, the examples and considerations are not isolated to changes involving performance metrics within the legal department. Fourth, the examples and considerations may have equal application in multiple stages of Kotter's model. Finally, the specific application of these tactics and practices will depend on the specific needs of the department and the organization.

WHEN THE SHARK BITES: USING THE TV SHOW "SHARK TANK" TO TEACH BUSINESS ENTITIES

MARGARET B. SHERMAN[253* 89]

I. INTRODUCTION

Most undergraduate Legal Environment of Business ("Legal Environment") classes include a discussion of business entities in the syllabus. Professors lecture on formation, liability, taxation, ability to go public, and other characteristics of the various entities. One of the challenges of teaching business entities to undergraduates is that the characteristics of different entities are complex, and undergraduate students have no context in which to understand the material. While they may have personal experience with contracts, torts and employment law, few of them have started a business or had to select an entity. They are not entrepreneurs and have not dealt with these issues. Often the distinctions among entities are lost on the students. The lecture quickly becomes a recitation of rules

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89 I would like to thank Paul Joseph Spina, IV, candidate for law degree at Georgia State University, for his assistance with this article.

which often leave students confused and bored. The rules in a vacuum make no sense to them.

Instead, business entities is a topic that is easier for the students to master if taught in an engaging and interactive student-centered format and if placed in a context to which the students can relate. This paper describes an exercise based on the popular ABC television show, "Shark Tank," as a way to cover the topic of business entities in an active-learning environment.

In Spring 2021, "Shark Tank" is in its twelfth season on ABC and is part of the cultural rubric. Many students have watched or recognize the show over its long run. Each episode, entrepreneurs pitch their start-up companies to sharks Lori Greiner, Mark Cuban, Barbara Corcoran, Robert Herjavec, Daymond John and Kevin O'Leary, as well as periodic guests. The entrepreneur's goal is to get the Sharks to 'bite' by investing in the start-up, usually in exchange for an equity position or a royalty arrangement. Successful products launched on "Shark Tank" include Scrub Daddy, a reusable sponge shaped like a smiley face, Lollacup, a BPA-free children's sippy cup, Chordbuddy, a device to help people learn the guitar, and Wicked Good Cupcakes, gourmet cupcakes sold in a jar.[254]

[254] *The 15 Biggest 'Shark Tank' Success Stories of All Time*, FORTUNE (Sept. 12, 2017), https://fortune.com/2017/09/12/successful-shark-tank-products/ (last visited on February 26, 2021); Taylor Locke, *Top 10 Best-Selling 'Shark Tank' Products*, CNBC MAKE IT (Oct. 14, 2019), cnbc.com/2019/10/14/best-selling-shark-tank-products.html (last visited on February 26, 2021); Gary Levin and Bill Keveney, *Shark Tank Exclusive: The New List of the*

Entrepreneurs representing over 900 different start-ups have pitched their companies and products on the show since 2009.[255]

This article, first, briefly describes the importance of student-centered learning in the undergraduate Legal Environment class. Next, the article describes how a professor can use a role-play exercise based on the format of "Shark Tank" to engage the students in learning about business entities. The exercise addresses legal issues related to liability protection for owners, taxation, and exit strategies, among other business entities topics.[256] The exercise and approach are suitable for a traditional Legal Environment class, whether large or small, and supplement the traditional lecture on business entities while providing context for such discussion. In addition, the use of the exercise reflects the Association to Advance Collegiate Schools of Business's ("AACSB") recommendation that business students engage in active and experiential learning.[257]

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20 Best-Selling Products from the Show, USA TODAY (Oct. 10, 2019), https://www.usatoday.com/story/entertainment/tv/2019/10/10/shark-tank-exclusive-new-list-20-best-selling-products/3841699002/(last visited on February 26, 2021); *Swimming with the Sharks*, PARADE MAG. 2 (Sept. 29, 2019).

[255] *"'Shark Tank' Entrepreneurs Face Copycats, Suits,"* WALL ST.J. B1 (Apr. 29, 2019).

[256] In addition, the exercise emphasizes other relevent topics, such as intellectual property, sales, marketing, and business planning.

[257] ASS'N. TO ADVANCE COLLEGIATE SCHS. OF BUS., 2013 Eligibility Procedures and Accreditation Standards for Business Accreditation, 32, 40 (last revised July 1, 2018),

I. STUDENT-CENTERED LEARNING

Student-centered learning is experiential learning through in-class activities as opposed to passive learning through lecture and memorization. Students are actively engaged in "learning experiences that require them to apply theory and knowledge learned through lectures to either real-world or simulated activities or exercises."[258] Student-centered learning requires students to use higher levels of taxonomy, such as problem solving

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https://www.aacsb.edu/-/media/aacsb/docs/accreditation/business/standards-and-tables/2018-business-standards.ashx?la=en&hash=B9AF18F3FA0DF19B352B605CBCE17959E32445D9 (last visited on February 26, 2021) ("AACSB 2013 Eligibility Procedures"). The AACSB recently approved the 2020 Proposed Guiding Principles and Standards for Business Accreditation, adopted July 28, 2020, which also include a requirement that students engage in experiential learning. ASS'N. TO ADVANCE COLLEGIATE SCHS. OF BUS., 2020 Proposed Guiding Principles and Standards for Business Accreditation, Standards 4.3, 36, https://www.aacsb.edu/-/media/aacsb/docs/accreditation/business/standards-and-tables/proposed%202020%20aacsb%20business%20accreditation%20standards%20-%20final%20draft%20-%20april%206%202020.ashx?la=en&hash=B40646D6F0057FBAF289B3B04888A33BB2741A3D (last visited on February 26, 2021) ("AACSB 2020 Guiding Principles").

[258] Justin Blount, *An Experiential Contract Negotiation Exercise for Business Law Students*, 36 J. LEGAL STUD. EDUC. 103, 104–05 (Winter 2019).

and critical analysis[259] and engages across different types of learning styles. Such active learning is particularly effective when teaching Generation Z students, born between 1995 and 2010.[260]

The exercise proposed by this paper is designed to promote student-centered learning using a role-play based on "Shark Tank." While the exercise is described in more detail in Part III, the basic premise is that volunteers will be placed into various entities (a sole proprietorship, general partnership, limited partnership, limited liability company, and C-corporation) and given a product to pitch to the rest of the class, who serve as the student Sharks. The student Sharks will then ask questions and determine whether to invest in any of the products. As the professor guides the exercise, the professor weaves in legal concepts relating to the

[259] Gerald Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (Sept. 1999).
[260] COREY SEEMILLER & MEGHAN GRACE, GENERATION Z GOES TO COLLEGE 6 (2016); Corey Seemiller & Meghan Grace, *Generation Z: Educating and Engaging the Next Generation of Students*, WILEY ONLINE LIB. (July 1, 2017), https://www.nvcc.edu/oiess/_docs/academic-assessment/clo/generation-z-educating-and-engaging-the-next-generation-of-students.pdf (last visited on June 11, 2021); Kathleen Mohr & Eric Mohr, *Understanding Generation Z Students to Promote a Contemporary Learning Environment*, 1 J. ON EMPOWERING TEACHING EXCELLENCE, Issue 1, 86 (March 2017). Other sources define Generation Z has having been born between 1997-2012. Michael DiMock, Defining Generations, Where Millennials End and Generation Z Begins, PEW RESEARCH CENTER (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/ (last visited on February 26, 2021).

various entities, such as limited liability, sharing of profits, taxation, and exit strategies. Thus, the delivery method is student-centered, and the students are actively engaged in role play as they learn the basic legal principles of entity formation. The following diagram shows the flow of the "Shark Tank" exercise.

In a traditional teacher-centered classroom, the teacher is the "sage on the stage" and does most of the talking through lecture, although questions may be posed to the class periodically. In this type of classroom, "students place all of their focus on the teacher, students generally work alone, and collaboration is discouraged," because students "rely solely on the teacher to facilitate their learning, from start to finish."[261] The student's primary role is to listen as the professor presents the information. Particularly in large section classes, interactive class discussion is even more difficult and there is often a default to more passive learning styles.[262] In a student-centered classroom, however, students are

[261] Renee Allen & Alicia Jackson, *Contemporary Teaching Strategies: Effectively Engaging Millennials across the Curriculum*, 95 U. DET. MERCY L. REV. 1, 20–21 (Fall 2017).
[262] Lucille Ponte, *The Case of the Unhappy Sports Fan: Embracing Student-Centered Learning and Promoting Upper-Level Cognitive Skills Through an Online Dispute Resolution Simulation*, 23 J. LEGAL STUD. EDUC. 169, 176 (Summer/Fall 2006).

responsible for and involved in their own learning through the process of collaboration and active engagement. Numerous techniques exist for active learning, including group exercises, games, role-plays, simulations, and flipped classrooms. Through each of these techniques, some "[c]lass time is spent on hands-on learning, collaborating with peers through group activities."[263] In essence, "[s]tudent-centered learning moves students from passive receivers of information to active participants in their own discovery process."[264] The concept of active learning has been much researched and written about over the years, and there is "strong evidence that learning to be most effective should involve active, integrative and experiential immersion on the part of students that both develops and transforms them. Students learn best when they are actively involved in their own learning."[265]

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[263] Jennifer Rosa, *Flipped Learning: Promoting Collaboration Cooperation, and Civility*, 96 MICH. BAR. J. 56, 56–57 (Oct. 2017).

[264] Allen & Jackson, *supra* note 261, at 23 (quoting from *Essential Conditions: Student-Centered Learning*, INT'L. SOC'Y FOR TECH. IN EDUC., https://www.iste.org/standards/tools-resources/essential-conditions/student-centered-learning (last visited on February 26, 2021).

[265] Julie Furr Youngman, *From Remembering to Analyzing: Using Mini Mock Arguments to Deepen Understanding and Increase Engagement*, 3 J.L.S. ED. 53, 55–61 (Winter 2020); McDevitt & George Lutzow, *Curricular Enhancement: Adding the Real World to a Legal Environment of Business Course*, 21 ATLANTIC L.J. 211 (2019); *see also* Ponte, *supra* note 262, at 169; *see also* Hess, *supra* note 259.

Student-centered learning requires students to utilize higher levels of taxonomy.[266] For example, in most Legal Environment classes, the goal is to move beyond lower skill levels such as memorization and recall of legal concepts, and to develop higher levels of cognitive skills under Bloom's taxonomy.[267] Students must do more than memorize and recite the laws. For example, students in the Legal Environment class need to:

> [A]pply legal concepts to hypothetical fact patterns or case studies, to identify and distinguish different legal issues and concepts, to develop legal frameworks from various cases and legal resources, and to evaluate the strengths and weaknesses of arguments and theories. Through the advancement of these upper-level cognitive skills, students develop effective written and oral communication abilities and strong critical thinking and reasoning skills.[268]

Thus, to achieve the desired higher levels of legal reasoning in the Legal Environment class, some types of experiential learning must be utilized.

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[266] The commonly used levels of student learning known as Bloom's Taxonomy were established by Benjamin Bloom in 1956. BENJAMIN S. BLOOM ET AL., THE TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATION GOALS, HANDBOOK 1 (1956); *see also* Ponte, *supra* note 262, at 172.

[267] Ponte, *supra* note 262, at 172.

[268] *Id*. at 174.

Higher level pedagogical goals cannot be obtained without some active learning because only then do students use critical thinking and cognitive skills as they analyze, synthesize and evaluate facts to formulate a reasoned argument, or reach a conclusion. Active learning also enhances mastery and retention of the content. The more students work with the content and apply it to fact situations, the more deeply they will understand the material and "the more likely they will retain their understanding and be able to apply it on exams and in real life."[269]

The need for student-centered learning is of further importance in the Legal Environment class because it is most often a survey course that covers a broad range of topics in a short amount of time. In the typical Legal Environment class, students are overwhelmed with new vocabulary and concepts at the same time that they are:

> [E]ncountering new methods of inquiry (e.g., analogic reasoning, principles-based augmentation and counterargumentation) coupled with new types of course materials (e.g., legal opinions and business cases). Everything is unfamiliar to the students, yet the instructor possesses an intimate knowledge of the materials and methods. This imbalance creates an inherent knowledge gap that if left unaddressed leads to student learning

[269] Hess, *supra* note 259, at 402.

> "bottlenecks" and unmet pedagogical goals.[270]

Not only the student, but also the professor, as the subject matter expert, often feels overwhelmed by the amount of law that is relevant to the business professional and thus needs to be covered in a survey class. As a result, "teaching a business law or legal environment of business course can feel like trying to cram a survey of the entirety of law school into one course."[271] In a setting like this, where there is a large knowledge gap between professor and student and a substantial amount of material to cover, any exercise or active learning experience that can assist the student in better understanding and remembering the material is of great benefit. The "Shark Tank" role-play exercise accomplishes these goals by teaching business entities concepts in an engaging, interactive and entertaining manner. In addition, "[s]tudents absorb legal concepts better when faculty provide a context or foundation for the review of complex legal material."[272] Another benefit of the "Shark Tank" exercise is that it provides a framework for discussion—the "Shark Tank" television show—that students are already familiar with or can quickly grasp during the role-play exercise.

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[270] Todd Haugh, *Modeling the Message: Closing the Knowledge Gap in Business Law and Ethics Classes*, 36 J. LEGAL STUD. EDUC. 159, 161 (Summer 2019).
[271] Blount, *supra* note 258, at 105–106; *see also*, Hess, *supra* note 259, at 404.
[272] Ponte, supra note 262, at 173.

Most of today's undergraduate students are Generation Z. Members of Generation Z are often referred to as "Digital Natives" because they grew up in a constantly connected world of internet, mobile phones, social media, and streamed entertainment.[273] They have always been able to access information instantaneously online and are quite comfortable multi-tasking among many different screens and applications on their electronic devices. Studies show that this over-usage of cellphones, in particular, is negatively impacting students' attention spans and ability to pay attention to others.[274] As it did with Millennials, this shortened ability to focus makes it even more difficult for the professor to hold Generation Z's attention with traditional lectures.[275] In fact, studies show that modern students lose interest after about 10 minutes, and some research shows the attention span has dropped to a mere 5 minutes.[276] Other research shows that over 70% of Generation Z students text an average of twelve times per class, and those with laptops can spend as much as two-thirds of the class time on non-class related activities.[277] Student-centered learning is thus

[273] DiMock, *supra* note 260; Mohr & Mohr, *supra* note 260, at 86.
[274] Blount, *supra* note 258, at 108.
[275] Allen & Jackson, *supra* note 261, at 5–6.
[276] *Id*. at 26. *See generally*, COREY SEEMILLER & MEGHAN GRACE, GENERATION Z LEARNS: A GUIDE FOR ENGAGING GENERATION Z STUDENTS IN MEANINGFUL LEARNING 13 (2019).
[277] David Doucette, *Meeting the Educational Demands of Generation Z*, EDTECH FOCUS ON HIGHER EDUCATION (Oct. 25, 2018),

extremely important when trying to educate and engage Generation Z.

Fortunately, Generation Z embraces student-centered learning environments and interactive classroom experiences: "[T]oday's students refuse to be passive learners. They aren't interested in simply showing up for class, sitting through lecture, and taking notes . . . . Instead, they expect to be fully engaged and to be a part of the learning process themselves."[278] A study by Corey Seemiller and Meghan Grace of more than 750 Generation Z students from fifteen different universities corroborates this preference for active learning.[279] Generation Z students prefer "fun and engaging" interactive activities and "hands-on experiences that allow them to situate themselves in the middle of the learning rather than on the periphery as an observer."[280] In fact, Generation Z students, who are

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https://edtechmagazine.com/higher/article/2018/10/meeting-educational-demands-generation-z (last visited on February 26, 2021).

[278] Sieva Kozinsky, *How Generation Z is Shaping the Change in Education*, FORBES, 2 (Jul 24, 2017), https://www.forbes.com/sites/sievakozinsky/2017/07/24/how-generation-z-is-shaping-the-change-in-education/#4fda50ce6520 (last visited on February 26, 2021); *see also* Mohr & Mohr, *supra* note 260**Error! Bookmark not defined.**, at 87.

[279] Seemiller & Grace, *Generation Z: Educating and Engaging the Next Generation of Students*, *supra* note 260 at 1, 3; *See generally*, SEEMILLER & GRACE, GENERATION Z GOES TO COLLEGE, *supra* note 260, wherein the authors compile results from larger studies of greater than 150,000 students.

[280] SEEMILLER & GRACE, GENERATION Z LEARNS, *supra* note 276, at 6768.

perfectly comfortable viewing the course's content online, showed a preference for flipped courses, where time spent in class is devoted to experiential activities and student-centered learning.[281]

Not only is the "Shark Tank" exercise interactive and engaging, but it also promotes collaboration in small groups, a skill which many Generation Z students need to develop. Unlike the highly collaborative Millennials before them, Generation Z students tend to prefer working alone instead of working with others: "One of the most preferred learning methods for Generation Z students is intrapersonal learning, which involves 'engaging in independent projects' and incorporates self-direction, self-pacing, self-reflection, and self-reliance."[282] With their preference for independent projects, Generation Z students are not motivated by competition with peers.[283] Instead, they are "fearful of being judged by their peers or instructors for

[281] Mohr & Mohr, *supra* note 260, at 88; SEEMILLER & GRACE, GENERATION Z LEARNS, *supra* note 276, at 61–62.
[282] SEEMILLER & GRACE, GENERATION Z LEARNS, *supra* note 276, at 57, 59, 93-94. *See also* Mohr & Mohr, *supra* note 260 at 87. Note, however, in a separate study, more than 60% of the Generation Z respondents stated they actually preferred situations where they could work collaboratively with peers. Workforce Partnership Staff, *How Do Gen Z Employees Learn? A Guide for Employers of Young Professionals*, 6 (Apr. 26, 2019), https://www.snhu.edu/about-us/newsroom/2019/04/gen-z-learning (last visited on February 26, 2021).
[283]SEEMILLER & GRACE, GENERATION Z GOES TO COLLEGE**,** *supra* note 260, at 16; Mohr & Mohr, *supra* note *260*, at 87.

saying the wrong answer."[284] Students with this preference may resist interactive exercises in group settings, particularly if competition among groups is a factor. However, sinceso many tasks and projects in the business world are accomplished by employees working together in teams, the ability to work effectively with peers is a critical skill for students to develop. University professors need to encourage more student-learning experiences and group work to guide today's students in the development of this skill. To address this preference, researchers have suggested that Generation Z students be given "shared projects to which individual students contribute portions" and that "expectations for collaboration be guided or altered for those who prefer or need direction to work alone."[285] The "Shark Tank" exercise accomplishes these goals. Students who are more comfortable working in groups can volunteer to be the entrepreneurs who must work together to pitch their product, determine share of profits, and agree on management structures as part of the exercise. Students who prefer to work alone will not be required to volunteer, but will be among the Sharks who will ask questions about the products, and so will be able to have as much input as they prefer on an individual basis. The project is ultimately a shared one where the entrepreneurs for each business entity contribute their pitches, product information,

[284] SEEMILLER & GRACE, GENERATION Z LEARNS, *supra* note 276, at 58, 63.
[285] Mohr & Mohr, note 260, at 88, 90.

and team decisions to the overall exercise and learning experience. Depending on the class, the exercise can be made more competitive by asking the Sharks to pick the product they would invest in, or less competitive by skipping this step altogether. Thus, the use of a role-play exercise based on "Shark Tank" provides the active learning and relatable context this student demographic needs to learn best, and also allows flexibility in terms of group versus individual participation.

Finally, the AACSB recommends, in the comments to its "Learning and Teaching" Standards 8-12, that:

> Curricula facilitate and encourage active student engagement in learning. In addition to time on task related to readings, course participation, knowledge development, projects, and assignments, students engage in experiential and active learning designed to be inclusive for diverse students, and to improve skills and the application of knowledge in practice.
>
> [. . . .]
>
> Curricula facilitate and encourage frequent, productive student-student and student-faculty interaction designed to achieve learning goals . . . with high levels of interaction between and among learners, as well

> as between and among teachers and learners.[286]

Furthermore, AACSB Standard 13 requires that "[c]urricula facilitate student academic and professional engagement appropriate to the degree program type and learning goals"[287] and provides the following definition for student academic and professional engagement:

> Student academic and professional engagement occurs when students are actively involved in their educational experiences, in both academic and professional settings, and when they are able to connect these experiences in meaningful ways.[288]

The "Shark Tank" exercise meets these recommendations by offering students an opportunity to apply knowledge about business entity legal concepts in a highly engaging and interactive manner, where the interaction is between and among the students, as well as between and among the instructor and the students.

On July 28, 2020, the AACSB approved updated guidelines for accreditation -- the AACSB's 2020 Guiding Principles and Standards for Business Accreditation ("2020 Guiding Principles"). However, the importance of experiential learning is maintained in the new version. The 2020 Guiding Principles require in Standard 4.3 that the "school's curriculum promotes and fosters innovation,

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[286] AACSB 2013 Eligibility Procedures, *supra* note 257.
[287] *Id*.
[288] *Id*.

experiential learning, and a lifelong learning mindset," and the commentary to Standard 4.3 includes recommendations that that "[t]he school has an innovative approach to curriculum, whether related to content, pedagogy, or delivery method, that demonstrates currency, creativity, and forward-thinking."[289] The "Shark Tank" exercise fulfills these requirements by offering an innovative and creative delivery method for teaching business entity concepts in an experiential learning environment.

Thus, using the "Shark Tank" exercise to teach about business entities promotes student-centered learning and higher levels of taxonomy. The interactive nature of the exercise is useful for engaging all students, particularly Generation Z. The exercise further meets the requirements of the AACSB that business law curricula include active learning experiences. Ultimately, "[c]ombining the study of a timely business law topic . . . with a method that encourages active student-centered learning is undoubtably a 'win-win' approach."[290]

II. THE EXERCISE: BRINGING "SHARK TANK" INTO THE CLASSROOM

The goals of the exercise are to (1) promote critical thinking in a group setting, (2) generate

[289] AACSB 2020 Guiding Principles, Standard 4.3, *supra* note 257, at 36.

[290] Judy Gedge, *Should Deficiency Judgments be Banned? Teaching Materials Designed to Promote an Informed Student Debate*, 19 J.L. BUS. & ETH. 65, 68 (Winter 2013).

discussion and class participation, and (3) provide a context for difficult subject matter. The exercise has the added benefit of breaking up lengthy classes, particularly those in excess of two hours. The product pitches component of the exercise is designed to be completed in class pursuant to a ten-to-fifteen-minute time frame. After the pitches, the Sharks ask questions of the entrepreneurs, which usually takes another ten to fifteen minutes. Class lecture of the business entity topics usually takes the remaining 45 minutes of a traditional 1 hour 15-minute class. Class lectures will be delivered with reference to, and in the context of, the "Shark Tank" exercise, with volunteer entrepreneurs providing a great deal of the learning experience in real time. The exercise is not graded since the focus is on learning the concepts together in an interactive environment and the goal is to encourage participation and engagement. However, extra credit points can be awarded to students who volunteer to be entrepreneurs.

The administration of the exercise begins with a short preparation period where the exercise is introduced, and volunteers are selected. Generally, the professor asks who has seen an episode of "Shark Tank?" Students familiar with the show will describe its format for those who have never seen it. Short video clips from prior episodes also can be used, if

desired, but are generally not necessary to explain the basic concept, which is that entrepreneurs come on the show to pitch their start-up ideas and ask the investors (the Sharks) to invest money in their companies, usually in exchange for an equity position or royalty arrangement. Entrepreneurs forming start-ups often do not have sufficient capital to fund the business and so routinely need and seek investors, particularly angel investors and venture capitalists, like the Sharks.[291]

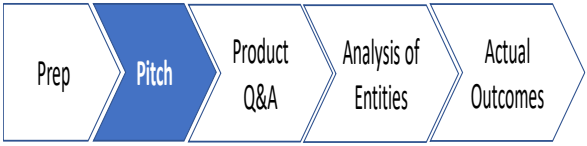
The professor then solicits approximately ten volunteers from the class to be the entrepreneurs. The volunteers are grouped into five entities, as follows:

Entities	Groups of Volunteers
Sole Proprietorship	1 Sole Proprietor
General Partnership	2 General Partners
Limited Partnership	1-3 to be general and limited partners
Limited Liability Company	2-3 Members
C Corporation	2-3 Shareholders

Each group stands, or sits if chairs are available, at the front of the room. The rest of the class is then informed that they will be the student Sharks. A benefit of this structure is that it engages the whole

[291] Caolan Ronan, *Start-Ups: Why Investors Prefer the Corporate Form to the LLC for Tax Purposes*, 9 ELON L. REV. 311, 312 (2017). Venture capital is "money provided by professional investors for investment in new or developing businesses." CONSTANCE BAGLEY & CRAIG E. DAUCHY, THE ENTREPRENEUR'S GUIDE TO BUSINESS LAW 148–149 (4th ed. 2012). For a general description of the entrepreneurial process, see Mirit Eyal-Cohen, *Through the Lens of Innovation*, 43 FLA. ST. U.L. REV. 951 (2016).

class, not just the volunteers, since all remaining members of the class are the student Sharks and can ask questions and vote. Also, the set-up of the "Shark Tank" exercise permits its use in not only smaller classes, but also in large classes of over 100 students, since there is no limit on how many student Sharks there can be. In large classes, it is often difficult to administer many active learning techniques.[292] Here, the entire class, regardless of size, has a role in the exercise.



Next, each of the five groups is given a product to pitch. Actual "Shark Tank" products can be used to add to the authenticity of the exercise. For example, in this article, Scrub Daddy sponges, Simply Fit exercise boards, Lollacup sippy cups, Fiber Fix repair tape, and Tipsy Elves sweaters are discussed.

While PowerPoint slides or handouts of the products could be used instead of the actual article, having the item in hand is helpful because the entrepreneur students can examine the products and the marketing material on the packages to help them prepare their pitches. The "Shark Tank" products mentioned above are available online and can be easily ordered. Alternatively, the professor can purchase similar products at any large retailer or

[292] Hess, *supra* note 259, at 405.

drugstore. Many drugstores have a section of the store reserved for "as seen on TV" type products that would be suitable for this exercise. Once purchased, the products are re-usable each semester.

After a few minutes to review their products, each group pitches their respective product to the class. The pitches are usually very creative, engaging, and entertaining. Some students show a great flair for marketing; others love to demonstrate the product in use. Since each group wants to be the one chosen by the student Sharks for investment, an element of competition is introduced, but it is low-key and non-threatening to the Generation Z students. Students usually embrace their inner salesperson, and a great deal of good-natured laughter ensues.

Immediately after the pitches, each group is given a set of facts relating to product information, such as cost to manufacture, past sales, the amount of investment money being sought, and the percentage ownership offered in exchange for the investment. The information is provided in the following format:

Product Information Provided
Seeking $__ for __% ownership
Cost to manufacture
Marketing Channel
Wholesale Price
Retail Price
Sales-to-Date
Patent

If this information is given to the entrepreneurs before the pitches, too much of the information is shared with the student Sharks in the pitches before they can ask for it, thus limiting the role of the student Sharks. Thus, it is best to hand out the product information immediately after the pitches. A complete set of product information relating to the "Shark Tank" products discussed in this article is attached as Appendix A. All numbers, including amount of investment sought and ownership percentage offered, are actual numbers as of the date the item was pitched on a "Shark Tank" episode. As shown in Appendix A, some companies are selling online, via trade shows, or also via well-known big box stores like Home Depot. Some companies have been in existence for several years and some for just several months. Percentages of ownership from 10% to 40% are being offered. Sales-to-date range from $30,000 to $1.3 million. Some entrepreneurs have already obtained patents on their products, and some

have not. As a result, a variety of start-up scenarios are available to be shared with the students.[293]

Once the product information is given to the entrepreneurs, the student Sharks are then encouraged to ask questions from each group and then choose a company in which to invest. Generally, there are plenty of student Sharks ready to ask questions of the different entrepreneur groups. Sometimes, the student Sharks will need some guidance to figure out what to ask. However, after some prompting, they typically will ask the following types of questions shown in the table below.

[293] If professors want to use products other than the ones discussed here, they can research similar information on the products used. While hypothetical numbers also could be used, the students do indicate that they appreciate the use of actual figures. Again, if the professor does not want to purchase actual products, PowerPoint slides or printed handouts of the products can be used instead.

Student Sharks Want to Know

- What is your cost to manufacture?
- What is the selling price?
- How many have you sold?
- How much profit have you made?
- Do you have a patent?
- What marketing channels are you using?
- Where are you advertising?
- Do you have a business plan?
- How long have you been in business?

This exercise has been used for over ten semesters and the questions routinely include those listed above. The Product Information sheet provided to each student group identifies the answer to most of these questions. For any question where the answer is not provided on the Product Information sheet, the student groups are instructed to extrapolate or invent a response. The exercise is not a case study, and while as much accuracy as possible is built in, all relevant facts are not available or necessary for the goal of the exercise. Some creativity may be required and is encouraged.

After the period of time for questions is completed, the professor then asks for a vote, by show of hands, to determine which product(s) the student Sharks would choose for investment. The professor can further engage students in the topic by asking them why they chose a particular product and how their decision was influenced by the percentage of ownership offered, how long the company has been in business, the marketing channels, the profit levels, and whether there is a patent in place. The exercise up to this point usually takes from ten to

fifteen minutes. The professor now turns to the introduction of the relevant content concerning business entities, which content is discussed within the framework of the "Shark Tank" exercise. It is important that the professor not dismiss the volunteers, as they will continue their role play during the presentation of the legal concepts.

The professor now points out the important questions the students did not ask (and have never asked in the over ten semesters this exercise has been used). These questions are described in the table below.

Key Questions for Entity Analysis
• What form of business entity is your company? • What liability protection will be afforded to the investors? • How will this investment impact the investors' income taxes? • Will this investment allow the company to go public as an exit strategy?

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These questions, which will be very critical for an investor, all relate to the choice of business entity. Even if the real Sharks on television do not ask these questions during the filmed portion of the TV show, they certainly do afterwards as part of due diligence.

Venture capitalists like the Sharks will want to know about the form of business entity because of its impact on liability, taxation, and exit strategy. How the entrepreneur's business is organized as a legal entity will play a crucial role in attracting investors.[294]

The professor then explains to the students that these questions will be the ones to focus on during the remainder of the exercise. As detailed in Part IV below, each entity is discussed with each group of student volunteers in turn (usually in order as follows: sole proprietor, general partnership, limited partnership, limited liability company, and finally C-corporation). The professor asks if the actual Sharks would invest in each entity and then reviews the legal concepts relating to liability, taxation, sharing of profits and losses, and potential exit strategies with the student volunteers, having them make real-time decisions relating to the issues. Since the concepts are taught within the context of the "Shark Tank" exercise, the students are able to learn the concepts within that framework and not in a vacuum, making it easier for them to understand and remember these complex concepts. Because the student volunteers are applying the concepts in front of the entire class, all students witness the analysis and have a visual reminder to help them remember the material.

The presentation builds to the conclusion that Sharks, as venture capitalists, prefer C-

[294] Ronan, *supra* note 291, at 312.

corporations.[295] Although they may choose to invest in a particular product, if the business selling that product is currently housed in another entity, the Sharks will usually require it be converted to a C-corporation prior to the investment being made. For entrepreneurs who desire the benefits of venture capital funding, starting as a C-corporation from the beginning is usually the best choice.[296] By the end of the exercise, the students will fully comprehend why venture capitalists have this preference. The final step in the exercise, the discussion of the actual outcomes of the various Shark Tank products used in the role play, is discussed in Section IV(F).

III. COVERING THE CONTENT: TEACHING NOTES AND SEQUENCE OF DISCUSSION

This section, a continuation of the Analysis of Entities, presents the general sequence of discussion on the legal principles of business entities within the framework of the "Shark Tank" exercise. The sequence builds upon itself and provides reinforcement of business entity formation basic concepts. This section also includes relevant teaching material, although coverage of all legal topics relevant to business entities is beyond the scope of this article.

[295] *See generally* Steven Carman, *Venture-Cap Funds Eschew Investments in LLC's*, 21 NAT'L. L. J. B13 (1998).
[296] See BAGLEY & DAUCHY, supra note 291, at 148–149.

A. *WOULD THE SHARKS INVEST IN A SOLE PROPRIETORSHIP?*

The professor begins introducing the legal content by asking if the Sharks would invest in the sole proprietorship. Note that the focus of the discussion going forward is not whether the student Sharks would invest in a particular product just pitched to them, but whether the actual Sharks would invest in the entity in which the business for that product is housed. The students will generally respond that a sole proprietorship is a business owned and run by one person, and the Sharks cannot invest in a sole proprietorship because it cannot have more than one owner. Using the product pitched by the student sole proprietor, the professor can ask who would be liable if the product is negligently designed and harms a customer. For example, if the student sole proprietor pitched the Lollacup, the professor can ask who would be liable if the cup is poorly designed so that a component is a choking hazard, a toddler chokes to death as a result, and the family is suing for one million dollars. The professor and students can then discuss that the sole proprietor has not established a separate legal entity and so there is no distinction between the business and the owner. Thus, the sole proprietor has unlimited personal liability for the debts and liabilities of the business, placing his/her personal assets at risk. On the other hand, the sole proprietorship is the simplest and most common way of organizing a business. The sole proprietor, as the alter ego of the business, has great flexibility, makes all decisions, and keeps all the

profits of his/her venture.[297] To illustrate this, the professor can ask the student sole proprietor who made the decisions regarding the price of his/her product, the packaging design, and the marketing channels. In each instance, the sole proprietor will respond that he/she decided without external input from partners or others. The professor can also refer to the exact amount of profit earned by the product, as listed on the sole proprietor's Product Information sheet ($30,000 in sales for the Lollacup) and ask who will keep this profit. The answer, of course, is that the sole proprietor will retain 100% of the product's profit. This discussion between the sole proprietor student and the student Sharks gives the class a visible reminder. They will remember that in the sole proprietorship, a single student made all the decisions and kept all the profit but had unlimited personal liability. The professor can highlight that the sole proprietor is not taking advantage of "[o]ne of the law's most economically significant contributions to business life" which is the ability to establish a fictional but separate legal entity.[298] The following chart summarizes the questions for

[297] CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT-STRATEGIES FOR THE 21ST CENTURY 576-677 (8th ed. 2016) [hereinafter MANAGERS]; BAGLEY & DAUCHY, *supra* note 291, at 55, 71; *see also* Mitchell Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA. J. CONST. L. 215 (Oct. 17, 2019); Emily Satterthwaite, *Entrepreneurs' Legal Status Choices and the C Corporation Survival Penalty*, 16 J. EMPIRICAL STUD. 542, 550 (2019).

[298] Crusto, *supra* note 297, at 217.

students, key concepts to cover, and the Shark's response to a sole proprietorship:

Sole Proprietorship - Would the Sharks invest?			
#	**Questions to Ask the Class**	**Key Concepts**	**Shark's Response**
1	How many owners can there be in a sole proprietorship?	Can have only one owner	Since there can be only one owner, the Sharks cannot invest in a sole proprietorship.
2	What is the owner's liability for the debts and obligations of the business?	Unlimited personal liability	*See Response to #1.*
3	Who makes all the decisions regarding the price of the product, packaging design, marketing channels, etc.?	Sole proprietor controls all the decisions	*See Response to #1.*
4	Who keeps the profit earned on the product?	Sole proprietors keep all profits	*See Response to #1.*

B. *WOULD THE SHARKS INVEST IN A GENERAL PARTNERSHIP?*

The class next will discuss whether the Sharks would invest in a general partnership. A general partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit" and is a legal entity separate from its owners.[299] As such, a general partnership can own real estate, acquire assets and liabilities, conduct business transactions, and sue and be sued all in its own name.[300] Since there are two student partners,

[299] *Id*. at 236; Rev. Unif. P'ship Act ("RUPA") Section 101(6) (1997).

[300] Unif. P'ship Act ("UPA") Sections 8(3), 9(1), 25, 40(h)(1914) (establishing a partnership as a legal entity), Rev. Unif. P'ship Act Sections 101(10), 201(a), 307(a)(1997). Section 201(a) of RUPA states that a "partnership is an entity

the other student Sharks may think that more investors can be added as additional partners, and so this is a form of entity in which the actual Sharks would invest. This presents an opportunity for the professor to discuss liability of general partners in contract and in tort with the students. Partners are jointly and severally liable for the debts of the partnership, and for any torts committed by a partner in the scope of partnership business. This liability extends to their personal assets.[301] The professor can throw out a simple hypothetical here by, for example, saying "What if [one student partner (using the student's actual name)] is driving a potential client back to the hotel after a business dinner and causes a car wreck that injures the potential client. Meanwhile, the [other student partner (using the student's name)] was home studying for an exam. Who can the potential client sue?" The professor can then lead the students through the example, showing that the partnership would be liable, and both partners would be jointly and severally liable. The students are usually very surprised to learn the extent of their potential liability for the actions of their partners if done in the context of partnership business. The student who was studying for an exam when the tort occurred is always particularly disappointed to learn of the joint and several liability.

Here, the professor can also ask the volunteer general partners to decide how they are dividing the

distinct from its partners." *See also* Crusto, *supra* note 297, at 253–54.

[301] Unif. P'ship Act Sections 15, 9(1) (1914); *see also*, Satterthwaite, *supra* note 297, at 550.

profit they are earning (as listed on their Product Information sheet). For example, if the general partnership is marketing Fiber Fix, the Product Information sheet shows it had sales of $400,000 so far (this is gross profit, not net, but serves the purpose of giving the students a solid number to work with). The general partners will usually say they are splitting evenly. The class can discuss further the concepts relating to division of profits and losses. The professor will highlight that the partnership structure allows a great deal of flexibility in determining profit-sharing.[302] The professor can alter the scenario and have one partner contributing the technology behind the product or contributing more start-up capital than the other, and then ask if the two partners are still willing to divide the profit 50-50. Usually they are not, and a short discussion can be entertained where each student partner discusses their position in front of the class.

In addition, the professor can ask the volunteer student partners how the taxes on the profit will be paid, thus introducing the concept of flow-through taxes. As with sole proprietorships, partnerships do not pay income taxes; instead, "all of the partnership's taxable income (or loss) flows through the entity and is reported on the partners' individual tax returns, in the same manner as if each partner had realized its share of the partnership income (or loss) directly."[303] Instead of discussing

[302] MANAGERS, *supra* note 297, at 577, 585.
[303] Gregg Polsky, Explaining Choice-of-Entity Decisions by Silicon Valley Start-Ups, 70 Hastings L.J. 409, 413 (Feb. 2019).

the concept in a vacuum, the professor has a hard number to work with— for example, $400,000 if using Fiber Fix. The students will see that, although considered a separate legal entity, the partnership does not pay income tax as a separate entity.[304] Instead, the $400,000 profit earned by Fiber Fix will pass through to the student partners, each of whom will report $200,000 on their individual income tax returns if sharing profits equally. The students are usually quite surprised to learn the income will pass through for tax purposes, whether distributed or not.[305]

The benefit to the students here is that the discussion is not abstract but is using actual numbers from the "Shark Tank" products. The visual cue students will remember is the two student partners trying to make joint decisions about partnership issues and discovering that they have personal liability for each other's actions. The professor will conclude that a partnership generally is not attractive to venture capitalists like the Sharks because of the liability issues it presents.[306] The following chart

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[304] MANAGERS, *supra* note 297, at 577, 585*; see also*, BAGLEY & DAUCHY, *supra* note 291, at 297,60–63

[305] If the profit is retained in the business, each partner must still report his or her share of the profits on his or her individual income tax return. This is the problem of "phantom income." Ronan, *supra* note 291, at 318.

[306] There is another tax-related reason venture capitalists do not prefer general partnerships. Venture capitalist funds usually have tax-exempt investors whose tax liability would be disadvantaged if the fund where to invest in a partnership or other pass-through entity. BAGLEY & DAUCHY, *supra* note 291, at 64. However, for purposes of progressing the students

summarizes the questions for students, key concepts to cover, and the Shark's response to a general partnership:

General Partnership - Would the Sharks invest?

#	Questions to Ask the Class	Key Concepts for Students	Shark's Response
1	What is the partners' liability for the debts and obligations of the business?	Unlimited personal liability	Since the Sharks will have unlimited liability, they would not invest.
2	What if one partner signs the contract or commits the tort?	General Partners have joint and several liability for debts of the partnership and torts committed in scope of partnership business	Since the Sharks will be jointly and severally liable for the actions of the other partners, they would not invest.
3	How will the profits be split?	Flexible; Partners can decide	*See Responses # 1, 2, and 4.*
4	How is the business taxed?	Flow through tax	Since the Sharks avoid flow through taxation, they would not invest (this concept to be covered in C-Corporation discussion).

C. *WOULD THE SHARKS INVEST IN A LIMITED PARTNERSHIP?*

The professor now turns to the limited partnership. A limited partnership is defined as an entity "having one or more general partners and one or more limited partners."[307] When discussing the

through the "Shark Tank" exercise, this concept will not be introduced to the students until the discussion on corporations.

[307] Unif. Ltd P'ship Act Section 102(11)(2001). A limited partnership is a legal entity separate and distinct from its partners, Revised Unif. Ltd. P'Ship Act Sections 102(a), 110 (2001)(last amended 2013). A limited partnership must have at least one general and one limited partner where the general partners "remain jointly and severally liable for partnership obligations (just like partners in a general partnership), and they are responsible for the management of the partnership. In

limited partnership, the professor usually asks the two or three student volunteers for that entity to decide, on the spot, which of them will be limited and which will be general partners. This gives the professor the opportunity to discuss how at least one of each type of partner is required, and that general partners have unlimited personal liability and limited partners have limited liability, limited to the amount of their capital investment in the business.[308] Once the volunteers understand this, their discussion of who will take each role becomes quite energized, as no one wants the unlimited liability of the general partner.

The professor then asks the students to split the profits, pointing to the specific profit numbers provided in the Product Information sheet for their product and asking how that exact dollar amount will be split. For example, if the students in the limited partnership were given Scrub Daddy as their product, the sales at that time were $120,000, and they would need to divide this amount among themselves. Their discussion of how to split the profits becomes animated, as the general partner usually will want a greater share of the profits because he or she has the liability exposure. Again, this visual cue of watching

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contrast, limited partners assume no liability for partnership debts beyond the amount of capital they have contributed, and they have no right to participate in the management of the partnership." MANAGERS, *supra* note 297, at 578, 585; *see also* Revised Unif. Ltd. P'Ship Act Sections 201(d), 303, 404 (2001) (last amended 2013).

[308] Revised Unif. Ltd. P'Ship Act Sections 201(d), 303, 404 (2001) (last amended 2013).

three fellow students struggle in real-time with these issues helps solidify the concepts for the entire class.

The professor will again ask if the Sharks would invest in the limited partnership. The students often suggest the Sharks would invest as limited partners, with the entrepreneurs being the general partners. Indeed, the ability to attract investors by offering limited liability is an important advantage of the limited partnership.[309] However, this gives the professor the opportunity to discuss how a limited partner jeopardizes his limited liability protection by actively engaging in the operations of the limited partnership. Limited partners who participate in management of the partnership may be treated as general partners for liability purposes.[310]

The entrepreneurs want more than just the Sharks' money: they also want the Sharks' contacts, experience, marketing channels and advice, much of which the Sharks could not offer without impacting their own limited liability protection. Venture capitalists often work closely with the companies they invest in, assisting with business strategies and marketing channels, providing key introductions, and recruiting management. Most venture capitalists will invest only if they share in the control of the entity through seats on the board of directors, veto power over material business operations or financial arrangements, or approval or selection rights for important management positions in the entity.[311]

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[309] MANAGERS, *supra* note 297, at 578, 585.
[310] Rev. Unif. Ltd. P'Ship Act Sections 109 (2001) (last amended 2013); BAGLEY & DAUCHY, *supra* note 291, at 61.
[311] BAGLEY & DAUCHY, *supra* note 291, at 149–50.

These rights and powers can be interpreted as participation in management, which could destroy any limited liability a Shark might have as a limited partner. Presenting the concept of liability in this context makes it easier for the students to understand.

At this point, the professor can reinforce the concept of flow-through taxation and its impact on the Sharks. Like general partnerships, limited partnerships are "pass through" entities, since profits and losses are taxed only one time at the owner level, and the entity itself is not separately taxed.[312] The professor can use the actual profit numbers given in the relevant Product Information sheet and ask the students what amount would flow through to each partner's individual income tax return. The answer will depend on the profit-split agreed to by the student partners. The professor will conclude that venture capitalists and the entrepreneurs themselves generally do not want to use a limited partnership entity. The Sharks usually want to play an active role in managing the operations of the business, and the entrepreneurs are usually actively seeking this involvement.[313] The following chart summarizes the

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[312] Ronan, *supra* note 291, at 314; BAGLEY & DAUCHY, *supra* note 291, at 62–63.

[313] Again, there is an additional reason venture capitalists do not prefer limited partnerships, which is that they generate flow-through income which impacts the venture capitalists' own income tax status. Ryan Himmel, *What's the Best Corporate Structure When Seeking Funding from VCs?*, ENTREPRENEUR (Oct. 29, 2009), https://www.entrepreneur.com/answer/222006 (last visited on February 26, 2021). Even if the Sharks were willing to be limited partners not managing the operations of the business,

questions for students, key concepts to cover, and the Shark's response to a limited partnership:

Limited Partnership - Would the Sharks invest?

#	Questions to Ask the Class	Key Concepts for Students	Shark's Response
1	What is the partners' liability for the debts and obligations of the business?	General Partner - Unlimited personal liability Limited Partner - Limited Liability	Sharks will not want to invest as General Partners because of unlimited liability. Sharks will not want to be Limited Partners because of Response # 2.
2	Can the Sharks participate in management?	If Limited Partners participate in management, they may jeopardize limited liability protection	Entrepreneurs and Sharks usually want Sharks to help manage the company, which can jeopardize limited liability protection
3	How will profits be split if the Limited Partners put in more capital than the general?	Flexible; the partners can decide but General Partners are taking on greater liability	*See Response # 2 and 4.*
4	How is the business taxed?	Flow through tax	Since the Sharks avoid flow through taxation, they would not invest (this concept to be covered in C-Corporation discussion)

D. *WOULD THE SHARKS INVEST IN A LIMITED LIABILITY COMPANY?*

Now the conversation moves to the limited liability company (LLC), which is "a legal entity distinct from its members."[314] The legal creation of LLCs by states was groundbreaking. For the first time, states provided statutory limited liability protection to all owners of an unincorporated entity.[315] The students will quickly understand that

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the tax implications would still deter them from investing in a limited partnership. Again, for purposes of progressing the students through the exercise, this point will be presented and discussed later, when reviewing corporations.

[314] REV. UNIF. LTD. LIAB. CO. ACT Section 104(a) (2006); UNIF. LTD. LIAB. CO. ACT Section 201 (1996).

[315] REV. UNIF. LTD. LIAB. CO. ACT Sections 106–07 (2006); Crusto, *supra* note 297, at 257. In most all states, one person

the LLC offers all members, including both the Sharks and the entrepreneurs, limited liability protection without the need for anyone to assume the role of a general partner with unlimited liability. The professor can also introduce the flexibility of the LLC. First, the LLC offers flexibility in management. LLCs can be member-managed or manager-managed.[316] Unlike with the limited partnership, the Sharks would have no limitations on their involvement in the management and operations of the business. Here again, to provide a visual and concrete re-enforcement of the concepts, the professor can ask the student members of the LLC to decide the management structure of their entity and the division of the specific profit number for their Product. If the students chose to be manager-managed, they can even be asked which management roles they each might want to assume based on their interests, abilities, and academic concentrations.

Secondly, the LLC offers flexibility in terms of taxation. The LLC founders can decide to be taxed as a flow-through entity or to be double-taxed like a C-corporation. LLCs by default are taxed as partnerships. The LLC does not pay income taxes, and the profits and losses are only taxed once at the

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may form a limited liability company. Crusto, *supra* note 297, at 261; MANAGERS, *supra* note 297, at 579, 585.

[316] REV. UNIF. LTD. LIAB. CO. ACT Sections 102(10), 102(12), 407(a)–(c) (2006). In member-managed LLC's each member has the right to participate in management and sign contracts on behalf of the LLC. In a manager-managed LLC, a group of members manages the business affairs of the LLC and has authority to sign contracts. MANAGERS, *supra* note 297, at 580, 585; Crusto, *supra* note 297, at 261–62.

member level. Indeed, the LLC's great popularity stems from the fact it "combines the tax advantages of a pass-through entity with the limited liability advantages of a corporation".[317] However, the LLC can elect to be taxed as a C-corporation, and even though the election is rarely made, the option provides flexibility to founders of a business.

At this point, the students are familiar with pass-through tax but need to be introduced to the concept of double taxation to understand the options the LLC has. The professor will explain that a C-Corporation is not a pass-through entity. The C-Corporation will pay taxes on any retained profit not distributed to shareholders as salary or bonuses, at a flat corporate rate of 21%.[318] When a C-Corporation distributes profit to its shareholders as dividends, the shareholder is taxed on the amount received, although often at preferential rates.[319] Thus, there are

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[317] *See* REV. UNIF. LTD. LIAB. CO. Prefatory Note; *see also* MANAGERS, *supra* note 297297, at 579.

[318] 26 U.S.C. § 11(a)–(b) (2020); Ronan, *supra* note 291, at 316; James R. Browne, Choice of Entity for a Startup Business After Tax Reform, Nat'l L. Rev. (Aug. 30, 2018), https://www.natlawreview.com/article/choice-entity-startup-business-after-tax-reform (last visited on February 26, 2021) ("A corporation is a separately taxable entity and pays tax on its taxable income at a flat rate of 21%, down from graduated rates of up to 35% for 2017 and prior years."); Satterthwaite, *supra* note 297, at 552. For a detailed discussion of the 2017 tax reform laws on taxation of entities in general, *see* Don Leatherman, "*The Treatment of Corporations and Partnerships Under The TCJA*," 19 TRANSACTIONS 509 (2018).

[319] BAGLEY & DAUCHY, *supra* note 291, at 69; Ronan, *supra* note 291, at 315; Polsky, *supra* note 303, at 413.

two levels of taxation: once at the corporate level and once at the shareholder level.

This can be a difficult concept to understand, and here again, the "Shark Tank" exercise can provide a concrete example. For example, assume there are three student volunteers for the LLC entity who pitched the Simply Fit Board product—which earned $575,000 in six months—and they agreed to divide profits equally. The professor can use that number (albeit a gross profit number) to compare taxation results with the students. If taxed as a partnership, the LLC will pay no tax on the $575,000, and each member will report $191,667 on his/her individual income tax return. If electing to be taxed as a C-Corporation, the LLC will pay tax on the $575,000 at the 21% corporate flat rate. Any remaining amounts distributed to the shareholders will be reported as income by them on their individual tax returns and subsequently taxed. The student volunteers can then be asked which taxation structure to elect, and they will generally choose the flow-through tax option, while at the same time being impressed with the flexibility to choose the tax strategy.

The LLC provides all the owners with limited liability, without the associated negatives of double taxation that the C-corporation requires.[320] In many

[320] REV. UNIF. LTD. LIAB. CO. ACT Sections 104(a), 304(a), 407(b)(2), (c)(2) (2006); Ronan, *supra* note 291, at 313–16; Satterthwaite, *supra* note 297, at 552–53. The professor may also discuss with the class the additional flexibilities offered by the LLC over the S-Corporation. The S-Corporation is limited to 100 shareholders and one class of securities. Its investors can only be individuals and certain other

ways, the LLC is becoming "the leading business entity of choice."[321] Limited liability, flexible management, flexible taxation: what more could a Shark want? Students will usually be very sure at this point that the Sharks would certainly invest in an LLC and may even prefer that form.

The professor can then introduce the concept of the exit strategy. Venture capitalists invest in businesses to make a profit and usually seek an exit vehicle to realize that profit within five years of the date of investment, since many venture capital funds have only a ten year life span. Typical exit strategies preferred by venture capitalists include a sale of the

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organizations, and it cannot have foreign investors. Polsky, *supra* note 303, at 412. The LLC has no such limitations. MANAGERS, *supra* note 297, at 580; BAGLEY & DAUCHY, *supra* note 291, at 66. Venture capitalists would not invest in an S-Corporation because shareholders must be natural persons and venture capital firms do not qualify since they are usually limited liability companies or limited partnerships. In addition, since the S-Corporation can only have 100 shareholders, this limits potential for growth and removes the public offering option as an exit strategy for the venture capitalist. Finally, S-Corporations can only offer once class of stock, usually common, and venture capitalists often prefer to receive preferred stock for their investment. Harvard Business Services, Inc., *Why Venture Capitalists Prefer Delaware C-Corps*, HBS BLOG (Jan. 7, 2019), https://www.delawareinc.com/blog/why-venture-capitalist-prefer-delaware-c-corps/ (last visited on February 26, 2021).

[321] Joshua Fershee, *LLCs and Corporations: A Fork in the Road in Delaware?*, 1 HARV. BUS. REV. ONLINE 82 (2011), at http://ssrn.com/abstract=1858945 (last visited on February 26, 2021); s*ee also*, Satterthwaite, *supra* note 297, at 554.

company or an initial public offering.[322] While the Sharks can choose to sell any form of business, only the C-corporation can be taken public. Membership interests in LLCs generally cannot be publicly traded on stock exchanges.[323] The initial public offering is of such vital importance to venture capitalists seeking a return on their investment that the LLC is of little value to them. The LLC is an excellent choice for a small business when the entrepreneur is not concerned with going public or raising significant amounts of outside capital. However, most venture capitalists want at least the future potential option of a public offering, and so most venture capitalists prefer the C-corporation.[324] The following chart summarizes the questions for students, key concepts to cover, and the Shark's response to a limited liability company:

[322] REV. UNIF. LTD. LIAB. CO. ACT Sections 502(a)–(b), (g)–(h), 601(a), 602(4)(B) (2006); BAGLEY & DAUCHY, *supra* note 291, at 151; Polsky, *supra* note 303, at 411, 417.

[323] MANAGERS, *supra* note 297, at 579, 585. In addition, state statutes typically provide that LLC membership interests are not freely transferable. Ronan, *supra* note 291, at 314, 319, 326-327.

[324] Ronan, *supra* note 291, at 323–324. The LLC can be converted to a C-Corporation and then taken public, but this involves numerous complications and delays. *Id.* at 324, 328.

Limited Liability Company - Would the Sharks invest?			
#	Questions to Ask the Class	Key Concepts for Students	Shark's Response
1	What is the member's liabilty for the debts and obligations of the business?	Limited Liability	While Sharks will enjoy limited liabilty, they would not invest in an LLC because of Response # 4.
2	Can the Sharks participate in management?	Yes, flexible management structure	While Sharks appreciate flexible management, they would not invest in an LLC because of Response # 4.
3	How is the business taxed?	Generally flow through tax, but can elect to be taxed as a C-corporation	While the LLC can be taxed as a C-corporation, Sharks would not invest because of Response # 4.
4	Can the LLC be taken public as an exit strategy?	No	Sharks prefer to preserve the public offering as an exit strategy, so they generally would not invest.

E. *WOULD THE SHARKS INVEST IN A C-CORPORATION?*

At this point, the professor introduces the C-corporation, and its distinctive characteristics. A C-corporation is a separate legal entity owned by its shareholders and managed by a board of directors and officers.[325] The C-corporation offers limited liability to all shareholders who can be actively engaged in the operations of the business if they are serving as officers or directors.[326] Thus, the C-Corporation vehicle is attractive to the Sharks because, as with an LLC, the Sharks can be actively involved in management and all investors have limited liability protection. The professor can

[325] MODEL BUS. CORP. ACT § 6.21(a), 7 et. al., 8.01(a), 8.40(a)—(b) (2017); BAGLEY & DAUCHY, *supra* note 291, at 55; MANAGERS, *supra* note 297, at 578.
[326] MODEL BUS. CORP. ACT § 6.22 (2017); BAGLEY & DAUCHY , *supra* note 291, at 71; Crusto, *supra* note 297, at 253.

highlight the point that here, unlike in other entities, the student shareholders will not be able to agree upon profit distribution among themselves. Instead, the corporation can retain profits at the corporate level or, at the discretion of the board, issue a dividend. The amount of dividend received by any one shareholder is determined by the number of shares that individual shareholder owns.[327] This reinforces for the students some of the distinct differences between corporations and other entities.

The class then can discuss how venture capitalists, like the Sharks, prefer C-corporations to other entities and are often unwilling to invest in other types of business.[328] Most students will struggle here and will not see how it can be advantageous to voluntarily choose this structure. Why would the Sharks prefer C-Corporations when the entity will be subject to double tax? The professor can discuss how a growing business more often will generate losses, not profits, in its first few years of operation. In a pass-through entity, these losses flow to the investor, but in a C-corporation, these losses can be offset against future income at the corporate level.[329] Even if profits are produced, the business may choose to re-invest the profits in the business

[327] MODEL BUS. CORP. ACT § 6.23(a)—(b) (2017).
[328] Polsky, *supra* note 303, at 409.
[329] *Id*. at 421. For a more detailed discussion of the value of losses to a corporation, *see* Ronan, *supra* note 291, at 318–23. For a discussion of the comparative value of losses to a corporation and a partnership, and the venture capital perspective on losses, *see* Victor Fleischer, *The Rational Exuberance of Structuring Venture Capital Start-up*s, 57 TAX L. REV. 137, 143–59 (2003).

rather than paying dividends.[330] There is no double-tax problem unless and until a dividend is actually paid. In fact, venture capitalists often prefer to grow the company through reinvestment of any profits instead of paying out dividends, since growing the value of the company augments their exit strategy.[331]

In addition, most venture capital firms are themselves organized as limited partnerships or LLCs and have their own investors who are either partners in the limited partnership or members in the LLC ("VC Investors").[332] The venture capital firms invest in start-ups using money contributed by the VC Investors. If the venture capital firm, often a pass-through entity itself, invests in a start-up that is also a pass-through entity for tax purposes, then any profits earned by the start-up flow from the start-up through the venture capital firm and on to the tax returns of the VC Investors, creating tax and accounting complications for these investors. Furthermore, the largest group of VC Investors are tax-exempt entities, such as pension funds, profit-sharing trusts, charitable organizations, and university endowments. Tax-exempt VC Investors prefer to receive investment income in taxable form (interest, dividends, and capital gains), and not in pass-through form as their pro rata share of ordinary income from a business in which the venture capital

[330] For a more detailed explanation of the importance of the ability to reinvest profits, see Ronan, *supra* note 291, at 318.
[331] Ronan, *supra* note 291, at 318.
[332] *Id.* at 320; *see generally* MODEL BUS. CORP. ACT § 1.40 (2017) ("Unincorporated entity").

firm invested.[333] This is because tax-exempt entities do not pay tax on investment income but do have to pay tax on unrelated business taxable income ("UBTI"), which includes pass-through income from a start-up investment.[334] Indeed,

> Tax-exempt investors go to great lengths to ensure that they are not subject to UBIT, as having even a small amount of unrelated income is thought to greatly increase the risk of audit. Because the Code treats LPs in the pass-through structure as directly engaged in the business of the start-up, and the start-up's business is unlikely to be consistent with the tax-exempt status of the organization, it sometimes is said that investing in numerous portfolio companies structured as partnerships potentially could endanger the tax-exempt status of the entire organization.[335]

Thus, if the venture capital firm invests in a pass-through entity, the investment will negatively impact the VC Investors tax position, trigger an audit, or jeopardize the VC Investor's tax-exempt status.[336]

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[333] Fleischer, *supra* note 329, at 158–59.
[334] *Id.* at 158; Polsky, *supra* note 303, at 416, 421–22.
[335] Fleischer, *supra* note 329, at 158–59.
[336] BAGLEY & DAUCHY, *supra* note 291, at 69; Ronan, *supra* note 291, at 320–22, stating tax-exempt entities "scrupulously avoid" deals that pass through any income subject to UBTI, out of concern that such income significantly increases audit risk and increase the risk of losing tax exempt status; MANAGERS, *supra* note 297, at 586.

The ability to invest in entities like C-corporations that can retain earnings and not pass them through is of critical importance to venture capital firms.

Furthermore, the professor will reinforce that venture capitalists prefer the exit strategies of selling the company or taking it public.[337] The C-corporation is the one option that allows a public offering. Venture capitalists:

> value exit strategies because their sole purpose for investing in a business in the first place is to profit from either significant growth of the business or from its eventual sale . . . . [W]hile VC funds may initially invest in small companies, the VC fund is actually betting that the company has the ability to grow into one it could take public or sell down the road.[338]

If the Sharks find that the company is currently being operated in another form, the Sharks will often require the company to convert to a C-corporation before proceeding with the investment.[339] One author has summarized the issue as follows:

> Every company that appears on "Shark Tank" is likely already a Delaware C-corporation . . . or is prepared to become one overnight,

[337] Polsky, *supra* note 303, at 415.

[338] Ronan, *supra* note 291, at 323–24 (quoting Christopher W. Cole, *Financing an Entrepreneurial Venture: Navigating the Maze of Corporate, Securities, and Tax Law*, 78 UMKC L. REV. 473, 492 (2009)).

[339] *Id.* at 323–27; Fleischer, supra note 329, at 175–84; Polsky, *supra* note 303, at 415.

> and that is because the first requirement of every serious investor, angel investor…and Venture Capitalist . . . is the same: your company must be a Delaware C corporation before they will even consider investing in it.[340]

If an entrepreneur plans to seek venture capital funding, there is really only one practicable option—the C-Corporation.[341] The following chart summarizes the questions for students, key concepts to cover, and the Shark's response to a C-corporation:

[340] *Why Venture Capitalists Prefer Delaware C-Corps*, *supra* note 320; *see also* Polsky, *supra* note 303, at 435; *see also* Fleischer, *supra* note 329, at 175–85 (commenting on the relative difficulties of converting an LLC or partnership to a C-Corporation).

[341] *Why Startups Are a Corporation for Venture Capital*, STARTUP LAW. (July 17, 2008), ttp://startuplawyer.com/venture-capital/why-startups-are-corporation-for-venture-capital (last visited on February 26, 2021).

C-corporation - Would the Sharks invest?			
#	Questions to Ask the Class	Key Concepts for Students	Shark's Response
1	What is the shareholder's liability for the debts and obligations of the business?	Limited Liability	Since all shareholders have limited liability protection, the Sharks would invest.
2	Can the Sharks participate in management?	Yes, if elected to the board or appointed as an officer	The entrepreneurs and Sharks usually want the Sharks to participate in management for their expertise, which is possible with a C-corporation
3	How is the business taxed?	C-corporations pay tax on income; shareholders pay tax on any dividends received	Sharks prefer C-corporations. Flow through tax distributions impact the taxes of the Sharks and their investors.
4	Can a C-corporation be taken public as an exit strategy?	Yes	Sharks generally prefer to preserve the public offering as an exit strategy, and the C-corporation offers this option.

By considering each entity in turn from the perspective of a venture capital Shark, the students now understand not only why venture capitalists prefer the C-corporation but also the various characteristics of business entities. While a summary chart, such as the one attached as Appendix B, can be shared with the students at this point, the chart and its list of rules is the end point of an interactive exercise, not the starting point of a lengthy lecture. The students have learned the material in a specific context instead of in a vacuum. If the professor prefers, deeper discussion can continue regarding additional benefits of the C-corporation, such as its ability to issue preferred and common stock and its ability to issue employee stock options.[342] However,

[342] The professor can also discuss the ability of a C-Corporation to issue both common and preferred stock and to issue stock options to incentivize employees. Himmel, *supra*

when the target audience is undergraduate students, concluding the discussion of corporations at this point is often appropriate.

F. *WRAP-UP: REVIEWING THE ACTUAL OUTCOMES OF THE SHARK TANK PRODUCTS*

Once the content is covered, a good wrap-up often is to share actual product outcomes with the students. For the "Shark Tank" products used in this exercise, a chart including information on the offer originally pitched on "Shark Tank", the final deal agreed upon with the relevant Sharks, and overall sales information is attached as Appendix C.

The students enjoy comparing the actual final deal to the original offer made by the entrepreneurs to the Sharks. They are also impressed by the amount

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note 313; BAGLEY & DAUCHY, *supra* note 291, at 164; MANAGERS, *supra* note 297, at 586; *Why Venture Capitalists Prefer Delaware C-Corps*, *supra* note 320; Polsky, *supra* note 303, at 435. The professor can discuss how it is easier to trade shares of a corporation than it is to trade partnership interests or membership interests in LLCs. *Why Venture Capitalists Prefer Delaware C-Corps*, *supra* note 320. The C-Corporation also has the broadest range of financial instruments available to it, including preferred stock, warrants, convertible notes, and subordinated debt. BAGLEY & DAUCHY, *supra* note 291, at 458–515. For more information on venture capital funding in general, *see Id*.; *see* MODEL BUS. CORP. ACT § 6.01(a)–(c), 6.21, 6.24, 13.01 (2017).

of money earned to date by some of these simple products. As the lecture concludes, the students have been entertained by and engaged in the material and the active-learning exercise. Instead of hearing a lecture about this complex topic, they have seen immediate application of the principles of entity formation as the volunteer entrepreneurs made decisions on shares of profit, management structure and other issues in real time. The students now have a context in which to study the material—the perspective of a venture capitalist. They have not memorized random rules or a complex chart relating to business entities but have actively analyzed the characteristics of business entities in a way that allows them to master the material.

IV. ASSESSMENT

An informal survey is administered after the exercise to determine its effectiveness. Student response to the exercise has been overwhelmingly positive.[343] Not only does the exercise promote

[343] The evaluations discussed in this section are based on surveys administered to approximately 140 students in undergraduate Legal Environment classes. The students responded anonymously in writing to the five following open-ended questions: (1) Did the Shark Tank exercise add to the quality of class discussion; (2) Did the Shark Tank exercise add to your understanding of the material; (3) Did the Shark Tank exercise promote critical thinking; (4) What did you like best about the exercise; and (5) Would you make any changes and what would they be? (Surveys on file with author). The survey was administered in class, and submitting a response was not mandatory. The students did not receive any class credit for submitting a response.

student-centered learning goals but the students enjoy it and engage with it throughout the entire class. When asked what the exercise added to the quality of the class, 97% of the responses were positive, repeatedly mentioning the "interactive" and "fun" nature of the exercise. Students noted, "It was an engaging exercise and fostered discussion during our class" and "I enjoyed it and thought it made the class more fun and interactive." The interactive nature of the exercise holds the students' interest more effectively, as one student noted, saying "I think it provided more information and understanding than reading about liability from a slide."

When asked what the exercise added to their understanding of the material, 88% of the students responded positively, stating, "it clarified the small business characteristics when applied to the real world" and "it helped me realize the implications that business structure can have for a business seeking investment." Students appreciated the "direct application." Students with different learning styles appreciated the fact that the exercise engages various styles, adding " I always learn better when I can visualize the concept the teacher is explaining" and "I was able to remember this exercise on the exam because I am a visual learner." The exercise helped students better remember the material for the exam, with students noting that "referencing this exercise in later discussions/lectures helped me better understand the material," "it helped me remember the business entities better," and "it helped the information following it stick more." Overall, many

students commented on how the exercise "made it easier to understand and to retain" the material.

Ninety-six percent of the students stated the exercise did promote problem solving and critical thinking. Students noted that "the exercise required application of material, thus critical thinking was needed to run the activity" and that "the audience was asked to apply the knowledge being taught to answer questions and make decisions." One student noted, "I had to think about each problem (situations) on a deeper level, as if I were an actual shark."

When asked what elements of the exercise the students liked best, the humor and engagement of the presentation were often mentioned. Typical student comments in response to this question include:

- "The introductions were funny."
- "The pitches by the students."
- "The examples of products were fun."
- "I liked the idea of being able to make 'real' decisions applicable to the course."
- "I enjoyed getting somewhat of a visual representation of different types of entities."
- "It incorporated something that most of us know and linked it to the concept which helped me remember it better."
- "How we used volunteers instead of the professor just talking about it."
- "I liked that the people actively engaged in learning and that the

professor took time to have this exercise in class to give a deeper understanding of the concepts."

- "Students felt like they had a stake in the activity."
- "It made class come to life."

Finally, when asked what changes they might make, the students mostly asked for more expansion of the exercise. Typical comments included requests for:

- "The ability to sell/pitch our own ideas."
- "More information about the businesses."
- "Make it a day long exercise."
- "Possibly assign it as a project and dedicate 1-2 classes for presentations. You could invite guests to be sharks and have a real experiment."
- "Do them more often."
- "More examples like the Shark Tank show."

The results of the surveys demonstrate the effectiveness of the exercise in meeting its stated goals. Other colleagues have used the "Shark Tank" exercise and received similar results.

VI. CONCLUSION

The "Shark Tank" exercise described in this paper allows students, in an interactive, student-centered learning environment, to evaluate different business entities and the benefits and limitations of

each in the context of making an investment decision in a product. Such active learning promotes critical thinking and problem solving in the undergraduate Legal Environment class. Instead of trying to learn in a vacuum, the exercise provides a familiar framework and context in which students can explore the material. As a result, students engage in their own learning and more thoroughly master the complex concepts of this area of the law.

APPENDIX A
PRODUCT INFORMATION SHEETS

Scrub Daddy (cleaning sponge)	
Seeking $___ in exchange for a ___% ownership stake:	$100,000 / 10%
Cost to manufacture	$1.00 each
Marketing Channel:	Sold in Philadelphia grocery stores and on ScrubDaddy website
Wholesale Price:	Not available
Retail Price:	$2.80 each
Sales-to-Date:	$120,000 in sales over 18 months
Patent:	Yes

Source: *The 15 Biggest 'Shark Tank' Success Stories of All Time*, FORTUNE, Sept. 12, 2017, https://fortune.com/2017/09/12/successful-shark-tank-products/ (last visited on February 26, 2021); Steve Dawson, *ScrubDaddy Update: What Happened After Shark Tank*, GAZETTE REV., Dec. 5, 2016, https://gazettereview.com/2016/03/scrub-daddy-shark-tank-technological-cleaning-breakthrough/ (last visited on February 26, 2021); Lori Greiner, *I'll Make You Millions*, http://www.lorigreiner.com/success.html (last visited on February 26, 2021).

Simply Fit Board (exercise equipment)	
Seeking $___ in exchange for a ___% ownership stake:	$125,000 / 15%
Cost to manufacture	$9.00 each
Marketing Channel:	Selling at trade shows and online
Wholesale Price:	Not available
Retail Price:	$45.00 each
Sales-to-Date:	$575,000 in sales in 6 months
Patent:	Not at time of pitch

Source: Ariel Leather, *Simply Fit Board Update: What Happened After Shark Tank*, GAZETTE REV., Dec. 5, 2016, https://gazettereview.com/2016/10/simply-fit-board-update-happened-shark-tank/ (last visited on February 26, 2021); Shelley Levitt, *How Simply Fit Board Survived 'Shark Tank'*, SUCCESS, Jan. 6, 2017, https://www.success.com/how-simply-fit-board-survived-the-shark-tank/ (last visited on February 26, 2021); Lori Greiner, *I'll Make You Millions*, http://www.lorigreiner.com/success.html (last visited on February 26, 2021).

Lollacup (BPA and phthalate-free children's drinking cup)	
Seeking $___ in exchange for a ___% ownership stake:	$100,000 / 15%
Cost to manufacture	$4.50 each
Marketing Channel:	Selling through sales representatives, trade shows, boutiques and online
Wholesale Price:	$9.00 each
Retail Price:	$16.00 - $18.00 each
Sales-to-Date:	$30,000 after 4 months
Patent:	Yes

Source: Ariel Leather, *Lollacup Update: What Happened After Shark Tank*, GAZETTE REV., Dec. 5, 2016, https://gazettereview.com/2016/10/lollacup-update-happened-shark-tank/ (last visited on February 26, 2021); Patricia Mertz Esswein, *Small-Business Success Story: How Shark Tank Helped Lollaland Grow*, KIPLINGER, March 4, 2015, https://www.kiplinger.com/article/business/T049-C000-S002-small-business-success-shark-tank-helps-lollaland.html (last visited on February 26, 2021).

FiberFix (repair tape)	
Seeking $___ in exchange for a ___% ownership stake:	$90,000 / 10%
Cost to manufacture	$2.99 each
Marketing Channel:	Selling through 400 different retailers, including Home Depot
Wholesale Price:	$4.00 each
Retail Price:	4 inch $9.99 each 2 inch $4.99 each 1 inch $5.99 each
Sales-to-Date:	$400,000 over 6 months
Patent:	Yes

Source: Steven Kahn, *FiberFix Update: See How They're Doing After Shark Tank*, GAZETTE REV., Dec. 5, 2016, https://gazettereview.com/2016/06/fiberfix-update-after-shark-tank/ (last visited on February 26, 2021); Lori Greiner, *I'll Make You Millions*, http://www.lorigreiner.com/success.html (last visited on February 26, 2021).

Tipsy Elves (humorous and ugly Holiday sweaters)	
Seeking $___ in exchange for a ___% ownership stake:	$100,000 / 5%
Cost to manufacture	$11.40 each
Marketing Channel:	Selling mainly through Amazon
Wholesale Price:	Not available
Retail Price:	$65.00 each
Sales-to-Date:	$1.3 million in 2 years
Patent:	No

Source: Steven Kahn, *Tipsy Elves Shark Tank Update: The Company Now in 2018*, GAZETTE REV., Dec. 5, 2016, https://gazettereview.com/2016/04/tipsy-elves-ugly-sweater-update/ (last visited on February 26, 2021); Tipsy Elves Update, 2018, https://sharktanktales.com/tipsy-elves-shark-tank/ (last visited on February 26, 2021).

APPENDIX B

Entity Options	Key Criterion			Would a Shark Invest in this Entity?
	Liability	Taxation	Ability to Go Public	
Sole proprietorship	Unlimited personal liability	Flow through	No	No
General Partnership	Unlimited personal liability	Flow through	No	No
Limited Partnership	General partners: Unlimited personal liability if in scope of partnership business; Limited partners: liability limited to capital contribution	Flow through	No	No
Limited Liability Company (LLC)	All members' liability limited to capital contribution	Generally flow through; Can elect double tax	No	No
C Corporation	All shareholders' liability limited to capital contribution	Double taxation	Yes	Yes

APPENDIX C
"SHARK TANK" PRODUCT OUTCOMES

Product	Aired on Shark Tank	Investor(s)	Amount Invested / Percent Ownership	Total Sales
Scrub Daddy	Season 4, Oct. 2012	Lori Greiner	$200,000 for 20%	$209M
Simply Fit Board	Season 7, Nov. 2015	Lori Greiner	$125,000 for 20%	$160M
Lollacup	Season 4, 2012	Mark Cuban, Robert Herjavec	$100,000 for 40%	$2M
Fiber Fix	Season 5, Oct. 2013	Lori Greiner	$120,000 for 12%	$65M
Tipsy Elves	Season 5, Dec. 2013	Robert Herjavec	$100,000 for 10%	$125M

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[344] *The 15 Biggest 'Shark Tank' Success Stories of All Time, supra* note **Error! Bookmark not defined.**; Locke, *supra* note **Error! Bookmark not defined.**; *Swimming with the Sharks*, *supra* note ***Error! Bookmark not defined.***; Levin & Keveney, *supra* note ***Error! Bookmark not defined.***; *Scrub Daddy: The Story Behind Shark Tank US's Biggest Success*, CEC MAG. (Feb. 8, 2019), https://www.theceomagazine.com/business/innovation-technology/scrub-daddy-the-story-behind-shark-tank-uss-biggest-success/ (last visited on February 26, 2021); Zaw Thiha Tun, *8 Most Successful Products From Shark Tank*, INVESTOPEDIA (Jan. 8, 2021), https://www.investopedia.com/articles/investing/082415/10-most-successful-products-shark-tank.asp (last visited on February 27, 2021). Sales information for Scrub Daddy, Simply Fit and Tipsy Elves products is current through July, 2020. Sales information for Fiber Fix products is current through October 2019. Lollacup sales information is current through February 2020. *See also, How Scrub Daddy Became a Household Name, After First Collecting Dust for Several*

Years, INC MAG. (Dec. 3, 2019), https://www.inc.com/magazine/201904/emily-canal/scrub-daddy-dish-sponge-shark-tank.html (last visited on February 26, 2021); Shelley Levitt, *How Simply Fit Board Survived 'Shark Tank'*, SUCCESS, Jan. 6, 2017, https://www.success.com/how-simply-fit-board-survived-the-shark-tank/ (last visited on February 26, 2021); Steven Kahn, *FiberFix Update: See How They're Doing After Shark Tank*, GAZETTE REV (Dec. 5, 2016), https://gazettereview.com/2016/06/fiberfix-update-after-shark-tank/ (last visited on February 26, 2021); Ariel Leather, *Lollacup Update: What Happened After Shark Tank*, GAZETTE REV. (Dec. 5, 2016) https://gazettereview.com/2016/10/lollacup-update-happened-shark-tank/ (last visited on February 26, 2021); Steven Kahn, *Tipsy Elves Shark Tank Update: The Company Now in 2018*, GAZETTE REV. (Dec. 5, 2016), https://gazettereview.com/2016/04/tipsy-elves-ugly-sweater-update/ (last visited on February 26, 2021); Tipsy Elves Update, 2018, https://sharktanktales.com/tipsy-elves-shark-tank/ (last visited on February 26, 2021); Patricia Mertz Esswein, *Small-Business Success Story: How Shark Tank Helped Lollaland Grow*, KIPLINGER(Mar. 4, 2015), https://www.kiplinger.com/article/business/T049-C000-S002-small-business-success-shark-tank-helps-lollaland.html (last visited on February 26, 2021).

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