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# **SOUTHERN JOURNAL OF BUSINESS AND ETHICS**

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**From the Editor-in-Chief. . . .**

This is the 14<sup>th</sup> volume of the *Southern Journal of Business and Ethics*, an official publication of the Southern Academy of Legal Studies in Business. The Journal is being published in hardcopy and electronically on the Southern Academy's web page at <http://www.salsb.org>.

The SJBE has been included in Ebsco Host services, allowing for full text search on most university library systems! This provides a great benefit to our authors and readers!

All articles that appear in this volume of the *Southern Journal of Business and Ethics* have been recommended for publication by the Advisory Editors, using a double, blind peer review process. A personal thanks is extended to the Advisory Editors for all their hard work and dedication to the *Journal* and the Southern Academy; without their work, the publication of this Journal would be impossible.

This is my eleventh year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation to all the Officers of the Southern Academy for their support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to Will Mawer of Southeastern Oklahoma State University, for his efforts in coordinating the start of the Journal. The publishing of this journal is an intense educational experience which I continue to enjoy.

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, March, 2022. Congratulations to all our authors. I extend a hearty invitation to the next meeting of the SALSb in San Antonio, Texas, March 2-3-4, 2023.

The Southern Academy annual meeting has been voted the "BEST REGIONAL" among all the regions affiliated with the Academy of Legal Studies in Business (ALSb) featuring over 60 authors and 50 papers. I hope to see ya'll in San Antonio! Please check the web site ([www.salsb.org](http://www.salsb.org)) for further information. To further the objectives of the Southern Academy, all comments, critiques, or criticisms would be greatly appreciated.

Again, thanks to all the members of the Southern Academy for allowing me the opportunity to serve you as editor-in-chief of the Journal.

**M.P. (Marty) Ludlum**

**Editor-in-Chief**

*Southern Journal of Business and Ethics*

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## **Our Reviewers**

The **Southern Journal of Business and Ethics** is truly a group effort, requiring the tireless efforts of many volunteers to review our submissions.

I would like to extend a very public and eternal thanks to our reviewers. Many are listed below. Some have chosen to be anonymous for their efforts. I thank them also for their many hours of work in supporting the **SJBE**.

Reviewers for the 2022 issue in alphabetical order were:

Jennifer Barger Johnson, University of Central Oklahoma

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### Notes for Authors:

The focus of the **Southern Journal of Business and Ethics (SJBE)** is to examine the current trends and controversies in business, law and ethics, both domestic and international. In addition, future issues will include a new section, *Short Notes*, which will consist of shorter articles focusing on pedagogical ideas for the new business law instructor.

All authors promise that any submission is original work, and has not been previously published.

Since the topics of **SJBE** cross into many different academic areas, the **SJBE** does not have a specific format. Authors are free to use Chicago style, Harvard style or the APA, as long as the application is consistent throughout the paper.

The title should be in ALL CAPS. The text should be in Times New Romans 12 point font for the text and 10 point font for the footnotes. Authors' names should be centered below the title. Paragraphs should be indented five spaces.

The maximum size for a paper is twenty-five pages, all inclusive, single spaced. Articles substantially longer may be accepted as space allows.

All submissions should include a complete copy (with author identification) and a blind copy (with author identification left blank).

All submissions are electronic, in MS-Word format. No paper copies will be reviewed or returned.

Artwork is discouraged. Tables and charts should be kept to a minimum and should be included in an appendix following the paper.

Submissions deadline is 45 days after the SALSB spring meeting each year. Articles sent after the deadline will be reviewed for the next issue, or may be withdrawn by the author and submitted elsewhere.

Look for the call for papers at the Southern Academy's website ([www.salsb.org](http://www.salsb.org)). If you would like to serve **SJBE** as a reviewer, your efforts would be appreciated. Many hands make light work.

If you have any questions, please submit them to the Editor in Chief.

Please submit all papers to:  
Marty Ludlum  
Editor in Chief, SJBE  
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***Mark Your Calendars***

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## THE RELATIONSHIP BETWEEN BUSINESS STUDENTS' CRITICAL THINKING DISPOSITION AND THEIR PERCEPTION OF CHEATING

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### Abstract

*Significant research found that cheating in college is widespread. The current study relates business students' disposition to critical thinking and their perception of cheating. Cheating actions were presented to a sample of 370 business students in a U.S. University who also completed a questionnaire related to their openness to critical thinking. They were also asked to reflect on their current critical thinking activities. The results showed that students with a high disposition to critical thinking were more likely to perceive cheating actions as unethical compared to students with a low disposition. Demographic factors such as gender and age were also influential in students' critical thinking disposition. The results have implications for business instructors who are trying to improve students' critical thinking skills and reduce the epidemic of cheating in their classes.*

**KEYWORDS:** College Cheating; Critical Thinking; Business Ethics.

Cheating in College has been described as an epidemic that is getting worse every year (Johnson et al. 2020). Part of the problem is the popularity and proliferation of online classes. Ghanem and Mozahem (2019) found that cheating in online classes is much easier than cheating in face-to-face classes and is more difficult to detect. Significant research (e.g. Nonis and Swift, 2001) found that business students who cheat in College were more likely to commit unethical actions in the workplace after graduation.

The purpose of this study is to investigate critical thinking disposition (i.e. the attitude of an individual toward reasoning, critical analysis, decision-making (Sosu, 2013)) as a determinant of cheating perception. Many psychological variables, such as academic entitlement (Elias, 2017) and individualism/collectivism (i.e. individual rights vs. group goals) are significantly related to ethical perception of cheating (Payan et al., 2010). This study introduces students' critical thinking disposition as a variable potentially related to cheating perception. The results showed that business students high on critical thinking disposition were more likely to perceive cheating as unethical compared to those low on critical thinking disposition.

The paper is organized as follows: Following this introduction is a literature review of cheating, and its psychological determinants, including critical thinking disposition. This will be followed by an explanation of the study's research design including sampling and measurement. A discussion of the results is followed by a conclusion and implications for business instructors.

## **Literature Review**

### **Business Students and Cheating**

Significant research investigated cheating actions among college students. Green (2004, 140) defined cheating as “a rule-breaking behavior associated with the intention of gaining an unfair advantage over a party or parties with whom the cheater has a norm governed relationship”. There is a consensus that cheating is widespread and has been getting worse and more sophisticated over the last two decades. Whitley (1998) found that about 70% of college students engaged in some form of academic misconduct while Jones (2011) found it much more prevalent, at close to 92%. In addition, the type and sophistication of cheating methods have dramatically changed in the last two decades. While cheating has traditionally involved copying homework and using cheat-sheets on exams, today’s cheating is much more sophisticated and involves ghost students and plagiarism (i.e. unauthorized use of someone’s ideas as the author’s own). Research showed that cheating is easier and more common in online classes. Hollis (2018) noted that some online students hire other students, known as “ghost students” to take the class on behalf of the registered students and pay them a fee for earning a certain grade. Plagiarism has also been increasing with Martin (2011) reporting its prevalence among online students at close to 72%. A survey of distance learning students by Burgason et al. (2019) found that 70% of them did not consider using existing notes or Power Points during an online exam to fit the definition of cheating. Smith et al. (2021) found that business students routinely consult assignment assistance websites that offer publisher’s test banks and homework solutions for sale. Considering that online classes are increasing (Johnson et al. 2020), these results become even more troubling.

The current study specifically examines cheating actions among business students. This population is particularly relevant for several reasons. First, research showed that there is a significant relationship between business students’ cheating in college and unethical behavior in the workplace (Mangan, 2006). Since these students will represent tomorrow’s managers, accountants and marketing professionals, it is important to understand the extent of their cheating in college to try to change their attitude. Second, extensive research also showed that undergraduate business students viewed cheating actions as more ethical compared to students in other majors (Freire, 2014). Third, McCabe et al. (2006) theorized that business education leads students to engage in behavior (i.e. plagiarism) that maximizes their self-interests. The combination of these factors makes studying the cheating tendencies of business students particularly important.

### **Situational and Demographic Determinants of Cheating**

Cheating in college has been attributed to many different situational and demographic factors. For example, students were more likely to cheat if they see others cheating, especially if there are no consequences (Molnar and Kletke, 2012). The authors attributed this attitude to the non-cheaters’ fear of being in a disadvantage compared to the cheaters. This precipitates a vicious competitive cycle that eventually results in significant harm to the university’s reputation and reduces the value of its diplomas (Bing et al. 2012). Students who attend classes taught by instructors who do not take cheating seriously were more likely to cheat compared to others (Blau et al. 2017). The authors found that 31% of surveyed faculty did not understand the

process of reporting students who cheat. Research also found that students who attend large classes were more likely to cheat compared to those who attend small classes (Blau et al. 2017). Students who attend universities with honor codes that students are required to sign were less likely to cheat compared to those without such a code (McCabe et al. 2001). Bunn et al. (1992) developed an economic model of cheating behavior. They found that cheating was a function of a student's GPA, cheating observation and its extent, likelihood of getting caught and the severity of the punishment.

Demographic factors have also been examined as determinants of cheating with mixed results. Some studies found that male students and those with lower GPA cheated more often than females and those with higher GPA (Ghanem and Mozahem, 2019). Elias (2017) also found that female and older students viewed cheating actions as more unethical compared to male and younger students. There was no effect of GPA on ethical perception (i.e. the judgment of the ethics of an action). However, Rawwas et al. (2004) found no significant differences between male and female students on cheating perception. There were also no significant differences based on age or GPA. Due to their importance, demographic determinants of cheating among business students are the subject of another study and are not reported in the current paper.

### **Psychological Determinants of Cheating**

Extensive research identified many psychological variables related to the ethical perception of cheating. Early evidence of such a relationship was provided by Hogan and Hogan (1989) who found that irresponsibility, disorganization and impulsivity resulted in increased cheating behavior. Extraversion was also positively related to the propensity to cheat (Tibbetts, 1999) as well as low agreeableness (Williams et al. 2010). Giluk and Postlethwaite (2015) found that students with low emotional stability and low conscientiousness were more likely to engage in academic dishonesty. Elias (2017) found that business students with higher levels of academic entitlement were more tolerant of cheating actions compared to those with low levels of academic entitlement. The variables of individualism/collectivism have also received increased attention regarding their role in academic dishonesty. Payan et al. (2010) found that collectivist business students were more tolerant of cheating compared to individualists while Martin (2011) found the opposite results by using plagiarism as the definition of cheating. Johnson et al. (2020) argued that personal guilt about doing immoral acts affected students' perception of cheating and removing this guilt resulted in cheating becoming all about temptation and the prospect of getting caught. The authors also found that students with higher cheating skills were more likely to cheat compared to those with few such skills. More recently, Hendy et al. (2021) found that perceived peer dishonesty was a strong predictor of business students' self-reported dishonesty.

The current study expands the literature on psychological determinants of cheating by examining a student's disposition for critical thinking as potentially related to his/her ethical perception of a cheating action.

### **Critical Thinking and Cheating**

Critical thinking has been defined in many different ways but McPeck (1981, 8) defined it concisely as "the propensity and skill to engage in an activity with reflective skepticism". Angelo (1995) noted that most authors characterize critical thinking as applying higher-order thinking skills, analysis and problem solving. Roohr et al. (2019) argued that critical thinking

skills are essential for success in a college environment and beyond. Bandyopadhyay and Szostek (2018) suggested they should be one of the central objectives of a college education. Boud and Falchikov (2006) noted that college graduates will be expected to solve different problems in the workplace and must be ready to meet this challenge upon graduation. Franco et al. (2017) reported that employers rely on levels of critical thinking skills when hiring new employees since they are better predictors of success than simply obtaining a college degree. However, critical thinking skills do not simply develop by maturation but rather they must be taught and practiced (Angelo, 1995). Some universities have a business course specifically reserved for developing critical thinking skills, while others integrate this education in several business classes (Roohr et al. 2019). Bandyopadhyay and Szostek (2018) offered a method of assessing critical thinking skills using multiple measures such as individual and group exercises and case analysis. Unfortunately, Arum and Roksa (2010) found that students were only minimally improving their critical thinking skills in their first two years of college education.

Research has distinguished between critical thinking skills and disposition. Critical thinking skills involve the student's ability to make inferences, assumptions, deductions and evaluation of arguments (Halpern, 1998). On the other hand, critical thinking disposition involves the student's attitude and habits that affect how he/she reasons, argues and makes decisions (Facione et al. 1995). The current study examines critical thinking disposition for several reasons: First, research found that critical thinking skills can exist without the disposition to use them, but having the disposition implies having the ability to use these skills when needed (Facione et al. 1995). Therefore, studying critical thinking disposition allows the measurement of each student's motivation and preparedness to think critically without the confounding effect of the skills that each student may or may not possess. Second, studies have found many benefits of acquiring and developing critical thinking disposition. West et al. (2008) reported that higher levels of critical thinking disposition were positively related to academic performance, deep learning and overcoming cognitive bias while negatively related to levels of anxiety among college students. Sosu (2013) found critical thinking disposition to be positively related to open mindedness. Butler et al. (2017) found that lower levels of critical thinking disposition were stronger predictors of negative life events such as bankruptcies compared to levels of intelligence.

Therefore, based on previous research related to the positive outcomes associated with critical thinking disposition, the following hypothesis is examined:

H1: Business students with higher levels of critical thinking disposition will perceive cheating as more unethical compared to those with moderate and lower levels of critical thinking disposition.

Limited research examined the impact of demographic factors on college students' critical thinking and even less research examined this impact on business students. Butler (2012) reported that older students and those who are in their junior and senior years in college scored higher on critical thinking measures compared to younger students and freshmen. The current study examines the impact of gender, age, class grade, and major on business students' levels of critical thinking disposition.

## **Research Design**

### **Sampling**

The sample for this study consisted of students in an AACSB-accredited public university on the West Coast of the U.S. The large university is located in a major metropolitan area and

has a very diverse study body. The university does not have a specific required critical thinking skills class. Rather, this concept is integrated in several classes. The students were enrolled in a variety of upper-division and graduate business classes. The current study uses junior, senior and graduate students for several reasons: First, the research focuses on more mature, committed students who have already adjusted to college life and had witnessed the opportunity to cheat in different classes. Second, selecting upper-division and graduate students has the advantage of sampling students who had time in college to develop their critical thinking skills. Finally, upper-division students are close to graduation and ready to enter the workplace. The study shows the ethical maturity of these students as they leave the university and enter the workplace.

A survey was developed by the researcher and administered to the students by different instructors during class time. This survey consisted of different measurement scales already used in previous studies and adapted for use in the current study. The scales ask students to record their perception of different actions and statements. A copy of the survey is provided in the Appendix. It took about 15 minutes to complete. Participation was voluntary and did not affect class grade. The useable sample consisted of 370 students. The students' demographic characteristics are listed in Table 1. As indicated, the sample was about evenly divided between male and female students. Most of the students were accounting majors due to the popularity of this major in the College of Business.

**TABLE 1**  
**DEMOGRAPHIC CHARACTERISTICS (N=370)**

Panel A: Demographics			
Gender	#	Age	#
Male	181	< 25 years old	247
Female	189	25 years old or >	123
Class Grade	#	Major	#
Junior	102	Accounting	151
Senior	198	Management	72
Graduate	70	Marketing	50
		CIS	26
		Finance	33
		General Business	18
		Non-Business	20
Overall GPA mean (SD) was 3.10 (.44)			
Panel B: Means and Standard Deviations			
	Mean (SD)		
In-class Cheating	6.34 (.91)		
Outside-class Cheating	5.85 (.80)		
Total Cheating	6.04 (.79)		
Critical Openness	39.51 (5.89)		
Reflective skepticism	23.56 (3.54)		
Total Disposition	63.06 (8.77)		
Cheating Ethics (Higher scores indicate higher unethical perception)			
Critical Thinking Disposition	Low	Moderate	High
Critical Openness	7-28	29-39	40-49
Reflective Skepticism	4-16	17-22	23-28
Total Disposition	11-48	49-62	63-77

### Study Measures

The questionnaire consisted of two research scales to measure ethical perception of cheating actions and the disposition for critical thinking. In order to measure the ethics of cheating, the scales developed by Simha et al. (2012) were used. The scales consisted of 16 statements depicting different cheating actions and students recorded their ethical perception of each action on a seven-point scale ranging from 1 (highly ethical) to 7 (highly unethical). The actions range from cheating on exams to plagiarism to other forms of online cheating.

Although critical thinking skills are extensively measured in the literature, few studies attempted to measure critical thinking disposition (Sosu, 2013). Facione and Facione (1992), Halpern (1998) and Ennis (2008) studied critical thinking skills in multidimensional constructs. Sosu (2013) noted that these studies have in common the notions of open-mindedness, intellectual curiosity and reflective thinking as specific constructs of critical thinking disposition. In order to measure critical thinking disposition, the current study uses the scales developed by Sosu (2013). Students were presented with 11 statements to measure their disposition to think critically. They recorded their agreement with each statement using a seven-point scale ranging from 1 (strongly disagree) to 7 (strongly agree).

## Data Analysis

Factor analysis was applied to both scales used in this study. Research on the perception of cheating scale yielded two factors with eigenvalues greater than 1 termed “In class cheating” (10 statements) and “outside class cheating” (6 statements) (Simha et al. 2012 and Elias 2017). In the current study, factor analysis with varimax rotation was conducted. Two factors with eigenvalues higher than 1 were obtained. The first factor was termed “In Class Cheating” (Factor Loading = .74) and the other factor was termed “Outside Class Cheating” (Factor Loading = .77). A total score for cheating perception is also obtained.

Regarding the critical thinking disposition scale, two factors emerged with eigenvalues greater than 1 termed “critical openness” (7 statements) and “reflective skepticism” (4 statements). The scale had internal consistency of .79 (Sosu, 2013). An overall score for critical thinking disposition is also obtained. The author explained critical openness as the student’s tendency to be open to new ideas, reflect on them and modify them under different circumstances. Reflective skepticism was defined as the student’s ability to learn from past experiences and question the evidence (Sosu, 2013). The current study also conducted factor analysis on this scale. The results showed two distinct factors of “critical openness” (Factor Loading = .80) and “reflective skepticism” (Factor Loading = .76). These two factors are used as constructs of critical thinking disposition consistent with West et al. (2008)) who found that higher levels of critical thinking disposition had a negative relationship with negative academic behavior (e.g. cheating). The mean scores for each scale along with an interpretation of these scores are provided in Table 1, Panel B. Based on their scores, each student was classified separately as low/moderate/high on critical openness, reflective skepticism and total critical thinking disposition. This classification was used in the statistical analyses in this paper.

## Research Results

The results presented in Table 1 indicate that business students perceived in-class cheating actions as more unethical (Mean 6.34/7) than outside-class cheating actions (5.85/7). Regarding critical thinking disposition, business students had moderate critical thinking openness score (Mean 39.51), and slightly high reflective skepticism score (Mean 23.56). Total critical thinking disposition was borderline moderate to high (Mean 63.06).

The next step in the statistical analysis was to examine the effect of demographic factors on critical thinking disposition. The results revealed statistical significance effects only on some factors. Female students had only higher reflective skepticism mean scores (23.89) compared to male students (23.21)( $p < .10$ ). Older nontraditional students had higher mean scores only on reflective skepticism (24.29) and total critical thinking (64.27) compared to younger traditional-



age students (23.19 and 62.47 respectively)( $p < .05$ ). No statistically significant results on critical thinking disposition were obtained using class grade or major.

In order to test H1 regarding the effect of critical thinking disposition on ethical perception, one-way ANOVA was used with critical thinking factors being the independent variable and each category of cheating being the dependent variable. The ANOVA results are presented in Table 2.

**TABLE 2**  
**COMPARISON BETWEEN MEAN CRITICAL THINKING DISPOSITION SCORES**  
**FOR EACH TYPE OF CHEATING (N=370)**

<b>In-class Cheating Perception Scores</b>			
	High	Moderate	Low
Critical Openness	6.45**	6.22**	6.20**
Reflective Skepticism	6.49***	6.13***	5.82***
Total Critical Thinking	6.49***	6.21***	5.92***
<b>Outside-class Cheating Perception Scores</b>			
	High	Moderate	Low
Critical Openness	5.97***	5.71***	5.73***
Reflective Skepticism	5.98***	5.64***	5.48***
Total Critical Thinking	6.01***	5.68***	5.58***
<b>Total Cheating Perception Scores</b>			
	High	Moderate	Low
Critical Openness	6.15**	5.90**	5.90***
Reflective Skepticism	6.17***	5.82***	5.61***
Total Critical Thinking	6.19***	5.88***	5.71***
Higher scores indicate higher unethical perception of cheating			
*** $p < .01$ ; ** $p < .05$ ; * $P < .10$			

The results show a statistically significant impact of critical thinking disposition on ethical perception of cheating. Business students who scored high on critical openness, reflective skepticism and total critical thinking disposition were more likely to perceive in-class cheating actions as unethical compared to students who scored moderate and low on critical thinking. Similar results were obtained regarding outside-class cheating and total cheating perception. H1 is therefore supported in this study.

### Discussion and Implications

The current study investigated the relationship between critical thinking disposition and business students' ethical perception of cheating. Several significant results emerged. First, the study found that business students had medium-to-high overall critical thinking disposition with older (nontraditional) students scoring high on critical thinking disposition compared to younger

(traditional) students. Second, Students who scored higher on critical thinking disposition and the corresponding factors were significantly more likely to view cheating actions as unethical. These results were consistent for in-class and outside-class cheating actions. These two results combined point to the increased importance of emphasizing critical thinking among business students. Since most of these students were upper-level undergraduates close to graduation, it is the author's opinion that moderate-to-high levels of critical thinking disposition are not sufficient at this stage and more emphasis should be given to increasing this score among business students. As indicated earlier in the paper, critical thinking disposition and critical thinking skills are two different concepts and components of critical thinking. Disposition represents a student's openness toward critical thinking and is a precursor to skills development (Sosu, 2013).

The study's results have several implications for education and employment. The current study shows that instructors should not only teach critical thinking skills in different classes but they should also focus on the equally important concept of getting students to accept the importance of critical thinking and making sure they are open to this concept. This can be accomplished by explaining the importance of critical thinking in the workplace and using case studies. For example, a case study can be developed of a newly-hired accountant, sales person or manager who is facing pressure to commit unethical acts. This new hire then uses his/her critical thinking disposition to analyze the potentially unethical situation and devise a plan to respond to the unethical request by his/her employer. The concept of critical thinking is essential in all education aspects, not just business. For example, Nursing instructors should focus on their students' critical thinking disposition and how it impacts the ethics of patient care. Employers are also advised to consider the critical thinking disposition of their future employees when making a hiring decision. Since employers benefit from an ethical workplace climate, selecting future employees with high levels of ethics is beneficial to the organization's mission.

The study's results should be interpreted in light of the following limitation: The sampled students were business majors in a large U.S. University. The results may not be generalized to students in other majors or in other countries. Future studies can investigate other variables such as country, university size and location, major and other demographic factors to determine if the relationship discovered in the study will hold in a different context.

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## Appendix

## Survey Questionnaire

Please record your ethical impression of each of the following actions according to the following scale (adapted from Simha et al. 2012):

<i>Highly Ethical</i>	<i>Moderately Ethical</i>	<i>Slightly Ethical</i>	<i>Neutral</i>	<i>Slightly Unethical</i>	<i>Moderately Unethical</i>	<i>Highly Unethical</i>
1	2	3	4	5	6	7
_____	Copying homework assignments from others					
_____	Allowing others to copy homework assignments from you					
_____	Collaborating with others on assignments meant to be completed alone					
_____	Obtaining exam questions illicitly beforehand					
_____	Fabricating bibliographies on assignments/papers					
_____	Copying from a source without citing the source					
_____	Obtaining papers from the web and turning them in as your own work					
_____	Making others write papers for you, and then turning them in as your own work					
_____	Referencing materials without reading them					
_____	Making false and fraudulent excuses to postpone assignments and/or tests					
_____	Collaborating with others on tests meant to be completed alone					
_____	using unauthorized cheat-sheets on an exam					
_____	Looking at or copying from others' exam copies					
_____	Allowing others to look at or copy from your exam copy					
_____	Using unauthorized electronic equipment in exams					
_____	Changing one's answers after getting the grade to increase one's score					

Regardless of the previous statements, please indicate your agreement or disagreement with each of the following statements (adapted from Sosu, 2013).

<b><i>Strongly Disagree</i></b>	<b><i>Moderately Disagree</i></b>	<b><i>Slightly Disagree</i></b>	<b><i>Neutral</i></b>	<b><i>Slightly Agree</i></b>	<b><i>Moderately Agree</i></b>	<b><i>Strongly Agree</i></b>
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<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>
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- \_\_\_\_\_ I usually try to think about the bigger picture during a discussion
- \_\_\_\_\_ I often use new ideas to shape (modify) the way I do things
- \_\_\_\_\_ I use more than one source to find out information for myself
- \_\_\_\_\_ I am often on the lookout for new ideas
- \_\_\_\_\_ I sometimes find a good argument that challenges some of my firmly held beliefs
- \_\_\_\_\_ It is important to understand other people's viewpoint on an issue
- \_\_\_\_\_ It is important to justify the choices I make
- \_\_\_\_\_ I often reevaluate my experiences so that I can learn from them
- \_\_\_\_\_ I usually check the credibility of the source of information before making judgments
- \_\_\_\_\_ I usually think about the wider implications of a decision before taking action
- \_\_\_\_\_ I often think about my actions to see whether I could improve them



## **FAMILY AND MEDICAL LEAVE ACT: EXAMINING A CORPORATE STAKEHOLDER MODEL TO ASSIST WITH IMPLEMENTATION**

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*Prior to the establishment of the Family and Medical Leave Act (FMLA), there were no federal regulations that allowed employees job protection and security while an employee was out from work for a prolonged length of time. After the FMLA was enacted, employers were charged with complying with the law as well as the rules and regulations associated with law. This paper includes a corporate stakeholder model as an approach to acting ethically by using the justice-based approach to consider the risks associated with not having the proper controls, metrics, and administrative activities in place within the workplace. This paper begins with a general discussion about FMLA and proceeds with part II discussing the background of FMLA, part III addressing the corporate stakeholder approach and impacts of the FMLA on the employer, part IV discussing the corporate stakeholder model, and part V including the conclusion.*

### **I. Introduction**

With the challenges and complexities of today's workplace, providing a work environment that allows for employees to stop working for an extended period of time and safely provide care for family members while still maintaining their employment position should assist with improving the quality of the workplace. Employees may feel more dedicated to a supportive work environment. However, it also requires substantial efforts to ensure basic issues from all parties involved are appropriately and adequately addressed. In this vein, the Family and Medical Leave Act (hereafter FMLA) was established to assist employees with leveling the challenges and responsibilities of the workplace and the family life (U. S. Wage and Hour Division, 2012). The act was established in 1993 when then-President William Jefferson Clinton signed this long-awaited law into effect (Cigna Group Insurance, 2018). Prior to the establishment of this law, there were no federal regulations that allowed employees job protection and security while an employee was out from work for a prolonged length of time. It is understandable to note how employees may be caught in the difficult position of choosing to assist a family member or staying with their employment position.

As part of a bi-partisan legislative effort, the FMLA law provided a balance to family and work needs. The law compels employers in the United States to provide necessary assistance for employees who need to provide care for a child, an employee's personal health situation, or a member of their families' health (U.S. Hour and Wage Division, 2012). Accordingly, the "the FMLA requires employers to provide leaves of absence of up to 12 weeks to close to fifty percent of the nation's employees when the leave request is associated with *inter alia*, the ill-health of the employee's immediate family member" (Lee, et al., 2018, p. 31).



The FMLA entitles “qualified workers to take unpaid leave of up to twelve weeks to care for a spouse, child or parent suffering a serious illness” (Lee, et al., 2018, p. 27). Furthermore, the FMLA pertains to “private-sector employers, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer; public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs; or public or private elementary or secondary school, regardless of the number of employees it employs” (U.S. Wage and Hour Division, 2012, p. 1).

The United States has traditionally trailed most *developed and developing* countries pertaining to providing family leave benefits assistance (Sholar, n.d.). Accordingly, the journey to providing family leave benefits has been most challenging. Workers could possibly lose their jobs if they took off from work for a length of time to assist a family member with an illness in need of long-term care. These situations could provide quite a challenge.

Although the law provides for employees to assist families in need of long-term care, its transitional implementation into the work environment could conceivably present significant challenges and issues for all parties involved. In order to address these issues and provide for a beneficial implementation, the authors provide information to assist in addressing these challenges. This paper will proceed with part II discussing the background of the FMLA, part III addressing the corporate stakeholder approach and impacts of the FMLA on the employer, part IV discussing the corporate social responsibility model, and part V including the conclusion.

## **II. Background of the Family and Medical Leave Act**

The initial rendering of the FMLA was the Family Employment Security Act (hereafter FESA) of 1984. This act sought nonpaid employment protection of twenty-six weeks per year for qualified persons which included children, a spouse, or an employee’s own personal health situation (Sholar, n.d.). Ironically, a number of the bill’s supporters wanted leave that provided pay. However, there was concern that a bill requiring pay would not receive enough support. The FESA allowed for an open exchange in the legislature pertaining to family leave benefits and further provided a foundation for possible forthcoming bills of this type to be reviewed. Notably, this bill was never officially brought before congress (Sholar, n.d.).

In 1985, the Parental and Disability Leave Act was proposed by Patricia Schroeder (D-CO) (U.S. Congress, 1985). This effort sought nonpaid employment protection of eighteen weeks for new parents, in addition to twenty-six weeks for child in need of care or an employee’s own short-term personal health situation. The bill was only able to successfully transverse two subcommittees of the house before running aground.

In 1986, another family leave bill was put forward in the legislative session. The bill’s name was switched to the Parental and Medical Leave Act (United States Congress, House, Committee on Education and Labor, 1986). Due to the efforts from certain Republicans, the number of employees covered was increased from five to fifteen for the amended version. In addition, three months of employment was required and thirty-six weeks over a two-year period was required for both medical and parental leave. During this time period, the American Association of Retired Persons effectively pushed to incorporate additional assistance that permitted employees time to assist an aged parent, child, or spouse (Sholar, n.d.). As a result of these efforts, the name was finally adjusted to the Family and Medical Leave Act.

From 1986 until to 1990, there were discussions pertaining to the specifics of the FMLA.

In May of 1990, the FMLA was approved by the United States House of Representatives (Sholar, n.d.). Accordingly, the U.S. Senate provided its approval a month later. However, the bill was vetoed later by then President George H.W. Bush (Holmes, 1990). President Bush stated that he favored family leave. However, President Bush wanted businesses to have the option of volunteering to provide this benefit (Sholar, n.d.). Another rendering of the FMLA with tougher provisions of leave got through the House. However, efforts were halted in that sponsors felt there were not enough votes to override the anticipated veto. In 1992, efforts were made to pass this bill and President Bush vetoed these efforts again (Sholar, n.d.).

In January of 1993, President Bill Clinton assumed office and as previously stated, the FMLA was soon signed into office (Scholar, n.d.) There was a desire on the part of some of the bill supporters that the FMLA protection would consistently increase to assist more employees and eventually allow the replacement of wages. Yet these hopes did not materialize.

Over a number of years, the FMLA underwent a number of adjustments. In January 2008, the FMLA was amended to include leave benefits for military families (Cigna Group Insurance, 2018). In particular, the “FMLA was expanded to include up to 12 weeks of job-protected leave for any *qualifying exigency* arising out of the active duty or call to active-duty status of a covered family member” (Cigna Group Insurance, 2018, p. 2). Further, it “expanded to include up to 26 weeks of leave to care for a covered family member currently serving, with the serious injury or illness incurred in the line of duty” (Cigna Group Insurance, 2018, p. 2).

In October 2009, additional efforts by amendment were made for leave for military caregivers through the FMLA to incorporate veterans and to provide for qualified service members with preexisting injuries or illnesses exacerbated while the member was on active duty (Cigna Group Insurance, 2018). At a later time, another provision, the Airline Flight Crew Technical Corrections Act (AFCTCA) adjusted the number of work hours needed for flight attendants and flight crew members to qualify for the FMLA (U.S. Department of Labor, 2010). Later, other areas were addressed such as same-sex marriages or common law marriages in states where applicable (Cigna Group Insurance, 2018). In 2015, then President Barack Obama obtained the distinction of being the first United President to request for paid family leave while making a speech during the State of the Union (Sholar, n.d.). Accordingly, it appears that the FMLA has been integrated into the fabric of the United States employment landscape.

### **III. Corporate Stakeholder Approach and Impacts of FMLA on the Employer**

Corporate social responsibility as defined herein is the idea that those who run corporations can and should act ethically in order to create business value and societal change on a daily basis (Cross & Miller, 2001; McElhaney, 2009). Carden and Boyd (2011) noted in their study that “the goal of corporate social responsibility is to heighten the awareness of social, environmental and human issues and put pressure on employers to adopt policies and procedures that focus on the importance of minimizing or eliminating practices that are harmful in the aforementioned segments” (p. 162). Thus, employers need to consider the policies and procedures that are mandated and make note of the underlying theories and approaches for considering their actions. Specifically, the corporate stakeholder approach defines stakeholders as “any person, group or organization that can place a claim on a company’s attention, resources or output” (Kytte, & Ruggie, 2005, p. 3). As such, the corporate stakeholder approach includes the view that employers have a duty to not only the external shareholders but also others that are internal and external to the operations of the organization including but not limited to employees, customers, vendors,

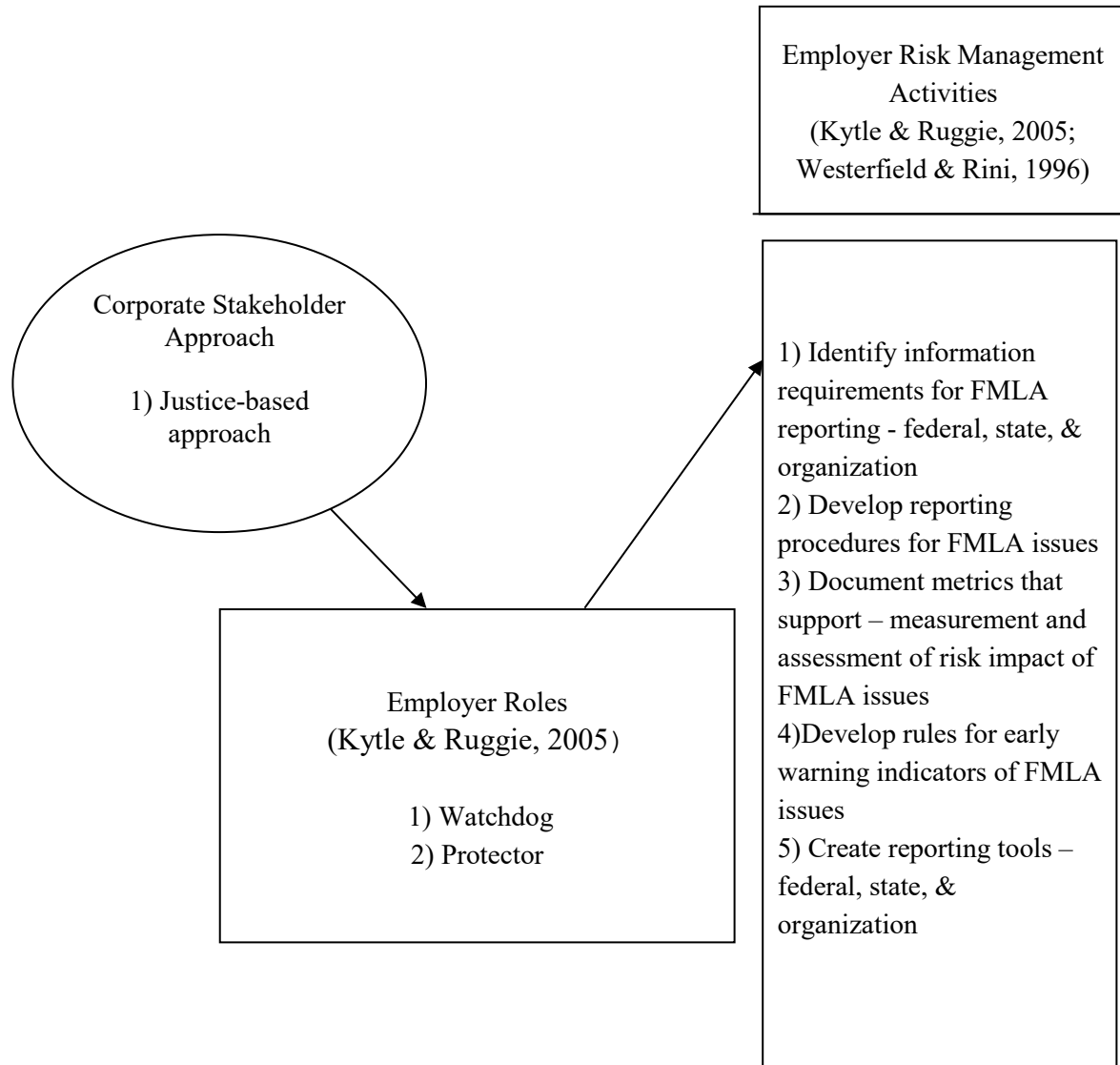
community, and the entire world (Cross & Miller, 2001; Freeman, 1984). The reasoning behind the corporate stakeholder approach “is that in some circumstances, one or more of these other groups may have a greater stake in company decisions than the traditionally know stakeholders” (Cross & Miller, 2001, p. 89).

The focus of the corporate stakeholder approach is that stakeholders need to be taken into consideration when making leadership decisions despite that fact that resources may be expensed in the process including money, time, and assets. Carden and Boyd (2011), in their study, considered employees as collaborators in planning, identifying, quantifying, and responding to situations that may impact the overall operations of the organization. In this study, the theoretical approach that guides the policies and procedures of employers in this paper includes justice-based ethics to provide a strategy for implementing FMLA activities. Justice-based ethics concentrates on actions that result in injustice to certain communities (Champoux, 2010). John Rawls (Rawls, 1999) noted that distributive justice is based on the following principles: (1) each person’s rights are equal to the other’s rights; (b) communities and institutions need to assist persons that deal with inequality; and (c) every person needs to have the same opportunities offered by society. The principle of equal liberty states that corporations “cannot invade employee privacy, use bribes to get contracts, or engage in any deceptive practices” (Champoux, 2010, p. 87).

In this study, we focus on employees as the stakeholders in which employers need to consider the policies and practices in order to enhance the positive FMLA impacts and minimize the negative impacts of FMLA. The positive impacts will be foundational to ensuring that all employees are guaranteed equal rights under the law. Specifically, the equal rights will facilitate positive impacts including better recruiting opportunities, reduced turnover rates, increased moral, and more productive workers for all employers (Scharlach & Grosswald, 1997; FMLA 1993). Alternatively, the negative impacts that need to be mitigated are high administration costs, increased administrative processing time, increased resources needed for compliance administration, staffing problems, training for FMLA requests, and enforcement processes in place to ensure that employers do not interfere, restrain, or deny employees their rights (Westerfield & Rini, 1996; Scharlach & Grosswald, 1997; U.S. Hour and Wage Division, 2012). To mitigate the negative impacts, the policies and procedures need to be implemented to ensure consistency in handling employee-related issues. In the next section of this paper, we discuss the *corporate stakeholder model* to mitigate the negative impacts related to FMLA implementations in employers.

#### IV. Corporate Stakeholder Model: FMLA

Using the Corporate Stakeholder Approach as a theoretical framework for this study includes defining corporate social responsibility as ensuring entities act ethically and responsible as they focus on providing accountability to society for their actions (Freeman, 1984; Cross & Miller, 2001). In this study, the *corporate stakeholder approach*, as noted in Figure 1, includes acting ethically and accountable by using the *justice-based approach* to consider the risks associated with not having the proper controls, metrics, and administrative activities in place within the workplace.

**Figure 1: Corporate Stakeholder Model: FMLA**

Employers need to mitigate the risks associated with not complying with the laws as well as rules and regulations associated with FMLA. The employer roles to consider when acting ethically and accountable include *watchdog* and *protector* (Kytile & Ruggie, 2005). For example, as watchdogs, employers need to “watch” the time and provide the employee 30 days advance notice if the leave is possible and provide up to 12 weeks of unpaid leave each year (United States Department of Labor, n.d.). As watchdogs, employers need to also administer preventative and mitigation activities related to the misuse of FMLA leave. Other examples, of policies needed as watchdogs, include policies and procedures to prevent or mitigate working on a second job as well as running errands or shopping (Connell, 2014).

Employers, as protectors, need to *protect the people’s rights and well-being* including human resource policies and procedures. This will include notifying employees concerning their eligibility status and rights and responsibilities related to FMLA. Additionally, employers need to

provide the administration and communication of the FMLA law including posting the provisions of the law as well as administering the tasks associated with documentation (U.S. Department of Labor, n.d.). If employers do not protect the people's rights, the employer can file a civil lawsuit if the FMLA law is not adhered to (Westerfiled & Fini, 1996).

To mitigate the risks associated with not implementing the FMLA law correctly as well as to mitigate FMLA fraud, we focus on the following risk management activities to mitigate uncertain events associated with the policies, procedures, and administration: (1) identify information requirements; (2) develop reporting procedures; (3) document metrics; (4) develop rules for early warning indicators; and (5) create reporting tools.

The *first risk management activity* is to identify the information requirements such as what is mandated by the law including *identifying information requirements*. This information can be accessed via the United States Department of Labor's website and includes such information as the rights and responsibilities notice. Specifically, the rights and responsibilities notice must be in writing and include information such as a statement related to (a) the period of leave applicable for the FMLA leave entitlement; (b) the 12-month period per the leave; (c) whether certification of the leave is needed; (d) the employee's status as a "key employee" and its relation to job restoration and benefits; (e) whether premium payments are needed to maintain health benefits, and (f) information related to consequences of not meeting all obligations communicated (U.S. Hour and Wage Division, 2012).

The *second risk management activity* includes *developing reporting protocols*. These protocols include the reporting chain of command, reporting frequency, and the use of reporting templates. For example, employees need to know who they should submit the paperwork to qualify for FMLA leave. Specifically, employers are required, per the law, to provide an eligibility orally or in writing, noting whether the employee qualifies for the FMLA leave or not (U.S. Department of Labor, n.d.). Thus, the authors recommend that someone in HR be responsible for communicating this determination. Employees should also know who to communicate with regarding issues and questions prior to and during the FMLA leave time. The authors also recommend employers put in place procedures to require employees to report their activities throughout FMLA leave to prevent abuse such as engaging in social activities including vacations (Connell, 2014).

The *third risk management activity* including *documenting metrics* such as (a) the reason for the leave; (b) lost workdays (absences related to the leave); (c) absences not related to the leave; (d) begin leave date; (e) end date of leave; (f) hours of service; and (g) certification required (yes/no) (U. S. Department of Labor, n.d.). Specifically, documenting the reason for the leave is an important metric to record and track. For example, if the FMLA leave was granted for assisting a family member the employee cannot use the FMLA leave for his/her personal illness. Another example related to documenting metrics is related to the hours-of-service requirement. Note that an employee must have worked 1,250 hours of service in the 12 months prior to the start of the FMLA leave and the employer is required to confirm or deny that the employee has met the hour of service requirement (U.S. Department of Labor, n.d.). Additionally, sometimes employers may request that an employee submit a certification from a health care provider to support the FMLA request (Wage and Hour Division, n.d.).

The *fourth risk management activity* including develop rules for warning indicators. For example, employees need to use all their paid leave before requesting unpaid FMLA leave. Therefore, the authors recommend including an indicator in the reporting system that will flag when an employee has used all his/her paid leave and thus will now be reported as taking unpaid

leave. Furthermore, the authors recommend including an indicator to note that a certification has been submitted by the employee so that the employer will not require more documentation related to the leave such as requesting information from a doctor for a FMLA-related absence. Requesting more supporting documentation after a certification has been submitted may be viewed as interfering with the use of the approved FMLA leave.

The *fifth risk management activity* includes creating reporting tools that will capture data for federal, state, and organizational needs. There is a need for employers to establish reporting protocols for FMLA issues so that employees cannot abuse FMLA by trying to use FMLA leave not related to the claim. Examples of data elements to include in the reporting tool include: employee ID#, gender, age, leave classification, reason for the leave, work location, cost center, data period began, begin date, end date, lost workdays, and premium payments (Wage and Hour Division, n.d.). See Table 2 below.

**Table 2: Data Elements for Reporting Tool**

Employee ID #	Gender	Age	Leave Classification	Reason for the Leave	Work Location	Cost Center	Begin Date	End Date	Lost Workdays	Premium Payments

## V. Conclusion

This paper discussed the background of FMLA, addressed the corporate stakeholder model to examine FMLA provisions and issues, and discussed the recommended risk management administrative and management activities of FMLA. The model supports creating a work environment that facilitates the use of FMLA leave as well as prevent or mitigate the abuse of FMLA leave. FMLA allows employees that are also caregivers to balance their work responsibilities with their caregiving duties as well as their medical conditions. Specifically, FMLA allows certain employees of specific employers to take up to 12 workweeks of unpaid leave, keep their health insurances, and protect their jobs (U.S. Department of Labor, 2012). The employees that are caregivers of family members, without the option of FMLA, have been dealing with financial hardships, high stress levels, and unbalanced lifestyles (Chen, 2016). Thus, this workplace law will allow employees to be dedicated to their work environments as well as express dedication to their individual medical and caregiver situations. Additionally, the FMLA requires employers to establish processes and procedures to prevent or mitigate the abuse of FMLA leave.

Employers need to develop policies and procedures to provide management and administration of the FMLA law. These workplace practices will help prevent FMLA abuse and ensure enforcement. Additionally, employers need to communicate the content of the law as well as the policies and procedures to ensure the enforcement of the law. As employers establish these policies and procedures, it is also important to train and educate the workforce to facilitate the use and correct administration of the procedures (Remišová & Búciová, 2012).

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## **MEDIATION METRICS II: DEALING WITH ERRANT ZOOM STYLES IN VIRTUAL MEDIATION**

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*This is the second in a series that examines emerging issues and opportunities in mediation. The need for social distancing over the past two years spawned a meteoric rise in virtual mediation to the extent that it is now the dominant form of alternative dispute resolution. Despite its efficiency and necessity at times, virtual mediation, now synonymous with Zoom mediation, presents new challenges for mediators. In particular, mediators have lost some control over social dynamics (Zoom dynamics). This paper examines a host of errant Zoom styles among participants that may plague the virtual mediation process. It offers a Personality-Based Model of Errant Zoom Styles as well as coping strategies for dealing with them. The extent to which mediators recognize and respond to these errant Zoom styles impacts the effectiveness of virtual Mediation. Recommendations and an update on mediation settlement rates are also provided.*

### **I. INTRODUCTION**

Mediation offers an alternative to the rigors of formal litigation in a courtroom. Once considered “Alternative” Dispute Resolution (ADR), mediation is now the dominant form of dispute resolution in civil cases (Hoole & Felt, 2018). It has exploded as a successful conflict resolution tool because, according to Gene Valentini, director of the Texas Dispute Resolution System, it provides an opportunity to resolve virtually any issue in “a cost effective and timely manner” (2010, p. 2). One can speak freely in mediation “about anything you feel will get you to a point of resolution because nobody’s recording or saying it’s out of order, whereas in the courtroom you may not be able to address those things” (p. 2). Business leaders must understand the dynamics of the process in order to prepare for successful mediation.

Virtual mediation has exploded over the past two years with the need for social distancing during the Covid pandemic. It has become the dominant form of ADR and is here to stay (Edwards, 2021). Zoom has emerged as the preferred videoconferencing platform to the extent that Zoom mediation is synonymous with virtual mediation (Black & Keathley, 2021). Despite its many benefits, heavy reliance on Zoom mediation has revealed a variety of misguided or errant Zoom behaviors or styles. This paper examines twelve such errant Zoom styles that the authors have reviewed in hundreds of Zoom sessions. These are summarized in the Personality-Based Model of Errant Zoom Styles. These Errant Zoom Styles are described in the Typology of

Errant Zoom Styles, and their severity is assessed in the Impact of Errant Zoom Styles Continuum. Coping strategies for each Errant Zoom Style and a Roadmap to Virtual Mediation Success are provided as are updates on mediation settlement rates.

The extent to which business leaders recognize and address the interpersonal dynamics of virtual mediation can determine whether the process succeeds or fails. Before considering how these skills can be developed using the model, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

## **II. THE MEANING OF MEDIATION**

Texas statutory law defines mediation this way:

- (a) Mediation is the forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.
- (b) A mediator may not impose his own judgment on the issues or that of the parties (Texas Civil Practice, 2008).

Unfortunately, this statutory definition offers little insight into what mediation actually can and should be. When successful, mediation can be characterized as proactive, forward-looking, and problem-solving in nature. As a process, it is enlightening, flexible, confidential, and, typically, evokes less stress than does formal litigation. It is not a drastic action and does not involve the surrender of freedom that arbitration dictates, as the latter requires an impartial third party who breaks a deadlock by issuing a final binding ruling (Lovenheim, 1998). Mediation basically involves negotiation through a disinterested third party, and it effectively can defuse emotional time bombs. One drawback mars this otherwise rosy picture: neither side is bound by anything in mediation. Arbitration binds; mediation intervenes benevolently. If the parties involved remain stubborn, intervention can sour, and mediation then becomes an exercise in futility.

Proactive use of mediation can help businesses avoid costly settlements and potential expensive litigation. Given the number of lawsuits filed, heavy reliance on compulsory mediation by the courts, and the recent dramatic shift to a virtual process, business leaders must understand and know how to prepare for and conduct successful virtual mediation.

## **III. THE USE OF MEDIATION**

Over the past two decades, the use of mediation has exploded. Business leaders and the courts have discovered its value as a cost-effective alternative to litigation in the traditional adversarial system. The number of mediation cases in Texas, Oklahoma, and Nebraska is staggering. Cases received by Texas ADR centers in the most recent three-year period for which records were kept average almost 20,000 annually, with a total of more than 58,000 from 2003 to 2005 (Annual Report Texas, 2005). The same situation is true of Oklahoma. As shown in Table 1, on average, more than 5,300 cases have been referred annually to the ADR system there, with 85,000 cases referred over the past 17 years. Also, an impressive average settlement rate of 65

percent has been registered (Annual Report Oklahoma, 2021). Farther north, results in Nebraska (see Table 2) are also impressive. The number of cases referred annually to that state's ADR system had more than doubled by 2019 before declining over the past two years perhaps due to Covid-19. The average settlement rate remained impressive at 80 percent (Annual Report Nebraska, 2021). These striking regional settlement rates are mirrored across the nation: Better Business Bureau, 78 percent (4 Disputes.com); U.S. Equal Employment Opportunity Commission, 75 percent (eeoc.gov); and Financial Industry Regulatory Authority, 89 percent (finra.org). They are also seen internationally as the Bangalore Mediation Centre tops 65 percent with 100 cases per day (MediatorsBeyondBorders.org), and the World Intellectual Property Organization exceeds 75 percent across its 179 member-nations (wipo.int). Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well established.

**Table 1: Oklahoma Alternative Dispute Resolution System Cases Referred and Settlement Rate**

<i><b>Date</b></i>	<i><b>Cases</b></i>	<i><b>Settlement Rate</b></i>
2005	6,328	68%
2006	7,968	62%
2007	5,139	64%
2008	5,766	64%
2009	6,275	71%
2010	6,375	63%
2011	6,535	64%
2012	5,704	62%
2013	5,261	61%
2014	5,046	63%
2015	4,852	63%
2016	<i>No</i>	<i>Report</i>
2017	4,559	68%
2018	4,168	70%
2019	4,419	65%
2020	3,677	62%
2021	3,361	62%
<b>Total</b>	<b>85,433</b>	<b>65%</b>

**Source:** *Annual Report Alternative Dispute Resolution System* from the Supreme Court of Oklahoma Administrative Office of the Courts

**Table 2: Nebraska Alternative Dispute Resolution System Cases Referred and Settlement Rate**

<i>Date</i>	<i>Cases</i>	<i>Settlement Rate</i>
2008	1,171	84%
2009	1,467	83%
2010	1,604	85%
2011	1,723	83%
2012	1,876	81%
2013	1,948	79%
2014	2,133	79%
2015	2,083	78%
2016	2,271	80%
2017	2,367	79%
2018	2,303	77%
2019	2,411	77%
2020	1,472	78%
2021	1,580	77%
<b>Total</b>	<b>26,409</b>	<b>80%</b>

**Source:** *Annual Mediation Center Case Data Report*  
from the Nebraska Office of Dispute Resolution

#### IV. PURPOSE

While virtual mediation was growing prior to the pandemic, it has exploded with the need for social distancing over the past two years. Virtual mediation has become the dominant means of ADR and top mediators agree, it is here to stay (Kichaven & Van Osselaer, 2021; Creo, 2020; Edwards, 2021). This sentiment is not limited to the United States, as virtual mediation has gained traction internationally as well. Bruce Edwards recounts a conversation with Sriram Panchu, one of India's leading mediators, who calls virtual mediation "enhanced mediation" and claims he is never returning to in-person mediation (Edwards, 2021). Moreover, as Zoom has emerged as the preferred videoconferencing platform (Kichaven & Van Osselaer, 2021; Creo, 2020; Black & Keathley, 2021), Zoom mediation is likely to endure long after the pandemic eases (Edwards, 2021).

Despite the many benefits of Zoom mediation, such as speed, convenience, efficiency, scheduling flexibility, and lower cost without travel (Kichaven & Van Osselaer, 2021), heavy use is revealing some deficiencies, like difficulty maintaining confidentiality, Zoom Fatigue, and distraction among participants (Bailenson, 2021; Greenwald, 2021; Rizzo, 2021). Mediation by any means is a form of collaborative communication. Thus, effective communication is vital to its success. While many have written about the emergence of Zoom Fatigue (a special type of fatigue caused by continual videoconferencing; Bailenson, 2021; Greenwald, 2021; Rizzo,

2021), few have examined the many detrimental or errant Zoom behaviors or styles that can plague virtual mediation. This paper focuses on twelve errant Zoom behaviors summarized in the Personality-Based Model of Errant Zoom Styles. These Errant Zoom Styles are described in the Typology of Errant Zoom Styles, and their severity is assessed in the Impact of Errant Zoom Styles Continuum. Coping strategies for each errant Zoom style are provided along with updates on mediation settlement rates. The paper closes with a compilation of recommendations from a broad spectrum of top mediation professionals. The Roadmap to Virtual Mediation Success consists of ten checkpoints to guide virtual mediation success. Overall, the paper enables mediators to identify and address a variety errant Zoom styles as a means to enhance the effectiveness of virtual mediation.

## V. ERRANT ZOOM STYLES IN VIRTUAL MEDIATION

### A. *THE RISE OF VIRTUAL MEDIATION*

Two events converged to spawn an explosion in virtual mediation. First, Eric Yuan left China to work at WebEx in California. The company was acquired by Cisco in 2007, and Yuan left four years later, disillusioned by the quality of the service (Konrad, 2020). Shortly thereafter, he started to build Zoom, a cloud-based videoconferencing app, and began offering it free to several organizations. Zoom's stock market debut made Yuan a billionaire in 2019 (Konrad, 2020). Second, Covid made its debut in Spring 2020, ravaging the planet in many places. This forced lockdowns or closure of schools, businesses, and governments, including the courts and legal offices. Nearly 3 million people downloaded Yuan's app on one day in March, 2020, bringing the total free downloads to 59 million since the Initial Public Offering a year earlier (Konrad, 2020). Zoom emerged as a Panacea for the Pandemic – the premier videoconferencing tool to connect people and keep businesses, schools, and organizations running (Konrad, 2020). The courts turned to virtual mediation, primarily using Zoom, to keep the legal system running. Thus, Zoom mediation, supported by virtually unlimited potential for expansion via Zoom's 17 data centers, exploded (Konrad, 2020).

Top mediators Jeff Kichaven and Paul Van Osselaer give virtual mediation high marks and proclaim that “For the foreseeable future, online mediation is mediation.” (Kichaven & Van Osselaer, 2021, p. 1.). The consensus among top mediators, as reported by Robert Creo in *Alternatives* (Creo, 2020), is that mediators universally embrace virtual mediation, finding it “not only a viable option, but in many instances the first choice” (p. 122). It is here to stay as a dominant form of mediation and a valuable tool in the mediator's toolbox (Creo, 2020).

Zoom mediation has advantages and disadvantages over in-person mediation. Most mediators cite as advantages convenience; scheduling flexibility; reduced cost due to elimination of travel; and greater comfort (reduced tension and stress) because of being in a familiar, more comfortable setting (Black & Keathley, 2021). Mark Metzger, a seasoned online mediator, reports that Zoom has cut the time of mediation in half (Kavanagh, 2020). Disadvantages include challenges with the technology; greater difficulty developing rapport with parties and

counsel; difficulty reading non-verbal cues; Zoom Fatigue; and a loss of control over session recording, unauthorized guests, distraction, and rogue comments by parties (Black & Keathley, 2021). Howard Koh, former dean of Harvard Law School, interviewed two dozen early adopters of virtual mediation, including federal and state judges, arbitrators, mediators, and trial lawyers (2021). While he reports clients seemed to be more relaxed, calmer, and happier when no longer confined to a conference room, attorneys and mediators had less control and persuasive power over parties (Koh, 2021). Zoom mediation seems to diminish some of the control that mediators and attorneys have exercised with in-person mediation. Virtual breakout rooms help, but it is difficult for mediators and attorneys to control misguided communication without compromising self-determination of parties. This paper addresses the potential for misguided communication or Errant Zoom Styles in virtual mediation.

### *B. MEDIATING WITH STYLE*

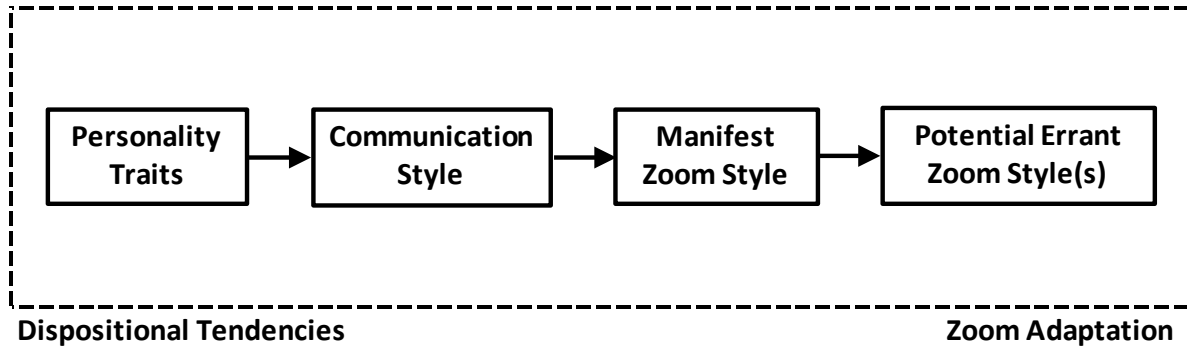
Mediators have long been aware of the importance of communication in mediation. Each participant, including the mediator, has a unique personality type and communication style. Mediators are skilled at recognizing and managing communication dynamics when in person, but this process is complicated in virtual mediation by physical separation, partial visibility, and indirect access to participants. Without the attorney and mediator's presence to persuade and to preclude and police potentially unproductive, negative, or errant behavior, parties who are one-step removed in virtual mediation and are more likely to relax and be less inhibited in expressing themselves. Moreover, participants in virtual mediation are less likely to read nonverbal cues, maintain eye contact, avoid outbursts, and maintain smooth flow of the conversation (Black & Keathley, 2021).

“The loss of these cues and differences in how communications are received are the reasons why, when we are online, it seems as if we are either sitting there in silence or talking over one another, creating a disjointed conversation that is hard to follow.” (Black & Keathley, 2021, p. 9)

While the relaxed atmosphere is considered to be a strength of virtual mediation by many top mediators (cf. Kichaven & Van Osselaer, 2020; Creo, 2020; Koh, 2021), it is also a likely avenue for manifestation of a participant's natural communication style and gives rise to the potential for negative or errant behavior in virtual mediation. Mediating from their home without the physical presence of the mediator and counsel, affords parties greater latitude to engage in communication styles that may hinder virtual mediation. They may disengage; be distracted in a casual home setting; dominate the session; or engage in a variety of unauthorized activities that may be difficult for the mediator to detect and control remotely. From observation of hundreds of Zoom sessions over the past two years, the authors identified twelve communication behaviors that hinder virtual mediation. These are mapped on four distinct Zoom Profiles derived from the four personality types in the Personality-Based Model of Errant Zoom Styles in Figure 2. The

theoretical basis for the model rests in the relationship between personality and communication outlined in the Progression of Expression Model in Virtual Mediation in Figure 1.

**Figure 1: Progression of Expression in Virtual Mediation**



Every personality trait expresses itself in a different way (deVries et al., 2011). The way a person communicates with others depends on the way he/she behaves in general. For example, a person who is more friendly, cheerful, and optimistic communicates in a more expressive way according to their personality type and is known to be helping and humorous (deVries et al., 2011). Ahmed and Naqvi (2015) demonstrated a positive relationship between Costa and McCrae's (1992) Big Five personality traits and deVries et. al.'s (2011) Six Communication Styles. Communication in Zoom is likewise an expression of personality. Florence Littauer (1992) reformulated the four temperaments (personality types) dating back to Hippocrates in her classic Personality Puzzle system, which consists of four types: Peaceful Phlegmatic, Popular Sanguine, Powerful Choleric, and Perfect Melancholy. Based on deVries et. al.'s (2011) work, Zoom participants can be expected to manifest a unique pattern of Zoom Communication or Zoom Style consistent with their dominant personality type or disposition – in this case, a unique pattern of Errant Zoom Styles. Based on personality, patterns or profiles were formulated as follows: Peaceful Phlegmatics, who avoid conflict at all costs, are likely to be **Disengaged (Hermits)**; Popular Sanguines, the life of the party, tend to be **Distracted (Multitaskers)**; Powerful Cholerics are the hard-charging **Dominators (Lions)**; and Perfect Melancholies, known to be highly organized and analytical, are **Detailed (Techies)**. Twelve Errant Zoom Styles identified by the authors are mapped on these four profiles in the next section.

### C. PERSONALITY-BASED MODEL OF ERRANT ZOOM STYLES

The authors describe twelve problematic or Errant Zoom Styles that plague virtual mediation in the Typology of Errant Zoom Styles in Table 3. Errant Zoom Styles are mapped on the four personality-based Errant Zoom Profiles outlined in the Personality-Based Model of Errant Zoom Styles in Figure 2. Errant Zoom Profiles are arranged into four quadrants defined by two dimensions: **Focus** and **Intensity**. In terms of **Focus**, the profiles are classified as being Driven

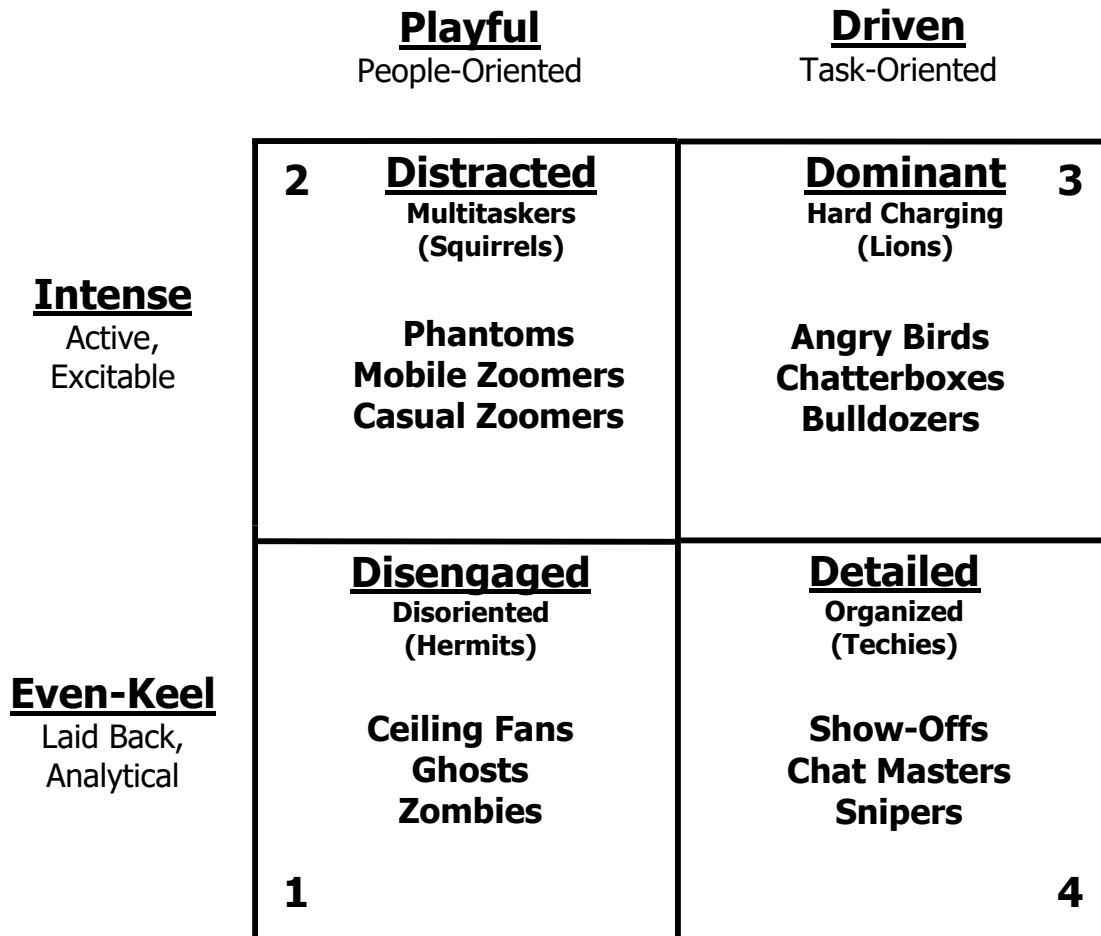


(Task-Oriented) or Playful (People-Oriented). *Intensity* gauges the activity level of the profiles, whether they are Intense (Active and Excitable) or Even-Keeled (laidback or analytical).

In Figure 2, **Quadrant 1**, labeled **Disengaged**, are the Hermits, whose personality type is the Peaceful Phlegmatic. They seek peace, harmony, and stability, and avoid conflict and change at all costs (Littauer, 1992). They tend to hide out in Zoom mediation and are characterized by three Errant Zoom Styles – *Ceiling Fans*, *Ghosts*, and *Zombies*. *Ceiling Fans* are not only disengaged, they are disoriented. Their reaction to the rise of virtual communication was to ignore it, hoping it would go away. Unfortunately, they became party to a civil suit and found themselves staring into a Zoom screen. These “Zoom Challenged” participants are unprepared and have no idea how to set up the webcam (hence, the ceiling fan view) nor how to navigate Zoom camera and audio controls, screen sharing, chat, etc. Despite the best efforts of mediators and attorneys to prepare parties for virtual mediation, some Ceiling Fans slip through the cracks. They can be a significant drain on the session. In some cases, the mediator may be forced to schedule in-office Zoom mediation with appropriate support. *Ghosts* are an aberration in virtual mediation. Were it not for their names appearing beneath a dark Zoom square or static background, no one would know they were there. Ghosts have “Gone Dark,” meaning they have muted the audio and video. Their presence is a mystery. Like a vapor, they may reappear, or remain invisible for long periods, perhaps an entire session, if not prompted by the mediator.

*Zombies* are visible in the Zoom session, but are, likewise, checked out staring blindly into the webcam, exhibiting the patented “Zoom Stare.” The old phrase, “the lights are on, but no one is home” describes these lifeless Zoom characters. While both Ghosts and Zombies may have checked out because they are unfamiliar with Zoom, are having equipment problems, or are just bored or disinterested, both may also be suffering from Zoom Fatigue. Jeremy Bailenson (2021), a researcher at Stanford University’s Department of Communication, produced the first published article on Zoom Fatigue in which he documents four consequences of prolonged video chat: 1) Excessive amounts of close-up eye contact is very intense and creates social anxiety; 2) Seeing oneself constantly in real time is fatiguing; 3) Video chats dramatically reduce typical mobility in meetings; and 4) Cognitive load is much higher in video chats as participants strain to communicate with fewer nonverbal clues. Both Ghosts and Zombies may suffer from Zoom Fatigue but cope in different ways – Ghosts “Going Dark” to alleviate the stress and fatigue, and Zombies toughing it out, staring mindlessly at the screen. Changing Zoom settings (using the “Hide Self-View” option), gaining mobility with an external camera and keyboard, and using an “audio-only” break from being nonverbally active can diminish the problem (Bailenson, 2021).

**Quadrant 2** is the realm of **Distracted** Multitaskers, whose personality type is the Popular Sanguine. They are active, outgoing, and charming – the life of the party (Littauer, 1992). Unfortunately, they are also forgetful, disorganized, and easily distracted (Littauer, 1992). They love to multitask throughout the session, popping in and out like *Phantoms* while working on other things, resorting to *Mobile Zooming* on their cell phones while driving, and tending to

**Figure 2: Personality-Based Model of Errant Zoom Styles**

**Source:** C.D. Bultena, C.D. Ramser, and K.R. Tilker

children, animals, and other distractions around the house during the session as *Casual Zoomers*. Phantoms “Go Dark” only to conceal the other activities they are engaged in during mediation. Listening in while they work, they are occasionally busted by the mediator for not responding promptly. Mobile Zoomers and Casual Zoomers are happy to invite participants into their home and auto. This can be a major distraction for participants who become “backseat” drivers in the Mobile Zoomer’s journey and front-row spectators in the Casual Zoomer’s home, getting to know the children, pets, and others within camera shot. Their behavior is counterproductive at best and may result in a “Zoom Wreck” at worst if not addressed by the mediator. The message for Mobile Zoomers: Hang up and Mediate!

**Dominant** hard-charging Lions occupy **Quadrant 3**. These Powerful Choleric are active, goal-oriented, and it is in their DNA to set the pace and to control the discussion (Littauer, 1992). They may compete with the mediator for control of the session, and they come in three varieties: *Angry Birds*, *Chatterboxes*, and *Bulldozers*. *Angry Birds* are argumentative hot heads who

swoop into the session without warning. They may be more willing to vent for several reasons: 1) They are more relaxed and uninhibited in a familiar home setting; 2) They are more willing to deal with controversial issues remotely than in person; and 3) There is some loss of control over participants by attorneys and mediators in a virtual setting (Black & Keathley, 2021).

**Chatterboxes** dominate the discussion, wander off topic, and never raise a hand or wait their turn to speak. They can become loose cannons who inadvertently share privileged or confidential information. Finally, **Bulldozers** do possess superior knowledge and experience regarding the topic at hand (Bramson, 1981). The old saying “knowledge is power” applies here – it takes a lot of power to stop the Bulldozer! The best defense is preparation – to arm yourself with relevant knowledge prior to mediation and consider inviting an expert to level the playing field for all parties (Bramson, 1981). Overall, the mediator stands to lose control of the session if these Dominators are not reined in. Zoom sessions characterized by angry outbursts, intimidation, and participants sharing privileged information are likely if the mediator doesn’t “Throttle the Dominators!”

Finally, **Quadrant 4** is home to the **Detailed** Techies whose personality type is Perfect Melancholy. They are introverted, analytical, highly organized perfectionists (Littauer, 1992). Their quiet nature can be deceiving, and they are often quite proficient with technology. **Show-Offs** have mastered Zoom technology and features. They may have flashy animated or elaborate backgrounds. One participant actually had vintage Batman scenes playing on his background screen. Participants were distracted watching the show rather than participating in the session. Their proficiency in Zoom technology affords them greater influence that can be intimidating to Zoom novices. **Chat Masters** are active in the chat room, preferring chat to live responses. Their behavior may compromise the mediation if they share privileged or confidential information through links and apps or collaborate outside the Zoom session. The Mediator (host) should disable chat or ensure that it is set to “Everyone” to avoid private chat that is not visible to the host. Finally, **Snipers** are like Phantoms, but for a different purpose. They “Go Dark” to a blank or static background to lie in wait for an opportune time to fire clever potshots from safe cover (Bramson, 1981). They may emerge from darkness to intimidate, retaliate, or just make a strong point. Victims may be the mediator or other participants who never see the barb coming.

Overall, this section presents a comprehensive, personality-based model of Errant Zoom Styles that plague virtual mediation. Being aware of these behaviors and responding appropriately enables mediators to preclude problems and effectively manage virtual mediation. The twelve Errant Zoom Styles vary in the severity of their impact on mediation. The next section explores their relative impact on virtual mediation.

**Table 3: Typology of Errant Zoom Styles**

<b>Zoom Profile</b>	<b>Errant Zoom Styles</b>
<b><i>Quadrant 1 – Disengaged - Hermits</i></b>	
<b>Personality Type: Peaceful Phlegmatic</b> – seeks peace, harmony, and stability. Avoids conflict at all costs. May be indecisive, lack initiative, and be tentative in social settings.	
<b>Ceiling Fans</b>	Zoom Challenged participant who is unfamiliar with webcam setup, Zoom camera and audio controls, and navigation of Zoom screen and functions.
<b>Ghosts</b>	Typically use blank screen or background only. May be unfamiliar with the technology or disinterested. There is little evidence they are present.
<b>Zombies</b>	Exhibit the Classic “Zoom Stare.” They appear to be in a comatose state, with little interaction or facial expression. May be a victim of Zoom Fatigue.
<b><i>Quadrant 2 – Distracted (Multitaskers) - Squirrels</i></b>	
<b>Personality Type: Popular Sanguine</b> – active, outgoing, and charming – the life of the party. Multitaskers who are often self-centered, forgetful, disorganized, and easily distracted.	
<b>Phantoms</b>	Undercover multitaskers who pop in and out of the session while working on other things. They are occasionally busted by the host for being AWOL.
<b>Mobile Zoomers</b>	Invite participants into their auto as they travel during the session. Others are distracted by the driving experience and occasional “Zoom Wreck.”
<b>Casual Zoomers</b>	Value convenience and invite participants into their homes to be acquainted with family pets, children, and other distractions.
<b><i>Quadrant 3 – Dominant - Lions</i></b>	
<b>Personality Type: Powerful Choleric</b> – hard charging, goal-oriented, leaders. It is in their DNA to lead and control. Tend to set the pace and dominate the discussion in Zoom sessions.	
<b>Angry Birds</b>	May come off as a hot heads. Willing to confront Zoom participants and argue strongly for their position. Use a competing style to win at all costs.
<b>Chatterboxes</b>	Dominate the discussion in the session. Interrupt the host and participants and tend to wander off topic, extending the duration of the meeting.
<b>Bulldozers</b>	Intimidate others with superior knowledge and experience (Bramson, 1981). Preparation is the only defense against the “D9 Caterpillar.”

**Table 3: Typology of Errant Zoom Styles (Continued)**

Zoom Profile	Errant Zoom Styles
<b>Quadrant 4 – Detailed - Techies</b>	
<b>Personality Type: Perfect Melancholy</b> – highly organized, introverted, laser-focused perfectionists. Tend to be very clever. Their mastery of technology can be intimidating to some.	
<b>Show-Offs</b>	Often become experts in Zoom and related technologies. Displaying their mastery of Zoom processes can be intimidating to the novice.
<b>Chat Masters</b>	Prefer chat responses to live responses. May submit links and circumvent mediator's role with unauthorized collaboration within and outside Zoom.
<b>Snipers</b>	Periodically emerge from background screen (safe cover) to take clever pot shots at host and other participants at opportune times (Bramson, 1981).

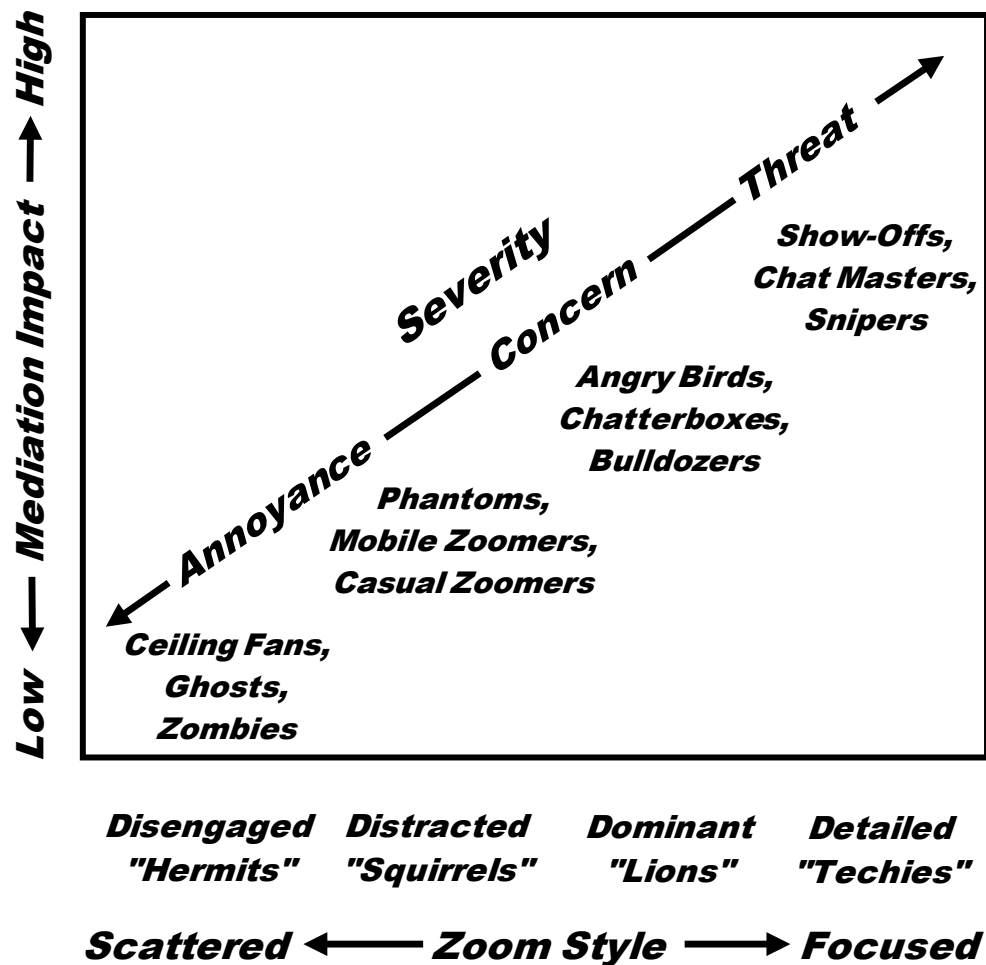
**Sources:** Twelve Errant Zoom Styles by the authors. Snipers and Bulldozers based on Robert Bramson (1981). Personality Types based on Littauer (1992).

#### *D. IMPACT OF ERRANT ZOOM STYLES*

The twelve Errant Zoom Styles cataloged in Figure 2 are not equally detrimental to virtual mediation. The impact of these Zoom Styles on virtual mediation is assessed in Figure 3. Disengaged Zoom Styles (Ceiling Fans, Ghosts, and Zombies) are merely Annoyances, requiring the mediator to prepare, check in, probe participants, or address Zoom Fatigue (Bailenson, 2021). Distracted Zoom Styles (Phantoms, Mobile Zoomers, and Casual Zoomers) are cause for Concern as these multitaskers can compromise their own safety (e.g., Mobile Zoomers) and compromise mediation effectiveness. The Dominant Zoom Styles (Angry Birds, Chatterboxes, and Bulldozers) and the Detailed (Techie) Zoom Styles can be a Threat to virtual mediation. Angry outbursts, interruption, domination, and intimidation indicative of Dominant (Lion) types are a direct threat to the collaborative communication process upon which virtual mediation is built. Perhaps the greatest threat emerges from Detailed Zoom Styles that may be employed by Techies in virtual mediation. Unauthorized or distracting collaboration with parties inside or outside the session through the chat function and other in-person or online means is a direct threat to privacy, confidentiality, and the integrity of the mediation process. Such activities may force a mediator to terminate a virtual session. Thus, in terms of consequences, not all Errant Zoom Styles are created equally.

Regardless of severity of impact, all Errant Zoom Styles must be dealt with in virtual mediation if the process is to succeed. Coping strategies for the twelve Errant Zoom Styles are provided in Table 4.

Figure 3: Impact of Errant Zoom Styles Continuum



Source: C.D. Bultena, C.D. Ramser, and K.R. Tilker

#### *E. COPING WITH ERRANT ZOOM STYLES*

The Errant Zoom Styles cataloged in Table 3 are a tangible threat to mediation success. Mediators and attorneys must be aware of the behaviors they entail and take steps to preclude or address them in virtual mediation. Coping strategies for each of the Errant Zoom Styles are outlined in Table 4. Generally, the **Hermits in Quadrant 1** are disengaged from virtual mediation in some way. Mediators must verify required Zoom hardware and provide training, a trial session, and support to Ceiling Fans beforehand and consider In-Office Zoom mediation if necessary. Mediators need to check in on Ghosts and Zombies to reassure them, address signs of Zoom Fatigue, and be good gatekeepers to encourage involvement. Some Zoom settings may help arrest Zoom Fatigue. Consider “Hiding Self View” in camera settings to eliminate the “All

Day Mirror” effect and switching the screen view from Gallery to Speaker View to eliminate the cognitive drain of staring at the “Hollywood Squares” game show grid all day (Bailenson, 2021).

**Distracted Multitaskers in Quadrant 2** require a different approach. Generally, mediators must take steps to avoid distraction to ensure that these participants focus on virtual mediation. Specific ground rules should be established prior to mediation regarding the need to keep cameras on and microphones muted in most cases. This allows the mediator to prevent multitasking and distraction that may be detrimental to mediation. Specific activities that are physically incompatible with effective communication in mediation should also be outlined and discouraged (e.g., working out, yard work, and online shopping). The mediator should insist on a safe, distraction-free environment. Of particular concern is the need to avoid mediating via cell phone and to prohibit Mobile Zooming – an obvious safety risk. Zooming from home may not be feasible for busy, distracted Casual Zoomers who are engaged in a variety of distracting or demanding activities that preclude effective communication (e.g., caring for small children or elderly parents and tending to family pets). In such cases, when feasible, a party may attend a virtual session from the attorney or mediator’s office (Fulford & Trimble, 2020).

**Dominant Lions in Quadrant 3** are a direct challenge to mediators. Mediators must establish their role up front as being in charge of the mediation. They must throttle the dominators in this category by setting and enforcing clear ground rules regarding respect, raising one’s hand (electronically) for permission to speak, and waiting one’s turn. Mediators must set and enforce effective conflict-resolution guidelines in the event Angry Birds fly into the session. In such cases, mediators must avoid direct confrontation, which is often unwinnable, in favor of breakout sessions to address specific concerns (Black & Keathley, 2021). Mediators must be prepared beforehand for the possibility that a Bulldozer plows into the mediation. According to Richard Bramson (1981), there is only one way to respond to a Bulldozer – Prepare, Prepare, Prepare! Anticipating the presence of an “expert” participant, mediators must arm themselves with all relevant knowledge possible or request an appearance by a neutral expert to level the playing field for all participants.

Finally, **Detailed Techies in Quadrant 4** present perhaps the greatest threat to the success of virtual mediation. If possible, the mediator should marshal some of the technical skills of Techies before mediation begins. Constructive suggestions, such as using Dropbox or Google Docs to share documents, may prove beneficial to a mediator who is not familiar with these tools. These should be handled by the mediator’s internal information technology support staff. Mediators must avoid potential intimidation by Show-Offs by ensuring that participants have adequate equipment and training for effective Zoom mediation beforehand. Likewise, intimidation by Snipers can be avoided by keeping cameras on as a good defense against Snipers who will “Go Dark” behind an elaborate background or blank screen waiting for an opportunity to take a clever potshot at the mediator or another participant (Bramson, 1981). Keeping Snipers visible and engaged precludes the behavior. Finally, mediators may consider disabling “Chat to Everyone” in favor of “Host Only” chat to prevent Chat Masters from distracting or dominating

**Table 4: Coping Strategies for Errant Zoom Styles**

<b>Zoom Style</b>	<b>Mediator Coping Strategy</b>
<b><i>Quadrant 1 – Disengaged - Hermits</i></b>	
<b>General Approach</b> – reassure participants, be a good gatekeeper to engage them in safe, rewarding interaction. Address signs of Zoom Fatigue, and encourage elaboration on decisions.	
<b>Ceiling Fans</b>	Verify/Provide required Zoom hardware, training, trial session, and support beforehand. Consider In-Office Hybrid Zoom Mediation if necessary.
<b>Ghosts</b>	Set and enforce specific ground rules on camera and microphone settings and the need to participate. Check in regularly to ensure participation.
<b>Zombies</b>	Address the potential for Zoom Fatigue, particularly for long sessions. Use “Hide Self View” and “Speaker View,” take breaks, check in and engage.
<b><i>Quadrant 2 – Distracted (Multitaskers) - Squirrels</i></b>	
<b>General Approach</b> – set ground rules in premediation to protect privacy and confidentiality and to minimize distraction. Refocus them and be prepared to terminate the session if violated.	
<b>Phantoms</b>	Set and enforce specific ground rules on camera and microphone settings and the need to participate. Check in regularly to ensure participation.
<b>Mobile Zoomers</b>	Set clear ground rules in premediation regarding the mediation setting. Insist upon dedicated time in a safe, distraction-free environment.
<b>Casual Zoomers</b>	Set clear ground rules, minimize distraction in mediation setting, consider hybrid virtual mediation from attorney or mediator’s office in some cases.
<b><i>Quadrant 3 – Dominant - Lions</i></b>	
<b>General Approach</b> – throttle the dominators, insist on respecting others, clarify your role as mediator. Avoid direct confrontation in open session (use breakouts), and be well prepared.	
<b>Angry Birds</b>	Review appropriate conflict-resolution techniques beforehand. Expect respect and civility. Avoid direct confrontation and use breakouts or delay.
<b>Chatterboxes</b>	Set clear communication ground rules in premediation. Stay on topic and throttle dominators by calling on others or using a rotation technique.
<b>Bulldozers</b>	Prepare! Prepare! Prepare! Bulldozers lack respect for those who do not share their expertise. Gain all the relevant knowledge possible beforehand.



**Table 4: Coping Strategies for Errant Zoom Styles (Continued)**

<b>Zoom Style</b>	<b>Mediator Coping Strategy</b>
<b><i>Quadrant 4 – Detailed - Techies</i></b>	
<b>General Approach</b> – set specific ground rules on use of Chat and other Zoom capabilities in pre-mediation. Explore and marshal technical skills, if possible, and clarify the need for respect.	
<b>Show-Offs</b>	Ensure proper training and equipment for all beforehand - equal access to justice. Manage distracting backgrounds and overloading Share Screen.
<b>Chat Master</b>	Set ground rules, disable chat or set to “Everyone,” and use text or email to reach mediator during inactive breakout sessions. Use Waiting Room and Breakouts to prevent intruders, and monitor for outside collaboration.
<b>Snipers</b>	Be on the lookout for Snipers. Set expectations for camera and microphone settings and respect for others. Call out Snipers when they take shots.

**Sources:** Compilation of recommendations from Black & Keathley (2021); Bailenson (2021); Greenwald (2021); Creo (2021); Fulford & Trimble (2020); Rizzo (2021); Schmitz (2021); and Robert Bramson’s (1981) advice for coping with Bulldozers and Snipers.

the session and, most importantly, sharing links to documents and apps not approved by the mediator (Creo, 2020). Any unauthorized attempt to share documents or to collaborate outside the mediation is a direct threat to privacy, confidentiality, and the integrity of the mediation (Black & Keathley, 2021). It is also important to guard against the threat of “intruders” (physically present in the room or in contact electronically) who may be coaching the participant or observing the proceedings (Schmitz, 2021). Mediators must set specific ground rules governing such activities and be prepared to terminate the mediation should they occur.

Overall, mediators must be aware of these Errant Zoom Styles, take steps to preclude them before mediation, and be prepared to address them during the process if virtual mediation is to succeed.

#### *F. ROADMAP TO VIRTUAL MEDIATION SUCCESS*

Errant Zoom Styles that plague virtual mediation were introduced in the Personality-Based Model of Errant Zoom Styles in Figure 2. These styles were outlined in the Typology of Errant Zoom Styles in Table 3 with coping strategies offered in Coping Strategies for Errant Zoom Styles in Table 4. Collectively, these models help mediators identify and address specific misguided behaviors in virtual mediation. What is lacking, however, is a roadmap to prepare for and deliver successful virtual mediation.

The Roadmap to Virtual Mediation Success in Table 5 is a compilation of recommendations from top mediators on how to prepare for and conduct successful virtual mediation. It offers Ten Checkpoints for Virtual Mediation Success – five dedicated to Preparation for Virtual Mediation

and five for Conducting Virtual Mediation. Preparation for virtual mediation is more demanding than preparing for in-person mediation. Considerable effort is required to set the ground rules, prepare documents and technology, train participants, test the virtual platform, and ensure privacy and confidentiality. Once mediation begins, the mediator is busy sharing documents, managing the technology, moving participants in and out of breakout rooms, and finishing strong with a Mediation Settlement Agreement that can be signed electronically via tools, like DocuSign. In the intervening period, mediators are tasked with the complexities of managing the virtual communications process. Recommendations are offered for dealing with Disengaged, Distracted, Dominant, and Detailed (Techie) participants. In addition, mediators have to deal with the “Wizard of Oz Complex” (clicking participants in and out of breakout rooms that “Go Dark” while the mediator is in other breakout rooms), Zoom Fatigue, and the occasional need for hybrid mediation where one party mediates from home while the other, because of unique challenges, mediates from the attorney or mediator’s office. The Roadmap to Virtual Mediation Success offers a practical approach to preparing for and conducting successful virtual mediation.

## VI. SUMMARY

The shuttering of the courts and offices of attorneys and mediators during the pandemic in Spring 2020 likely changed the face of mediation forever. It ushered in the age of virtual mediation which has become the dominant form of dispute resolution. Robert Creo of *Alternatives (Master Mediator Series)* was surprised at the “universal embrace” of online mediation in his canvassing of top mediators (Creo, 2020, p. 119). Some drift back to the in-person model of mediation is likely as the fog of the pandemic lifts, but virtual mediation is here to stay. Mediators will continue to adapt to what may be the most significant development in the field of ADR to date. This paper highlights some of the communication challenges they are facing and offers solutions for addressing them.

Errant or misguided Zoom Styles that plague virtual mediation were introduced in the Personality-Based Model of Errant Zoom Styles in Figure 2. This model traced the connection between personality and communication style, identifying four personality-based Errant Zoom Profiles. Twelve Errant Zoom Styles were classified and mapped onto those profiles. These styles were outlined in the Typology of Errant Zoom Styles in Table 3, with coping strategies offered in Coping Strategies for Errant Zoom Styles in Table 4. The impact of these Errant Zoom Styles was assessed in the Continuum of Errant Zoom Styles in Figure 3. Finally, a Roadmap to Virtual Mediation Success, with ten key checkpoints to prepare for and conduct successful virtual mediation, was offered in Table 5. Collectively, these models help mediators identify and address specific misguided behaviors in virtual mediation, which helps ensure the success of the mediation.

## **VII. CONCLUSION**

The resilience of mediation in the wake of the dramatic shift to a virtual process has been noted, the communication challenges posed by misguided or Errant Zoom Styles has been exposed, and several tools to help mediators and participants respond appropriately to ensure success in mediation have been supported. Business leaders can use these tools to address communication problems among mediation participants, leading to a more efficient and effective process. Virtual mediation has become a vital tool in ADR. It is most likely to succeed when participants recognize and respond appropriately to these communication challenges.

The volume, variety, and settlement rates of mediation cases suggest a bright future for this form of conflict resolution if its usefulness is recognized. With the utilization of virtual mediation on the rise, it is more important than ever for business leaders to master skills necessary to take full advantage of the opportunities this process offers. Mediation is an effective tool when business leaders prepare for and navigate the process with a clear understanding of how to remove interpersonal barriers, thus ensuring more understanding, mutual respect, and open communication.

**Table 5: Roadmap to Virtual Mediation (VM) Success**

	<b>Preparing for Virtual Mediation</b>
1.	<b><u>Prepare</u></b> - Set specific expectations (ground rules) for security, document sharing, confidentiality, etiquette, dress code, and respect prior to mediation.
2.	<b><u>Provide IT support</u></b> to verify equal access and familiarity with necessary virtual mediation technology. Avoid cell phones and distracting environments. Level the technology playing field to ensure equal access to justice for all parties.
3.	<b><u>Demonstrate use of VM platform</u></b> prior to mediation. Make sure participants are familiar with camera, mic, background settings, document sharing, and breakout sessions. Conduct a “Test Session” to verify familiarity and correct operation.
4.	<b><u>Ensure privacy and confidentiality</u></b> – Share expectations, lock the virtual and physical room to uninvited intruders (consider 360 camera scans), prohibit recording, and limit or restrict chat in favor of direct email or voice connection.
5.	<b><u>Organize and prepare documents</u></b> to be shared in advance. Documents must be in electronic form and be organized for sharing. Consider Dropbox or Google Docs.
	<b>Conducting Virtual Mediation</b>
6.	<b><u>Manage the mediation process</u></b> – Enter early, organize documents to be shared, manage the technology and participant interaction. Be proactive and deliberate.
7.	<b><u>Be friendly and personable</u></b> . Keep the lines of communication open. Avoid the Wizard of Oz Complex – clicking participants in and out of a variety of breakout rooms with long dark delays from behind the mediator’s curtain.
8.	<b><u>Engage disengaged or distracted participants</u></b> – Be a good gatekeeper, ask clarifying questions, enforce ground rules, and address Zoom Fatigue with appropriate breaks. Consider in-office VM with counsel in some cases.
9.	<b><u>Rein in dominant participants and techies</u></b> – Expect respect and civility, throttle the dominators, avoid direct confrontation, manage any misuse of technology, guard against potential intruders, and be as prepared and knowledgeable as possible.
10.	<b><u>Finish Strong</u></b> – Craft an accurate Mediation Settlement Agreement, gain mutual approval, enable DocuSign in case a final decision is reached, ensure parties feel they had a voice, and build goodwill for the next virtual mediation.

**Source:** Compilation of recommendations from: Creo (2021); Fulford & Trimble (2020), Jabbour (2021), Kraus et al. (2021), Morris (2020), Schmitz (2021); Siedel (2021), Slipp (2020). Additional recommendations by the authors.

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## BOILS, PLAGUES AND CARBUNCLES: LESSONS NOT LEARNED FROM COVID-19

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### *Abstract*

*Since the COVID-19 pandemic began, hosts of extremely difficult legal, social, economic, political questions have arisen in both domestic and international venues, some more angry, some more confused, some more distressed, yet all that deserve further examination in light of the damage the pandemic has caused: “Coronavirus has been dismantling our daily life in all its features (health, behaviour, economy) (Bassareo, Melis, Marras and Calcaterra, 2020: 637).” To have such a devastating upheaval in terms of lives lost, lives changed dramatically with illness and slow recovery, lost jobs, and deep divisions about public health responses, etc., has prompted many questions about how society can move forward safely and productively, even civilly. In the Middle Ages, Italy grappled with several plagues of the era. Given what Italy has gone through then and now, as well as everyone else, the question presented itself: how did people and society deal with the myriad problems they had with the advent and continuation of plagues centuries ago? Other questions relate to how we have dealt with the current pandemic and whether we have learned anything since pandemics began about how to deal with pandemics, epidemics, infectious diseases, etc. After reviewing these questions and others, the conclusion is that, in many respects, we have not learned much at all, even with the road map created centuries ago. This article contributes to the public policy literature by offering country and time comparisons among societies dealing with a pandemic and offering suggestions as to how to better respond to future pandemics. In support of these suggestions, we argue that adhering to public health measures is morally and legally mandated.*

### **Introduction**

“Thou art a boil, a plague sore, an embossed carbuncle.”  
(Shakespeare, King Lear, Act II, Scene 4, Stationers’ Register in 1607)

This Shakespearean quote, wherein King Lear is angrily addressing his daughter, was one of Shakespeare’s most vitriolic insults of an impressive array of vicious invective. In the context of the COVID-19 pandemic, however, it seems most apt as to how society views this heinous illness, regardless of the fact that this virus carries no skin disfigurement. Indeed, since the COVID-19 pandemic began, hosts of extremely difficult legal, social, economic, political questions have arisen in both domestic and international venues, some more angry, some more confused, some more distressed, yet all that deserve further examination in light of the damage the pandemic has caused. “Coronavirus has been dismantling our daily life in all its features (health, behaviour, economy) (Bassareo *et al.*, 2020: 637).” To have such a devastating upheaval in terms of lives lost, lives changed dramatically with illness and slow recovery, lost jobs, and deep divisions about public health responses, etc., has prompted many questions about how society can move forward safely and productively, even civilly. The experience provided

by the Venetian festival of Redentore, a festival established to give thanks to the Redeemer Jesus Christ for ending the Black Death plague in Italy in the Middle Ages is today a wonderful one (Venezia Autentica, n.d.). However, after grappling with COVID-19 for a couple of years, the exuberance of the celebrations has even more meaning. Given what Italy has gone through then, in multiple waves of that illness, and now, as well as everyone else during the COVID-19 pandemic, the question presented itself: how did the Italians and others deal with the myriad problems they had with the advent and continuation of plagues centuries ago? Another question is related to whether we have learned anything since then about how to deal with pandemics, epidemics, infectious diseases, etc. Fox (1988: 6) states that “modern history of health policy begins with the response of the leaders of Italian city states to the epidemics of Black Death... Policies devised in Italian cities became the model for Europe and, later, the Western Hemisphere.” The conclusion, however, is that, in many respects, we have not learned much at all, even with the road map created centuries ago.

Many questions were raised in developing this article, the answers to which shed light on society’s progress (or lack thereof) in managing rife contagious disease. These questions were not only concerned with definitional, factual understanding, but also were posed to determine the differences between these issues and how we deal with them now as opposed to how such conditions have been dealt with in the past. A long list of the questions merely reveals the scope of the number and complexity of the issues surrounding societally-threatening pandemic events. For example, what is the difference between pandemic, epidemic, endemic, plague, pestilence, etc. and how are those different from communicable and infectious diseases? What is public health surveillance? Who has the right to establish legally mandated policies and procedures related to slowing disease spread? How can we better manage pandemics, even to the extent of preventing an epidemic from becoming a pandemic? This article addresses these questions, as well as a number of others.

This article proceeds as follows. First, a brief presentation of actions undertaken by three governments in response to the Black Death in 1600s Florence, Italy and in response to COVID-19 in present day Italy and the U. S. helps provide context for governmental responses to epidemics/pandemics. Next, we review some basic definitions. Then we present a short history of plagues/pandemics and their causes. Fourth, we provide a brief history of public health measures in the past and in the present, from governments like those in Italy or England and in the U. S. We then offer arguments that part of the solution to managing pandemics more effectively and efficiently is that we must accept some basic truths and actions as being in the best interests of society as a whole, using the concepts of contractual rights and Rawlsian justice to support our position. Finally, lessons learned from past pandemics are offered in conjunction with suggestions as to how to approach pandemics from a position of unity on at least some issues. It is time that we reviewed the stagnation caused by a refusal to accept some of the basic truths and actions as being beneficial to society as a whole with a view to approaching the next true pandemic more efficiently, to prevent such massive outbreaks if we can and to more effectively deal with outbreaks when they do occur.

### **The Black Death and COVID-19 Pandemics: What Happened?**

The coronavirus, COVID-19 began in December, 2019 with the advent of a number of cases of pneumonia caused by an unknown virus. In early January of 2020, the World Health Organization (WHO) determined that this was a new virus and, in February, the WHO formally designated the virus as 2019-nCoV and, in March, designated COVID-19 as a pandemic, the

virus having reached global proportions (Bassareo *et al.*, 2020). Writing in early 2020, Tori, Sbrogio, Di Rosa, Cinquetti, Francia and Ferro (2020: 1) note that “exponential increases in the number of confirmed COVID-19 cases and deaths continue to be reported globally.” They further urge the necessity for awareness of the disease and its progression and the need for proactive action. With the rapidly expanding infection from China, Germany, France and the U.K., the WHO declared the outbreak a public health emergency of international concern.

See Table 1 for a brief comparison of key dates for actions taken by the U. S. and Italian governments to COVID-19. Also included, without specific time designations, is a list of actions taken in earlier times in Italy as a response to the Black Death. The responses of the Italian government, in conjunction with the U. S. responses, were provided to exhibit that some of the same initiatives were taken 500+ years ago, as well as now. The comparison also serves to highlight the differences in approach between two different political regimes at the time of the COVID-19 pandemic. The use of the country of Italy in comparison to the U. S. is then twofold: it provides a comparison of how the Italians responded during one wave of the Black Death in the 1600s and the country of Italy can also be used in a comparison of what they and the U. S. did in the current pandemic. Thus, the connection between present-day Italy and Italy in the middle ages is a good way to connect what Italians learned in the middle ages (as representative of what has been learned about pandemic/epidemic response throughout the ages) and how they dealt with a pandemic and then how they and we dealt with the pandemic now. The comparison provides a startling number of similarities in societies’ responses to plague/pandemic disease.

**Table 1:** Early Events and Responses of the Black Death Plague in 1600s Florence, Italy, Current Day Italy and the U. S. During the COVID-19 Outbreak (Henderson, 2018; Tori *et al.*, 2020; Wolfe and Dale, 2020; CDC Museum, 2022b; Chappell, 2020; Wallach and Myers, 2020; Kurilla, 2021)

<b>Florentine Government Responses</b>	<b>Italian Government Responses</b>	<b>U. S. Government Responses</b>
8/1630: Black Death outbreak	12/31/2019: COVID-19 outbreak	12/31/2019: COVID-19 outbreak
Trade from infected states was banned	January, 2020: Italian community spread occurred	January, 2020: the CDC activated a Center Level Response for this unknown virus
Sanitary cordons around infected areas were established	A six month state of health emergency was declared	The CDC screened passengers on flights from China in east and west coast states; contract tracing began
Boards of health were established		The first case was confirmed in U. S.
Inspection of suspect homes was mandated		The U. S. declared COVID-19 a public health emergency and announced implementation of new travel policies
Health surveillance began		
The sale of cloth and clothes was prohibited	February, 2020: First death	February, 2020: First death
Quarantine at home or in a lazaretto was mandated	By the end of February, Italy was in the early stages of uncontrolled viral spread	“A lost month during a critical period (Wallach and Myers, 2020)” as the federal and most state and local

<p>Fines, imprisonment and corporal punishment were imposed for mandate violations</p> <p>A culture of blame developed</p> <p>Beggars, the poor, prostitutes and Jews were expelled from cities</p> <p>“Walking maps” were developed to determine locations and spread of disease</p> <p>The state took responsibility for the transportation of the sick and dead</p> <p>Public assemblies were banned</p> <p>Burials were to be in designated pits outside city walls</p> <p>Clothes and bedding were aired or burned</p> <p>Housing was disinfected</p> <p>Sewage storage issues were identified</p>	<p>A mandatory supervised quarantine for 14 days for those who had come into close contact with confirmed cases was ordered</p> <p>Mandatory communication and surveillance was required of those who entered Italy from areas with high COVID-19 risk; appropriate quarantine was prescribed</p> <p>The Ministry of Health suspended all public gatherings in five regions</p> <p>Italy was identified as a virus hot-spot</p>	<p>governments did very little to alter normal economic and social life</p> <p>Travel bans widened to exclude foreign nationals who had traveled to Iran</p> <p>The private sector became more involved in crisis response</p> <p>Congress passed a \$8.6b supplemental appropriation bill to fund vaccine and treatment research</p> <p>The CDC warned that everyday life could be severely disrupted</p>
	<p>March, 2020: “draconian (Tori <i>et al.</i>, 2020: 2)” measures were imposed: gatherings limited, schools closed, travel restrictions unless for work or necessity; only critical retail and business activities allowed</p> <p>Travel bans were instituted for travel within the country and from outside the country</p> <p>The WHO declared a pandemic</p>	<p>March, 2020: Virus surveillance networks were modified to incorporate COVID-19 symptoms</p> <p>The WHO declared a pandemic</p> <p>Trump declared a national emergency and initiated a culture of blame, using the term “Kung-Flu,” etc.</p> <p>Further travel restrictions were put in place</p>

Roberts and Tehrani (2020) note that demographics and urbanization have eased and quickened the pace at which infectious disease spreads; globalization of markets and the ease of travel also contribute to the rapidity with which COVID-19 and any other infectious disease can spread. Ironically, though, they also point out that “the public health response to disease outbreaks has remained nearly unchanged in the last 101 years (p. 1/27).” So, though we have changed so much as groups of societies and cultures, through knowledge, technology, urbanization and globalization, still we haven’t changed a great deal in how we deal with plagues, as can be deduced by the similarities between the responses to the Black Death in the 1600s and the current pandemic. In order to better understand ranges of possible response to a pandemic, review of some basic information is called for: the next section of this article provides some background information in understanding what we know and that can help form a basis for better responses to such life- and societally-altering events as pandemics.

### Basic Definitions/Terms

Choi (2012) relates that Hippocrates was the first to believe that diseases occurred naturally and not as a result of gods or superstitions. He (2012: 2) describes a variety of nomenclature for illnesses originally presented by Hippocrates. Illnesses can be categorized by being of short duration (acute) or long duration (chronic). Historically, endemic diseases, diseases found consistently in some places but not others, are controlled by “the nature of a certain place, and climatic, hydrological, and behavioural determinants are seen as the main forces.” Likewise historically, epidemics are defined by Choi as diseases historically found at random times wherein large numbers of people are affected within a specific region.

With our better understanding of the causes of infectious disease also comes more specific identification of categories of infectious disease. According to the CDC (2021b) modern definition, to differentiate between categories of contagious disease, one must understand the differences in the concepts of endemic, epidemic, outbreak, cluster, pandemic and plague. Endemic disease is disease that is constantly and/or usually present in a geographic area; an example of an endemic disease is malaria. An epidemic occurs when there is an increase (commonly sudden) in the number of cases beyond what is usually expected for the area; examples of an epidemic are yellow fever and smallpox. Outbreaks are the same things as epidemics, but the geographic area involved is smaller than that of an epidemic; examples of outbreaks are salmonella tainted onions and listeria found in fresh salad packs. A cluster is a group of cases found at the same time and with relatively close proximity to each other; cholera and pneumonia have been instances of clusters. Pandemics are merely epidemics on a global or worldwide scale; it is an epidemic that has breached international borders and affects large portions of the world’s population; an example of this is, of course, COVID-19. A plague is a disease that can reach epidemic and pandemic proportions, but that has a particular cause. It is caused by the bacteria *Yersinia pestis* and can affect humans and other mammals. Further, it is subject to antibiotic treatment; as such, it is more uncommon in industrialized countries than in developing countries in Africa and Asia where ready access to therapeutics is more limited. Interestingly, although plague is narrowly defined by the CDC [Centers for Disease Control and Prevention (CDC), 2021b], many writers seem to use the concepts of epidemic, pandemic and plague interchangeably, as broader concepts of rife infectious or contagious disease, whether caused by a virus or by bacteria (CDC, 2021a; Columbia, 2021; ATSDR, 2008).

The term quarantine originated in Italy in the 14<sup>th</sup> century. It references the 40 (quaranta) day period that was deemed to be the appropriate length of isolation for ships suspected of harboring infectious or contagious diseases: during this period, no crew, passengers or goods could leave the ship (Bassareo *et al.*, 2020). Tognotti (2013) notes that the origin of the length of 40 days for a quarantine is unknown, but speculates that it may have been derived from Hippocratic or Pythagorean sources. Forty is also the number of days Jesus Christ spent in the desert. According to the CDC (2022a), a person should quarantine when one has been exposed to a contagion. In comparison, isolation is the action of separating those who are considered infected from those considered healthy, but who have indeed been exposed to infection. Bassareo *et al.* (2020) note that the idea of isolation was developed as long ago as the 7<sup>th</sup> century B. C. or perhaps even earlier.

Akin to the concepts of isolation and quarantine is the idea of a lockdown. COVID-19 lockdown restrictions have included shelter in place and stay at home orders; different states have imposed these restrictions non-uniformly (COVID-19 Restrictions, 2022). Interestingly, the term lockdown has been used in association with the treatment of prisoners who are confined

to their cells as a security measure (Merriam-Webster, 2022), as well as restrictions on citizens in times of emergency, like that precipitated by COVID-19.

Those isolating in quarantine during periods of the Black Death were housed in lazarettos. Tognotti (2013) reports that lazarettos were the original plague hospitals. They were established by the Venetians in 1423; these hospitals were situated away from community centers in an effort to prevent the spread of the infectious complaint for which the inmates were hospitalized. The name lazaretto is associated with the biblical story of Lazarus who rose from the dead (Tognotti, 2013): one presumes that the hope was that those who went into a lazaretto with an illness would re-emerge from the hospital in full health, as Lazarus rose from the dead.

Initial public health surveillance took a number of forms. Sanitary surveys are surveys about the physical environment of a plague-ridden area and about the way people lived that influenced their health (Henderson, 2018). These surveys could be done on the basis of house-by-house inspections to determine whether anyone in a household was ill, to register the sick and to identify who needed to be incarcerated “in isolation hospitals and the quarantining of their contacts and families in their houses or in separate institutions (Henderson, 2018: 1).” A sanitary cordon, the prevention of strangers from entering into a community via transit routes and community access points, was imposed by force to prevent the spread of the disease (Tognotti, 2013). A walking map is similar to a sanitary survey in that an appointed person literally walked the streets of a community to “identify individuals and places ‘not by a specific address, but by spatial relationships that weave physical movement into the fabric of the Florentine urban environment’ (Henderson, 2018:8).” Sanitary surveys and regulations placed by the International Sanitary Conference were designed to determine which mitigation efforts would be most effective in stopping the spread of a disease.

Public health surveillance has many definitions, definitions that have developed over centuries. Choi (2012), writing before COVID-19, presents a comprehensive review of public health surveillance and how it fits with many issues, past, present and future. The purpose of public health surveillance is descriptive, to be used, for example, in enhancing data collection on infectious disease, investigating it, evaluating the data and disseminating pertinent information derived from the surveillance. “Public health surveillance is the ongoing systematic collection, analysis, interpretation and dissemination of health data for the planning, implementation and evaluation of public health action (Choi, 2012: 9).” Scerri and Grech (2021) describe public surveillance inspectors, whose tasks included searching for possible sources of disease, scheduling disinfection efforts and conducting contact tracing. Indeed, Tognotti (2013: 257) regrets that, during the flu pandemic of 1918-1919, the multilateral health surveillance systems that had been “laboriously built during the previous decades in Europe and the United States, were not helpful in controlling the pandemic.” She attributed the failure to a “world divided by war,” such that the predecessor to the WHO “could not play any role during the outbreak.”

There are myriad issues associated with public health surveillance, including the idea of a negative connotation of the word surveillance. Somehow, this phrase seems invasive and illicit. For example, Scerri and Grech (2021) relate that the public health inspectors were required to undergo rigorous training in all aspects of a virus, including the all-important cultivation of proper persuasion and messaging to convince people that all the mitigation efforts were necessary. Rather than merely to pry into private business of citizens, public surveillance actually has five major functions, all of which are to contribute to a healthier society: population health assessment, health surveillance, health promotion, disease and injury prevention and public protection (Choi, 2012). The major subject of this work is not an examination of

surveillance, its type, its efficacy or its legal or moral standing, but it is an inherent element to the better control of infectious diseases.

### **A History of Epidemic/Pandemic Disease and Causes of Disease**

Choi (2012) provides a concise recitation of the major epidemics throughout history. He notes that the first recorded epidemic, “a great pestilence” occurred in 3180 B.C. There were several other notable “plagues” from 1495 B.C. to 427 B.C., predominantly in the middle east, in Egypt, Kadesh, Greece and Israel. Rome, Constantinople, England, Central Asia, China, India, Portugal, Russia, Norway, Germany, France and Italy were cited as centers for plagues from the early 100s A.D. to 1665 A.D. The more modern era of plagues began in Calcutta in 1817; Choi notes that the series of four pandemics of cholera, from 1817 to 1875, was caused by travel during the Industrial Revolution, as well as a contaminated pump in England. In 1918, the Spanish Influenza caused millions of deaths in France, England, China and the U. S. In Choi’s estimation (2012), the Plague of Justinian, the Black Death and the Spanish Influenza count as the most destructive epidemics in world history.

Bassareo *et al.* (2020) also provides a timeline of fearsome plagues, including an episode in Athens in 430 B.C., a smallpox plague believed to have been caused by invading Huns in 165 A.C., the Justinian Plague of 541 A.C., a suspected bubonic plague which killed approximately a fourth of the world’s population, a plague of leprosy in the 11<sup>th</sup> Century, and a plague in China, killing two-thirds of the population in 1334. Other plagues of interest include the “Columbian Exchange,” the spread of smallpox, measles, and bubonic plague to the new world by Spanish explorers. In the great plague of London, about a fifth of the population in London died, while in the First Cholera Pandemic, the populations of Russia, Europe, the British Empire, Africa and Japan were decimated. 15 million people died in the “Third Plague Pandemic” in China and India. The Russian Flu, 1889, preceded the Spanish Flu beginning in 1918 and had worldwide repercussions. In addition to Choi’s recitation of the historically noteworthy plagues/pandemics, Choi also presents the major diseases that cause such outbreaks. Malaria, poliomyelitis, influenza, hepatitis, SARS, HIV/AIDS, cholera, typhus and yellow fever are among the most dangerous communicable diseases. Additionally, smallpox, leprosy, syphilis and tuberculosis present epidemic/pandemic danger. This is a distressingly long list of infectious or pandemic disease that includes COVID-19 (Bassareo *et al.*, 2020; Choi, 2012; Fox, 1988; Tesh, 1982). Given the number such infectious diseases and the rate of occurrence, it is clear that better responses should be developed to manage the effects of disease on society as a whole, in addition to individuals stricken with such diseases.

Tesh (1982) lists four historical theories as to the causes of infectious diseases. First, the contagion theory was that the Black Death was introduced into societies by ships. The response was manifold: from quarantine to isolation to “living with fear (p. 325),” to social distancing, even to abandonment of family. Another theory of the source of infectious disease that Tesh recounts is the supernatural theory. Diseases are simply caused by supernatural forces and are God’s way of punishing people for their sins. The appropriate response to this theory among the people was simply to pray, to engage in special church services to confess their sins and, thereby, hope that God would relent. The third source of infectious disease is listed as inappropriate personal behavior: “people cause their own diseases by living unhealthfully (Tesh, 1982: 331).” There is a connection to the response people took to this purported cause of illness with what is going on now: the “freedom of the individual to prevent and cure illness without physicians and the medical panoply of treatments and drugs (Tesh, 1982: 332)” sounds very like the freedom

people have sought not to be bound by mask or vaccine mandates and/or to decide that ivermectin is actually an effective therapeutic, even against medical advice. The final source of theory of disease cause is the atmospheric theory, the idea that weather or other physical phenomena like earthquakes or tidal waves were the sources of disease. The response to this as a source of disease was to clean things through fire, firing cannon or utilizing perfumes or evil smelling things to prevent getting sick. Roberts and Tehrani (2020: 6/27) add more specifically the idea of the miasma theory, long developed, of contagion source for the 1918 Spanish Influenza pandemic: bad air was a problem, in conjunction with “congestion, pollution, lack of sunshine and poor airflow.”

Other causes of major epidemics have included droughts, earthquakes, war, poor sanitary conditions, dense populations, overcrowded housing and contaminated water supplies (Choi, 2012: 3; Henderson, 2018; Tesh, 1982; Roberts and Tehrani, 2020). This list of causes is included to highlight the fact that, while some of these things cannot be avoided, some of them can be avoided. As we move forward as a society, within each country or among international partners, we should seek better ways of dealing with man-made disaster, like poor sanitary conditions, as well as try to fashion better responses to acts of nature that can cause such dire results as were caused by the COVID-19 pandemic.

### **Public Health Measures: Then and Now**

Public health measures are critical to the prevention and/or spread of contagious disease: “(P)ublic health interventions have been and are still the first line of defense against a pandemic in the absence of a vaccine (Roberts and Tehrani, 2020: 1-2/27).” Visceral responses to plagues and other pandemic diseases are that “people quickly acquire(d) the habits of living with fear (Powell, 1970: 49).” Choi (2012) asserts that one of the first public health actions was undertaken by the Venetians as a response to the Black Death: three officers were charged with inspecting incoming ships to make sure that ships with infected people on board were denied entry to the port. In another example, Henderson (2018) relates that the Fraternity of the Misericordia was a charitable group of laymen who inspected suspect homes and helped transport the ill to places of isolation.

Choi (2012: 4) also notes that, at some point in the 1700s, “the health of the people was the responsibility of the state.” In 1741, surveillance legislation was introduced in the U. S.: it required tavern keepers to report contagious disease noted in their customers. The first permanent board of health in Venice was established in 1486, with the initial creation of public health policy (Scerri and Grech, 2021). A public health board, the Congregazione della Sanita, was constituted in Ferrara, Italy in the 1620s, used orders and warnings about suspects of the plague to mandate activities designed to contain the spread of the disease (Vicentini and Contini, 2020). Tesh (1982) reports that quarantines and isolation of vessels, of people and of cargo was an integral part of keeping the Black Death at bay.

The U. S. began its efforts in preventing contagion with voluntary reporting of infectious disease; Italy imposed a mandatory reporting of such disease in 1888, with the U. K. mandating such reporting in 1890 (Choi, 2012). In the 20<sup>th</sup> century, mandatory reporting of infectious disease has become the norm across the globe. In the U. S., the CDC was established in 1946, beginning its existence with the charge of public health surveillance; its reach is now considerably broader than merely engaging in public health surveillance. The WHO was founded in 1948 to achieve better health for everyone (WHO, n.d.): it has played a historic role in many pandemics and epidemics since its inception. Table 2 is a comparison of historical and



current responses to infectious disease; both historical and current responses developed over relatively short periods of time in history (for example, two to three year periods of intense disease spread). It clearly shows that much of the response to infectious disease has not altered significantly relative to societal response. Also clearly, some key differences between the past and present are seen as a result of advances of medical science, including the introduction of vaccines, effective masking, even something as simple as hand-washing. An examination of the comparison allows us to gauge how responses to infectious disease have changed for the better or how responses might be improved. These entries are not necessarily presented sequentially in time, nor are they evolutionary in nature, but do reflect that societal response was similar in many cases within fairly narrow time frames (two to three years). These efforts represent actions individuals and governments have taken in the past and are currently considered best practices.

**Table 2:** Differences in Infectious Disease Response in Centuries Past and the Present (Logie and Turan, 2020; Bassareo *et al.*, 2020; Choi, 2012; Fox, 1988; IMAC, 2020; Griffiths, 2020; Perez-Pena, 2021)

<b>Historical Responses to Infectious Disease</b>	<b>More Recent Responses to Infectious Disease</b>
Lazarettos	Pop-up hospitals
	Social distancing
Sanitary cordons Travel and trade bans	Transportation disruption and closure Travel bans
Bills of health	Vaccine passports
Quarantine/isolation	Quarantine/isolation
Lockdowns	Lockdowns
Sanitary Committees/Conferences	
Masking (i.e., Venetian beak mask)	Masking
Physician distanced from the infected	Healthcare providers deeply embedded
Physicians fleeing from disease Church responsibility for caring for the sick	Burned out health care providers question whether they are required to treat those who chose not to get vaccinated
Washing hands, burning fabrics and bedding	Washing hands
	Testing
First vaccine: 1796	Vaccines
Limited public health surveillance	More sophisticated public health surveillance
Establishment of Boards of Health	CDC, WHO
School closures	School closures
Closure of theaters	Closure of theaters
Palliative care	Curative care
Much better conditions for the wealthy	Better conditions for those not at the lower end of the socio-economic spectrum
	Employer/employee mandates
The poor are blamed and segregated by economic position, race, ethnic origin	The Chinese are blamed
Causes of disease not known	Bacteria and viruses cause disease
Penalties for non-compliance	Penalties for non-compliance
Levels of disease severity and prevalence	Levels of disease severity and prevalence

Government support	Government support
Protests against lockdown and other public health measures	Protests against lockdown and other public health measures
Makeshift morgues and coffins	Makeshift morgues
Prohibitions on funerals	Limitations on number of persons allowed at funerals

The use of the phrase best practices above is also questionable in the sense that there was resistance to many of the public health measures implemented centuries ago and today. Henderson (2018: 7) reports that during the Florentine plague there was opposition to the authority mandating public health measures, some of which were dealt with more lightly than would otherwise have been the case. Judges were aware that such criminal activities as theft from vacant houses was a result of the poor merely trying to survive in the “economically depressed environment, as plague regulations led to disruption of trade and commerce and high levels of unemployment.” Logie and Turan (2020: 2003) acknowledge that initial public responses to epidemics are plagued by a lack of seriousness of the situation and by governmental actions that can “exacerbate power imbalances between civilians and the state.” Similarly negatively, Scerri and Grech (2021: 2) recount that “strict regulations during an outbreak, however, sometimes sparked a debate about the contagiousness of the disease,” begging the question of whether restrictions on things like movement, lockdowns, etc. were indeed merited. Szreter (1997: 713-14) recognizes a “veneration of or aversion to the central state” in managing epidemics.

Modern day responses at federal, state and local levels have included many initiatives, from mask mandates in a variety of places, to cancellations of public events, both inside and outside, stay-at-home orders (quarantines), school closures, travel restrictions, testing protocols, vaccination requirements, and the like. Indeed, Bassareo *et al.* (2020: 633) note that “(Q)uarantine, spread, isolation, lockdown, cocooning, masking, social distancing, hand hygiene, blood tests, vaccine, immunity: all these words are now part of our daily speeches, pervading the most subconscious of our thoughts.” While many people all over the world have gladly accepted or at least acquiesced in many of these restrictions to normal life, many have refused to accept them for a variety of reasons.

Additionally in more recent times, in the U. S., the question of who should impose which restrictions to prevent the spread of infectious disease was first given to the individual states, according to Bassareo *et al.* (2020). In 1850, the creation of a permanent statewide public health system was suggested, including a proposal to create state and local healthcare offices which could continue to engage in public health surveillance (Choi, 2012). When, however, yellow fever epidemics became more common, Congress passed the National Quarantine Act of 1878. They further report that the quarantine system in the U. S. was “totally nationalized (Bassareo *et al.*, 2020: 635)” by 1921.

In line with the Jacobson case (1905) and the National Federation of Independent Business (2022), it seems that the “politics of local government might be critical to public health...” It is also worth noting that, in the National Federation of Independent Business case (2022), the U. S. Supreme Court viewed OSHA’s mandates about safety in the workplace as excluding COVID-19 as a source of authority for OSHA to mandate vaccinations. Although there was some criticism of the Court’s decision (Mello, Gould, Duff and Driscoll, 2022) concerning workplace safety, with the extremely narrow reading of the OSHA enabling law, it does raise the question of how far regulations for safety in the workplace can be carried.

According to Bassareo *et al.* (2020: 638), we need to make sure that “the ‘cure’ for COVID-19 is not worse than the disease itself. The universal and unprecedented public health preventive measures, including lockdowns and social distancing, are damaging our economy and increasing unemployment worldwide.” Indeed, the labor shortage endured by the Florentines in the mid-14<sup>th</sup> century after the passing of one wave of the Black Death, was intense. Davis (2021: na) offers that “The lack of funds, labor and craftsmen made it impossible to pick up the work immediately after the plague.” Wooldridge (2022: na), for example, reports that which is commonly known: employers are “crying out in vain for workers,” while “the obvious reason for all of this, of course, is the coronavirus pandemic, supercharged by the omicron strain.” The challenge related to the imposition and acceptance or rejection of public health mandates is one which must balance individuals’ freedoms with each other and balance the costs and benefits of imposing such mandates to individuals, businesses and society in general.

### **Arguments for Acceptance of Public Health Measures**

There seems to be widespread agreement among scientists now and historically that some public health measures do in fact affect the course of a pandemic, some more positively, some more negatively. For example, according to the CDC (2022a), hand-washing, staying up to date with vaccinations and improving ventilation are all actions each person could take to mitigate the effects of the pandemic, either by not getting the disease or acting to prevent further spread. It is this sort of action that society needs to agree to accept as being efficacious. We offer two arguments that the acceptance of and/or mandate of such actions is necessary to reduce the crushing effects of a pandemic.

First, the idea of contractual rights supports the imposition of public health mandates. Simplistically, contractual rights consist of four characteristics: privity of contract, contracts are legally binding, there must be knowing and willing acceptance of the social contract and, finally, there must be honesty in the provisions of the contract (Velasquez, 1998). The concept of privity refers to the nature of contracts as specific to the groups affected by the social contract. In this instance, governments have the obligation to provide for the public good, as exemplified in Medicare programs or governmentally provided health insurance. Thus, the government has the corresponding right to assess the most efficacious public health measures to provide for the public good. Social contracts are morally and legally binding: the government is obligated to provide certain goods and services at certain times; we can count on the government, then, to make proper assessments as to which goods and services should be provided. Again, in the instance of COVID-19, the government has an obligation, for example, to provide vaccinations to protect the public health. Regarding the knowing and willing acceptance of the social contract, each party should understand and accept their rights and responsibilities inherent in the social contract. As the government provides social goods like affordable education or housing, medical care, or infrastructure creation/maintenance, community members accept those goods, knowingly and willingly, with the understanding that this is a symbiotic relationship. Abiding by the social contract theory requires that we accept all of our responsibilities as well as exercising our rights: if public goods are expended for the healthcare of pandemic patients, pandemic patients can logically be required to participate in adherence to public health mandates. Finally, honesty is required; fraud of any kind must be avoided, while integrity and good faith are essential contractual elements, contributing to the stability and structure of the community. Thus, informing society as to the availability and efficacy of vaccines, hand-washing or masking in a truthful manner is an incumbent moral and legal responsibility of the government, as it is

incumbent upon community members, for example, to be truthful when acknowledging that they have been exposed to the virus or have the virus. “The force of legal structures, rather than moral tenets, is behind the imposition and recognition of these contractual rights (Payne and Raiborn, 2018: na).”

Another theory that supports the imposition and adherence to public health measures can be found in the writings of John Rawls (1958; 1971). His principles of justice require that decision makers be ignorant of who they are or what characteristics they possess; this achieves the “original position” that allows for utterly fair development and imposition of public health measures. One does not know whether one will be immune from a virus or at serious risk of death from the virus; thus, one would enact and follow rules that would prevent contracting the virus to avoid possible serious risk of death. Further, rules should be made such that public health measures would not harm those least advantaged in society and indeed would most protect those that are least advantaged. This addresses the issue of front-line workers, for example: they deserve the best protections we can provide via mechanisms like masks, vaccines, testing, etc. Given that these workers are “front-line” workers, workers who must continue to work to provide necessities for others in the community and that they are typically among the least well paid, public health measures that protect these workers are essential (Wade, 2020; Roberts and Tehrani, 2020).

### **Conclusion: Lessons Learned**

Tesh (1982) offers that laissez-faire approaches to infectious disease management often fail for a variety of reasons: failure to act quickly, decisively and effectively are marks of a laissez-faire approach that simply intensifies epidemic disease. Logie and Turan (2020) have three suggestions in their article that focuses on the concept of “othering” or the stigmatizing of those society fears for some reason. They suggest first that messages of kind and caring connections can reduce both the fear and stigma associated with infectious disease. Regarding travel bans, lockdowns and movement restrictions, all of which are legally enforced, they suggest that these methods of disease spread prevention disproportionately affect groups of people already at risk for blame and exclusion, including the homeless, the imprisoned, migrants and refugees, undocumented immigrants and racial minorities. To ameliorate the deleterious effects of these measures, they suggest that appropriate messaging can be beneficial: anti-xenophobic public service announcements and messages of inclusion can strengthen “communities to support persons to protect their own and one (an)other’s health (p. 2004).” They also recognize that misinformation is a serious problem that must be addressed, particularly as it relates to those least advantaged in society. The solution here is long-term: society needs to address social inequalities in a way that allows the “transformation of values, laws and policies (p. 2004).” As this is a long-term solution, society cannot expect this solution to yield immediate results in terms of misinformation or how the marginalized are treated, but it can yield fruit in the fullness of time, just as the Chinese proverb suggests that the best time to plant a tree was 20 years ago, but the second best time is to begin the process in the present. Logie and Turan’s last suggestion as to how to mitigate the stigmatization people may face as a result of their marginalization by society is to include those stakeholders in the development of messages and in the study of the inequities that subject marginalized people to being marginalized. As Rawls (1971) would suggest: the least advantaged in society must be given the best opportunities to overcome their disadvantages. This call is echoed by Marmot and Allen (2020: 682), who call “for a national

commitment to reduce social and economic inequalities and thereby achieve greater health equity.”

Bassareo *et al.* (2020: 638) note that one strategy to managing a pandemic hasn't changed without a vaccine to help. “A vast majority of countries identified persistent lockdown as the only way to limit contagion from spreading without control. Overall, the 7-centuries old ‘quarantine’ word is back in fashion.” They also suggest that there are two long-term strategies to deal with rampant infectious disease: long-term mitigation and suppression. Long-term mitigation requires sustained or intermittent social distancing until a vaccine is discovered or until herd immunity is acquired by the society. Suppression is the idea of identifying and isolating those who have the infectious disease until a vaccine is developed. Each of these strategies implies that we will act towards protecting the most vulnerable in our society and that we can be required to do so via mandates like those to wear masks, those to cancel events or close schools or those to be vaccinated when one becomes available.

Finally, risk assessment has been deemed critical in public messaging: those at greater risk, with underlying health issues, have been urged to get vaccinated as soon as possible. Logie and Turan (2020; Choi, 2012) have addressed the importance of crafting messages of inclusion and compassion; such messages, supported by the science proven by the medical community, is also helpful in preventing the spread of disease and the diminution of blame placed on the marginalized. In short, Choi (2012: 16) argues that an “optimal surveillance system will examine interactions among biological, social, psychological, and environmental factors to support public health promotion, intervention programs, and both mental illness and chronic disease prevention.”

The lessons learned from the COVID 19 pandemic are lessons that have been accessible for centuries. The failure of any of the systems society has to deal with pandemics has allowed the current pandemic to escalate to the immeasurable loss or disruption of so many lives and extensive damage to society. These losses and the damages sustained will take years to recover from. If we can better accept lessons learned from the experiences of centuries past, it is to be hoped that the next pandemic, and there is sure to be one (i.e., Monkeypox), will not impose such heavy costs individually and societally. Perhaps a frightful prediction, based on the deterioration of the Italian city-state of Siena in the mid-14<sup>th</sup> century, as to what society learns from handling the COVID-19 pandemic: “The case of Siena is an example of how nature can direct the events of human history, and change the course of a government and society. Pestilence limited the city's growth, cultural expression, and military defense...plague struck the medieval city, and devastated it (Davis, n.d.).” If we can learn from the past, perhaps we can prevent such devastation as the COVID-19 has wrought in the future where one thing is certain: there will be another pandemic to manage.

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## VIRTUE ETHICS AND THE NEED FOR SCIENTIFIC ACCOUNTANTS

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### ABSTRACT

*As accounting embraces virtue-based professional ethics, based on integrity, objectivity, independence, and due care, to ensure consistent application for the creation and audit of financial statements, there is compelling evidence that the profession must provide a solid foundation to allow accountants to make the best and most consistent accounting standard choices. This is important because financial accounting standards allow a broad range of opportunities for companies to manipulate their numbers through their choices in accounting policies, fair value accounting, and principles-based standards. This paper adds value to the current literature by examining how the audit profession can increase its value to the public by adopting a scientific mindset that is created when the profession combines a framework seeking the true value of a firm, it's underlying economic reality, with the profession's virtue ethics. This mindset will aid auditors in their defense when called to the stand to defend their professional judgment and will provide a basis for auditor and industry accountants to use when justifying financial statement adjustments and corrections to their clients.*

**KEYWORDS:** Virtue Ethics, Scientific Accountant, Scientific Approach, Accounting Ethics

### INTRODUCTION

As accounting embraces virtue-based professional ethics, based on integrity, objectivity, independence, and due care, to ensure consistent application for the creation and audit of financial statements, the profession must provide a solid foundation to allow accountants to make the best and most consistent accounting standard choices. This is important because financial accounting standards allow a broad range of opportunities for companies to manipulate their numbers through their choices in accounting policies, fair value accounting, and principles-based standards. This paper adds value to the current literature by examining how the audit profession can increase its value to the public by adopting a scientific mindset. First, the paper explores the literature on public trust and virtue-based accounting ethics. Second, the paper introduces a framework and credo that can be used to guide the profession. Third, the paper discusses the need for accounting professionals to adopt a scientific mindset that is created when the profession combines a framework seeking the true value of a firm, it's underlying economic reality, with the profession's virtue ethics. Finally, the paper discusses the implications for universities and the accounting profession.

### LITERATURE REVIEW AND DISCUSSION

#### Public Trust and the Rise of Virtue-Based Accounting

Public trust is paramount to the accounting professions continued monopoly of public company audits. When the markets fail, as they did after the scandals in the early 2000's, the public began to question the integrity of the financial reporting and audits of public companies (Fuerbringer, 2002; Goelzer, 2006; Hilzenrath, 2001; Lail et al., 2017), Congress boosted public

faith in the markets by passing laws, such as the Sarbanes-Oxley Act of 2002 (Turner, 2006; Lail et al., 2017). However, historically, such actions by the government do not solve the systemic underlying problem (Lail et al., 2017). To maintain a monopoly on audits, the accounting profession knows it must work to ensure its practitioners retain the trust of the public. After the accounting scandals of the early 2000's, there was an increase in articles advocating virtue ethics as a way to increase and maintain public trust in the accounting profession (McMillian, 2004; Lail et al. 2017; Lopez and Perry, 2018) and accounting based ethical education and research has focused on virtue-based ethics (Armstrong et al., 2003; McMillian, 2004; Lehman, 2014; Lail et al. 2017; Lopez and Perry, 2018; West, 2018).

### **Virtues of Accounting Professionals**

While, at the state level, each state maintains its own code of professional conduct for accountants, most are similar to the American Institute of CPAs Code of Professional Conduct (AICPA Code). The AICPA Code defines the four main virtues required to be maintained by auditors in public practice as integrity, objectivity, independence, and due care. Non-auditors are expected to maintain the same virtues, with the exception of independence. As part of this paper each of these virtues are discussed in detail.

#### *Integrity*

The AICPA Code 0.300.040.01-.02 places emphasis on the role of its members to act with integrity to ensure the maintenance and growth of the public's trust in the profession (AICPA, 2014). The AICPA Code 0.300.040.04 states:

Integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance or in the face of conflicting opinions, a member should test decisions and deeds by asking: "Am I doing what a person of integrity would do? Have I retained my integrity?" Integrity requires a member to observe both the form and the spirit of technical and ethical standards; circumvention of those standards constitutes subordination of judgment. (AICPA, 2014)

Additionally, the AICPA Code 0.300.040.05 stipulates that to have integrity, an accountant must act with due care, objectivity, and independence (AICPA 2014)

#### *Objectivity and Independence*

The AICPA Code 0.300.050.01 posits that objectivity and independence require that the member stays objective and remain free of conflicts of interest in the performance of his or her professional duties (AICPA, 2014). Per the AICPA Code 0.300.050.02, in addition to being free of conflict of interest, objectivity also requires the professional to be impartial and intellectually honest (AICPA, 2014). For auditors, the AICPA Code 0.300.050.01 is stricter, requiring independence in fact and appearance (AICPA, 2014).

#### *Due Care*

Due Care, per the AICPA Code 0.300.060.01 and 05, requires its member accountants to apply both the profession's technical and ethical standards. The AICPA Code (0.300.060. 01 and 03-.04) denotes exercising due care in the performance of one's duties including continual improvement, through education and experience, to improve the member's competence, service quality, and ability to complete services with insightful talent (AICPA, 2014).

When interpreted and applied uniformly across the profession, these virtues can increase the quality of financial statement audits. However, the definitions of these virtues may not be uniformly interpreted or applied for a multitude of reasons.

### **Impediments to the Effective Application of Virtue-Based Accounting**

The application of virtue ethics can be influenced by regional differences, which can influence the interpretation of what constitutes a virtue and the emphasis placed on that virtue (Hakan Özkan, 2013). Additionally, the salience of the accountant's employer, personal ethics, and professional identification also influences how the accountant interprets virtues (Bamber and Iyer, 2007; Lopez and Perry, 2018) and may result in different interpretations by different individuals. Bamber and Iyer (2007) found the more an auditor identified with his or her client, the more the auditor's judgment was influenced by the client's preferences. Bamber and Iyer (2007) found this to be mitigated by experience and by identifying more heavily with the accounting profession. Moore et al. (2006), found that auditors may become unconsciously biased toward their clients and use selective perception that impedes independence.

Additionally, the AICPA Code 1.000.010.08, .10-.16 has identified several threats that may impede an accountant's objectivity, independence, and integrity (AICPA, 2014). The listed threats include: familiarity threat, including a knowing or working with a client over a long period of time (AICPA Code 1.000.010.12); self-interest threat, including reliance on a single client for most of the firm's revenue (AICPA Code 1.000.010.14); and, undue influence threat, including when a client threatens to dismiss a firm unless it gets its way or when a client threatens to not hire the firm for additional engagements unless the client gets its way (AICPA Code 1.000.010.16) (AICPA, 2014). This is exactly what happened with ZZZZ Best and Ernst & Whinney (Mintz and Morris, 2020, p.322). These threats create pressure making it difficult for auditors, or even industry accountants, to stand up to the upper management of companies concerned with managing the financial statement numbers. Under such pressure, when there is room for interpretations within the virtues, accountants may use this to rationalize a different, more client friendly interpretation.

Thus, while the shift to virtue-based ethics is a step in the right direction, there is a potential problem. Even if we all agree on some basic virtues, such as integrity, objectivity, due care, and independence, without an ingrained credo, such as medicine's "do no harm," the impact of these virtues will never be evenly applied to decisions made by accounting professionals.

Accounting professionals are presented with a myriad of unique, complex situations, and pressures throughout their professional careers and for each situation, they must determine the applications of items such as integrity, objectivity, due care, and independence using their professional judgment for situations that are not black and white (McMillian, 2004; Melé, 2005). Public company financial statements contain summary numbers that are compiled using thousands of judgments, where, for each judgment made, there were acceptable alternatives that were not chosen (McMillian, 2004) and, when put together, these differences in judgment, that seem small in the moment they are made, can add up to material errors on the financial statements. Without a solid credo, accountants under pressure from their client to meet specific numbers, it may be easier to agree with the client in areas that are more open to interpretation, even when the numbers as a whole end up distorting the financial statements. Fair value accounting and principles-based accounting are on the rise in the U.S. and are among the grey areas of accounting. When there are disagreements, accountants may need additional guidance and strength to stand up to their clients.

#### *Fair Value Accounting*

Over the years, both U.S. and international standard-setters have incorporated more fair value requirements and options into their standards (Munter, 2000; FASB 2001; FASB 2007;

Boyles, 2008; Shortridge and Smith, 2009; Smith and Smith, 2014; Marra, 2016). Standard-setters have done their best to minimize the social impact of fair value standards (Blecher, 2019), issuing standards that hopefully will increase the relevance of financial statements while keeping faithful representation as much as possible.

However, even with the care standard-setters have taken while setting standards, fair value accounting leaves room for financial statement manipulation and is an area that requires greater professional judgment (Singh, 2015). Concerns expressed by investors and analysts have been substantiated by a variety of studies demonstrating instances where management has manipulated fair value amounts to achieve a goal (Shalev et al., 2013; Haswell and Evans, 2018). In addition, even without financial statement manipulation, companies with unique long-lived assets specific to the company have a difficult time assessing fair value (Abbott and Tan-Kantor, 2018). Further, Yao et al. (2018) found assets using Level 2 and Level 3 measurements, meaning items not measured using directly observable inputs, did not explain a firm's earning persistence, indicating the true fair value of the items were not being captured.

Carcello et al. (2020) noted that the PCAOB often cites inadequate testing related to fair value estimates as an audit deficiency. Carcello et al. (2020) found independence issues may impact the inadequate testing. However, even with independence, auditors face many challenges in accurately trying to judge the reasonableness of fair value estimates (Pannese and DeFavero, 2010). In order to maintain the public's trust, accountants must do their best to ensure items measured at fair value are reasonable, even when they are malleable estimates.

#### *Principles-Based Accounting*

The International Accounting Standards Board (IASB), known for setting current International Financial Reporting Standards (IFRS) was established in 2001 (Deloitte, n.d.). At this time, the predominately rules-based United States was dealing with a series of accounting failures that included Enron, WorldCom, and Tyco (Chartier, 2002; Harding, 2002). In the wake of these scandals, in 2003, the SEC issued a staff report recommending the U.S. move toward a more principles-based approach, requiring more professional judgment to better capture the underlying economic reality of companies, because the rules-based approach was deemed too easily manipulated (U.S. Securities and Exchange Commission, 2003; Elifoglu and Fitzsimons, 2003; Schipper, 2003; Chandra and Azam, 2019) and the IASB chose to pursue a principles-based approach.

There is evidence that companies using a more principles-based system are able to more accurately capture the economic substance of their transactions. Collins et al. (2012) found better lease classification between operating and capital leases when a principles-based system was used. In addition, evidence shows that under principles-based accounting higher amounts of accrual earnings management exist, the absolute magnitude of accruals earnings managements was lower, the quality of the accruals was higher, and there was less chance of financial misconduct (Webster and Thornton, 2005; Sundvik, 2019).

However, for a principles-based system to be effective, accountants implementing the system need training and a frame of reference to judge the appropriateness of accounting treatments to ensure integrity and objectivity. McMillion (2004) noted that principles-based standards can be problematic if the interpretation of the standard occurs outside the profession. Bjornsen and Fornaro (2019) found that companies using a principles-based system of accounting standards more accurately complied with the original standard-setter's intent when given additional rules-based supplemental guidance. Additionally, a more principles-based system requires education to guarantee accountants learn how to interpret and apply the more

flexible accounting standards in order to ensure financial statements capture the company's underlying economic reality (McMillian, 2004; Chandra and Azam, 2019).

Fornaro and Huang (2012) found evidence while investigating SFAS No. 143, a principles-based standard issued by FASB, that effective monitoring is mandatory in a principles-based system to ensure compliance and that when standards are too ambiguous, they found strong opportunities for earnings management, even with strong monitoring. McBarnet (2003) discusses the idea that creative compliance is all too often impacted by ambiguous laws and attitude. Attitude is described as the user's desire or willingness to take advantage of the grey areas of the law (McBarnet, 2003). Principles-based accounting does not eliminate the ability to manipulate financial statements and commit fraud (Stuart, 2006), but it does provide for the possibility of more relevant financial statements, provided the preparers and auditors have criteria to judge the correctness of accounting transactions and, perhaps most importantly, the will to implement it. Without a formal education program designed to provide an objective, standardized approach for implementation and the ethics and will to implement it, a principles-based system is open to more manipulation than a rules-based system.

Because of all the factors influencing the application of virtue ethics, teaching virtue ethics alone is not enough to ensure a unified application across the profession. Without a strong framework and the ethics to apply it, inconsistencies in accounting between firms will undoubtedly arise as identical financial statement items may be presented differently, resulting in the erosion of the public's trust in the ability of the accounting profession to provide truthful financial information.

### **Framework for Accounting**

The Financial Accounting Standards Board (FASB) has provided the profession with framework guidance that can be used to choose between accounting treatments. Per FASB, the goal of financial statements is to provide useful information to investors and creditors (SFAC No. 1 and 8, Chapter 1). In 1980, FASB passed Statements of Financial Accounting Concepts (SFAC) No. 2, superseded by SFAC No. 8, Chapter 3, which specified the qualities that make information useful to financial statement users. This does much to establish a framework that can be used to provide justification for the use of one accounting method over another.

At the heart of the framework are the fundamental qualities, identified as relevance and faithful representation; information is deemed to be useful if it increases one of these two fundamental qualities (SFAC No. 8, Chapter 3). The components of relevant information are predictive value, confirmatory value, and materiality (SFAC No. 8, Chapter 3); items that include these items are considered more relevant. The components of faithful representation are completeness, neutrality, and statements that are free from error (SFAC No. 8, Chapter 3); items that include these characteristics are considered more faithfully representative. In addition, FASB's Concepts Statement No. 8, Chapter 3, also includes four enhancing qualities that while not necessary for information to be useful, their presence enhances the usefulness of financial statements. These are understandability; comparability, verifiability, and timeliness.

The two fundamental qualities of relevance and faithful representation are often seen as tradeoffs. The more a reporting choice encompasses the qualities of faithful representation, the less it will encompass the qualities of relevance. When balancing between the two items, to provide investors with the most useful information, accountants should give preference to increasing the relevance of the financial statements they present. This is because its components predictive value and confirmatory value emphasizes presenting information on the timing of cash flows of a company, which can be used by both investors and creditors to value the firm.

Finance teaches that a value is the sum of its future discounted cash flows. To know what should be paid for a company's stock, simply take the sum of the company's future discounted cash flows and divide it by the number of shares issued. To the extent an accountant can ensure that financial statements best capture the companies estimated future cash flows, that accountant starts to capture the true value of the firm, its underlying economic reality, and provides the most useful information to investors and creditors. To capture a company's underlying economic reality, the goal of the auditor should be to choose standards that give the best possible relevance with the least loss in faithful representation. If a choice also increases the enhancing qualities that makes it even stronger. This analysis should be included in the work papers of auditors as documentation of the logic used. The analysis should show the impact on each component of relevance and faithful representation and then using this information along with any impact on the enhancing qualities the accountant should choose the accounting method that best captures the underlying economic reality of the company. This is imperative for accountants as FASB moves towards a more principles-based approach to standard setting (Clay, 2007; Greenspan and Hartwell, 2009; McCarthy and McCarthy, 2014) requiring more professional judgment. In the past, rules-based systems, with their detailed guidance, provided more protection from legal liability because whether or not the accountant ensured an item was appropriately accounted for was subject to less interpretation and it was more difficult to question the integrity and objectivity of the accounting (Schipper, 2003; Dickey and Scalton, 2006; Stuart, 2006).

Integrity, objectivity, independence, and due care will need to be used to ensure that not just any method allowed by current accounting standards is acceptable to accountants. If one method decreases the usefulness of the financial statements to investors and creditors it should be discarded and not used.

This paper advocates accountants take a scientific approach by combining professional virtue ethics and the framework found in FASB's SFAC No. 8, Chapter 3 to do their best to capture the underlying economic reality of companies in financial statements they prepare. A scientific approach will help to ensure accountants choose methods that more accurately reflects the economic substance of all recorded transactions.

### **Credo for Accounting**

While the accounting professional should be taught to use the framework combined with the profession's virtue ethics as described above when making accounting decisions, the profession also needs a strong credo that reminds its members of their duty as accountants, even when confronted with instance pressure from clients to allow accounting policies that would provide less useful information to investors and creditors. The accounting profession's credo should be, "always seek to capture the underlying economic reality of the firm". This credo is simple, easy to understand, and captures the essence of the scientific approach this paper advocates, empowering accountants and providing additional guidance and strength to the accounting profession.

### **The Need for Scientific Accountants**

As accounting becomes more malleable—through the profession's move to fair value and principles-based accounting—accounting professionals must learn to consistently use virtue ethics in applying FASB's SFAC No. 8, Chapter 3 framework to ensure a more uniform application of accounting standards. To accomplish this, it will require universities and the profession to educate accountants to think with a scientific mindset. When choosing between accounting choices, the use of a scientific mindset can allow accountants to decide on the course of action that is most objective by requiring the consideration of which version best captures the

underlying economic reality of the company while minimizing distortions in faithful representation. In turn, this objective approach also allows accountants to maintain their independence in both fact and appearance, integrity, and provides a way to clearly document the exercise of due care. Educating accountants to use a hard and fast rule to apply SFAC No. 8's framework with integrity, objectivity, independence, and due care will provide the overall structure that a principles-based accounting system using more and more fair value requires to provide for consistent application of accounting methods.

This will help ensure the profession is able to meet public expectations. With the flexibility in standards and estimates allowed in current financial statements, if accountants are not trained to use a universally accepted framework ethically, the results will be the release of financial statements by companies that cannot be compared properly and are manipulated to represent the wishes of the firm's management, which is what occurred in the early 2000's. Many papers have espoused ethics, specifically virtue ethics, as being vital to ensuring good financial statements and building this trust with investors (McMillan, 2004; Lopez and Perry, 2018). While ethics is an important part of this, it alone cannot lead to consistent financial statements. There are too many divergent approaches to what constitutes ethical behavior, driven by dynamically diverse moral philosophies. To obtain consistent quality in financial statements, it is vital that accountants be educated to approach their profession as a scientist. The public has an expectation that accountants are ensuring the financial reports of companies reflect their underlying economic realities. Yet, without a clear framework, accountants lack a basis for integrity, objectivity, due care, and independence to use when confronting a firm's management who insist on using a series of accounting policies that distort the picture the company presents of its overall viability in order to reach its targeted financial goals. On the other hand, a scientific accountant will have a framework upon which to support his/her discussion with management and the ethics to insist on proper accounting treatments that best show the underlying economic reality of the company.

### **Implications for Universities and the Profession**

Within universities, this means a slight change in how most upper-level financial accounting courses are currently taught. Intermediate Accounting I and II, Advanced Accounting, Accounting Ethics, and Accounting Theory provide excellent opportunities to teach students this scientific approach to accounting. To prepare future accountants for changes occurring in the profession, financial accounting courses must emphasize the use of the scientific approach in choosing and applying accounting standards.

To aid in developing critical thinking and research skills, students can be tasked to compare current Generally Accepted Accounting Standards (GAAP) set by the Financial Accounting Standards Board (FASB) to prior standards allowed by FASB. The fundamental qualitative characteristics of relevance and faithful representation, along with the enhancing qualitative characteristics—comparability, verifiability, timeliness, and understandability—as defined by FASB's Statement of Financial Accounting Concepts No. 8, Chapter 3 can be used to provide a consistent framework that students can use to determine if a change to a GAAP standard makes the financial statement information more useful. Allowing students to “discover” why certain standards work better than others will aid in developing scientific mindsets in the students.

Once students become comfortable comparing old and new standards, this educational exercise can help students in deciding the most appropriate GAAP for a company to use when the current GAAP standard allows options in accounting choice or interpretation. Using the



qualitative characteristics to judge standards, students can be educated to choose standards for a company that will aid users in determining the timing of the company's future cash flows and aid the investor in determining the underlying economic reality of the company. Since the goal of accounting, as defined by SFAC No. 8, is to provide useful information to decision-makers, defined as investors and creditors, this skillset can be used by students in the future to justify their choice of accounting standards to clients and defend their choices in lawsuits.

Additional exercises that can be used, especially in Accounting Theory courses, encourage students to study FASB proposals, read comment letters on the proposals, and write comments in response to FASB proposals. Such exercises promote confidence, build critical thinking skills, encourage the use of the scientific method, and encourage active participation in the profession; all of which are necessary components of professional judgments in future accountants.

Furthermore, as future accountants are educated to endeavor to be scientists, virtue ethics becomes an imperative part of the profession. Future accountants will need training to develop the integrity of scientists to ensure they have the strength to disagree with their clients when the client's preferences distort the company's financial statements from showing the company's underlying economic reality. These conversations should be incorporated in discussions throughout the accounting curriculum, including financial accounting courses.

Within the profession, it will be necessary to convince firms to embrace this approach. The best way would be to show how the implementation of a scientific approach would provide stronger evidence, in the case of litigation, of due diligence and have the potential to eliminate or mitigate judgments against the audit firm or accountant. In addition, continuing education in financial, audit, and ethics will need to incorporate these ideas.

Working to change the culture of accounting to a more scientific approach will take time. It has to start with the universities laying a foundation that is reinforced by firms and continuing professional education programs.

## **CONCLUSION**

In conclusion, simply embracing virtue ethics will not eliminate the variability in the quality of financial statements causing the loss of trust with investors. Accounting virtues must be combined with a strong point of reference to ensure consistent application of accounting standards to safeguard continued public trust in the accounting profession.

Accounting is now requiring more professional judgement through the profession's move to fair value accounting and principles-based accounting. A lack of a bona fide scientific approach by the profession sanctions accountants to record similar transactions in vastly different ways, resulting in the inability of the general public to recognize comparable economic transactions. This can inevitably lead to substantial financial scandals and the view that the accounting profession lacks the integrity, objectivity, due care, and independence required to conduct audits. If accountants do not embrace a scientific approach that seeks to instill the ethics of seeking the underlying economic reality of firms, then fair value and principles-based accounting, which require an extensive amount of professional judgment and estimates, will continue to allow too much freedom in the creation of financial statements.

Embracing a scientific approach to the development of financial statements, guided by the FASB's SFAC as a framework, will provide the profession with a consistent interpretation of the virtues it embodies. This will support accountants in maintaining uniform integrity, objectivity, and due care across the profession and help auditors uphold independence, even when they face threats that could impair their independence. In addition, adopting a more

scientific approach will aid auditors in their defense when called to the stand to defend their professional judgment. It will also provide a basis for auditor and industry accountants to use when justifying financial statement adjustments and corrections to their clients.

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**Book Review: THINK AGAIN by Adam Grant**

**Viking Publishing (A division of Penguin Random House), copyright 2021, 307 pages, \$28. ISBN 978-1-9848-7810-6**

Sometimes a book comes along and seems to perfectly capture our culture at this moment in time with all its imperfections. THINK AGAIN is a perfect book for this imperfect time.

Adam Grant is an organizational psychologist at The Wharton School, a highly successful author (*Give and Take*, *Originals*, *Option B*), TED talks speaker, and blogger. His newest bestseller, THINK AGAIN, is a training manual for critical thought. THINK AGAIN examines the process of which led you to your views and beliefs. Often that process is flawed, and as our times indicate now, for many, it is broken.

Grant's THINK AGAIN explores a process he describes as "Re-thinking" in three areas, individual, interpersonal, and collective, which are also the three sections of his book. Grant explains the process of critical thinking without being overly clinical and he evaluates examples of this (both good and bad) without being preachy. That is a difficult line to walk, and Grant does it perfectly. His explanations are reader-friendly and do not require any background in psychology or logic. I will offer two brief examples.

First, Grant describes multiple examples of the Dunning-Kruger trap, a cognitive bias whereby people with limited knowledge or competence overestimate their own knowledge or competence. In Dunning-Kruger, a novice in any activity quickly becomes arrogant because they become fluent in the five percent of a topic they have incorporated. If you are unfamiliar with the D-K trap, spend ten minutes on social media and you will find hundreds of examples. Instead of psychology jargon, Grant makes a much easier to follow model of the D-K trap which he titles as Stranded on the Summit of Mount Stupid. Grant's descriptions are witty and easily relatable.

Second, THINK AGAIN examines the Overconfidence Cycle, a problem where confidence is viewed as an equal counterpart to expertise. We can see plenty of instances of this trap on social media or coverage comparisons on the nightly news. One person has expertise, another has absolute confidence in his/her non-expertise. Absolute confidence (arrogance) is considered equal with expertise. For an example taken from the headlines, a medical doctor after years of education and decades of training and experience tells you to take a vaccine, but an unnamed person on the internet claims is 1000% sure taking the vaccine will turn you into a zombie, all part of an evil conspiracy by (also un-named) Asian villains. Which one should you believe? Because of the Overconfidence Cycle, expertise and arrogance are equally valid.

Grant's THINK AGAIN is not an advocate for one political view or another. He advocates for critical thinking, which is becoming less and less common.

Of course, these are but two of the examples from THINK AGAIN. In addition, Grant covers Binary Bias (every issue can be divided into two extremes) and Confirmation Bias (you only read/watch/believe information which is in line with your predetermined views. All contrary information is ignored). Grant's THINK AGAIN is a wonderful read and will challenge you to re-think your ideas, a process which is so very needed in the current climate.

Who should buy it? Anyone who can read. Anyone who wants to examine their own views, challenge their objectivity, and improve their thinking process. Who should not buy it? Anyone who is correct 1000% of the time on every topic despite having no education, research, or training. Ironically, those folks never purchase or read any book, but alas, they are the ones most in need.

As a final note, I think this book would make an excellent introduction for those interested in debate. [Note: This review's author was a debate coach in a former life, and often wishes he still was]. This book does not examine the formal rules of competitive debate but gives and wonderful start for the critical thinking process so essential in good debate.

**MARTY LUDLUM**



