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From the Editor-in-Chief. . . .

This is the 7th 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 sixth 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 entire process. 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, April, 2015. Congratulations to all our authors. I extend a hearty invitation to the 2016 meeting of the SALSBS in San Antonio, Texas, April, 2016.

The Southern Academy annual meeting has been voted the "BEST REGIONAL" among all the regions affiliated with the Academy of Legal Studies in Business (ALSBS) featuring over 60 authors and 50 papers. I hope to see ya'll in San Antonio! Please check the web site (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

www.salsb.org

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 SALSBS 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). 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:
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A PRIMER ON TEACHING THE LAW OF WILLS, PROBATE, AND BASIC ESTATE PLANNING DOCUMENTS TO BUSINESS LAW STUDENTS

DAVID W. READ* and WILLIAM A. BAILEY**

- I. INTRODUCTION**
- II. LITERATURE REVIEW: LEGAL STUDIES TEXTBOOKS AND SCHOLARSHIP**
- III. OVERVIEW OF ESTATE PLANNING IN THE U.S.**
- IV. A FRAMEWORK FOR TEACHING WILLS, PROBATE, AND BASIC ESTATE PLANNING DOCUMENTS**
 - a. PROBATE**
 - b. WILLS**
 - c. BASIC ESTATE PLANNING DOCUMENTS**
- V. CASE STUDY FOR A ONE-HOUR CLASS**
- VI. TEACHER'S NOTE**

Practically all business students will face an estate planning issue at some point in their lives.¹ This article addresses what American business students are currently taught about the law of wills, probate, and basic estate planning documents; it also addresses the pedagogy scholarship in legal studies regarding these estate planning issues. This article runs on the assumption that one of the primary objectives of business school education is not just to accumulate wealth, but also to *preserve* wealth.²

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¹ If not during their life, their estate will be handled by someone, if not the state or probate court.

² Lois Lavelle, *Declining U.S. Competitiveness: Blame B-Schools?* BLOOMBERG BUSINESS WEEK, <http://www.businessweek.com/articles/2013-05-29/declining-u-dot-s-dot-competitiveness-blame-b-schools> (last visited on December 15, 2014). (This short news article explores competing contentions about the objectives of Business School.) See Warren G. Bennis and James O'Toole, *How Business Schools Lost Their Way*, HBR, <http://hbr.org/2005/05/how-business-schools-lost-their-way/ar/1> (last visited on December 15, 2104) (the authors argue that the scientific approach to business education should be rejected; in its place, a practical knowledge should be imparted by practitioners); Warren G. Bennis, *Have Business Schools Found Their Way?*, BLOOMBERG BUSINESS

As of 2014, Americans held more than \$9 trillion in retirement savings accounts.³ Much of this will pass on to heirs, along with other assets such as real estate, insurance proceeds, personal property, business holdings, etc. In honoring the commitment to teach the *preservation* of wealth, it is important to recognize that the maximum federal estate tax rate is currently 40%⁴ of the value of property an individual has at death (after certain exemptions of roughly \$5 million⁵). The prospect of wealthy individuals above the exemption threshold losing up to 40% of an individual's accumulated wealth at death warrants that business schools should provide, at the very least, a basic study of the most common issues and planning techniques applicable to estate planning.⁶

There is a general consensus that the analysis and study of wills, probate, and basic estate planning documents are typically the foundation of any advanced estate planning study. This article, like the most common approach to wealth transfer rules in a business school's business law course, focuses on the foundational rules of wealth transfer.

I. INTRODUCTION

We first introduce the topic of wills, probate, and basic estate planning documents and why this article is currently needed. This article presumes that while most business law instructors have a legal education background, only a small portion of business law instructors have a significant degree of experience in probate and will matters or significant education in this area beyond a course or two in law school. We seek to provide a framework for the business law professor whose experience in matters of probate and wills is limited. We also recognize that such a framework should consider the limited time and space allotted in a business law instructor's semester long business law course and the resulting constraints on subject-matter coverage.⁷

In addition to offering a primer for the business law instructor in the area of wills and probate, this article adds to pedagogical research by extending the discussion of lesser-addressed

WEEK, (last visited on July 10, 2014) (Here, Bennis alone, argues that things have only "gotten worse") (<http://www.businessweek.com/articles/2012-07-09/have-business-schools-found-their-way>) ; Vicente Safón, "Factors That Influence Recruiters' Choice of B-Schools and Their MBA Graduates: Evidence and Implications for B-Schools", ACAD MANAG LEARN EDU June 1, 2007 6:2 217-233 (The author explores what is valued by MBA recruiters by analyzing data from a sample of U. S. business schools.); Serving Constituencies in Business Schools: M.B.A. Program Versus Research Performance

ACAD MANAGE J December 1, 2000 43:6 1130-1141 (The authors make the observation that Business schools strive to meet two goals: knowledge exploration through research and knowledge exploitation through instruction.).

³ Sterk, Stewart E. and Leslie, Melanie B., *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession* (May 10, 2013). NYU L. REV. VOL. 89, 2014, Forthcoming; Cardozo Legal Studies Research Paper No. 390.

⁴ 26 U.S.C. §2001(c).

⁵ The exemption amount is adjusted for inflation. 26 U.S.C. §2010(c)(3).

⁶ In addition to transfer of wealth considerations from an individual's perspective, estate planning has some implication for all business entities. For example, a deceased individual's sole proprietor interests, shares of stock, partnership interests, and LLC interests all create unique issues for heirs, the surviving business owners, and even the business itself when the owner of these interests dies. Wealth transfers at death can affect a business substantially, from new and dissimilar ownership styles and resulting management turnover, to the potential alteration of a business's long-term objectives.

⁷ Carol J. Miller and Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?*, 28 J. LEGAL STUD. EDUC. 149–206 (2011) (This article explores undergraduate law-based course requirements in schools of business in order to discuss the reliability of interchangeably using the course titles, Legal and Regulatory Environment in Business or simply Business Law.).

topics in legal studies scholarship.⁸ Similarly, this article adds to and updates the sparse articles published on the topic of business school coverage of will and probate law.

Second, we introduce what is addressed in the 42 most visible business law textbooks regarding wills, probate, and basic estate planning documents. In our study, we have found a core set of topics that are covered by most business school business law textbooks. A business law professor in business school should be aware of these topics and how they related to each other.

Third, we provide an extended overview of will and probate law in the United States. This overview frames a case-study discussion and serves to highlight student application of key concepts in the area of wills and probate. Students are encouraged to read this overview section in preparation for the case study. We conclude with a proposed case-study involving wills, probate, and basic estate planning documents for a one-hour class designed for a survey course in business law for the undergraduate or MBA student.⁹

II. LITERATURE REVIEW: LEGAL STUDIES TEXTBOOKS AND SCHOLARSHIP

We reviewed 42 business law textbooks.¹⁰ The chapters we reviewed were generally sufficient in their coverage, although they varied in depth and scope. Curiously, of the 42

⁸ Robert J. Landry, III, *Ethical Considerations in Filing Personal Bankruptcy: A Hypothetical Case Study* 29 J. LEGAL STUD. EDUC. 59-93 (2012) (Landry highlights the lack of scholarship in the Journal of Legal Studies in Education and the American Business Law Journal in certain areas of legal studies scholarship).

⁹ We largely do not address the debate about the justice of inheritance laws although this debate persists today and has persisted since, at least, Charles Dickens' time. In Dicken's fictionalized *Jarndyce v. Jarndyce*, Dickens' makes the argument against obscure and complicated inheritance laws by describing the interminable legal quagmire a probate proceeding can create. Indeed, then and now "Jarndyce and Jarndyce drones on." CHARLES DICKENS, BLEAK HOUSE 6 (2002 Modern Library Paperback ed., Modern Library 2002) (1853). There are numerous articles discussing the justice of inheritance laws. The following are examples. See Sterk, Stewart E. and Leslie, Melanie B., *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession* (May 10, 2013). NYU L. REV., VOL. 89, 2014, Forthcoming; Cardozo Legal Studies Research Paper No. 390. See also Saul Levmore, *From Helmets to Savings and Inheritance Taxes: Regulatory Intensity, Information Revelation, and Internalities*, CHIC. L. REV., VOL. 81, No. 1 (Winter 2014), pp. 229-249. While these discussions are worthy, we do not focus on this tempting philosophical problem; rather, we focus herein on the present state of the law and what one must do to preserve, protect, and pass on one's estate. A discussion about philosophical underpinnings of inheritance law may serve as a good precursor or follow-up to the case study presented herein.

¹⁰ The following textbooks are used primarily in schools of business and are written by professor or practitioners who teach in a school of business. Some of the books listed vary only by edition, but we included the updated edition because the edition had new chapters. NANCY K. KUBASEK, DYNAMIC BUSINESS LAW 1149-1164 (3rd ED. McGraw Hill 2014); Gordon W. Brown & Paul A. Sukys, *Business Law with UCC Applications* 678-698 (13th ED. McGraw Hill 2013); JANE MALLOR ET AL., BUSINESS LAW 689-708 (15th ED. MCGRAW-HILL/IRWIN 2012); NANCY KUBASEK ET AL., DYNAMIC BUSINESS LAW: SUMMARIZED CASES 1071-1088 (MCGRAW-HILL/IRWIN 2012); JOHN E. ADAMSON, LAW FOR BUSINESS AND PERSONAL USE 356-371 (18th ED. THOMSON/SOUTH-WESTERN 2009); HENRY CHEESEMAN, BUSINESS LAW: LEGAL ENVIRONMENT, ONLINE COMMERCE, BUSINESS ETHICS, AND INTERNATIONAL ISSUES 876-893 (8th ED. PEARSON HIGHER ED 2013); MARGARET E. VROMAN, BUSINESS LAW BASICS 189-193 (KENDALL HUNT 2009); A. JAMES BARNES, TERRY M. DWORKIN & ERIC RICHARDS, LAW FOR BUSINESS 682-703 (12th ED. MCGRAW-HILL/IRWIN 2015); KENNETH CLARKSON, ROGER MILLER & FRANK CROSS, BUSINESS LAW: TEXT AND CASES: LEGAL, ETHICAL, GLOBAL, AND CORPORATE ENVIRONMENT 1018-1038 (12TH ED. CENGAGE LEARNING 2012); DAVID TWOMEY & MARIANNE JENNINGS, ANDERSON'S BUSINESS LAW AND THE LEGAL ENVIRONMENT, STANDARD VOLUME 1169-1185 (22ND ED. CENGAGE LEARNING 2013); MICHAEL BIXBY ET AL., THE LEGAL ENVIRONMENT OF BUSINESS 492-495 (5TH ED. 2011); ANTHONY LIUZZO, ESSENTIALS OF BUSINESS LAW 448-463 (8TH ED. MCGRAW-HILL HIGHER EDUC. 2012); DON MAYER ET AL., ADVANCED BUSINESS LAW AND THE LEGAL ENVIRONMENT 627-647 (1ST ED. FLATWORLD 2013); JEFFREY BEATTY & SUSAN SAMUELSON, CENGAGE

textbooks, only 18¹¹ of them had chapters beyond basic wills and trusts to include more advanced estate planning concepts such as the basic framework of the federal estate tax or

ADVANTAGE BOOKS: INTRODUCTION TO BUSINESS LAW 556-571 (4TH ED. CENGAGE LEARNING 2012); ROGER MILLER, BUSINESS LAW TODAY, STANDARD: TEXT & SUMMARIZED CASES 956-973 (10TH ED. CENGAGE LEARNING 2012); ROGER MILLER & GAYLORD JENTZ, BUSINESS LAW TODAY, STANDARD EDITION 1074-1088 (8TH ED. W. LEGAL STUDIES IN BUS. 2007); RICHARD MANN & BARRY ROBERTS, SMITH AND ROBERSON'S BUSINESS LAW 1077-1097 (15TH ED. CENGAGE LEARNING 2008); HENRY R. CHEESEMAN, ESSENTIALS OF BUSINESS AND ONLINE COMMERCE LAW 594-600 (PRENTICE HALL 2005); KEITH ABBOTT, NORMAN PENDLEBURY & KEVIN WARDMAN, BUSINESS LAW 307-314 (9TH ED. CENGAGE LEARNING 2013); ROGER MILLER, BUSINESS LAW: TEXT AND CASES - THE FIRST COURSE (CENGAGE LEARNING 2014); HENRY R. CHEESEMAN, THE LEGAL ENVIRONMENT OF BUSINESS AND ONLINE COMMERCE (7TH ED. PRENTICE HALL 2012); NANCY K. KUBASEK, BARTLEY A BRENNAN & M. NEIL BROWNE, THE LEGAL ENVIRONMENT OF BUSINESS (6TH ED. PEARSON HIGHER ED 2014); O. LEE REED ET AL., THE LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS (16TH ED. MCGRAW-HILL HIGHER EDUC. 2012); DAVID KELLY ET AL., BUSINESS LAW (TAYLOR & FRANCIS 2011); DANIEL V. DAVIDSON, BRENDA E. KNOWLES & LYNN M. FORSYTHE, BUSINESS LAW: PRINCIPLES AND CASES IN THE LEGAL ENVIRONMENT (SOUTH-WESTERN PUB 2011); DAWN BENNETT-ALEXANDER & LINDA HARRISON, THE LEGAL, ETHICAL, AND REGULATORY ENVIRONMENT OF BUSINESS IN A DIVERSE SOCIETY (MCGRAW-HILL/IRWIN 2011); TONY MCADAMS, LAW, BUSINESS AND SOCIETY (10TH ED. MCGRAW-HILL/IRWIN 2011); SEAN MELVIN, THE LEGAL ENVIRONMENT OF BUSINESS: A MANAGERIAL APPROACH: THEORY TO PRACTICE (MCGRAW-HILL/IRWIN 2010); DON MAYER ET AL., THE LEGAL ENVIRONMENT OF BUSINESS (1ST ED. FLATWORLD 2012); DON MAYER ET AL., FOUNDATIONS OF BUSINESS LAW AND THE LEGAL ENVIRONMENT (1ST ED. FLATWORLD 2012); CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY (7TH ED. CENGAGE LEARNING 2012); JEFFREY BEATTY, SUSAN SAMUELSON & DEAN A. BREDSON, LEGAL ENVIRONMENT (5TH ED. CENGAGE LEARNING 2012); ROGER E. MEINERS, AL H. RINGLEB & FRANCES EDWARDS, THE LEGAL ENVIRONMENT OF BUSINESS (11TH ED. CENGAGE LEARNING 2011); ROGER MILLER & FRANK CROSS, THE LEGAL ENVIRONMENT TODAY: BUSINESS IN ITS ETHICAL, REGULATORY, E-COMMERCE, AND GLOBAL SETTING (7TH ED. CENGAGE LEARNING 2012); ROGER MILLER, FRANK CROSS & , ESSENTIALS OF THE LEGAL ENVIRONMENT (4TH ED. CENGAGE LEARNING 2010); MARIANNE JENNINGS, BUSINESS: ITS LEGAL, ETHICAL, AND GLOBAL ENVIRONMENT (9TH ED. CENGAGE LEARNING 2010); JOHN ADAMSON, 21ST CENTURY BUSINESS: BUSINESS LAW (2ND ED. CENGAGE LEARNING 2010); JON RUSH & MICHAEL OTTLEY, BUSINESS LAW: PRINCIPLES AND CASES IN THE LEGAL ENVIRONMENT (1ST ED. CENGAGE LEARNING 2006); MARIANNE JENNINGS, CENGAGE ADVANTAGE BOOKS: FOUNDATIONS OF THE LEGAL ENVIRONMENT OF BUSINESS (2ND ED. CENGAGE LEARNING 2012); FREDERICK JONES & CRISTEN DUTCHER, BUSINESS ETHICS: DEVELOPING ANALYTICAL AND CRITICAL THINKING SKILLS (4TH ED. KENDALL HUNT 2012); NANCY KUBASEK ET AL., DYNAMIC BUSINESS LAW: THE ESSENTIALS (2ND ED. MCGRAW-HILL/IRWIN 2012).

¹¹ NANCY K. KUBASEK, DYNAMIC BUSINESS LAW 1149-1164 (3RD ED. MCGRAW HILL 2014)

GORDON W. BROWN & PAUL A. SUKYS, BUSINESS LAW WITH UCC APPLICATIONS 678-698 (13TH ED. MCGRAW HILL 2013); JANE MALLOR ET AL., BUSINESS LAW 689-708 (15TH ED. MCGRAW-HILL/IRWIN 2012); NANCY KUBASEK ET AL., DYNAMIC BUSINESS LAW: SUMMARIZED CASES 1071-1088 (MCGRAW-HILL/IRWIN 2012); JOHN E. ADAMSON, LAW FOR BUSINESS AND PERSONAL USE 356-371 (18TH ED. THOMSON/SOUTH-WESTERN 2009); HENRY CHEESEMAN, BUSINESS LAW: LEGAL ENVIRONMENT, ONLINE COMMERCE, BUSINESS ETHICS, AND INTERNATIONAL ISSUES 876-893 (8TH ED. PEARSON HIGHER ED 2013); MARGARET E. VROMAN, BUSINESS LAW BASICS 189-193 (KENDALL HUNT 2009); A. JAMES BARNES, TERRY M. DWORKIN & ERIC RICHARDS, LAW FOR BUSINESS 682-703 (12TH ED. MCGRAW-HILL/IRWIN 2015); KENNETH CLARKSON, ROGER MILLER & FRANK CROSS, BUSINESS LAW: TEXT AND CASES: LEGAL, ETHICAL, GLOBAL, AND CORPORATE ENVIRONMENT 1018-1038 (12TH ED. CENGAGE LEARNING 2012); DAVID TWOMEY & MARIANNE JENNINGS, ANDERSON'S BUSINESS LAW AND THE LEGAL ENVIRONMENT, STANDARD VOLUME 1169-1185 (22ND ED. CENGAGE LEARNING 2013); MICHAEL BIXBY ET AL., THE LEGAL ENVIRONMENT OF BUSINESS 492-495 (5TH ED. 2011); ANTHONY LIUZZO, ESSENTIALS OF BUSINESS LAW 448-463 (8TH ED. MCGRAW-HILL HIGHER EDUC. 2012); DON MAYER ET AL., ADVANCED BUSINESS LAW AND THE LEGAL ENVIRONMENT 627-647 (1ST ED. FLATWORLD 2013); JEFFREY BEATTY & SUSAN SAMUELSON, CENGAGE ADVANTAGE BOOKS: INTRODUCTION TO BUSINESS LAW 556-571 (4TH ED. CENGAGE LEARNING 2012); ROGER MILLER, BUSINESS LAW TODAY, STANDARD: TEXT & SUMMARIZED CASES 956-973 (10TH ED. CENGAGE LEARNING 2012); ROGER MILLER & GAYLORD JENTZ, BUSINESS LAW TODAY, STANDARD EDITION 1074-1088 (8TH ED. W. LEGAL STUDIES IN BUS. 2007); RICHARD MANN & BARRY ROBERTS, SMITH AND ROBERSON'S BUSINESS LAW 1077-

strategies of lifetime gifting. The focus of most estate planning related chapters centered on the tradition legal concepts typically covered in a basic wills course in law school: the probate process, intestacy statutes, formalities of a will, will alterations and revocations, and of course, will contest issues (e.g., undue influence, forgery, lack of testamentary capacity, etc.).

Legal studies in business scholarship is slim on the topic of wills and/or the probate process. The two primary publications of the Academy of Legal Studies in Business—*American Business Law Journal* and *Journal of Legal Studies in Business*—have very few articles on wills, probate, or estate planning articles.¹² The one article on point is a 1985 piece by Elizabeth Arnold published in the *Journal of Legal Studies Education* entitled *A Problems Design for An Undergraduate Estate Planning Class*.¹³ The article is a broad introduction to the entire estate planning toolkit, including trusts, income taxation of a decedent's estate, and other federal estate and gift tax laws. Unlike Arnold's article, the present article limits itself to wills, probate administration, and other minor general estate planning issues. The present article seeks to fill the limited pedagogical scholarship gap on the law of wills and probate administration in legal studies education.

The framework offered for instructors below fortifies this traditional approach to teaching wills, although the authors of this article question, to some extent, whether the curriculum in most textbooks sufficiently meets the needs of most business students. For example, many business students may find the topic of the federal estate tax more applicable to their wealth preservation needs than the study of the distinction between legacies and devises, or the application of *in terrorem* clauses. Nevertheless, a critical analysis of what *should* be taught in business school business law texts is beyond the scope of this article. Even as there is room for improvement in the standard business school business law curriculum, there is great value for any instructor of business law in a business school to understand and be primed on the concepts adopted by most present-day textbook content. This article seeks to meet that understanding. The framework in Part III below tracks the issues most predominately taught in business law textbooks presently adopted for business school pedagogy.

There is one other noteworthy point of discussion relating to the approach of a significant number of business school business law textbooks and that is the common pedagogical element of introducing dead celebrities. A common and useful pedagogical technique is to stoke interest in the minds of students.¹⁴ A common undertaking in this area is to introduce a celebrity who has passed away recently with estate planning problems. The high-profile character of celebrities—from Michael Jackson to Phillip Seymour Hoffman—in concert with the scenario of accumulated wealth, makes the world of celebrities a mine for introducing wealth transfer problems. The case-

1097 (15TH ED. CENGAGE LEARNING 2008). RYAN PACE, LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS 353-360 (2ND ED. KENDALL HUNT 2014).

¹² A search of Wiley Online Library of the both journals pulls up the following results corresponding to the respective search terms. In the *American Business Law Journal* a search of “wills” resulted in zero publications; a search for “wills and trusts” resulted in zero publications; a search for “estate planning” results in an article about financial planners’ unethical business practices (see John A. Gray, *Reforms to Improve Client Protection and Compensation Against Personal Financial Planners’ Unethical Business Practices*, 32 Am. Bus. L.J. 245 (1994), an article about accountants, many of which advise on estate planning issues (see Robert A. Prentice, *The Case for Educating Legally-Aware Accountants*, 38 Am. Bus. L.J. 597 (2001); a search for “probate” resulted in zero articles. In the *Journal of Legal Studies in Education*

¹³ E. Elizabeth Arnold, *A Problems Design for An Undergraduate Estate Planning Class*, 3 J. LEGAL STUD. EDUC. 103-120 (1985).

¹⁴ AMERICAN PEDAGOGY: EDUCATION, THE SCHOOL, AND THE TEACHER IN AMERICAN LITERATURE, Hartford, Brown & Gross, 2d ed. (1876) 14-5.

study in Part IV below attempts to help students grasp will and probate issues through the pop-culture lens of individuals they may already be familiar with.

III. A FRAMEWORK FOR TEACHING WILLS, PROBATE, AND BASIC ESTATE PLANNING DOCUMENTS

This section provides a conceptual framework of the topics most generally covered by business law school textbooks. Any discussion of will and probate law should start with an understanding of the *estate*. Once the concept of the entity of the estate is understood, a student is prepared to understand the probate process and what part a will typically plays in that process.

a. THE ESTATE

Under common and statutory law, a person who dies is known as a decedent. When an individual dies, the law is not comfortable with the idea that no one immediately owns the decedent's property. The heirs do not own it immediately because the property has not yet been transferred to them. The decedent no longer owns the property because he or she is dead. This problem was resolved in the law by the advent of an entity known as the decedent's estate (or simply, the estate).¹⁵ Conceptually, a decedent's estate is an entity that springs into existence at the moment of a decedent's death and immediately takes possession of all of the decedent's property. The property is held by the estate until an administrator (known as the executor or personal representative) can pay the debts of the decedent and distribute any remaining property equitably to the heirs. Thus, the entity known as the estate allows for the proper and fair administration of the property of the decedent to the decedent's creditors and then to heirs.

Estate planning provides the process for a person to arrange an efficient and value-maximizing transfer of an estate's property (personal, real, and intangible) during a person's life and upon death. Two key objectives of estate planning are to (1) eliminate uncertainty over the administration of an estate,¹⁶ and (2) maximize the value of the estate transferred to heirs by reducing taxes and other expenses.¹⁷ The first objective—eliminating uncertainty in the

¹⁵ John G. Woerner, *THE LAW OF DECEDENTS' ESTATES: INCLUDING WILLS, AN ABRIDGMENT FOR THE USE OF LAW STUDENTS* (1918) 3.

¹⁶ The foundational document of any estate plan is an individual's will. A will's most key functions are typically to (1) designate a personal representative (also known as an executor) who will administer the estate, (2) designate guardians of minor children, and (3) designate who is to receive the decedent's property. The personal representative's duties in administering the estate are to (1) inventory and gather all of the decedent's property, (2) pay off the decedent's debts, and (3) distribute any remaining property to heirs under the terms of the will or other estate planning document.

Beyond the will, other basic estate planning documents provide planning should an individual become incapacitated or the subject of certain life-sustaining medical procedures. These planning documents include (1) Durable General Powers of Attorney, (2) Medical Powers of Attorney, and (4) Living Wills. A Durable General Power of Attorney designates an agent of an individual to handle the financial affairs of an individual should the individual become incapacitated. A Medical Power of Attorney designates an agent of an individual to step into the shoes of an individual to make health care decisions should the individual become incapacitated. A Living Will allows an individual to direct that medical providers should withhold certain life-sustaining procedures in the event of terminal illness or permanent unconsciousness.

¹⁷ Estate planning also serves to mitigate tensions within a family or business partners upon one's death, or as one 2014 business law textbook states it, the purpose of estate planning "is to promote family harmony." Other purposes of estate planning include answering the question of what to do with one's bodily organs, and body, upon death. NANCY K. KUBASEK ET. AL., *DYNAMIC BUSINESS LAW* 1143 (3RD ED. MCGRAW HILL 2014).

administration of an estate—is satisfied by implementation of a suitable will and other documents discussed in this article. The second objective—maximizing the value of an estate—is met through more advanced estate planning concepts.

b. THE PROBATE PROCESS

A person who dies without a will dies *intestate*, meaning they die owning property and without a valid will. A person dies *testate* if they die with a valid will. Whether or not a person has a valid will, some mechanism must administer the decedent's real and personal property so that taxes and debts can be paid and the rest of the property can go to heirs. If a valid will exists, the estate will be distributed to the beneficiaries designated in the will; if no valid will exists, the estate will be distributed to the heirs as designated by state intestacy statutes.¹⁸

Whether through a will or not, the estate is handled by a court having jurisdiction over the deceased's estate—this type of court is called *probate court*. If no valid will exists, the Court will appoint a personal representative formally known as an administrator (male) or an administratrix (female); this person is in charge of administering the property in the estate (gathering property, paying debts, and distributing the remainder to heirs). A testator with a will can, notably, designate a personal representative (an executor) in his or her will.

Once the probate action is open, the personal representative is tasked with administering the estate. The first step in administering the estate is to create an inventory of the estate assets (and liabilities). Once an inventory is made, the next step is to pay the debts of the decedent and taxes. Finally the personal representative distributes any remaining property to the beneficiaries as specified in the will, or state's intestacy statute.

As discussed above, a person with standing can contest the validity of the will, appropriateness of the personal representative, the validity of heir designation, and whether or not the estate has been properly administered.

Most people die intestate and this has a tendency to create conflict among those who think they stand to inherit from the decedent.¹⁹ Because numerous probate disputes arise, most states have enacted statutes consistent with the Uniform Probate Code²⁰ (UPC) to provide probate courts with guidance on resolving disputes and will contests (see more below on the UPC); however, each state's probate laws differ. The American Bar Association promulgated the first version of the UPC in 1969 and, then, later the UPC was amended.²¹ An example of how an estate is distributed by state law when (1) there is no will or (2) a will is invalid can be

¹⁸ Where there is no valid will, the deceased's estate is automatically devised to a surviving spouse in most jurisdictions. Utah is an example of this. See *Utah Code Ann.* §75-2-103(1) "Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as provided in this title, except as modified by the decedent's will."

¹⁹ Reid K. Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877 (2012) (author claims that most Americans die without executing a will).

²⁰ See UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code> (last visited on December 15, 2014)

²¹ Lawrence H. Averill Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891 (1991-1992). (This article describes how the American Bar Association and the National Conference of Commissioners on Uniform State Laws worked together to draft the first version of the Uniform and later amendments). See also Bruch H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (while man explores formalism and its tensions, Mann provides a good discussion about the Uniform Probate Code and its formalities); Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191 (1968-1969).

seen in Utah's intestate statute.²² The following, in part, is a distribution flow chart of Utah's succession statute:

If a Person Dies With:	The Following Will Inherit:
Spouse but no children	Spouse inherits everything ²³
Children but no spouse	Children inherit <i>per capita</i> ²⁴
Spouse and children from you and spouse	Spouse inherits everything ²⁵
Spouse and children from you and another mother	Spouse inherits the first \$75,000 of your intestate property, plus half of the residuary ²⁶
Parents and no spouse or children	Parents inherit everything, or one parent if only one survives ²⁷
Siblings but no spouse, children, or parents	Siblings inherit <i>per capita</i> ²⁸
Grandparents, but no siblings, spouse, children, or parents	Half to paternal grandparents; half to maternal grandparents. ²⁹

A question for state legislatures to consider in creating intestacy statutes, that apply when no valid will exists, is the degree of remoteness of relative before the remote heir is too remote to inherit under the statute. Some jurisdictions have a laughing heir statute.³⁰ These rules assert that heirs can be too remote to inherit and thus fall outside the succession line set by the statute if an heir is found to be too remote.

If no heirs stand to inherit under the intestacy statutes, the property of the estate *escheats* (or reverts to) to the state.³¹

Certain types of property do not pass through probate. These types of property are called non-probate assets. Examples include proceeds from a life insurance policy that designates a beneficiary. Insurance policies highlight the importance of making sure the beneficiaries of one's will and insurance policies are consistent (or as desired). Bank and retirement accounts, and other joint tenancy property can pass to others outside of probate. Additionally, property can

²² Utah Code Ann. §75-2-101 – 103. <http://www.le.utah.gov/UtahCode/section.jsp?code=75-2> (last visited on December 15, 2014).

²³ Utah Code Ann. §75-2-103(1)

²⁴ Utah Code Ann. §75-2-103(1)(a)

²⁵ Utah Code Ann. §75-2-102(1)

²⁶ Utah Code Ann. §75-2-102(1)(b)

²⁷ Utah Code Ann. §75-2-103(1)(b)

²⁸ Utah Code Ann. §75-2-103(1)(c)

²⁹ Utah Code Ann. §75-2-103(1)(d)(1)

³⁰ DeRosa, David V., *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh*, 12 QUINNIPIAC PROB. L.J. 153 (1997-1998).

³¹ See §2-103 of the Uniform Probate Code.

pass to another person, company, or third party as the result of a contractual obligation. Property placed into trusts is also nonprobate property. Because of this, trusts play an important part in estate planning for individuals who want to avoid the public nature of probate proceedings.³²

c. WILLS

A legally valid will is a written document wherein a testator³³ (the person who makes a will) expresses the wishes about how the testator wants his or her property distributed after death. The testator must have what is called testamentary intent, which is a clear intention (including, soundness of mind) that the will is to serve as his or her last will and testament.³⁴ The will must be signed and dated.³⁵ The will can be typewritten or handwritten,³⁶ but must be signed by the testator and two adult witnesses (three in some states³⁷). The witnesses are not allowed to inherit from the testator. If these formalities are not met, the will may be found invalid.

Inheritance. A will sets forth the beneficiaries to receive an inheritance. An inheritance is generally made up of bequests, legacies, and devises. A bequest is a gift by will of *personal property* and is typically one of three types: specific, demonstrative, and general. A specific bequest is just that—a specific gift (e.g. the Ping golf clubs), one that is easily distinguished from the testator’s other personal property. A demonstrative bequest is a gift that must be paid out from a specific fund or account or stock (e.g. “\$200,000 from the sale of my Google stock”). A general bequest is a gift to be paid out of the general assets of the estate (e.g. “I bequeath to \$7,000 to Tad, my nephew”). There can be gray area between what constitutes a demonstrative bequest and a general bequest (*see* discussion on ademption below). A legacy is a gift of money by will. The person receiving the legacy is called a legatee. A devise is a gift by will of real property. The person receiving the devise is a devisee.

Once all personal and real property are distributed in accordance with a will and all administrative expenses, creditor claims, and other dispositions are settled, a testator may designate what happens to any remaining property in the estate. This remaining balance of the estate is called the residuary.

Will Validity. Many questions arise about whether or not a particular will is legally valid. Generally, to have a valid will, the established formalities of a will must be followed without exception; however, there are a few narrow exceptions to the rigid adherence by the law to will formalities. If the will is not valid, an exception does not apply, the state intestacy statutes govern distribution of the property, which can have a dramatically different result than the distribution scheme desired by the decedent.

Courts have addressed numerous unique cases regarding the validity of wills, which add to the body of common law. We address the most common questions that are largely settled issues of law. For example, what happens if a will is drafted entirely in handwriting, signed by

³² John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, (1984) Yale Faculty Scholarship Series. Paper 511 at 1109.

³³ Black’s Law Dictionary 1021 (10th ed. 2014).

³⁴ Gerry W. Beyer, *Wills and Trusts*, 63 SMU L. Rev. 865, 867 (2010).

³⁵ Katherine R. Guzman, *Intents and Purposes*, 60 KAN. L. REV. 305, 306 (2011).

³⁶ For an exception, see the discussion of holographic wills below.

³⁷ JESSE DUKEMINIER, STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* (ASPEN LAW & BUSINESS, 6TH ED. 2000).

the testator, but not signed by witnesses? This type of will is called a holographic will and most courts deem it as a valid will. What happens if a person does not have a will and falls terminally ill or faces imminent death while on active duty in the armed forces? Such a person can create a nuncupative will, or simply, an oral will. This oral wish must be witnessed and reduced to writing by the witness.

Will Alterations. What happens if the testator changes his/her mind about a provision in his/her will? Can a change be made? Can a child be disinherited? Can a testator revoke a provision from the will? The answers to these questions are a qualified yes.³⁸ A will can be altered during a testator's lifetime.³⁹ There are at least two ways to amend a will; (1) either make an amendment to the existing will by codicil or (2) completely replace the will.⁴⁰ A codicil is a document that amends, rather than completely replaces, an executed will. The codicil can amend a minor provision or alter a majority of the will. The codicil must meet all the legal requirements and formalities of a valid legal will, e.g., proper mental capacity of the testator, signatures of the testator, two disinterested witnesses, etc.

Revocation may occur up to the testator's death so long as the testator has testamentary capacity. A testator may also revoke the entire will, partially or completely. One can either destroy the will or replace it with a new will. However, a testator must keep in mind the governing state laws. The states vary on how complete revocations are viewed by the courts, if one does not execute a new valid will. For example, in some states,⁴¹ if one does not execute a valid will after revoking the prior will, the prior will is automatically revived. Other states⁴² deem the testator intestate if a new valid will is not made, meaning no will exists and the laws of intestacy are invoked. Because of these complications, new wills typically have an *exordium* clause at the beginning of the will.⁴³ This clause sets forth identifying information (e.g. "I, Matthew E. Silver, of Monroe County, Georgia, declare that this be my Will and revoke all my prior wills and codicils."⁴⁴) and the express wish that all prior wills be revoked.⁴⁵

Some state statutes automatically terminate a will by the realization of certain life events. However, divorce does not serve as an automatic termination.⁴⁶ In fact, some states⁴⁷ treat former spouses as if the former spouse died before the testator. On the other hand, terminating events may include the testator's marriage and the birth or adoption of a child.⁴⁸ Children of a testator born or adopted after a will is executed are known as pretermitted children; pretermitted

³⁸ Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone* 57 LA. L. REV. 1 (1996-1997) (In the U.S. a testator may disinherit a child or children in all states, but Louisiana).

³⁹ A will is considered ambulatory because as long as the person who made it lives, it can always be changed or revoked. See Black's Law Dictionary 1021 (10th ed. 2014).

⁴⁰ Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057 (1996).

⁴¹ JESSE DUKEMINIER, STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* (ASPEN LAW & BUSINESS, 6TH ED. 2000); JOHN RITCHIE ET AL., *DECEDENTS' ESTATES AND TRUSTS, CASES AND MATERIALS* (UNIVERSITY CASEBOOK SER., 1995); EUGENE F. SCOLES, EDWARD C. HALBACH JR., *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* (ASPEN PUBLISHERS, 7TH ED. 2006);

⁴² *Id.*

⁴³ Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, footnote 275 (explains the meaning of an exordium clause to be an introductory clause to a will).

⁴⁴ *Id.* at 737-738.

⁴⁵ Katherleen R. Guzman, *Intents and Purposes*, 60 KAN. L. REV. 305, 306 (2011).

⁴⁶ Lawrence W. Waggoner et al. *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS* (FOUNDATION PRESS, 4TH ED. 2006).

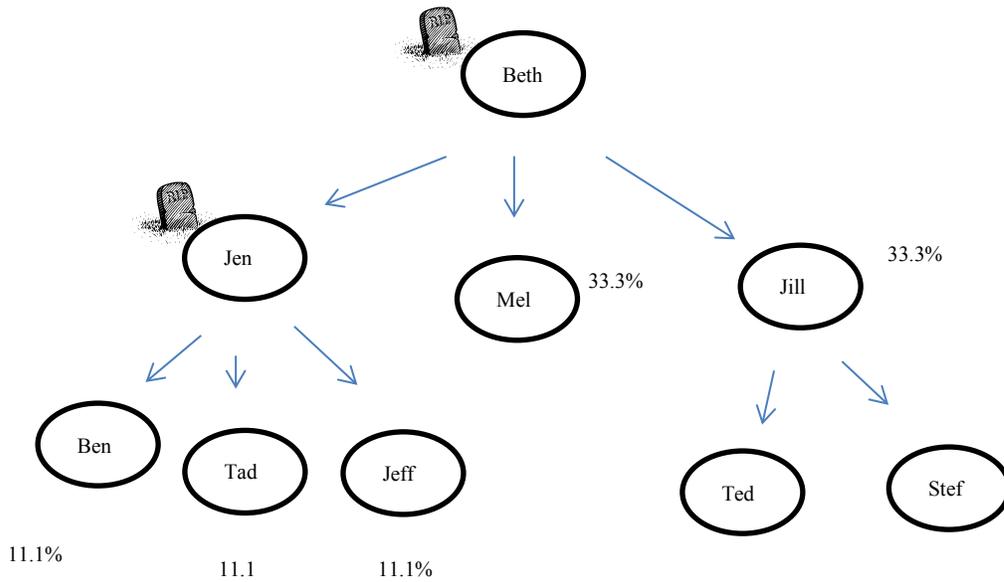
⁴⁷ *Id.*

⁴⁸ Dukeminier, *supra*, note 41.

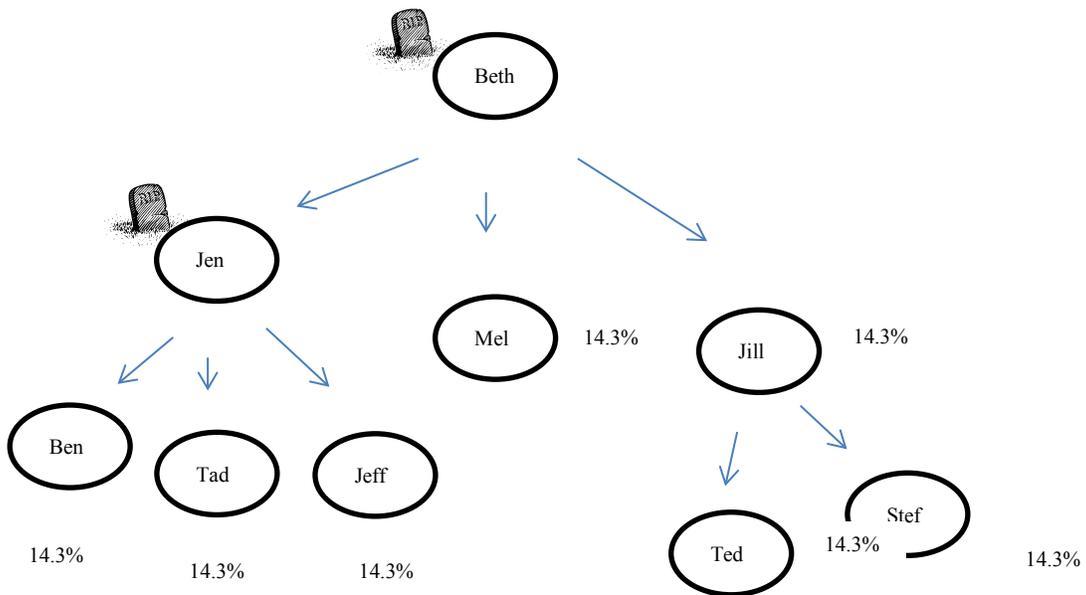
children are presumed to inherit as other children depending on the mode of distribution the testator chooses.

Estate Distribution Schemes. A testator may elect that the estate be distributed *per stirpes* or *per capita*. A *per stirpes* distribution is one in which the decedent's assets are distributed initially at the first generation of descendants. If the decedent's child at the first generation is already deceased, descendants at lower generations take a representative share of their parent's portion. A *per capita* distribution allows all decedents to share equally, regardless of generation. The distribution schemes are diagrammed below.

Per Stirpes Distribution



Per Capita Distribution



Will Contests. Many problems can arise with a will and, as a result, numerous lawsuits are filed to contest a will.⁴⁹ However, only certain individuals have standing (can contest a will) such as those who fall under a category of a state's intestacy's laws (anyone who could inherit if no valid will exists) or who stood to inherit under a prior will (a named beneficiary).

Various theories of will contestation are propounded to challenge the validity of a will. The most common theories are undue influence,⁵⁰ fraud, forgery, mistake, and lack of testamentary capacity (does the testator have a sound mind?)⁵¹ which encompass the theories of insane delusion⁵² and duress. Courts largely recognize a testator's right to dispose of his or her property by will and generally do not question the fairness of a will.⁵³

The tort of intentional interference with an expected inheritance or gift has provided for a new avenue of litigation in estate planning. This tort has a somewhat complicated history⁵⁴ and not every state has codified the tort.⁵⁵ While some states argue against liability under this tort, other states have adopted this tort theory. Examples of why the tort is necessary have been described by multiple practitioners.⁵⁶ One example of facts that could lead to the tort of intentional interference with an expected inheritance is as follows:

“Uncle has a will that leaves everything equally to his only surviving relations, Niece and Nephew. Niece lives in a different state, leaving Nephew to look after Uncle's needs. Resentful of this burden, Nephew decides to take matters into his own hands. He isolates Uncle from outside contact, tells him lies about Niece's character and behavior, defrauds him into immediately signing over his house, and threatens to cut off cable service and worse unless the kindly old gentleman rewrites his will. After months of this treatment and enfeebled by mental deterioration, Uncle finally breaks down and executes a new will which leaves everything to Nephew and nominates him to be personal representative of the estate.”⁵⁷

A testator may wish to limit litigation arising under his or her will by drafting an *in terrorem*⁵⁸ clause; this clause serves as a legal warning to preserve the testator's donative intent,

⁴⁹ Jeffrey A. Schoenblum, *Will Contests - An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607 (1987) (this empirical study was limited to Nashville, TN over a nine-year period. The scope of filings studies was also limited, highlighting the difficulty to track civil proceedings in the U.S.).

⁵⁰ A common example is if an attorney who drafted the will stand to inherit from the will.

⁵¹ The testator has no senility, dementia, or insanity.

⁵² Black's Law Dictionary 1021 (10th ed. 2014).

⁵³ This right of disposition has not always existed. For example, in the English feudal system, the king owned all of the land; lords and knights had a right to land only for the term of their life, thus there was no inheritance to their heirs. Some progress was made in 1215 with the Magna Carta, a legal document with a provision granting nobility with a right to pass their interest in land to heirs. Magna Carta (1215 & 1225), reprinted in Ralph V. Turner, *Magna Carta Through the Ages*, 226, 231 (2003) (the Runnymede Charter provided new laws on intestacy in clause 27. See George Burton Adams, *Constitutional History of England* 138 (1934); HELEN M. CAM, *MAGNA CARTA - EVENT OR DOCUMENT?* 3, 13 (1965); J.C. Holt, *Magna Carta* 393-94 (2d ed. 1992).

⁵⁴ Diane J. Klein, *Go West, Disappointed Heir: Tortious Interference with Expectation of Inheritance - A Survey with Analysis of State Approaches in the Pacific States*, 13 LEWIS & CLARK L. REV. 209, 210 (2009).

⁵⁵ For example, Arkansas has not adopted the theory. Rachel A. Orr, *COMMENT: Intentional Interference with an Expected Inheritance: The Only Valid Expectancy for Arkansas Heirs is to Expect Nothing*, 64 Ark. L. Rev. 747 (2011).

⁵⁶ James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, 36 AZ ATTORNEY 26 (2000). See also, Curtis E. Shirley, *Tortious Interference with an Expectancy*, 41 RES GESTAE 16 (October 1997).

⁵⁷ James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, 36 AZ ATTORNEY 26 (2000).

⁵⁸ Black's Law Dictionary 1021 (10th ed. 2014).

i.e., if potential beneficiaries contest the will they will be disinherited, or receive a reduced inheritance as the testator specifies.⁵⁹ An example of this would be leaving \$1 dollar to any heir that challenges the will—the heir would technically inherit part of the estate, but would practically be disinherited.

Property Directed to be Transferred, But No Longer In the Estate at Death. Another question often raised in probate court is what happens when property bequeathed under a will is not in the estate at the time of the testator's death. If a testator's will bequeathed a set of golf clubs to a specific beneficiary, but at the time of the testator's death, the testator no longer owned the golf clubs, the golf clubs would be considered *adeemed*. In other words, the gift of the golf clubs fails and thus the designated beneficiary does not receive the gift. The law of ademption (the determination of what happens when property bequeathed under a will is no longer in the testator's estate at the time of the testator's death) can be very involved and nuanced.⁶⁰

Slayer Statutes. The slayer rule, a common law doctrine, prevents a person from receiving an inheritance from someone he or she has killed. Such laws are known as slayer statutes. Most states have such laws, with the exception of Texas.⁶¹ Slayer statutes allow for a civil proceeding with the burden of proof being proved by a preponderance of evidence, and not proved beyond a reasonable doubt as required in criminal proceedings. Some states require a criminal conviction to bar inheritance.⁶² Slayer statutes also address the issue of paying out life insurance policies to a beneficiary who has murdered the insured.⁶³ The Supreme Court of the United States addressed this issue.⁶⁴

Uniform Simultaneous Death Act. One area of concern that could lead to substantial litigation is the problem of simultaneous or near simultaneous death. An example of the application of this concern would be a couple without children who die simultaneously and intestate. If the husband were to predecease his wife, leaving all of his assets to her, and the wife dies moments later, then, under intestacy statutes, the husband assets would end up being distributed to the wife, and then to his wife's parents instead of his parents.⁶⁵ This set of circumstances has led to most states adopting some version of the Uniform Simultaneous Death Act (USDA).⁶⁶ As one Court notes, "The USDA is a uniform statute originally drafted to apply

⁵⁹ Jack Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45, 45 (1963); See also Ryann Lamb, *NOTE AND COMMENT: Will Contests in Texas: Did the Codification of the Good Faith and Probable Cause Exception Render In Terrorem Clauses Meaningless?*, 63 BAYLOR L. REV. 906 (2011).

⁶⁰ See Raley L. Wiggins, *Adeemed if You Do, Adeemed if You Don't: The Testator's Intent to Passively Revoke a Specific Devise*, 61 ALA. L. REV. 1163 (2010).

⁶¹ Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986) (discussing the moral and legal justifications for slayer rules). See also Lillian Wan, *Parents Killing Parents: Creating a Presumption of Unfitness*, note 187, 63 ALB. L. REV. 333 (1999).

⁶² *Id.*

⁶³ Tara L. Pehush, *Comment: Maryland is Dying for a Slayer Statute: The ineffectiveness of the Common Law Slayer Rule in Maryland*, 275-281, 35 U. BAL. L. REV. 271 (2005).

⁶⁴ *New York Mutual Life Insurance Co. v. Armstrong*, 117 U.S. 591 (1986). "Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired."

⁶⁵ See J. Rodney Johnson, *The New Simultaneous Death Act: Welcome Changes for Donative Transfers*, 19 Va. Bar Ass'n J., Fall 1993, 5 n.5.

⁶⁶ Unif. Simultaneous Death Act § 5, prefatory note (amended 1953, superseded 1991), 8B U.L.A. 268-69 (1993).

in circumstances resulting in multiple related deaths where it is not possible to determine the order in which the deaths occurred.”^{67 68} The Act primarily helps to determine the heirs of a married couple who have died simultaneously and intestate, although insurance companies rely on the statute for guidance.⁶⁹

Will contests are multiple and varied and so are the case law and statutory schemes that address them. A review of some of the law is helpful for business students to gain a basic understanding of what is at stake with what they stand to inherit and why they ought to execute a last will and testament.

d. BASIC ESTATE PLANNING DOCUMENTS

Many people want full control over what happens to their body, health, or finances when they no longer can make such decisions due to mental or physical incapacity. The vehicle to make such decisions is an advance health care directive. An advance directive is a legal document in which a person provides instructions as to what actions should be taken for their health if they no longer have capacity to make decisions for themselves. The most common advance directives are living wills, durable powers of attorney, and health care proxies.

Living Wills. A living will provides specific instructions about how health care providers should or should not administer health care treatment. A living will can address whether or not certain (burdensome) treatment should be allowed or forbidden, such as life-sustaining measures that would serve only to prolong death.

Durable Power of Attorney. A durable power of attorney is a tool of estate planning. It is a document a person may execute wherein a person (the principal) designates an agent to act on one’s behalf when the principal no longer has the capacity to make decisions on one’s own. The document must be executed while in good health or simply before one is unable to make decisions on one’s own (lacking mental or physical capacity). What distinguishes a durable power of attorney from a power of attorney is that ordinary powers of attorney terminate upon the principal’s incapacity. Not so with a durable power of attorney; they endure after a principal’s incapacity or incompetence.

This estate planning tool is extremely important because it allows, say, a parent (the principal) to designate an adult child (the agent) to care for matters of the parent’s health and parent’s estate, such as affecting health care decisions, investments, real property, banking accounts, email accounts or other social media accounts, among other matters. If no durable power of attorney exists, a child or other care-taker must petition a court for guardianship—a guardianship proceeding is a much more costly and delaying approach to estate planning.

Health Care Proxy. A health care proxy is similar to a durable power of attorney but is limited to matters of principal’s health care when a principal can no longer communicate his or her wishes on health care decisions. A health care proxy is a document executed to establish the principal/agent relationship relating to medical decisions or the document simply sets forth one’s wishes regarding their health-care when incapacitated without designating an agent. If a principal does not specify the limits or scope of decision-making, the agent may have broader powers than intended by the principal. Under a health care proxy or durable power of attorney,

⁶⁷ *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 26 P.3d 510, 2001 Ariz. LEXIS 103 (Ariz. 2001).

⁶⁸ Seema K. Shah & Franklin G. Miller, *Can We Handle the Truth? Legal Fictions in the Determination of Death*, 36 AM. J. L. AND MED. 540 (2010).

⁶⁹ *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 26 P.3d 510, 2001 Ariz. LEXIS 103 (Ariz. 2001).

an agent may not be empowered until a qualified physician makes a determination that the principal no longer can make decisions regarding their medical care. Each state has specific requirements to establish legally valid advance health care directives.

The underlying philosophy driving advance directives is the concept of self-determination, meaning one should have the moral right to make autonomous decisions, and in this context, one's autonomous decisions about health care decisions even when one can no longer make such decisions. The same applies to trusts and wills, i.e. giving direction in advance on how to distribute one's estate upon one's death. This powerful philosophical notion is the driving force behind the Patient Self-Determination Act (PSDA).⁷⁰ The US Congress passed the PSDA in 1990.⁷¹ This legislation requires hospitals or other statutorily enumerated health care agencies to inform adult patients about advance health care directives when they are admitted to their facility.⁷² These hospitals or agencies must provide patients with written notification of their rights regarding advance health care directives.

Uniform Anatomical Gift Act . The Uniform Anatomical Gift Act (UAGA),⁷³ UAGA governs organ donations for the purpose of transplantation. The UAGA also regulates the making of anatomical gifts of cadaver's for medical and scientific research. The uniform act provides guidance to state legislatures to adapt their state laws with developments in medical research and practice.

IV. PROPOSED CASE-STUDY FOR A ONE-HOUR BUSINESS LAW COURSE

The following provides a case study where a class can identify the relevant issues and advance potential solutions in class for purposes of discussion and debate.

⁷⁰ Edward J. Larson, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 249, 250.

⁷¹ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388, 1388-115 to -117, 1388-204 to -206 (codified in scattered sections of 42 U.S.C.).

⁷² *Id.*

⁷³ UNIF. ANATOMICAL GIFT ACT § 2 (amended 2006), 8A U.L.A. 53 (supp. 2010).

Case Study on Probate, Wills, and Basic Estate Documents

Part #1:

Whitney Houston

Whitney Houston died in February of 2012 of accidental drowning after cocaine and other drug use. Whitney was survived by her daughter, Bobbi, and Nick. At the time of Whitney's death, Bobbi was 19 and Nick was 22. Although Nick was not Whitney's child by blood or adoption, Whitney raised Nick and treated Nick as her own child since 2002. Whitney last updated her will in the early 1990's. The will reportedly made no provision for Nick, and gave Bobbi the majority of Whitney's estate, starting with a distribution of 10% of the estate when Bobbi turns 21. The estate is valued at up to \$20 million. In 2014, the year Bobbi turned 21, Nick married Bobbi. Forbes magazine stated that "Whitney's mother, Cissy Houston, reportedly called the relationship "incestuous" when they were dating. Now that they are actually married...she hasn't spoken publicly about it since then."

It was further reported that Whitney's family was so worried about Bobbi's immaturity and inability to handle money, that the family began legal proceedings to try to delay the estate payouts until Bobbi was older in an effort to protect Bobbi from herself—the family reports they are concerned the money will destroy Bobbi. Because the will was clear on the inheritance Bobbi was to receive, the legal challenge was unsuccessful.

- a) What consequences occurred or may have occurred as a result of Whitney having an outdated will?
- b) What could Whitney have done to avoid some of the issues above?

Case Study on Probate, Wills, and Basic Estate Documents

Part #2:

Gary Coleman

Gary Coleman died in May of 2010 at the age of 42 after suffering a brain hemorrhage as a result of an apparent fall at home. He died without any children. He married Shannon in 2007 when she was 22 years old. The couple divorced in 2008, although the two continued to live together off and on until his death. Shannon was with Gary when he hit his head from a fall at home and called 911. He was put on life support at the hospital. Gary had named Shannon in an “advanced health care directive” as having authority to end his life by removing him from life support. Two days after Gary hit his head, Shannon directed the hospital to remove life support from Gary and he died. She planned a funeral for him later that week, but Gary’s parents stepped in and received a court order blocking the funeral so that he could be buried in his boyhood home over 1,000 miles from where he had died. Gary was estranged from his parents—it was common knowledge in the entertainment industry that Gary blamed his parent’s for spending most of the income he had earned as a child-hood star. Gary’s parent’s filed with the probate court to open the estate to probate within a short time after Gary’s death. It was shortly revealed that an 11-year-old will was in effect, and Gary’s parents withdrew their probate request. The will named Anna, an old business associate and ex-girlfriend as the executor of the estate and principle beneficiary.

A police investigation into Gary’s death did not reveal any indications of foul play. A court later ruled that Shannon and Gary were not married and did not qualify for a common-law marriage at the time of Gary’s death.

- a) Under what rules should the hospital have removed Gary from life support?
- b) What else is an advanced health care directive called?
- c) Should an advanced healthcare directive designee (here, Shannon) survive a divorce proceeding as it did above?
- d) What are some potential reasons Gary’s parents may have initiated and then abandoned a probate filing if they were estranged from their son?
- e) If Shannon had been found liable for Gary’s death, would she have been able to inherit from Gary’s estate?
- f) Who is most likely to inherit Gary’s estate?
- g) Does it seem wise to have an individual be both executor and principle beneficiary of an estate? When would this arrangement make sense? When would this arrangement not make sense?

Case Study on Probate, Wills, and Basic Estate Documents

Part #3:

Jimi Hendrix

Jimi Hendrix died in September of 1970 of asphyxia from his vomit while intoxicated. Jimi was survived by his father, Al; Jimi's brother with whom he shared a close relationship, Leon; Jimi's girlfriend of three years with whom he had been cohabitating; and Jimi's step-sister, Janie. Janie had been adopted by Al in 1968 and had only met Jimi several times for about 10 minutes each time. Jimi died without a will. Al, a gardener, inherited all of Jimi's estate. Over the years, Al and Janie were very close, even though Janie had significant problems with spending money. When Al died in 2002, Al's 1997 will disinherited Leon completely, and Jimi's estate, then valued at \$80 million, was left entirely to Janie. The estate's value included music rights, royalties, and merchandise income. Before the 1997 will, Al had allocated 25% of the \$80 million estate to Leon. Under Janie's administration, the Hendrix estate ranks number 5 in all-time grossing revenues for a recording artist after Elvis Presley, John Lennon, George Harrison, and Bob Marley.

- a) Why did the estate go to Jimi's father and not to Leon or the other beneficiaries?
- b) Was this outcome fair?
- c) Could Leon have contested the distribution in 1970 to Al?
- d) Are there any legal theories Leon could advance to contest Al's 1997 will?

Case Study on Probate, Wills, and Basic Estate Documents

Part #4:

Princess Di:

Princess Diana died in August of 1997 in a car accident involving paparazzi. Her last will, executed in 1993, named her mother and sister as co-executors of her estate. Her probate filings showed an estate valued at the time of roughly \$31 million. Diana's will stated that the executors should "give effect as soon as possible but not later than two years following my death to any written memorandum or notes of wishes of mine." She later wrote a document entitled "Letter of Wishes," dated the day after she signed her will, and asked that $\frac{3}{4}$ of her personal property pass to her two sons, William and Harry, with $\frac{1}{4}$ of her personal property to pass to her 17 godchildren. It was estimated that such shares to the godchildren would have been valued at over \$100,000 each at the time of Diana's death. After Diana's death, the executors petitioned to probate court to grant a variance from the will so that 100% of Diana's personal property would pass to William and Harry, arguing that language such as "discretion" and "wishes" gave the executors discretion to ignore the Letter of Wishes. The variance was requested without notifying the godchildren or parents or guardians of the godchildren. The court granted the variance because it found the will provided discretion regarding the disposition of Diana's personal property.

- a) Can a letter or note from outside a will be incorporated by reference into a will?
- b) Should letters or notes outside a will be used to transfer significantly meaningful or valuable assets?
- c) Who were the executors likely trying to protect?
- d) Is it possible that when an instrument gives executors discretion over the affairs of the estate, they may administer the estate in a way that is not in accord with the desires of the decedent?

V. TEACHER'S NOTE

The following observations serve as a solution to the case study questions:

Part #1 Solution: Whitney Houston Consequences of Outdated Will

Whitney Houston died in February of 2012 of accidental drowning after cocaine and other drug use. Whitney was survived by her daughter, Bobbi, and Nick. At the time of Whitney's death, Bobbi was 19 and Nick was 22. Although Nick was not Whitney's child by blood or adoption, Whitney raised Nick and treated Nick as her own child since 2002. Whitney last updated her will in the early 1990's. The will reportedly made no provision for Nick, and gave Bobbi the majority of Whitney's estate, starting with a distribution of 10% of the estate when Bobbi turns 21. The estate is valued at up to \$20 million. In 2014, the year Bobbi turned 21, Nick married Bobbi. Forbes magazine stated that "Whitney's mother, Cissy Houston, reportedly called the relationship "incestuous" when they were dating. Now that they are actually married...she hasn't spoken publicly about it since then."

It was further reported that Whitney's family was so worried about Bobbi's immaturity and inability to handle money, that the family began legal proceedings to try to delay the estate payouts until Bobbi was older in an effort to protect Bobbi from herself—the family reports they are concerned the money will destroy Bobbi. Because the will was clear on the inheritance Bobbi was to receive, the legal challenge was unsuccessful.

- a) What consequences occurred or may have occurred as a result of Whitney having an outdated will?

Perhaps the two most obvious impacts of Whitney's outdated will were (1) the failure to provide for Bobbi in a way that would protect her from her own financial immaturity, and (2) failing to provide at all for Nick.

An outdated will led to the direct consequence of a contested will. Although speculative, the timing of marriage between a non-inheriting Nick and a recently inheriting Bobbi may lead to the conclusion by some that a relationship of convenience and possibly even predatory behavior can follow the transfer of wealth.

- b) What could Whitney have done to avoid some of the issues above?

Had Whitney revoked the old will and created a new will, or created a codicil to provide for the financial immaturity of Bobbi or the provision at all for Nick, a will challenge would have been less likely.

Additionally, an in terrorem clause that would reduce or eliminate the inheritance of a will challenger may have also prevented a will contest in this case.

Part #2 Solution:

Gary Coleman

Advance Health Care Directives, Intestacy, Probate, and Slayer Statutes

Gary Coleman died in May of 2010 at the age of 42 after suffering a brain hemorrhage as a result of an apparent fall at home. He died without any children. He married Shannon in 2007 when she was 22 years old. The couple divorced in 2008, although the two continued to live together off and on until his death. Shannon was with Gary when he hit his head from a fall at home and called 911. He was put on life support at the hospital. Gary had named Shannon in an “advanced health care directive” as having authority to end his life by removing him from life support. Two days after Gary hit his head, Shannon directed the hospital to remove life support from Gary and he died. She planned a funeral for him later that week, but Gary’s parents stepped in and received a court order blocking the funeral so that he could be buried in his boyhood home over 1,000 miles from where he had died. Gary was estranged from his parents—it was common knowledge in the entertainment industry that Gary blamed his parent’s for spending most of the income he had earned as a child-hood star. Gary’s parent’s filed with the probate court to open the estate to probate within a short time after Gary’s death. It was shortly revealed that an 11-year-old will was in effect, and Gary’s parents withdrew their probate request. The will named Anna, an old business associate and ex-girlfriend as the executor of the estate and principle beneficiary.

A police investigation into Gary’s death did not reveal any indications of foul play. A court later ruled that Shannon and Gary were not married and did not qualify for a common-law marriage at the time of Gary’s death.

- a) Under what rules should the hospital have removed Gary from life support?
If an individual has a properly executed living will, a healthcare facility is generally obligated to honor the direction given by the living will’s designee to make end of life decisions for the patient
- b) What else is an advanced health care directive called?
A living will
- c) Should an advanced healthcare directive designee (here, Shannon) survive a divorce proceeding as it did above?
This is clearly up for debate. The state laws governing Gary’s case, as well as the default laws in most jurisdictions, is to have the designee’s power survive divorce. The underlying assumption of this rule is that when an individual gets divorced, that individual will change the living will designee if that is the desire of the patient. This should offer a good area of reasoned debate among students as to the wisdom of this law, and whether changes should be made to existing laws.
- d) What are some potential reasons Gary’s parents may have initiated and then abandoned a probate filing if they were estranged from their son?

A somewhat cynical view may be that if no will was offered up for probate, that the intestacy rules would cause the estate to be distributed to the deceased parents, but that when a will was found, the couple declined to pursue the legal ramifications of probate. It could be coincidence—reasonable minds may disagree, however, this is an opportunity to discuss that next-of-kin under intestacy statutes do not necessarily have a close relationship with the decedent.

- e) If Shannon had been found liable for Gary's death, would she have been able to inherit from Gary's estate?

No. The slayer statutes of most jurisdictions bar an individual who has caused the death of a decedent to inherit from that decedent.

- f) Who is most likely to inherit Gary's estate?

Here, because there is a valid will probated with Anna, it appears most likely that Anna will inherit Gary's estate.

- g) Does it seem wise to have an individual be both executor and principle beneficiary of an estate? When would this arrangement make sense? When would this arrangement not make sense?

The problematic issue here is that an executor who serves as a beneficiary may have a conflict of interest over administration of the estate and distributing property. One way to remedy this issue is to have co-executives that can provide a check on abusing power within the estate. The probate court is another check against abuse, but the probate court does not have the resources or the position to discover fraud or other abuses unless the issue is brought before it.

Part #3 Solution:

Jimi Hendrix

Undue Influence, Intestacy

Jimi Hendrix died in September of 1970 of asphyxia from his vomit while intoxicated. Jimi was survived by his father, Al; Jimi's brother with whom he shared a close relationship, Leon; Jimi's girlfriend of three years with whom he had been cohabitating; and Jimi's step-sister, Janie. Janie had been adopted by Al in 1968 and had only met Jimi several times for about 10 minutes each time. Jimi died without a will. Al, a gardener, inherited all of Jimi's estate. Over the years, Al and Janie were very close, even though Janie had significant problems with spending money. When Al died in 2002, Al's 1997 will disinherited Leon completely, and Jimi's estate, then valued at \$80 million, was left entirely to Janie. The estate's value included music rights, royalties, and merchandise income. Before the 1997 will, Al had allocated 25% of the \$80 million estate to Leon. Under Janie's administration, the Hendrix estate ranks number 5 in all-time grossing revenues for a recording artist after Elvis Presley, John Lennon, George Harrison, and Bob Marley.

- a) Why did the estate go to Jimi's father and not to Leon or the other beneficiaries?
The intestacy statutes would send the property to the decedent's parent or parents if the decedent dies without a surviving spouse or issue. It may be noteworthy that Jimi was reported to have had two children out of wedlock who would have stood to inherit under today's laws, but paternity was harder to prove in the 1970's. Had Al been deceased, the estate would have gone to Al and Janie in equal shares.
- b) Was this outcome fair?
Fairness is often in the eye of the beholder. This question is designed to stimulate debate about the intestacy rules; a likely conclusion for the class is that the intestacy rules are an imperfect fit in a variety of situations and therefore should not be relied on. The only way to not rely on the intestacy rules is to create a valid will.
- c) Could Leon have contested the distribution in 1970 to Al?
No. If there had been a will, then there may have been grounds for Leon to contest the will, but without a will, the intestacy statutes automatically apply.
- d) Are there any legal theories Leon could advance to contest Al's 1997 will?
The most apparent will contest theory under these facts would likely be undue influence. The theory would argue the Janie held undue influence over Al to a degree of disinheriting Leon so that Janie would receive more inheritance. Other theories that are less promising based on these facts include testamentary capacity, fraud, or mistake.

Part #4 Solution:

Princess Di:

Will Formalities, Incorporation by Reference, Powers of Executors

Princess Diana died in August of 1997 in a car accident involving paparazzi. Her last will, executed in 1993, named her mother and sister as co-executors of her estate. Her probate filings showed an estate valued at the time of roughly \$31 million. Diana's will stated that the executors should "give effect as soon as possible but not later than two years following my death to any written memorandum or notes of wishes of mine." She later wrote a document entitled "Letter of Wishes," dated the day after she signed her will, and asked that $\frac{3}{4}$ of her personal property pass to her two sons, William and Harry, with $\frac{1}{4}$ of her personal property to pass to her 17 godchildren. It was estimated that such shares to the grandchildren would have been valued at over \$100,000 each at the time of Diana's death. After Diana's death, the executors petitioned to probate court to grant a variance from the will so that 100% of Diana's personal property would pass to William and Harry, arguing that language such as "discretion" and "wishes" gave the executors discretion to ignore the Letter of Wishes. The variance was requested without notifying the godchildren or parents or guardians of the godchildren. The court granted the variance because it found the will provided discretion regarding the disposition of Diana's personal property.

- a) Can a letter or note from outside a will be incorporated by reference into a will?
Yes. A letter or note from outside the will is routinely used in estate planning to dispose of lower value personal property.
- b) Should letters or notes outside a will be used to transfer significantly meaningful or valuable assets?
Probably not. The problem with transferring meaningful or valuable assets outside of the will is that such transfers have lesser protection from will formalities.
- c) Who were the executors likely trying to protect?
The executors here were likely trying to protect the sons—William and Harry; i.e., trying to keep the wealth in the family. Executors will often look for discretionary provisions if they disagree with the decedent's choice of distribution or if the decedent's desires are unclear.
- d) Is it possible that when an instrument gives executors discretion over the affairs of the estate, they may administer the estate in a way that is not in accord with the desires of the decedent?
Yes, this is the consequence of allowing discretionary clauses in wills and other estate documents. It provides room for executors to administer estate's in a way that may be completely different from the decedent's desires. On the other hand, such clauses allow for interpretation in cases where circumstances change or the distribution scheme is unclear.

FIGHTING TOPIC IRRELEVANCE IN ETHICS AND CSR EDUCATION: USING PINK RIBBON CAMPAIGNS, EXPERIENTIAL LEARNING, AND SEMSTER- LONG ACTIVITIES TO BOOST ENGAGEMENT AND PERSONAL CONNECTION

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Abstract

This paper outlines exercises designed to introduce first year students to the complex ethics and corporate social responsibility (CSR) topics. In part, difficulties arise because academic ethics and CSR discussions can be very abstract and their practical discussions can cover a vast range of confusing perspectives. Students have to work their way through those perspectives, deal with information overload, cope with their sense of intimidation, engage in more in-depth thinking, and link real-life articles on the topic to often limited personal experiences. All of these make establishing relevance more difficult. The assignments help students to build topic relevance by restricting topic complexity, encouraging student exploration of connections with those topics, and offsetting students' inexperience by working within the familiar pink ribbon campaign context.

Introduction and Background: Ethics and CSR

Ethics and corporate social responsibility (CSR) have come to the forefront of business, research, and business education as scandals change the landscape of society and a call is made for new kinds of leaders (Lissack & Richardson, 2003; Moratis, Hoff, & Reul, 2006; Pomeroy & Dolnicar, 2009; Templin & Christensen, 2009; Waddock & McIntosh, 2009). Even though the importance of ethics and CSR increases and business programs place increasing emphasis on them, they are very complex, multi-definitional, and they are viewed through many different lenses. Developing a basic grasp of those topics can be challenging. For example, academic work in CSR concentrates on its relationship to financial performance, its impact on stakeholder value, its measurement and its definition. It also ranges across various functional areas such as strategic decision-making, marketing, human resource management, operations, and information systems. Various academic reviews exist that could theoretically simplify its treatment in the business curriculum. However, work in CSR remains fragmented (Aguinis & Glavas, 2012; Carrol & Shabana, 2010) and that fragmentation is often reflected in and influenced by differences in business practice, policy, and general interpretations of which focus may be best. The vastness of the topic, therefore, presents a complexity that may dictate a more flexible approach to the topic. Some studies suggest that it is precisely that flexibility, though, that creates problems in effectively teaching useful best practices (Sharland, 2013). We acknowledge the complex nature of ethics and CSR due to the topic's diverse nature. However, rather than eliminate flexibility

recommended by Sharland and colleagues, we created a series of flexible, semester-long, and student-based experiential activities that were especially sensitive to the freshmen student experience set. As we show below, these did appear successful in decreasing student indifference and intimidation when studying these complex topics.

We sought to avoid the alienation that can occur for freshmen when they are hit with static, multitudinous definitions and overwhelming topic introductions *until* we could help those students to discover the topic's relevance to themselves. They could then more easily tackle ethics and CSR challenges with their new sense of self-efficacy on the topic (Welch Jr., 2013). We had students examine a large but self-contained ethical and CSR context – the pink ribbon campaigns that dominate marketing efforts in October - and discovered what resonated with them. Once students found one or more aspects of this phenomenon that they found personally relevant, we were then able to examine the topic's diverse definitions and conceptual challenges, and experiment with ethics and CSR concepts in an increasingly complex way. For this paper, as in class, we define ethics very generally as the concern with right versus wrong; and we select a summary definition of CSR from a literature review to be “context-specific organizational actions and policies that take into account stakeholders' expectations and the triple bottom line of economic, social, and environmental performance” (Aguinis, 2011, p. 855). In summary, we designed a series of exercises to offset an intimidation factor that can occur with complex and abstract ethics and CSR topics. We provided the pink ribbon campaign, or breast cancer awareness, context which permitted students to explore their own personal ethics and to informally examine a CSR landscape by sharing those perspectives, informed by research, with their peers and found that students indeed had an easier time understanding and relating to those more familiar activities as they developed confidence with ethics and CSR abstraction and uncertainty.

Pink ribbon campaigns

One of the earliest breast cancer awareness ribbons was, in fact, peach colored. It was introduced by Charlotte Hayley - and featured in a 1992 *Self Magazine* article – to establish both a memorable and effective awareness symbol. In 1992 Estée Lauder collaborated with the world's largest ribbon manufacturer C.M. Offray and Son to create the first *pink* ribbon and handed out 1.5 million of these iconic ribbons from their make-up counters. They also collected over 200,000 petitions urging greater White House support for research funding. Other organizations, both for- and not-for-profit, quickly followed suit. According to MAMM Magazine's June/July 1998 issue, roughly 80 to 100 major companies designed their own versions of the original pink ribbon over the next five-and-a-half years (Fernandez, 1998). According to Elliott (2007) and King (2006), the issue of pink ribbon campaigns has grown so much over the years that pink is now largely associated with breast cancer awareness (Elliott, 2007; King, 2006).

Many individuals and corporations alike support these campaigns as they raise significant funds for breast cancer research, patient care and other related causes. For countless companies, this popular, successful, and ubiquitous cause makes it possible for them to craft charitable credentials at minimal cost. This is especially true during October's breast cancer awareness month when pink ribbon symbols dominate store aisles, banners, and ads. However, while

enhanced awareness and fundraising result from October's activities, an overall *lack of accountability* permits corporations to benefit significantly from increased sales without benefiting the cause. This problem – labeled “pinkwashing” by campaign critics – is one of many ethical issues surrounding pink ribbon activities. In addition to pinkwashing, pink ribbon campaigns have been criticized by the medical community. They point out that the campaign's focus on early screening largely *excludes prevention research* and *overlooks downsides* associated with over-screening and over-diagnosis (Welch, 2013). Additionally, *misogynistic messages* abound when failure to diagnose cancer through early screening and lifestyle choice are blamed on breast cancer victims (Aschwanden, 2010; Ehrenreich & Brenner, 2011; Hornaday, 2012). Lastly, *conflicts of interest* also arise when support for the campaign leads to outcomes that are enhanced but not desired by the campaign (Singer, 2011). According to Dartmouth cancer specialist Dr. H. Gilbert Welch, "It's a common problem with disease awareness campaigns and patient advocacy groups" that the expansion in the number of people receiving treatment from over-screening and misdiagnoses directly and strongly benefits certain sponsor groups that are commercially dependent upon a campaign's growth (Aschwanden, 2010; Singer, 2011). Such is the case with pharmaceutical company AstraZeneca, a major pink ribbon sponsor company that both benefits from the campaign and has a major stake in the screening and diagnosis approaches regardless of the fact that they lead to painful and often unnecessary surgeries, chemical treatments, and radiation (Orenstein, 2002). That is, company sales, product continuance, and profits depend on known and undesirable sets of medical practices that negatively impact a large portion of the population. And these are fueled by the campaign's continued focus on certain messages to the exclusion of others, without weighing the pros and cons or net benefit of each (Anonymous, 2013; Aschwanden, 2010; Fazeli Fard, 2012; Hornaday, 2012; Orenstein, 2012, 2013).

The Assignments and Their Relevance

The ethics/CSR activity described below was created for use in an undergraduate organizational behavior course composed almost entirely of a traditional freshmen group which generally has difficulty examining and articulating the concerns associated with ethical issue management. While this activity does have relevance even at the graduate level, it is especially impactful on freshmen students who generally support ethical decision-making and CSR. But they either do not understand decision complexity, are not familiar with various steps in the decision process, or they have difficulty identifying how corporate ethics and decision-making are personally relevant. As a result, they face motivational barriers that impede a committed examination of the issues.

Our goal was to find a way beyond lecture-based instruction and passive learning to make student decisions more real (absent student managerial experience) by using the richness and accessibility of the pink ribbon campaign. We chose to emphasize exploratory learning by having students: 1) create a bibliography based upon their findings; 2) use the bibliographical references to guide their involvement in class discussion; and 3) prepare a summative paper. These steps were designed to take students first from the creation of a bibliography they connected with the most; then to the generation of research notes meant to inform class

discussion exposing the topic's various complexities; and finally to a paper tying ethics and CSR together within the pink ribbon campaign's context.

By taking a step-wise and incremental approach, these series of activities help students to better understand ethics and CSR while establishing a framework that emphasizes personal relevance via personal values. Also, our use of the pink ribbon campaign's rich but bounded information landscape and familiar context helps students to overcome challenges associated with organizational actions and policies, stakeholder expectations, and those triple bottom line concerns that drive CSR discussions in general. This offsets students' tendency toward a superficial treatment of ethics and CSR because they do have some experience with the campaign and can more easily find relevance in the topic than they might with an alternative, loosely defined set of problems.

While students do not make the types of executive-level decisions about corporate philanthropy or involvement in pink ribbon campaigns, they do have experience with their own buying decisions impacted by the easily-identified pink ribbon campaigns. Students also likely know somebody who is either fighting breast cancer directly or supporting a family member or friend who is fighting the disease, making the pink ribbon context immediately personal. In sum, the availability of abundant and diverse perspectives, familiarity with at least some aspects of the campaign, and their likely contact with the cause leverages existing topic relevance while the assignments ground ethics and CSR in a manner that makes those topics increasingly pertinent while exploration emphasized in the assignments helps grow personal connections to ethic and CSR topics in general.

CSR/Ethics Student Activity

As stated above, this activity was developed with the needs of a traditional undergraduate student, especially freshmen, and delivered in an organizational behavior (OB) course. To get started, all students needed was foundational CSR and ethics knowledge to support the activity's three main stages which included the student creation of a bibliography with research notes; class discussion; and a final written paper, which we will discuss in detail below. Introductory reading and background lecture and CSR and ethics were kept to a minimum and, because OB is an introductory survey course, these topics were discussed broadly. Specifically, we focused initially on just three ethical frameworks that included utilitarianism, individual rights, and distributive justice with all other frameworks left to future discussion only if they came up more organically via ongoing student examination of the topics. Suggestions for the activity's modification for other courses will follow.

Bibliography

Just after the CSR and ethics introduction and a week or two prior to the bibliography's due date, students are introduced to the concept of pink ribbon campaigns and provided with an overview of the activity's three stages in order to better understand how each stage built upon the

next. Students are coached at this point and on to remember the primary focus of developing a better understanding of and appreciation for CSR and ethics. In prior semesters, interest in pink ribbon campaigns led some students to focus too heavily on the campaigns themselves while ignoring the application of CSR and ethics.

When work on the bibliography begins, students are instructed to research CSR and ethics as it relates to pink ribbon campaigns followed by the creation of a related bibliography and research notes. The selection of a 10 citation minimum, from varied source types (e.g. books, journals), is required. Students may choose to attach research notes in a separate summary or they can include them as annotations in the bibliography with the intent that they demonstrate that they had read and collected sources that helped inform their thinking, rather than just choosing random sources. This step ensures that students are prepared for the second stage. The hope was that the students had sufficiently explored the topics of pink ribbon campaigns, CSR, and ethics to actively participate in the class discussion.

In our experience, most students require significant support in developing information literacy skills at this stage. Therefore using library resources to help instruct students can be helpful. Students often struggle in assessing the credibility of the sources, as they tend to favor Internet sources that may include blogs. Also, we instruct students that they are not required to interview a person related to pink ribbon campaigns and that they can use online blogs to get a personal perspective; however, these must be clearly noted in their submissions. This assignment is graded based on adherence to requirements, appropriate source selection and citations, and the completion of research notes that demonstrate a clear understanding of those sources they selected.

Class discussion

This element provides an opportunity for students to explore the topic with other students and with the instructor. Students are asked to bring their bibliography and research notes to class. Depending on the size of the class, students can be divided into teams or the discussion can be facilitated with the whole class. To get started we ask students to consider what they learned about pink ribbon campaigns, what surprised them, and how they might feel having learned more about pink ribbon campaigns. Once students provide examples and information from their research, we challenge them with questions about how pink ribbon campaigns relate to CSR and ethics.

Our experiences at this stage have varied widely by class. Generally, a few students are shocked by what they find. For example, they are surprised to find that so many companies include pink ribbons on products, but that the resulting increase in sales are not donated – sometimes at all – to a pink ribbon cause. This controversy helps to get things going, but in our experience students typically fail to integrate CSR and ethics into the discussion or analysis without clear direction. We are also cautious to halt exploration within discussions so as not to hinder further exploration by students when they write their own paper later on. From our experience, maintaining balance within the discussion required careful guidance to aid student

exploration while keeping those few highly motivated students from dominating this stage of the activity.

Paper

In the final stage, students are asked to complete a research paper by selecting one of three approaches: adopt the perspective of a CEO trying to decide whether or not to participate in pink ribbon campaigns; take on the role of a consumer choosing whether or not to purchase products with pink ribbons; or complete a more traditional research paper. Students are instructed to write analysis rather than opinion, although they can include their opinion in the final concluding paragraph. In addition, students are reminded that they should continue their research and not depend solely on those sources that they included in their initial bibliography or those examples that were discussed in class.

Our experience indicates that students can have difficulty distinguishing between writing an opinion and writing an analysis that leads to a well-supported conclusion. We find that many students also struggle with proper citations and other writing mechanics because of their limited skills and that providing support for vast differences in skill level can be challenging. We inform students, though, that the paper's grade is based on writing quality as well as thoroughness of research; and knowledge of CSR and ethics.

Alternatives

This activity's various stages provide opportunities to integrate content across courses. As mentioned above, pink ribbon campaigns can be difficult to understand because so many separate disciplines cover the topic in so many different ways. This challenge, though, can be seen as an opportunity particularly when integration across courses diminishes the workload in any one course. Pink ribbon campaigns often rely upon or lend themselves to social marketing-specific analysis (George, 2002) covered in some marketing courses. Likewise, unique financial challenges associated with CSR activities (Pomeroy & Dolnicar, 2009) and greater attention to ethical frameworks and analysis allow relevant integration with finance and ethics and society courses, respectively. Other business courses, economic and legal courses where ethics and CSR are explored could also benefit from these activities. Finally, while we did not specifically mention it above, this activity is flexible enough to adapt to learning objectives focused on skill-building related to decision-making and critical thinking.

Student Feedback and Pedagogical Support

Direct and anonymous student feedback was gathered after all stages of the activity were completed and graded. We collected data across multiple classes over a two-year period, asking 129 students to complete the survey with 97 responses, providing a 75.2% response rate. The survey asked students to respond to statements on a five-point Likert scale from "1 - Strongly disagree" to "5 - Strongly agree." Students were not required to answer all the questions, but no more than five students failed to answer any given question. Differences in administration and feedback are noted throughout. Specifically the bibliography and research notes were more formalized in the second year.

CSR/Ethics

The primary focus of the activity presented here is to ensure student learning content related to CSR and ethics academically and practically. Students reported that they learned more about CSR than ethics from the assignment when responding to statements about their learning. Ethics' average response was 3.32 while CSR averaged 3.73, which may have been caused by greater emphasis placed on CSR, the more practical nature of CSR, or the sheer quantity of material on CSR available to students in their research. In response to the statement "this assignment would be valuable to other students studying CSR and ethics," only 16 students (17%) selected the strongly disagree or disagree options. The overall average was 3.68.

In starting the design of this student work, we wanted students to have a more personal and meaningful view of the complexity of CSR and ethics so they could apply it practically. Student interest and ability to engage in the topic are important to the student learning. In response to the statement "this assignment helped me explore my personal values related to CSR and ethics," the average response was 3.43 with less than 30% replying that they strongly disagreed or disagreed that the exercises helped with that exploration. Only 20% of students strongly disagreed or disagreed with the statement "this assignment changed my view of how corporations engage in CSR activities," with a 3.65 average overall. In response to the statement "I found the pink ribbon campaign topic interesting," only 20 students (21%) selected a one or two, with a 3.61 average.

Reading student papers and listening to the class discussion, it was clear that students were surprised by their findings. An additional question was added to the survey the final time it was administered. A total of 47 students responded to the statement "I was surprised by what I learned about pink ribbon campaigns." Only seven (less than 2%) showed that students disagreed or strongly disagreed with this statement. The overall average for this question was 3.43. The above feedback supported our belief that this activity enhanced student appreciation of the complexities of CSR and ethics and that they were surprised by the magnitude of their learning surrounding these complicated subjects.

Pedagogical Support

According to pedagogical research, successful learning of more abstract concepts, such as ethical decision-making and CSR, benefits from a number of delivery modes and the consideration of a number of factors when designing that learning. As our discussion will demonstrate, learning design for our ethics/CSR activity benefited from the three stage process. As we mentioned before, we wished to explore complex topics, develop advanced decision-making skills, deal directly with more thoughtful information processing, while at the same time keeping students fully engaged. Each of the three design elements, therefore, were expected to lower information overload; the undergraduate and freshmen student's sense of intimidation; the need to support greater comfort with critical thinking and analysis; and greater leveraging of often limited personal experience.

Experiential Learning. This multi-step process takes advantage of Kolb's (1984) (Kolb, 1984) learning cycle: While learning may start at any point in the cycle, we will discuss, as is common, the Concrete Experience (CE) first. Students have typically seen pink ribbon campaigns in stores or restaurants and some students will also know a person who has been affected by breast cancer. These experiences, coupled with students' initial research, provide that concrete experience from which students proceed. During class discussions, the first information solicited from students is experience-related, followed by questions about how that experience relates to CSR and ethics. This brings students into the reflective observation (RO) stage.

As the discussion proceeds, students move through the learning cycles at different rates. As reflection increases, students begin to think about their experiences in new ways—known as Abstract Conceptualization (AC). Some students continue on to Active Experimentation (AE) during the discussion by suggesting some new connection or idea. The group discussion is intended to facilitate but not push the learning cycle. Students continue to move through the stages (from CE and on to RO) as they revise their bibliographies, conduct more research, and work on their papers from draft through final versions. The class discussion time provides an excellent opportunity for students to receive coaching regarding the way in which information was processed, taking further advantage of the learning cycle.

Spreading this activity across three separate stages with varied delivery helped to accommodate different student learning styles as derived from Kolb's experiential learning cycle (Kolb, 1984). Those with the diverging style of learning will benefit from active listening, participation during class discussions, and opportunities to receive verbal and written feedback during discussion, on their bibliographies, and prior to writing their papers. Assimilators will thrive during out-of-class time provided through because the process permits time to think about and process topic concerns. Additionally, students with a more convergent style of learning have the opportunity to explore new ideas during discussion time while accommodators more greatly benefit from working with others in class to explore the topic. By ensuring that different learning styles have an opportunity to flourish and students can progress through the entire learning cycle students will feel more comfortable with the learning process.

This activity's multi-stage set-up also provided greater opportunities for student and instructor interaction. The most notable opportunity for interaction was during discussion which provided face-to-face student-instructor interaction that was rich in two-way communication. Discussion is a viable means to teach skills (Sautter, 2007) and here is used effectively to teach critical thinking skills and other skills. Questions, instruction, encouragement, and realistic expectations could be communicated, providing time for instructor and peer coaching of skills. It also provided the opportunity to clarify content, redirect students who seemed to lose focus, and monitor the stages of learning.

Information Literacy/Writing. First-year students need to be supported in their development of skills related to learning. This assignment while supporting content learning also supports skills and provides practice in information literacy, writing skills, and critical thinking skills. The initial requirement for research and bibliography requires student to gain and practice skills in information literacy by database use, searches, and information relevance occurred somewhat in informal and formal discussions between students, with the reference librarian, and

with the instructors. Students recognized that it is in their best interest to learn from the feedback provided on their initial research and correct their mistakes prior to writing their papers. The written paper also provides an opportunity for students to practice their writing skills. Students were asked about their development of both information literacy and writing skills. Greater instruction and feedback (in the bibliography prior to the paper) was given to research skills than to writing. It is not surprising that, comparatively, students felt they improved their research skills more than their writing skills, with surveyed averages of 3.24 and 2.7 respectively on the student feedback survey discussed above.

Discussion/Conclusion

The general purpose of the assignment our paper describes is to enhance topic relevance so that students – even students at the freshman level – can relate more personally to complex and sometimes intimidating topics. In particular, we took the related topics of ethics and CSR that expose students to a vast array of perspectives in both academic and practical discussions. The intimidation factor that originates from information overload and the more in-depth thinking required from these topics, is enough to alienate students. In fact, we should safely assume that students enter college with *some* sense of right and wrong and an understanding of the cause-effect nature of human and corporate activity. All students have some sense of responsibility to persons or groups. Nonetheless, helping students to connect the understanding just described to complex and messy topics (such as ethics and CSR) is a challenge. We found that our approach to the topic successfully met this challenge and that observation and data collected throughout the exercise provided us with insights into the future use of this approach. We discuss these lessons learned and extend them more generally to the common task of connecting and building on student experiences to develop a strong connection to more complex content.

Proposed benefits

As we mentioned above in our student feedback section, our more cyclical and iterative approach to the topic and our progression from more practical to abstract appeared to be highly effective. Students expressed that they both learned about and valued the complex ethics and CSR topics, indicating that students developed mastery over competing and vague definitions, dealt with discomfort that accompanies abstract concepts, and eased their own confusion surrounding the massive volume of ethical issues found in the corporate world. All indicators point to the exercise's effectiveness at increasing student self-efficacy while reducing student intimidation. Additionally, topic relevance was enhanced as students reported that these topics were worth covering in future classes (were valuable to others) and that they did establish a personal connection to the topics (their ability to explore their own values). A sense of enhanced value and personal application would indicate the exercise's value in improving student motivation, which was another goal of the exercise. Finally, students demonstrated engagement and a sense of confidence with these topics when they expressed, at the end of this series of exercises, both interest and surprise over how much they had learned surrounding ethics and CSR.

Recommendations for improvement

Our data easily provides one area where the entire exercise may be improved. While students expressed greater understanding of CSR and ethics, they did rank their understanding of CSR slightly above ethics, which means that some additional attention or support is needed to tie ethics to CSR. It may be that the practical nature of the exercises provides intrinsic support for learning in CSR and that is okay from a learning perspective. However, we suspect that a greater understanding of the relationship between the two can lead to a greater appreciation of both topics, better overall skill development in the application of ethical concepts, enhanced consideration of the opportunities to apply ethics in a practical way, and a much greater appreciation for their own ability to drive their own behaviors in a manner congruent with their own sense of right and wrong. Additional pedagogical research that tracks greater detail within ethics and CSR disciplines would be helpful in future iterations of this as well as similar exercises and we recommend gathering greater detail surrounding such things as how students view their understanding, what they have learned about their own values, and in what manner their experiences changed their viewpoint of each topic.

A second area, which we spoke to briefly in the pedagogical support section of the paper, includes both information literacy and writing. While we did find that students perceived improvement in research, this is an expected result given the support provided for both throughout the duration of the exercise. We did not anticipate that students would feel, on average, that they did not improve their writing. However, despite writing support that was provided, the instruction of writing remains a complex topic that does not clearly fall within the training and skill set of non-English instructors. Furthermore, identifying for students where writing instruction was focused and where improvements in their writing should take place could undoubtedly be improved in future assignments. Support from such resources as campus writing centers, tutors, or collaboration with writing instruction happening around the campus should probably be built into exercises such as this. Of course, that collaboration could increase the complexity associated with the design and implementation of exercises like the one we have discussed. From a research perspective, we would recommend focusing on specifics. For example, it may be that providing adequate detail for their assertions is the prime impediment in their written communication. If this is the case, more explicit instruction and focus throughout the exercise should be provided and data that corresponds with that behavior collected according to facets associated with that skill.

Final note

Our discussion throughout the paper and in our concluding section has focused on issues within the freshman context, within the fields of ethics and CSR, and support based on experiential learning and writing/information literacy. While we have avoided generalizing based upon this focus and the nature of our data collection efforts, we do acknowledge that some generalizability does exist. We recommend, for example, that the student sense of intimidation is not limited to ethics and CSR, but present in many areas. Mathematics and science come readily to mind. Student difficulty to relate to a topic, like drawing personal comparisons between historical events or recognizing the value in understanding comparative religions or political systems, can benefit from the experiential-to-abstract approach we took in designing this

exercise. Finally, improvement in written communication and information literacy can and should occur at any level of education; and a focus on other skills make greater sense in different course and topic contexts. We recommend that more common explorations and/or empirical investigations of course exercises also consider those skill sets that most greatly impede student learning and our true understanding of student learning in these content areas.

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MEDIATION MADNESS: DEALING WITH BULLIES IN MEDIATION

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I. INTRODUCTION

Mediation offers an alternative to the rigors of formal litigation in a courtroom. It has become a successful conflict resolution tool because it provides an opportunity to resolve virtually any issue in “a cost effective and timely manner.”¹ Moreover, according to Gene Valentini, director of the Texas Dispute Resolution System, 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.”² Business leaders can prepare for and manage a successful mediation only when they understand the dynamics of the process.

Applying models and recent research from the field of group dynamics, this paper offers insight into how to prepare for and conduct mediation when bullies take a seat at the table. The study of bullying has advanced from general investigation to a rich field of study focused first on the schoolyard and more recently the workplace and the legal profession. Lacking, however, is an examination of how bullying relates to mediation. As far as we know, this article is the first to address that and to offer recommendations to mediation participants. The literature on workplace bullying is first reviewed. Next, we define mediation bullying and discuss how it differs from workplace bullying. Then, we offer a Typology of Mediation Bullies and the Integrated Model of Bullying Behaviors in Mediation that highlight six specific types of bullies a mediator may encounter and offer coping strategies to deal with them. We close with recommendations on how to address bullying in mediation in general. The extent to which business leaders recognize and respond to bullying can determine whether mediation succeeds. Before considering how skills can be developed in this area, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

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¹ Office of Dispute Resolution, *The Texas Resolution Connection*, Vol. 24, Issue 4, (Fourth Quarter, 2010), p. 2.

² Ibid.

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.³

Unfortunately, this statutory definition offers little insight into what mediation 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.⁴ 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 keep conflict out of costly litigation and can even help settle conflicts already in litigation. For this to happen, though, business leaders must know what should transpire in mediation and how to prepare for it.

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 (the state nearest the region to track statistics) is staggering. Cases received by Texas alternative dispute resolution centers in the most recent three-year period for which records were kept average nearly 20,000 annually, with a total of more than 58,000 from 2003 to 2005.⁵ The same is true of Oklahoma. As shown in Table 1, on average, more than 6,000 cases have been referred annually to the alternative dispute resolution system, with 68,504 cases referred in just over a decade. Also, an impressive average settlement rate of 64 percent has been registered.⁶ Farther north, results in Nebraska (see Table 2) are even more impressive. The number of cases referred annually to its alternative dispute resolution system has almost doubled in six years, with an average settlement rate of 82 percent.⁷ These impressive regional settlement rates are mirrored around the world. The World Intellectual Property Organization, which protects intellectual property and copyrighted goods and services, reports an overall settlement rate of 70 percent

³ TEX. CIVIL PRACTICE AND REMEDIES CODE ANN. §154.023 (2008).

⁴ Peter Lovenheim, *How to Mediate Your Dispute*, Boston, Irwin-McGraw Hill, 1998, p. 386.

⁵ Annual Report of the Texas Judiciary, Office of Court Administration, 2005 (last year reported).

⁶ Annual Report of Alternative Dispute Resolution System, Supreme Court of Oklahoma Administrative Office of the Courts, 2003-2013.

⁷ Annual Mediation Center Case Data Report, Nebraska Office of Dispute Resolution, 2008-2014.

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

<i>Date</i>	<i>Cases</i>	<i>Settlement Rate</i>
2003	6,800	64%
2004	6,353	64%
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%
Total	68,504	64%

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%
Total	10,318	82%

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

in mediation cases across its 185 member-nations.⁸ Moreover, these results were obtained in cases across a wide variety of industries, including the categories of Technology (32 percent), Industrial (14 percent), Medical (15 percent), Entertainment (11 percent), Luxury Goods (5 percent), Chemistry (2 percent), and Other (21 percent).⁹ Large, private dispute resolution firms, such as the Edwards Group Consultants¹⁰ and the Financial Industry Regulatory Authority (FINRA)¹¹, report settlement rates in excess of 80 percent, rivaling Nebraska's impressive

⁸ World Intellectual Property Services, *WIPO Mediation Case Examples*, <http://www.wipo.int/amc/en/mediation/case-example.html> (last visited Ap.20, 2015) lead author retains a copy.

⁹ Ibid.

¹⁰ Edwards Group Consultants, *Mediation Settlement Rates*, <http://www.mediate.com/tegci/pg1.cfm> (last visited Ap. 20, 2015) lead author retains copy.

¹¹ Financial Industry Regulatory Authority, *Mediation Statistics*, <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics> (last visited Ap. 20, 2015) lead author retains copy.

numbers. Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established.

IV. PURPOSE

Mediation is a form of alternative dispute resolution that allows parties to avoid traditional litigation. Mediation parties agree to allow an impartial mediator to manage the process as they seek common ground and, hopefully, a win-win settlement. Because the parties are at odds initially, each attempts to influence the other in an effort to resolve the dispute. While the mediation parties are assumed to be of equal power and standing before an impartial mediator, this is not always the case. The rise of court-sponsored mediation is leading to an explosion in the use of mediation. Originally conceived in the 1970's and 1980's as a form of Alternate Dispute Resolution (ADR) involving collaboration of the parties without legal representation, mediation has been adopted as Primary Dispute Resolution (PDR) in both state and federal jurisdictions across the country where court-ordered mediation is required before a trial may take place¹². Thus, as mediation invades the judicial system, the judicial system (attorneys as counsel and former judges as mediators) in turn invades mediation. Familiarity with mediation is widespread among attorneys, with substantial numbers reporting that they have taken courses, represented clients, and served as neutrals in mediation.¹³ This trend is diminishing the role of mediation parties, who tend to defer to counsel in court-ordered mediation.¹⁴ Thus, the foundation of mediation, collaboration among the parties, is indirect at best. More importantly, attorneys bring their adversarial style to the mediation table. Recent research in the legal profession indicates that bullying is common among legal professionals¹⁵ and that a "bully culture" exists in many law offices.¹⁶ Without the procedural controls and oversight of the courtroom, the new model of mediation may be fertile ground for bullying. These developments in mediation tend to destroy the personal relationship, trust, and connection between parties that underlie the collaborative process upon which mediation is built.

Only when business leaders understand these dynamics can they prepare for and manage a successful mediation, which is a process of partnership and persuasion. Compelling persuasion is based on effective, ethical influence tactics that preserve a personal relationship founded on trust, confidence, and integrity. Bullying, whether detected or not, compromises this supportive climate and is a key concern not only for mediators who are charged with managing the process, but also for the parties and their attorneys.

As far as we know, this article is the first to address the bullying phenomenon and offer recommendations to mediation participants. The literature on workplace bullying is first

¹² Goldfien, J. & Robbenol, J., "What if Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles," *Ohio State Journal on Dispute Resolution*, 22, 2, 2007, p. 283.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 284.

¹⁵ Omari, M. & Paull, M., "Shut Up and Bill: Workplace Bullying Challenges for the Legal Profession," *International Journal of Legal Profession*, 20, 2, 2014, pp. 141-160. Mire, S. & Owens, R., "A Propitious Moment? Workplace Bullying and Regulation of Legal Profession," *UNSW Law Journal*, 37, 3, 2014, pp. 1030-1061.

¹⁶ Bagust, J., "The Culture of Bullying in Australian Corporate Law Firms," *Legal Ethics*, 17, 2, 2014, pp. 177-201.

reviewed. Next, we define mediation bullying and discuss how it differs from workplace bullying. Then, we offer a Typology of Mediation Bullies and the Integrative Model of Bullying Behaviors in Mediation that highlight six specific types of bullies a mediator may encounter and offer recommendations on how to deal with them.

Finally, we offer recommendations to mediators, parties, and their attorneys to safeguard mediation from bullying. These tools draw on current and classic research in social psychology and group dynamics to help mediation participants recognize and avoid the devastating effects of bullying on the mediation process. Effective use of these tools is vital to mediation success.

V. DEALING WITH BULLIES IN MEDIATION

A. BULLYING IN THE WORKPLACE

Workplace bullying has gained considerable attention since the 1980's. The scientific study of workplace bullying originated in the steel mills of Sweden with the work of physician Heinz Leymann.¹⁷ In his groundbreaking article, he used the term "mobbing" to describe hostile and unethical treatment that is systematically directed toward one individual by one or more coworkers on a regular basis over a period of time.¹⁸ More recently, Norwegian sociologist Stale Einarsen offered a more comprehensive definition of workplace bullying:

"Bullying emerges when one or more individuals persistently over a period of time perceive themselves to be on the receiving end of negative actions from one or more persons, in a situation where the target of bullying has difficulty defending him or herself against these actions."¹⁹

The Workplace Bullying Institute and the Healthy Workplace Bill, which was crafted by Suffolk University law professor David Yamada, now share the same definition of workplace bullying as "repeated mistreatment: abusive conduct that is threatening, intimidating, or humiliating, work sabotage, or verbal abuse."²⁰

Unlike England, Sweden, Australia, and Canada, there is no anti-bullying workplace legislation in the United States, where it is "four times as prevalent as some forms of illegal harassment."²¹ Of adults surveyed in the 2014 Workplace Bullying Institute's Annual Survey, 27 percent reported having directly experienced abusive behavior at work.²² This proportion, if applied to the entire U.S. labor force, would equate to 37 million U.S. workers, thus indicating that bullying is a significant problem in the American workplace. The survey also indicates that

¹⁷ Leymann, H., "Mobbing and Psychological Terror at Workplaces," *Violence and Victims*, 5, 1990, p. 120.

¹⁸ Ibid.

¹⁹ Einarsen, S., "The Nature, Causes, and Consequences of Bullying at Work: The Norwegian Experience," *Pistes*, 7, 3, 2005, p. 1.

²⁰ Namie, G., *2014 WBI U.S. Workplace Bullying Survey*, Workplace Bullying Institute, 2014, p. 16.

²¹ McLaughlin, K., "Workplace Bullying: A Silent Epidemic," *HR Magazine*, 59, 10, 2014, p. 22.

²² Namie, pp. 4-5.

69 percent of bullies are men, 56 percent are bosses, and 77 percent of the victims are bullied by perpetrators of the same gender.²³ Finally, the Industry Analysis of the survey indicates that the healthcare and education industries followed closely by government are most prone to bullying.²⁴ Twenty-six states have attempted to address workplace bullying by introducing variations of the Healthy Workplace Bill, but none have enacted it to date.²⁵

Bullying behavior is manifested through harassment, humiliation, discrimination, intimidation, innuendo, harming a person's reputation and credibility, and malicious isolation.²⁶ Keashly offers examples of specific bullying behaviors, including:

“aggressive eye contact, either by glaring or meaningful glances; giving the silent treatment; intimidating physical gestures, including finger pointing and slamming or throwing objects; yelling, screaming, and/or cursing at the target; angry outbursts or temper tantrums; nasty, rude, and hostile behavior toward the target; accusations of wrongdoing, insulting or belittling the target, often in front of other workers; excessive or harsh criticism of the target's work performance; spreading false rumors about the target; breaching the target's confidentiality; making unreasonable work demands of the target; withholding needed information; and taking credit for the target's work.”²⁷

The behavioral manifestations of bullying are many, limited only by the creativity of the perpetrator. Based on extensive nationwide survey research and more than 10,000 client calls at the Workplace Bullying Institute, Gary and Ruth Namie amassed a list of hundreds of bullying behaviors that they categorized into four common themes or archetypes in their book, *Bullies at Work*.²⁸ These included The Screaming Mimi, The Constant Critic, The Two-Headed Snake, and the Gatekeeper.²⁹ Common to all these is a systematic, persistent campaign by the perpetrator to threaten, humiliate, intimidate, and ultimately destroy or drive the target out.

The root causes of bullying have been extensively researched. Moira Jenkins summarized the factors that contribute to the development and maintenance of workplace bullying in terms of Characteristics of the Perpetrator and the Target (e.g., social skills, qualifications, conflict style, employability, coping, and attribution styles), the Social Environment (e.g., work group environment, group hostility, envy, and pressure to conform), and the Organizational Environment (leadership style, job design, role conflict and ambiguity, work environment, and

²³ Namie, G., *2014 WBI U.S. Workplace Bullying Survey*, Workplace Bullying Institute, 2014, p. 7-10.

²⁴ Namie, G., *2013 WBI Survey: Bullying by Industry*, Workplace Bullying Institute, 2014, p. 4-5.

²⁵ Namie, G., *2014 WBI U.S. Workplace Bullying Survey*, Workplace Bullying Institute, 2014, p. 16.

²⁶ Davenport, N., Schwartz, R., & Elliot, G., *Mobbing: Emotional Abuse in the American Workplace*, 1999, p.33.

²⁷ Keashly, L., “Emotional Abuse in the Workplace: Conceptual Empirical Issues,” *Journal of Emotional Abuse*, 85, 1998, pp. 97-98.

²⁸ Namie, G. & Namie, R., *The Bully at Work: What You Can Do to Stop the Hurt and Reclaim Your Dignity on the Job*, 2000, Sourcebooks: Chicago.

²⁹ Ibid.

job security).³⁰ According to Einarsen, two major factors underlie all workplace bullying: escalation of conflict and imbalance of power.³¹ Most workplace bullying springs from escalation of workplace conflicts in which one party has greater power in terms of status, position, knowledge, or personality. As the conflict escalates, the party with greater power often resorts to bullying behavior to exploit the weaker party. Einarsen points out, however, that even in a conflict of equals, one party may become disadvantaged in the process and fall victim to bullying by the other party.³² Thus, workplace bullying is driven by escalation of conflict and the dynamics of power imbalance. While both factors abound in the workplace giving rise to extensive bullying, the workplace is not the only setting in which these factors occur. We now turn our attention to whether bullying is a significant threat to mediation.

B. *BULLYING IN MEDIATION*

While no research was found in the literature pertaining to bullying in mediation, analysis indicates that bullying is likely to happen for three reasons. First, the two factors that drive bullying, as noted by Einarsen³³, are escalating conflict and imbalance of power, which are present in mediation. Escalating conflict is clearly present, as it is often the last resort in resolving long-standing disputes, which can be intense (e.g., divorce, child custody, and eldercare decisions). Also, because of the explosion of court-sponsored mediation, the balance of power has shifted from the parties themselves to lawyers who, in some cases, do not allow their clients to speak, and to court-appointed mediators who often act as brokers and auctioneers hammering out deals in private caucus. James Alfini, director of Education and Research at the Florida Dispute Resolution Center, which relies heavily on court-sponsored mediation, describes three options for mediators in a court-ordered process: Trashing, Bashing, and Hashing It Out.³⁴ Trashing limits direct party communication and relies upon party caucuses in which the mediator criticizes as worthless the respective cases, forcing the parties to make realistic settlement offers. Bashing also involves limited direct-party contact and relies upon party caucuses, but this time it is to strike down initial offers, regardless of case merit, and then push for a middle-ground settlement. The final technique, Hashing It Out, is more like traditional mediation in that the mediator facilitates direct communication between opposing attorneys and their clients in order to talk out a good settlement. Alfini refers to the first two options as “muscle mediation” and questions whether it is the end of “good mediation.”³⁵ As those practices illustrate, the parties in mediation are no longer in control of the process, and mediation

³⁰ Jenkins, M., “Practice Note: Is Mediation Suitable for Complaints of Workplace Bullying?” *Conflict Resolution Quarterly*, 29, 1, 2001, pp. 29-32.

³¹ Einarsen, S., “The Nature, Causes, and Consequences of Bullying at Work: The Norwegian Experience,” *Pistes*, 7, 3, 2005, p. 1-14.

³² *Ibid.*

³³ *Ibid.*

³⁴ Alfini, J., “Symposium: Trashing, Bashing, and Hashing It Out: Is This the End of Good Mediation?” *Florida State University Law Review*, 19, 1991, p. 66-73.

³⁵ *Ibid.*

begins to resemble non-binding arbitration. The dynamics in this setting generally create greater power imbalance among mediation participants (parties, their lawyers, and mediators). Thus, when taken together, escalating conflict and power imbalance can make mediation a fertile ground for bullying.

A second reason for bullying potential is an increasing shift to court-sponsored mediation, which brings a flood of legal professionals (lawyer mediators and lawyers representing parties) into the mediation room. While some of those professionals have adapted to mediation, recent research indicates that bullying and a bully culture persist in law offices and in courtrooms.³⁶ Attorney, Douglas Richmond, recounts the actions of four “Bench Bullies,” all judges: Samuel Kent, Sam Sparks, Talmadge Littlejohn, and Frederick Brown. He uses them as examples of “intemperate, excessive, unjustified” intimidation from the bench.³⁷ When judges “abuse or denigrate those who appear before them, they may be fairly described as bullies,” but thick skin is expected of lawyers in the “ordinary rigor of litigation practice.”³⁸ The risk is that the rough-and-tumble courtroom practices may spill over into the less-adversarial practice of mediation, bringing along elements of a bully culture.³⁹ Thus, mediation practices may be shifting toward acceptance of heavy-handed courtroom tactics as “normal.” Just as there is “no room for bullies on the bench,”⁴⁰ there is no room for bullies and those who tolerate them in mediation. Court-mandated mediation often involves lawyers and former judges, who tolerate as a normal part of the legal profession behaviors that a non-attorney may consider bullying.

The final reason that bullying may be found in mediation is that the process is largely unregulated. Kim Kovach, a 35-year expert in the field of alternative dispute resolution, reports that the conduct of mediation practitioners is generally not supervised, despite codes and guidelines that have been in place for some time.⁴¹ Omari and Paull, in their study of bullying in the legal profession, noted that it could be found more often in organizations with little structure and with weak policies.⁴² The reverse was true of organizations in which clear policies existed.⁴³ Thus, in the absence of meaningful oversight, mediation bullying can be expected to flourish.

Mediation is becoming a more adversarial process and thus a fertile ground for coercive behavior for the following reasons: the persistence of such behavior in the legal profession; the increasing number of legal professionals at the mediation table; pressure to settle cases quickly with limited direct-party communication; growing imbalance of power between parties, their

³⁶ Omari, M. & Paull, M., “Shut Up and Bill: Workplace Bullying Challenges for the Legal Profession,” *International Journal of Legal Profession*, 20, 2, 2014, pp. 141-160. Mire, S. & Owens, R., “A Propitious Moment? Workplace Bullying and Regulation of Legal Profession,” *UNSW Law Journal*, 37, 3, 2014, pp. 1030-1061.

Bagust, J., “The Culture of Bullying in Australian Corporate Law Firms,” *Legal Ethics*, 17, 2, 2014, pp. 177-201.

³⁷ Richmond, D., “Bullies on the Bench,” *Louisiana Law Review*, 72, 2, 2012, p. 328.

³⁸ *Ibid.*, pp. 329-330.

³⁹ Mire, S. & Owens, p. 1045.

⁴⁰ Richmond, p. 360.

⁴¹ Kovach, K., *Ethics: Fallacy, Folly, Or Foundation of Best Practices*, Alternative Dispute Resolution Course, State Bar of Texas, Austin, TX, 2015, p. 8.

⁴² Omari, M. & Paull, p. 152.

⁴³ *Ibid.*

lawyers, and mediators; and the lack of regulation of practitioners. These factors, coupled with the relatively informal climate of the process, increase bullying possibilities.

Because no research evidently has been conducted concerning bullying in mediation, this paper attempts to fill the gap in the literature. In the sections that follow, a definition of mediation bullying is offered and behaviors are classified into six archetypal profiles with strategies for coping with each. The paper then closes with recommendations for alleviating bullying in mediation.

C. DEFINING MEDIATION BULLYING

The mediation room differs from the workplace in several ways. Generally, mediation involves fewer people (the mediation team) who interact more intensely over a shorter period of time (the duration of the case) with greater oversight (the mediator), higher levels of conflict, and intense pressure to succeed. Thus, bullying may operate in a somewhat different manner in mediation than it does in the workplace. Einarsen's⁴⁴ definition of workplace bullying can be adapted to mediation thusly:

“Mediation bullying is a pattern of unfair, abusive conduct in which a mediation participant threatens, humiliates, intimidates, dominates, manipulates, obstructs, or verbally abuses another participant such that the target has difficulty defending himself or herself and believes that the opportunity for fair participation has been compromised.”

This definition retains Einarsen's idea of abusive conduct and the target's inability to defend himself or herself but expands the realm of potential bullying behaviors to better fit the mediation environment. It also incorporates the twin imperatives of fairness and opportunity to participate, both of which are foundational in mediation. In addition, mediation bullying is described as a “pattern” of unfair, abusive conduct in order to reconcile the elements of persistence and duration in workplace bullying with the limited duration of a mediation case, which may last only days, weeks, or perhaps months, at most. Although bullying in mediation typically will be of shorter duration than what happens in the workplace, there is ample opportunity to establish a repeated pattern of abusive conduct (multiple occurrences) during a mediation case. Mitigating this concern is the likelihood that some mediation participants, particularly lawyers and others in court-sponsored mediation will meet again in future cases, thus extending opportunities to bully or be bullied by a familiar party.

Many of the same behaviors employed by workplace bullies can be seen in mediation. Domination, manipulation, and obstruction are added to better fit the nature of mediation.

⁴⁴ Einarsen, S., “The Nature, Causes, and Consequences of Bullying at Work: The Norwegian Experience,” *Pistes*, 7, 3, 2005, p. 1.

Usually the motive in mediation bullying is more instrumental than destructive. Domination, manipulation, and obstruction (impeding good-faith negotiation) are key strategies in neutralizing the opposition as a means of obtaining an advantageous settlement as quickly as possible. Unfortunately, this limits meaningful participation by the other party, which violates the spirit of mediation and derails the process. Mediation is built upon the concepts of fairness, equal participation, collaboration, and good-faith negotiation. Skilled mediators who recognize problematic behaviors (not dismissing them as puffery or legal gamesmanship) and who have the skills and inclination to respond can thwart mediation bullies. However, this is not always done. A certain degree of bullying may be accepted by mediators who bow before aggressive attorneys representing the parties and to the pressure for quick settlement in court-sponsored mediation. Bullying is an abuse of power that flourishes where there is intense conflict and imbalance of power.⁴⁵ The question becomes, then, how much abuse is acceptable and when does legal posturing cross the line into bullying?

Perpetrators could be any one of the participants: belligerent parties, overbearing lawyers, or even heavy-handed, court-approved mediators. Although mediators are unlikely to openly bully in a joint session, fearing complaints of partiality, they may resort to arm-twisting in private caucus because “what happens in caucus, stays in caucus.” The most likely perpetrators, though, will be lawyers bullying their own clients as well as the opposing party and his or her counsel. Because most parties are represented, they are less likely to bully each other directly.

D. INTEGRATIVE MODEL OF BULLYING BEHAVIOR IN MEDIATION

From a review of the bullying literature, six profiles of certain behaviors that might be encountered in mediation were identified. The types, described by identifying label, are Hot Head, Intimidator, Dominator, Expert, Manipulator, and Narcissist. The Typology of Mediation Bullies in Table 3 outlines the approach used by each profiled type and describes both the goal and associated behavior. The types were classified as to whether their approach is Direct (forceful, active, and visible) or Indirect (projecting knowledge, or creating an impression or illusion) as well as whether their behavior is Physical in nature (observable and potentially threatening); Rational (factual, reasonable, and practical); or Emotional (personal or manipulative). Combinations of these dimensions yielded six sectors. The Integrative Model of Bullying Behaviors in Mediation in Figure 1 graphically depicts the location of the six types of bullies in a multidimensional space. This may be the first comprehensive model of bullying behaviors in mediation.

⁴⁵ Einarsen, S., “The Nature, Causes, and Consequences of Bullying at Work: The Norwegian Experience,” *Pistes*, 7, 3, 2005, p. 1-14.

Table 3: Typology of Mediation Bullies

Type	Approach	Description
Sector 1 – Physical (Direct)		
Hot Head	Confrontational	Goal: To spark fear, shock, intimidate, demoralize, harass, belittle, neutralize, and subjugate the target. Behavior: Yelling; cursing; aggressive tirades; temper tantrums; forceful, intimidating actions; finger pointing; fist pounding; throwing and kicking objects.
Sector 2 – Physical (Indirect)		
Intimidator	Physical	Goal: To impress, overpower, create awe, generate fear/respect, project confidence, power, and superiority. Behavior: Exploiting advantage in physical size, stature, booming voice, non-verbals, appearance and dress.
Sector 3 – Rational (Direct)		
Dominator	Verbal	Goal: To control communication, undermine the value of other's comments, and limit participation (equal time). Behavior: Dominating meetings, control information flow by interrupting, talking over others, and using persistent, persuasive lobbying to limit target's opportunity to interact.
Sector 4 – Rational (Indirect)		
Expert	Intellectual	Goal: Use extensive legal expertise to intimidate "laymen" into accepting a settlement to avoid "adverse" litigation. Behavior: Using "superior" legal expertise to dominate participants on points of law. Intimidating party with fear of negative litigation outcomes should they fail to settle.
Sector 5 – Emotional (Direct)		
Narcissist	Delusional	Goal: To demonstrate superiority and command respect to bolster fragile self-image and win over "inferior" participants Behavior: False superiority, uncooperative, unwilling to accept responsibility for any aspect of the conflict, threatens to quit if inflated self-image is challenged.
Sector 6 – Emotional (Indirect)		
Manipulator	Psychological	Goal: To reduce mediation to a "Grand Chess Game" with participants as pawns and mediator as patron (supporter). Behavior: Crafty, skilled, hard-core Machiavellian, manipulator. Devises a "grand scheme" and uses propaganda to manipulate parties and win at all costs.

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

Figure 1: Integrative Model of Bullying Behaviors in Mediation

	<u>Direct</u> Forceful, Active, Visible	<u>Indirect</u> Knowledge, Impression/Illusion
<u>Physical</u> Observed, Potentially Threatening	1 Hot Head	2 Intimidator
<u>Rational</u> Factual, Reasonable, Practical	3 Dominator	4 Expert
<u>Emotional</u> Personal, Manipulative, Gamesmanship	5 Narcissist	6 Manipulator

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

In Figure 1, **Sectors 1 and 2** represent **Physical** bullying behaviors (Hot Head and Intimidator), **Sectors 3 and 4**, the **Rational** bullying behaviors (Dominator and Expert), and **Sectors 5 and 6**, **Emotional** bullying behaviors (Manipulator and Narcissist). In **Sector 1**, the **Hot Head** uses a direct, physical, confrontational approach involving yelling, cursing, temper tantrums and tirades, finger pointing, fist pounding, and throwing things in order to shock, intimidate, demoralize, harass, and belittle the target. This behavior is so shocking that it throws the target into a state of fearful paralysis. Unwilling to endure another tirade, the target forfeits his or her right to any meaningful participation in the proceedings. Unless the mediator rescues the target, a fair outcome is unlikely.

A less-shocking physical bullying behavior resides in **Sector 2**, where the **Intimidator** uses a more subtle, indirect physical approach to bully the target. In this case, the bully exploits powerful physical attributes such as size, strength, appearance, and a booming voice to impress, overpower, and intimidate the target. Like an old Arnold Schwarzenegger movie, this bully,

commands a certain degree of awe and respect merely by walking into the room. It is not the physical attributes themselves that qualify the Intimidator as a bully, but his or her efforts to exploit and augment this power base.

Turning to the Rational Bullies, the Dominator is encountered in **Sector 3**. This bully type uses a forceful, direct approach to inundate the mediation room with information that is relevant and reasonable, but excessive in volume and quantity. The Dominator interrupts, talks over others, and never tires of endless, persuasive lobbying. He dominates the conversation with an avalanche of words and undercuts the opportunity for others to participate. Unless the mediator is an effective gatekeeper, there is no civil defense against this bully.

A more subtle form of Rational Bully, the Expert, is found in **Sector 4**. Experts are usually lawyers and even former judges with extensive legal knowledge and courtroom experience. They use their superior knowledge to bulldoze participants into accepting their offers, with dire predictions of the target's fate in the courtroom should he refuse. This form of legal bullying is better suited to the courtroom than to the mediation room. The only defense is to counter knowledge with knowledge—seek equally qualified counsel or third-party advice.

The final classification of mediation bullies, **Sectors 5 and 6**, are those that use an Emotional or psychological approach. These are the most dangerous bullies, referred to in the literature as the “Dark Triad.”⁴⁶ The triad consists of three socially undesirable traits: narcissism, psychopathy, and Machiavellianism that have all been linked to workplace bullying.⁴⁷ **Sector 5** is home to the Narcissist, the paradoxical bully. Narcissists have strong feelings of vanity, grandiosity (superiority), and entitlement, but beneath their Superman cape lies a fragile, over-inflated self-image.⁴⁸ They are classified in Sector 5, the direct form of Emotional Bullies, because their superior ego makes them relatively easy to spot. Narcissism, however, is a two-edged sword. While their inflated self-image is intact, narcissists are abusive, unfair, and feel too superior to participate; however, when their behavior is called into question, they take their toys and go home. Mediators walk a fine line between tolerating this type's false superiority long enough to secure a settlement and exposing the bully, which may lead to his early departure. Timing is, therefore, essential in dealing with this bully.

Finally, in **Sector 6**, is found the most divisive bully, the Manipulator. Manipulators are a combination of the psychopath and the Machiavellian, the “evil twins” of the Dark Triad.⁴⁹ Psychopaths are fundamentally unfair and find it amusing to hurt people. They are ruthless, and they manipulate and abuse others without conscience. Using charm, they build a network of pawns (exploited coworkers) and patrons (exploited superiors) who later become patsies when

⁴⁶ Paulhus, D. & Williams, K., “The Dark Triad of Personality: Narcissism, Machiavellianism, and Psychopathy,” *Journal of Research in Personality*, 36, 2002, pp. 556-568.

⁴⁷ Baughman, H., Dearing, S., Giammarco, E., & Vernon, P., “Relationship Between Bullying Behaviors and the Dark Triad: A Study of Adults,” *Personality and Individual Differences*, 52, 2012, pp. 571-575.

⁴⁸ Kerig, P. & Stellwagen, K., “Roles of Callous-Unemotional Traits, Narcissism, and Machiavellianism in Childhood Aggression,” *Journal of Psychopathological Behavior Assessment*, 32, 2010, pp. 343-352.

⁴⁹ Paulhus, D. & Williams, K., 556-568.

they cease to be useful.⁵⁰ Machiavellians are also ruthless manipulators who remain emotionally detached and do whatever it takes to win.⁵¹ Manipulators are classified in this sector because their behavior is more difficult to detect. They are so charming and personable that others usually do not detect their divisive plans until it is too late. Manipulators envision their involvement in mediation as nothing more than a grand chess game in which mediation participants are pawns and the mediator - their patron. The only defense to this is to think strategically, stay a step ahead, and resist being used as a pawn or patron. Manipulators are likely to be frustrated in mediation cases of relatively short duration because there is not enough time to work their magic.

In reality, the lines of demarcation between the six types of bullies described are not absolute. Some perpetrators exhibit behaviors that cross the lines between the six types. These are the hybrids: the Intimidating Hot Head, the Dominating Expert, and, the most difficult bully, the Narcissistic Manipulator.

E. *STRATEGIES FOR COPING WITH MEDIATION BULLIES*

Now that the six profiles of bullying behavior have been defined, the focus shifts to how best to respond to each type when encountered in mediation. A tool for doing this is *Strategies for Coping with Mediation Bullies*, summarized in Table 4. The coping strategies listed are not exhaustive, but they do provide guidance to mediation parties. Each is intended for general use with special advice offered to mediators.

⁵⁰ Hare, R., *Without Conscience: The Disturbing World of Psychopaths Among Us*, 1999, Guildford Press, New York.

⁵¹ Christie, R. & Geis, F., *Studies in Machiavellianism*, 1970, Academic Press, New York.

Table 4: Strategies for Coping with Mediation Bullies

Type	Coping Strategy
Sector 1 – Physical (Direct)	
Hot Head	<ul style="list-style-type: none"> • Protect yourself, but avoid the temptation to retaliate. • Don't try to talk over them. Give them time to cool down. • Take a break; delay or reschedule the session if necessary. • <u>Mediator</u>: Don't tolerate angry outbursts; redirect or threaten termination.
Sector 2 – Physical (Indirect)	
Intimidator	<ul style="list-style-type: none"> • Dress professionally. Arrive early to get a strategic seat at the table. • Invite the perpetrator to sit down to neutralize size advantage. • Resist interruption, but don't try to talk over a booming voice. • Prepare for the session. Speak clearly and confidently. • <u>Mediator</u>: Ensure equal participation by de-emphasizing intimidating factors.
Sector 3 – Rational (Direct)	
Dominator	<ul style="list-style-type: none"> • Don't argue, but be more assertive yourself. • Take notes, check facts, challenge false information. • Stay focused. Don't be overwhelmed by the verbal "smoke screen." • <u>Mediator</u>: Maintain focus and use gatekeeping to throttle the dominator.
Sector 4 – Rational (Indirect)	
Expert	<ul style="list-style-type: none"> • Prepare! Prepare! Prepare! Know the facts! • Gain all possible technical knowledge beforehand in order to earn respect. • Fact-check all legal matters with the mediator or counsel. • Avoid private caucusing with an "expert" without representation. • <u>Mediator</u>: Seek qualified third party expertise to counter the tactic.
Sector 5 – Emotional (Direct)	
Narcissist	<ul style="list-style-type: none"> • Watch for inflated self-image, self-aggrandizement, and belittling of others. • Underestimating everyone else in the room eventually will undo them. Hold your peace, take good notes, and wait for the right time to expose them. • Challenge with care as they will quit if their ego is threatened. • <u>Mediator</u>: Demand equal treatment, respect, and participation. Avoid strong criticism. Keep them at the table long enough to reach a fair settlement.
Sector 6 – Emotional (Indirect)	
Manipulator	<ul style="list-style-type: none"> • Look past charming behavior. Think and act strategically. • Check facts and avoid being used as a pawn or ignored as patsy. • Develop contingency plans. Anticipate the perpetrator's next moves. • <u>Mediator</u>: Beware of psychopathic, Machiavellian behavior. Avoid being charmed (used) as a patron in the perpetrator's grand scheme.

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

F. *RECOMMENDATIONS FOR MEDIATION AND MEDIATION PARTICIPANTS*

The entrenched culture of the legal profession and the legal system now entering mediation may be slow to change and adapt to the collaborative spirit of mediation. The time-honored traditions of respect for the law and the bench, as well as the independence of the courtroom, are creeping into mediation, where a laissez-faire approach to the enforcement of mediation standards prevails. The court affords a certain degree of deference to mediators, who are viewed as “pseudo-judges” charged with oversight of the mediation process. Judges walk a fine line between respect for the delicate process of mediation and judicial integrity (enforcing the law). While codes, standards and rules abound in oversight of both private and court-sponsored mediation, enforcement is tenuous at best.⁵² Just as superior courts were reluctant to sanction the “Bullies on the Bench” discussed previously, judges are reluctant to interfere with mediators and the independence of that process.⁵³ In fact, Judge Talmadge Littlejohn, who once jailed an attorney for refusing to recite the Pledge of Allegiance in court, escaped with only a slap on the wrist and a \$100 fine for his extreme bullying.⁵⁴ Oversight of mediation seems to be operating in a similar fashion in that codes abound, but enforcement is limited.⁵⁵

The success of mediation derives from its flexibility, informality, and privacy. Freedom from the discipline, rigor, and procedural integrity of the courtroom is perhaps its greatest strength. Thus, responsibility for civility and fairness in mediation rests with the mediator and to some degree with lawyers who are accountable to the profession and the state bar. Yet, external oversight of those responsible for this dynamic process is limited, a situation that likely will continue in all but the most extreme cases of abuse. Thus, mediation professionals will be largely responsible for policing themselves. Those who succeed in doing so will be rewarded by the marketplace, not by the courts. Thus, it is good business for all mediation parties to take steps to prevent bullying and to be prepared to address it when it does occur.

What can be done to protect the mediation process from the types of bullies described in this paper? First, mediators must be trained to recognize and respond to bullying. Professional mediation firms, private resolution centers, public mediation centers (community, state, and federal), and mediation associations should develop mandatory anti-bullying training programs to educate mediators. Such programs ideally would include professional video scenarios depicting various forms of bullying in realistic settings, because many perpetrators are unaware such practices are unethical. Second, standards and codes of conduct should be revised to address mediation bullying, with provision for feedback from participants (complaint and rating systems) and effective means of enforcement (sanctions) for mediators and lawyers who violate them. Law schools, state and local bar associations, and other professional legal associations should incorporate similar training for lawyers.

⁵² Kovach, K., *Ethics: Fallacy, Folly, Or Foundation of Best Practices*, Alternative Dispute Resolution Course, State Bar of Texas, Austin, TX, 2015, p. 8.

⁵³ Richmond, D., “Bullies on the Bench,” *Louisiana Law Review*, 72, 2, 2012, pp. 325-327.

⁵⁴ *Ibid.*, p. 360.

⁵⁵ Kovach, p. 8.

Third, mediators should provide an orientation to participants before mediation begins to help them recognize, prevent, and respond appropriately should bullying behaviors arise in a session. Mediators should have access to an abbreviated version of the training and videos described above. Ground rules clearly prohibiting bullying behaviors must also be established and agreed upon by all participants before mediation begins. Finally, and most importantly, mediators must honor the intention of mediation by facilitating direct, collaborative communication and conflict resolution between parties whenever possible and avoiding heavy-handed caucusing tactics, such as Trashing and Bashing, described previously, in order to force quick settlements. The intense pressure to settle quickly in high-volume, court-sponsored mediation destroys the mediation process and violates the rights of parties to participate fully in the process. Privatized dispute resolution has a bright future if mediation professionals focus on quality and mutual respect, the real value of mediation, over high volume, bully-prone, “Trash and Bash” tactics.⁵⁶

Overall, the recommendation is to put in place programs to safeguard mediation from bullying behavior, including recognizing and preventing it as well as sanctioning offenders, whether they be parties, their attorneys, or even the mediator who bullies or tolerates the behavior.

VI. SUMMARY

An abundance of theory and research is dedicated to the problem of bullying on the schoolyard and in the workplace and to the absence of such in the context of mediation. This paper attempts to fill that gap by extrapolating knowledge about bullying in other settings to the mediation room. First, an operational definition of mediation bullying was offered. Then, bullying behaviors relevant to mediation were explored before profiles of six mediation bully types were developed. These bullies were described in the Typology of Mediation Bullies in Table 3. The types then were mapped on the multidimensional space of an Integrated Model of Mediation Bullying Behaviors in Figure 1; this was done by the nature of the behavior (physical, rational, or emotional) and by whether it is direct (forceful or obvious) or indirect (subtle or less noticeable). In addition to these diagnostic tools, specific coping strategies were offered to help participants respond appropriately. Finally, a comprehensive plan to safeguard mediation from bullying in the larger arena of mediation practice was presented. This plan includes a proposal to address bullying in mediation standards and codes; training of mediators and attorneys; and pre-mediation orientation, ground rules, and enforcement during the mediation process.

Bullying threatens the core of the collaborative process, and while little research exists, findings in the workplace and in the legal profession suggest it is on the rise. With the explosion of high-pressure, court-sponsored mediation, the rapid influx of legal professionals into mediation, and the general lack of enforceable standards, mediation is fertile ground for

⁵⁶ Alfini, J., “Symposium: Trashing, Bashing, and Hashing It Out: Is This the End of Good Mediation?” Florida State University Law Review, 19, 1991, p. 66-73.

bullying. Mediation bullying has been defined, and practical tools have been provided to recognize and respond to it at the mediation table. Additionally, specific recommendations to address the problem in the larger arena of mediation practice have been offered. Yet, this is only the beginning. Future research should focus on refining the construct, identifying other forms of bullying behavior in mediation, developing instruments to measure bullying, and providing guidance to help mediation professionals arrest the problem.

VII. SUCCESSFUL MEDIATION IN BUSINESS

While there is room to improve mediation through application of the interpersonal tools presented in this paper, there is little doubt that mediation has become a highly effective mechanism for conflict resolution. The significance of the process here and abroad can be seen in the large number of cases in Texas and Oklahoma, the rapid growth in the number of cases in Nebraska, the impressive settlement rates seen in the region, and the global reach of mediation as exemplified by the World Intellectual Property Organization. Beyond the numbers, however, mediation's success is also evident in the wide variety of cases settled, not to mention the many cases that do not reach full settlement yet narrow the differences to be subsequently resolved through arbitration or litigation. As shown in Table 5, successful mediation has occurred in a broad range of conflict situations, varying greatly in both the size and nature of the dispute. Cases range from massive corporate cases such as the \$1.43 billion Stryker hip implant case to far-reaching government cases involving 80,000 employees to small domestic disputes involving poor installation of a sewer system. Table 5 also highlights the variety of issues involved in mediation, varying from suits over product liability, malpractice, interstate transportation, and Native American school desegregation to cases of child abuse, divorce settlements, and disputes over black mold, apartment privacy, and property repairs. Overall, the increasing volume, variety, and scope of mediation cases highlight its expanding role in business and society.

VIII. CONCLUSION

The success of mediation and its application across a spectrum of conflict situations have been noted, the problem of mediation bullying has been exposed, and several tools to help participants respond appropriately to ensure success in mediation have been supported. Business leaders can use these tools to address the problem of bullying among mediation participants, thus leading to greater harmony and more success in the process. Mediation need not be a maddening process. It is most likely to succeed when participants avoid heavy-handed tactics, such as bullying, and are able to recognize and respond appropriately to those who do use those tactics.

The volume, variety, and settlement rates of mediation cases suggest a bright future for this form of conflict resolution. With the use of 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: Examples of Successful Mediation in Business

Cases Mediated by Bruce Meyerson⁵⁷

- A claim of legal malpractice brought against a physician.
- A Fair Labor Standards Act collective action involving claims of 80,000 employees.
- An Employee Retirement Income Security Act (ERISA) claim involving transportation between states via fixed-wing aircraft.
- A claim of retaliation and discrimination against a Fortune 500 company.
- A claim alleging that a minor was coached to make allegations of child abuse.
- A multi-million dollar dispute over settlement of property in a contested divorce.
- A construction dispute over claims of poor workmanship in a water/sewer system.
- A class-action suit brought by Native-American families seeking school desegregation.

Major Cases Mediated by JAMS⁵⁸

- Retired Judge the Honorable Diane Welsh successfully mediated last year more than 20 bellwether cases last year that were filed in state court in New Jersey.
- Welsh also successfully mediated the massive global settlement agreement for Federal Multi-District Litigation and New Jersey Litigation covering approximately 4,000 cases.
- Welsh mediated a \$1.43 billion settlement of thousands of claims against medical device maker Stryker, for faulty hip implants.

Cases Mediated by SEEDS (Services that Encourage Effective Dialogue & Solutions)⁵⁹

- Disputes between property owners and apartment managers over money owed.
- Small-claims court disputes involving real estate, civil harassment, relationships.
- Cases involving disputes between neighbors over property repairs.
- Small-claims court disputes involving timing and payments of obligations.

Cases Mediated by NAFCM (National Association for Community Mediation)⁶⁰

- Tenant/landlord conflict over repeated violation of privacy.
- Tenant/landlord conflict over a chemical sensitivity disability problem.
- Lease-breaking due to early mold discovery by tenant.
- Employer/employee disagreement over back pay.

⁵⁷ Bruce Meyerson, *Examples of Cases Mediated*, <http://www.brucemeyerson.com/arizonamediationservices.html> (last visited Ap. 20, 2015) lead author retains a copy.

⁵⁸ JAMS Arbitration, Mediation and ADR Services, *News, Events, and Publications*, <http://www.jamsadr.com/jams-neutral-judge-diane-welsh-mediates-143-billion-stryker-hip-implant-settlement-11-06-2014/> (last visited Ap. 20, 2015) lead author retains a copy.

⁵⁹ SEEDS (Services Encourage Effective Dialogue & Solutions) Community Resolution Center, *Mediation Success Stories*, <http://www.seedscrc.org/success-mediation.php> (last visited Mar. 22, 2015) lead author retains a copy.

⁶⁰ NAFCM National Association for Community Mediation, *Mediations Success Stories*, http://www.nafcm.org/?page=Success_Stories (last visited Ap. 20, 2015) lead author retains copy.

ADVANCING *LEGAL ASTUTENESS* SKILLS THROUGH INDUCTIVE LEARNING: AN EDUCATIONAL APPROACH FOR MBA STUDENTS

HENRY LOWENSTEIN*

ABSTRACT

This article discusses the current challenges in advancing improved critical and strategic thinking for graduate students in developing legal astuteness skills in business. These skills in today's legal and regulatory environment are critical in the development of effective upper managers, the objective of most MBA programs. In addition AACSB International in its newly enacted (2013) accreditation standards has placed a renewed emphasis on "Learning and Teaching," which explicitly includes an expectation of legal and regulatory knowledge as essential to management. Hence, new approaches to MBA learning of the subject matter are important to serving students and stakeholders. The author begins with an overview of pedagogical challenges and offers an example of an on line (Distance Learning) approach which utilizes an *inductive learning* techniques which bolster graduate student interests, skills and critical skill development in conceptualizing legal issues from the management perspective and in furtherance of developing strategic approaches that incorporate many dimensional aspects of the organization impacted by management decisions relative to legal regulatory issues. The course technique in using conventional organizational email-intranet technology also assists students replicate the type of management discussions and decision making processes that take place in today's business environment among managers within complex organizations at remote locations convening via internal electronic blogs, SKYPE, FaceTime and the like. The article concludes with preliminary observations of positive and consequential outcomes observed in the early implementation of the inductive learning methodology in a distance learning modality.

I. INTRODUCTION AND PURPOSE

One of the roles of the Academy of Legal Studies in Business (ALSB) is to enhance the education and learning of legal studies (the discipline that includes in collegiate business schools such topics as business law, the legal environment of business, ethics, regulatory compliance and public policy).

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The goal is not to have our students necessarily become attorneys (though some will go on to do so) nor to establish rote formulated processes that will ensure every manager or professional stay within the mythical boundaries of law or social policy in their daily business operations (though we certainly hope they would do so). Rather, the key educational power of our various curricula in business' legal studies is to achieve among our students, what Professor Constance Bagley of Yale University calls, skills in *legal astuteness*, that is, "the ability of a top management team to work with counsel to solve complex problems and to protect and leverage firm resources."¹

Such a skill set has been recognized as essential in AACSB International's new 2013 standards (referenced below) (AACSB is the top accreditor of business schools worldwide.) Today most business schools include at least one undergraduate course on the legal environment of business and in graduate programs, such as the MBA degree, a like course at the graduate level.² In more specialized masters degrees such as accounting, one or more specialized graduate course tied to the requirements of the Certified Public Accountant exam (CPA) are also present.³ Indeed, AACSB in its newly implemented 2013 standards for business schools includes a renewed emphasis through a set of *Learning and Teaching Standards (Standards 8-12)* with Standard 9 governing expectations in curriculum content.⁴ Among its expectations, AACSB states:

Curricula facilitate and encourage active student engagement in learning. In addition to time on task related to readings, course participation, knowledge development, projects, and assignments, students engage in experiential and active learning designed to improve skills and the application of knowledge in practice is expected.⁵

¹ CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY 3-5 (7th ed. Cengage, 2013). A detailed discussion of the role of business law and strategy is found in Chapter 1 *Law Value and Risk Management*, at 1-18. Also see; Constance E. Bagley, "Winning Legally: The Value of Legal Astuteness," ACAD. MGMT. REV., 33 (378) (2008).

² For example in AACSB accredited schools: B.S. Business Administration Degree requirement, Kogod School of Business, American University; Mgmt 243 Legal Environment of Business; <http://www.american.edu/kogod/undergraduate/BSBA-BADM.cfm>; and its MBA program, Business Law, Ethics and Governance, <http://onlinebusiness.american.edu/mba/curriculum/>. At the E. Craig Wall Sr. College of Business, Coastal Carolina University, undergraduate core requirement, CBAD 344 Legal Environment of Business, <http://www.coastal.edu/media/academics/catalog/2012-2013%20Undergraduate%20University%20Catalog.pdf> at 143.; and in its MBA program; MBA 650 Managerial Responsibility and the Law, <http://www.coastal.edu/media/academics/catalog/Graduate%20Catalog%202012-2013> at 83.

³ A full discussion of business law in business school curricula may be found in: Carol J. Miller and Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction without a Difference*, J. LEGAL STUD. EDUC. 28 (2), (2011) at 146-206.

⁴ AACSB International, *Eligibility Procedures and Accreditation Standards for Business Accreditation*, Learning and Teaching Standards, April 2013 (www.aacsb.edu) (Hereafter references as "AACSB Standards")

⁵ *Id.*

AACSB in recognition of the rapid growth of legal and societal impacts on business mandates curricula content in the first two bullet points for expected business school coverage, “General Business and Management Knowledge”:

- Economic, political, *regulatory*, *legal*, technological, and *social contexts* of organizations in a global society
- *Social responsibility*, including sustainability, and *ethical behavior* and approaches to management⁶ (emphasis added)

Moreover, AACSB’s guidance to business schools and reviewers notes the expectation for subject coverage and rigor increases at higher levels of education attainment via the higher degree levels (masters, doctorate, etc.)⁷ And, as both the legal and regulatory reach of government impinges on the management of organizations, *legal astuteness* skills become of greater importance, indeed essential skill to effective organizational operations in today’s society and marketplace. While recognition has been slow in the past, increasingly, business faculty are recognizing the legal environment as a critical success factor and key strategic “cost of production” in commercial and non-profit enterprises.⁸

Given the premise of the increasing importance of *legal astuteness* skills (as Professor Bagley describes) as a necessary condition for the “top management team,” the attentions of business school curricula should rightfully focus on the degree most closely associated with developing top managers, the Master of Business Administration degree (MBA). A quick perusal of major MBA programs demonstrates the active marketing of the degree as a gateway to leadership in organizations and top management career paths.⁹

II. DEVELOPING *LEGAL ASTUTENESS* SKILLS

The challenge of developing in students *legal astuteness* skills fits directly into the ongoing demands of employers who seek graduates with “Critical Thinking” skills. This important need was recently summarized in a *Wall Street Journal* article by Melissa Korn.¹⁰

⁶ *Id.* at Standard 9. (Also see, AACSB student-faculty interaction expectations in Standard 10)

⁷ AACSB International, *Eligibility Procedures and Accreditation Standards for Business Accreditation*, Standard 9, April 2013 (www.aacsb.edu)

⁸ For further discussion on the importance of business law-legal environment curricula to the business degree (graduate and undergraduate), see; Henry Lowenstein, *Building The Manager’s Tool Box: Reflections of A Former Business Dean on the State of Law in the Business Curriculum*, J. LEGAL STUD. EDU. 30:2 (2013) at 347-378.

⁹ Examples: *These elements combine to create an environment that develops Darden students into principled and complete leaders who are ready for anything after graduation* (MBA, Darden School, University of Virginia, <http://www.darden.virginia.edu/web/MBA/Why-Darden/Why-Darden-MBA/>); *In our respected program, you’ll build core business skills to meet your career goals through real-life projects, on-site with companies, or around the globe.* (MBA, Kelley School, University of Indiana, http://kelley.iu.edu/promo/topMBAprogram/Ranked/?atrkid=V1ADWD4A892F3-16750247224-k-%2BIndiana+%2BUniversity+%2Bmba-53256147064-b-g-m-1t3&gclid=CLCI_PZ3sECFXEQ7AodNmWAPA); *At Kellogg, we develop brave leaders who inspire growth in people, organizations and markets.*, (Kellogg School of Management, Northwestern University, <http://www.kellogg.northwestern.edu/about/kellogg-difference.aspx>)

¹⁰ Melissa Korn, *Bosses Seek ‘Critical Thinking,’ but What Is That?* WALL ST. J., October 21, 2014, <http://online.wsj.com/articles/bosses-seek-critical-thinking-but-what-is-that-1413923730>

Among the comments noted are the observations of author and New York University sociology professor Richard Arum as to a potential cause for diminished critical thinking skills among college graduates.

Schools have institutionally supported and encouraged [a] retreat from academic standards and rigor...colleges have allowed students to focus on their social lives at the expense of academic pursuits.¹¹

Judy Nagengast, CEO of Continental Inc. (staffing firm) noted, “Graduates have been trained to memorize and they can regurgitate but who struggle to turn book learning into problem solving a work.”¹²

A fine operational summation of the critical thinking challenge facing business was stated by the late Fred Friendly (1915-1998), President of CBS News and later producer for Public Broadcasting (PBS).

I have a motto: My job is not to make up anybody’s mind, but to make the agony of decision making so intense that you can escape only by thinking.¹³

What comes into focus is the challenge in business higher education of managers and administrators to improve skill development in the area of critical thinking. While definitions of what constitutes “critical thinking” abound, for our purposes in this paper we will define it as follows:

Critical Thinking represents skill sets that enable the student to examine problems and issues from a multi-dimensional/multi-faceted perspective which lead to the development of effective problem solutions.¹⁴

In our current business environment, the impact of the business legal environment fits firmly into the demands for such skill sets. After all, today’s manager is faced not merely with linear decision making of profit and loss, but multi-layers of decision criteria to evaluate both in terms of intended and unintended consequences to the firm stakeholders and society at large.

Nearly a quarter century ago Professor David Reitzel of California State University Fresno made this observation which remains current today as it was in 1991.

Many business law students are utterly lost when asked to reason through a problem, and a surprising number believe that college education is mainly the acquisition of an existing, static body of factual knowledge. But, as guidelines of the American Assembly of Collegiate Schools of Business (AACSB) indicate (and as most of us intuitively know), our major responsibility as collegiate educators is to develop in students those intellectual qualities that will serve them throughout life. Imparting knowledge of fundamental subject matter is a part of our task. A far more important aspect of our work is to help students learn how to acquire knowledge that ultimately may exceed our own, to apply it in efficient and reasonable ways, and to adjust and

¹¹ *Id.*

¹² *Id.*

¹³ *Fred W. Friendly Quotes*, IZ QUOTES, <http://izquotes.com/author/fred-w.-friendly>

¹⁴ Note: This definition was offered by the author in response to a discussion on the ALSB State of the Discipline on-ALSB lineBlog, October 26, 2014.

grow when knowledge becomes outmoded and new needs for application emerge. We should be developing in our students a mode of thinking that will enable them, on their own, to determine what is significant and what is not, to avoid being misled by personal biases and other distractions, and to get to the heart of a matter and to a satisfactory solution as often as possible.¹⁵

As but one example, often presented in our legal environment classes, is the decision of the former Polaroid Corporation to engage in decades-long litigation with Eastman Kodak over an instant camera patent played out against a backdrop of rapid business and technological change not recognized by a management singularly focused on short-run legal dimensions of the case without thought to their implications to the long run business.¹⁶ While the firms fought over legal theory, they both lost sight of technological change by digital cameras (ironically invented by Kodak), losing both their previous market shares and prominence in photographic equipment markets. Technological change made the ultimate decision, moot. As a result Polaroid despite winning \$909.4 million went out of business in 2001; Kodak filed for bankruptcy in 2012 emerging from bankruptcy as a different company in 2014.¹⁷

III. CRITICAL THINKING-BUSINESS LEGAL ENVIRONMENT AND THE TEACHING CHALLENGE

Instruction in business law and legal environment of business within AACSB schools has followed traditional pedagogical methods taught in law schools or more generally in higher education. Typically, the courses are taught using a “Case Method” of learning, or, more commonly, in concert with lecture and text method often assessed by multiple choice fixed answer exams. Some may also use short essay narratives, but these are lessened by increased class sizes at many universities presenting the practical difficulty in grading faced by faculty with large numbers of students. Faculty with degrees in law tend to teach the way they learned in schools of law and the way they were examined by state bar associations.

Author Paul Mahary referred to conventional legal education learning as a form of “banking,”

Education thus becomes an act of depositing, in which the students are the depositories and the teacher is the depositor. Instead of communicating, the teacher issues communiques and makes deposits which the students patiently receive, memorize and repeat. This is “banking...”¹⁸

This phenomenon is not just confined to teaching. Though law is well suited for developing critical thinking skills and approaches, professionally it is rarely assessed as such. The discipline itself in licensing uses batteries of multiple choice exams (e.g. Multi-State Professional Responsibility Examination) and like state bar exams.¹⁹

¹⁵ J. David Reitzel, *Critical Thinking and the Business Law Curriculum*, J. LEGAL STUD. EDU. 9:1 (1991)

¹⁶ *Polaroid v. Eastman Kodak*, 789 F.2d 1556 (1989)

¹⁷ See; Peter Cohan, *How Success Killed Eastman Kodak*, FORBES, October 1, 2012.

<http://www.forbes.com/sites/petercohan/2011/10/01/how-success-killed-eastman-kodak/>

¹⁸ Paul Mahary, *TRANSFERRING LEGAL EDUCATION, LEARNING AND TEACHING THE LAW IN THE EARLY TWENTY-FIRST CENTURY* (Ashgate Publishers, 2007) at 230.

¹⁹ National Conference of Bar Examiners, *The Multistate Professional Responsibility Examination (MPRE)* <http://www.ncbex.org/about-ncbe-exams/mpre/>

But in schools of business our objectives are not necessarily teaching the students to be attorneys any more than we teach production operation managers to be metallurgists or mechanical engineers. The knowledge conveyed in the business curriculum is learning necessary to assist the decision making of resources and the formation of strategy and strategic alternatives leading to a defined organizational success. We are developing managerial skills to certainly manage the firm's legal processes and interaction with attorneys and the legal system; an increasingly large cost component on the balance sheet and business risk analyses. This suggests the need for a different instructional approach.

Burke, Johnson and Kemp (quoting from Thomas Friedman's, The World Is Flat) stated:

Success has less to do with where individuals are educated and more to do with their level of practical and emotional intelligence and their willingness to put in the time required to achieve mastery in their field.²⁰

Do we do this with conventional lecture, simulations or other pedagogical tools now before us in the digital environment? Jennings in her research article attempted to investigate the learning in terms of learning styles and cognition for undergraduate legal environment of business students, but found no correlation and noted that a lack of data and research exists to establish what style works best; concluding (at that time) a mixture of styles by a live professor, what she called "sage on stage" may be best.²¹

Reitzel's work presents a basic direction on effective legal studies in business learning that elicits critical thinking; described as possessing the following overlapping qualities:

- A classroom approach conducive to critical thinking would involve
- Encouraging students to be active, not passive.
- Verbalizing thinking strategies.
- Encouraging students to see a problem through the eyes of others-use of roles and perspectives.
- Encouraging students to take an evaluative stance toward the law.²²

IV. THE MBA LEGAL ASTUTENESS CRITICAL THINKING IMPERATIVE

We have discussed in this opus various aspects of the critical thinking conditions and needs in collegiate schools of business. However, reviewing the literature reveals mostly a general approach to the subject, particularly focused on undergraduate business students. We suggest the subject when focused on graduate students (i.e. MBA) is quite different and presents a more unique set of circumstances for achieving critical thinking skills in decision making and its effects in the legal environment context of business.

First, by and large MBA students have reached a more mature state as adults and often in schools of business' standard MBA degree program (and certainly, executive MBA programs) are individuals who are in-service. That is, they are actually working as managers or professionals in which they daily face real world management issues and their consequences.

²⁰ Deborah D. Burke, Ronald A. Johnson, and Deborah J. Kemp, *The Twenty-First Century and Legal Studies in Business: Preparing Students to Perform in a Globally Competitive Environment*, J. LEGAL STUD. EDUC. 27 (1), (2010) at 2.

²¹ Marianne M. Jennings, In Defense of the Sage on the Stage: Escaping from the "Sorcery" of Learning Styles and Helping Students Learn How to Learn, J. LEGAL STUD. EDUC. 29 (2), (2012) at 216.

²² Reitzel, *supra*. note 15 at 487

This is decidedly different from the undergraduate experience which is more structured, theoretical, and lacking in actual real world organizational experiences.

Second, MBA students have all completed a four year degree in business or another field (typically 120-128 credit hours). Thus they have had arguably, years of higher education “seasoning” as to skill sets such as writing, studying, research, thinking and the like. We would expect, then MBA students to operate on a higher cognitive skill level (a higher learning plain) from these experiences.

Third, MBA students come from a more selective pool of applicants versus undergraduate students. While many public universities (and private) have low barriers to entry at the undergraduate level, that is not the case with MBA (and many other) graduate programs. AACSB International guidelines proscribe quality criteria such as use of GMAT scores, undergraduate grade point averages, statements of career goals and often minimum years of work experience and/or community service.²³

Consequently, students in an MBA program should be of a learning level and learning cognition (frequently self-motivated) to attain the higher level, multidimensional thinking contemplated by graduate studies. This concept is further bolstered by the explosive growth in On-Line MBA programs in which, even with video capture of professor lectures, the onus of learning and demonstrated performance falls squarely on the shoulders of graduate students; a modality that requires a high degree of individual responsibility and time management.²⁴

Given these factors, we sought a new approach to capitalize on the learning potential posed by the unique properties of MBA students; an on-line business legal issue course that utilizes *inductive learning* of the students to advance knowledge and critical thinking. This posits a far different approach than traditional legal studies in business learning methods.

V. THE CONCEPT OF INDUCTIVE LEARNING

What is “inductive learning?” Our traditional concepts of instruction in business schools be it lecture, project, case or simulation all fall under the general heading of “deductive” learning. Information, data and the like are conveyed to the student with problems for students to deduce relevant answers. Assessment is often by exams, quizzes and the like.

In contrast with the deductive method, inductive instruction makes use of student “noticing”. Instead of explaining a given concept and following this explanation with examples, the teacher presents students with many examples showing how the concept is used. The intent is for students to “notice”, by way of the examples, how the concept works.²⁵ (Emphasis added)

The term, “notice,” referenced herein is not as much *notice* to the instructor, but rather as is “notice,” i.e. understanding/recognition by the student, the student’s peers and more generally an understanding that develops multi-dimensional thinking approaches to business legal environment questions. It may be viewed as the perennial “light bulb” going off in a person’s mind, that moment of recognition of the key concept in learning.

²³ Elliot Davis, *Changing Program Composition*, AACSB, July 14, 2014, <http://aacsbblogs.typepad.com/dataandresearch/mba-programs/>

²⁴ AACSB eNEWSLINE, *Benchmarking MBA On-Line Programs*, enewline.aacsb.edu/benchmarking-an-online-mba-program.asp

²⁵ Olenka Bilash, *Inductive and Deductive Instruction*, January 2011, <http://www.educ.ualberta.ca/staff/olenka.bilash/best%20of%20bilash/inductivedeductive.html>

Much has been written on inductive learning in the science and engineering instructional literature and virtually nothing in the pedagogical literature on legal studies education. There is certainly every reason to believe that given the nature of our discipline, inductive learning can have a material positive impact, particularly on our graduate students' education.

Indeed, past methods of legal education (reading of law under a judge as did Andrew Jackson and Abraham Lincoln), or, early use of the case method could be considered early forms of inductive learning. Donovan and Anderson noted:

A special feature of legal education is its reliance upon the case book..introduced By Christopher C. Landell at Harvard Law School in 1869..an "inductive system of teaching law in which students study specific cases to learn general legal principles."²⁶

The observation is certainly true from a historical perspective. But both the nature and extent of business law in particular changed markedly in the late 19th Century, 20th Century and even more so in the 21st Century.²⁷ But the case method is merely one tool that can be in theory used inductively. Yet, over the course of time, the authors' study pointed to the evolution of over specialization of law to the point where teachers of one subject of law lacked knowledge of another specialty of law that might well be impacted.

With the possible exception of a rare course in jurisprudence or legal history, the law school curriculum usually does not require courses that examine how law complements other institutions of society.²⁸

Business managers being educated in business schools, however, must understand the implications of decisions on those other societal institutions. That may be the many societal, economic, environmental and cost consequences faced by BP in the Gulf Oil Spill (2010), hacking of personal data such as experienced by Target (2013), South Carolina Department of Revenue cyber data breach (2012) and other like situations in the news confronting private and public managers and ultimately the courts and legislative bodies.

One of the few legal articles on the topic by Hunter, suggests that inductive learning methods in law are a vastly overlooked form of education in teaching law in law schools. Moreover, its applicability given the intersection of law and technology may provide better decisions in the application of both.²⁹

Udolf suggested that using inductive methods in teaching the law would have the positive effects of:

1. Material presented actively defines the subject matter of the course.
2. Gives a professional student the opportunity to develop needed professional skills such as culling [critical] facts in a case and identifying operative principles of law.
3. Forces a student to think, hence, more active learning experience than straight

²⁶ James M. Donovan and H. Edwin Anderson, *ANTHROPOLOGY & LAW* (Berghahn Books, 2005), at 8.

²⁷ Consider at the Landell introduced the Harvard case method at a time that predated federal Anti-Trust Laws, the Uniform Commercial Code, the federal Internal Revenue Code, and the progressive regulatory-legal boom of the early 1900's and later 1930's. It was one year before the establishment of the first federal independent regulatory agency, Interstate Commerce Commission.

²⁸ *Id.* at 9.

²⁹ Dan Hunter, *Near Knowledge: Inductive Learning Systems in Law*, VA. J.L. & TECH. 9 (2000) 1522-1687.

lecture.³⁰

Thus, the author concluded inductive teaching of law using experiential examples presents the most effective way to illustrate principles and devise effectively solutions.³¹

The literature of other disciplines suggests the value of using inductive learning techniques in teaching legal studies in business. Prince and Felder's research posits positive impact of inductive learning in the teaching of engineering, sciences, and decision systems (often very esoteric research).³² As in legal studies in business, they found traditional deductive methods used in the engineering discipline progressing from theories, concepts and modeling. But to attain higher level skills, inductive techniques, those based on the student's quest for discovery (inquiry learning) provide greater conceptual outcomes.³³ The key feature of inductive learning beside the fact it is, *inductive*, is:

They are all learner-centered (aka student-centered), meaning that they impose more responsibility on students for their own learning than the traditional lecture-based deductive approach does. They are all supported by research findings that students learn by fitting new information into existing cognitive structures and are unlikely to learn if the information has few apparent connections to what they already know and believe.³⁴ (emphasis added)

Furthermore, these traditional teaching methods beyond the lecture-discussion aspects,

..can all be characterized as constructive methods, building on the widely accepted principle that students construct their own versions of reality rather than simply absorbing versions presented by their teachers. The methods almost always involve students discussing questions and solving problems in class (*active learning*) with much of the work in and out of class being done by students working in groups (*collaborative or cooperative learning*)³⁵

In a similar analysis, Felder describes the use of inductive learning as a way to achieve the goal of "Reaching the Second Tier" of future learned scientists, i.e., those (his reference was undergraduates) who exhibited serious intuitive perceptions and thus would skill develop into the effective scientists and engineers who would fill the gap the U.S. was projected at the time to incur in the 21st Century.³⁶

Having stated the inductive learning concept, let us return to its application and potential in business legal studies education, particularly at the graduate level. Again, Reitzel states the

³⁰ Roy Udolf, THE COLLEGE INSTRUCTOR'S GUIDE TO TEACHING AND ACADEMIA, Taylor Publishers, 1976 at 41.

³¹ *Id.* at 42.

³² See for example in these other disciplines: Shoichiro Nakayama and Ryuichi Kitamura, *Route Choice Model with Inductive Learning*, J. TRANSP. R. BOARD, 1725 (2000), January 2007 at 63-70, Seluyn Piramuthu, Narayun Raman, Michael J. Shaw, and Sung Chun Park, *Integration of Simulative Modeling and Inductive Learning in an Adaptive Decision Support System*, DECISION SUPPORT SYSTEMS, 9, (1), Jan. 1993 at 127-142.

³³ Michael J. Prince and Richard M. Felder, *Inductive Teaching and Learning Methods: Definitions, Comparisons and Research Bases*, J. ENGR. EDUC., 95 (2) (2006) at 123.

³⁴ *Id.* at 1245.

³⁵ *Id.*

³⁶ Richard M. Felder, *Reaching the Second Tier: Learning and Teaching Styles in College and Education*, J. C. SCI. TEACHING, 23 (5) 286-290 (1993).

challenges facing students, particularly future top managers for which MBA programs are established to address. Among these include:

Sorting through competing considerations such as these will enable students not only to evaluate specific law, but also to perceive the nature of lawmaking in a pluralistic society. Among the topics likely to surface are legislators' rationales for their ordering of policy priorities, the role of special interest groups in policy formulation, the abuses that sometimes occur, corrective measures that can be taken, and political and social forces that can overwhelm the best of policy intentions.³⁷

This suggests a key enhancement and opportunity to graduate education in MBA programs would be the development of a course that brought together both the student-centered learning of inductive learning, encouraged further integration of management decision-making with specific legal environment issues, and used newer communication/information modalities on line (distance learning) as would occur in many business global collaboration process settings today.

Finally, we would be remiss in not noting that it is the advancement in technology itself that makes available effective tools to implement inductive teaching methods in legal studies in business. Today, the law library of old is available in electronic form at the fingertips of most students. Such resources range from Lexis/Nexis®, WestLaw® and other software packages purchased by college libraries to the many free on-line resources such as Cornell University's Legal Information Institute (www.law.cornell.edu) or search engines such as Google® or Bing®.³⁸

Stranien and Zeleznikow noted these “data mining” technology advances in legal databases make available as never before learning strategies including:

- a. Direct Implanting of Knowledge
- b. Learning from Instruction
- c. Learning by Deductive Inference
- d. Learning by Analogy
- e. Learning from Examples
- f. Learning by Observation and Discovery³⁹

VI: INDUCTIVE GRADUATE STUDENT LEARNING: THE MBA 651 *LEGAL TOPICS FOR MANAGERS* EXAMPLE

In 2011, the MBA degree program at Coastal Carolina University, Conway, South Carolina (an AACSB accredited school of business) implemented a new MBA curriculum which provided for two hour and one hour focused courses rather than the traditional 3 hour block graduate courses. As part of the required core was implemented an integrative legal environment course, MBA 650 *Managerial Responsibility and the Law* (2 units). MBA 650's objectives were:

Understand the nature and structure of the legal and ethical environment of society

³⁷ Reitzel, *supra*. note 15 at 495.

³⁸ Other examples include the Legal Studies Classroom (www.legalstudiesclassroom.blogspot.com); Find Law (www.findlaw.com) and official court sites themselves such as the U.S. Supreme Court (www.supremecourt.gov).

³⁹ Andrew Stranien and J. Zeleznikow, *KNOWLEDGE DISCOVERY FOR LEGAL DATABASES*, (Springer, 2005), Chapter 5, at 83-84

As it impacts management decision-making and execution of business plans and strategies. Examines interactions of societal expectations of business reflected in laws & ethical expectations impacting society from business contexts: environment, marketing, employment, financial & organizations among others.⁴⁰

As is quickly apparent, this course differs from a traditional legal studies in business course, incorporating our previous definition of *critical thinking* by not just presenting the legal and regulatory aspects and interpretation of decisions, but challenging the students to integrate other core components of business into the decisions making process. The students are then challenged to come up with solutions that are best for the company, balancing with other stakeholder factors. In short, managing the legal processes within or impacting the organization.

For example, in the lecture and case review on *environment*, the students are exposed to a detail review of the infamous Alaska, Exxon Valdez Oil Spill,⁴¹ and, the more recent BP Gulf Oil Spill (2010), both with their legal class action settlement, litigation and court decisions.⁴² Here the topic is addressed from both the aspect of the environmental requirements of the Clean Water Act⁴³ and various related regulations but the marketing impact on BP, the financial impact, public relations, public health, employment and a host of factors not usually incorporated in the standard case briefing in a legal studies in business or business law course.

In the first years of this course, it became apparent that the students desired more discussion far beyond the in-class sessions' time allocated. Often, students continued the conversation with the professor by email hours into the evening and weekends. And, the lengthy streams among students and faculty member quickly amounted to as many or more learning "contact" hours than in the standard, traditional MBA lecture-discussion.

Viewing this very positive confluence of graduate student motivation and interest, both the MBA Director and the academic department chair suggested and supported capturing this learning experience in an on-line elective for the MBA program. Thus, from this interaction with students, literally at their own request, was developed a one unit companion elective to the MBA 650 course, MBA 651 *Legal Topics for Managers*.

HOW MBA 651's INDUCTIVE LEARNING APPROACH WORKS

MBA 651 is offered each term parallel with MBA 650 as an online (distance education, DL) course. In this way it functions at the MBA level much like a science lab add-on to university science courses. The difference is there is no "physical" meeting. All the discussion is contained in the course email blog stream and work is submitted on-line. As formally described:

MBA 651 Legal Topics for Managers is an on-line/DL companion elective to the required course MBA 650 Managerial Responsibility and the Law. Following each session of MBA 650 the professor provides a POST SESSION Email discussion or short lecture that focuses in detail on

⁴⁰ Henry Lowenstein, *Fall I and Fall II 2014 Syllabus, MBA 650-Managerial Responsibility & Law*, Wall College of Business, Coastal Carolina University.

⁴¹ Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008)

⁴² In Re: Deep Water Horizon, 732 F.3d 326, 332 (U.S. 5th Circuit, 2013); Post settlement appeal filed Case No. 12-20215, March 3, 2014

⁴³ 33 U.S.C. §1251 et. Seq. (1972)

one or more aspects of the previous session's discussion. This allows (1) the MBA students to delve in more depth with a particular aspect of the business law topic covered within the in-class MBA 650 lecture-discussion; (2) MBA students to capitalize on legal subjects of greatest interest to them beyond the MBA 650 course; and (3) Enhance students' knowledge, analytical and critical thinking skills that help effectively plan, manage and intelligently deal with legal counsel on critical legal issues and situations confronting managers.⁴⁴

Students as a prerequisite to MBA 651 must have had MBA 650 or be currently enrolled in it. This ensures that all the students have consistency in background and the full foundation in the legal environment of business. The topical schedules or weekly "themes" for both courses are identical.

The key feature of MBA 651 is the continuous email stream blog that operates off of the university's email system. This differs from such systems as Moodle and Blackboard as the intent is to replicate what the manager would face in a global corporate setting. (Although others implementing like course may decide to use the Moodle-Blackboard system.) Typically, a corporation maintains its own (closed end) internal proprietary email or intranet system in which confidential discussions may be made among managers from distant locations. This speeds decision making and avoids costly travel expenses and time commitments. As such MBA 651's system allows students to see each other's input as does the professor. The objective is to replicate the real world experience.⁴⁵

In MBA 651, each week has a topical "theme," in which the students then research, discuss and argue among themselves. Students develop their input based on their own research/inquiry, discovery into the subject theme. Facts often lead to changed perspectives. The professor monitors the discussion but does not participate or intervene unless the students are hitting a roadblock, are going far off topic, or simply need a fact or two to keep them on track. In some cases, the professor may send out a broad discussion question for the theme to help initiate the students' discussion. By mid-course, the students are so used to the system that the Professor hardly needs to intervene at all.

The MBA 650 live class runs on Tuesday night. The MBA 651 inductive learning process runs from Tuesday to Friday. On Friday night or Saturday morning, the professor then sends the class a commentary on the topic, the comments made by students, clarification of facts and legal decisions on the topic and food for future thought on the subject as they become operating and top managers. The professor commentaries prove to be quite comprehensive running from 3,500-4,000 words (8-10 pages) fully referenced.

Through this inductive approach students begin to develop the multi-dimensional/multi-faceted perspectives business employers seek. They view facts and observations from different angles and differing perspectives. Typically, students tell us this method "opened their eyes" to new focus on issues that are often misrepresented or misinterpreted by the 15 second sound bite on the main stream media, short newspaper articles lacking depth even in the best of news outlets, or glossed over within various sites on social media with vested interests one way or the

⁴⁴ *MBA 651, Primary Goals*, Wall College of Business, Coastal Carolina University, *New Course Proposal*, November 11, 2013.

⁴⁵ It is true that current technologies exist to conduct such discussions on a closed loop two-way video system which many larger corporations use. However, for small and medium colleges, the costs, logistics, band-width and personnel support necessary at present time is prohibitive. Nevertheless, it is conceivable as technology improves and costs come down, this may well be an enhancement available in the future.

other. The student's thus develop objective analysis and ability to tune out biases to arrive at rational or optimum decisions. In the rush of a management crises, loud-low information media, threats of legal or regulatory action, the ability of a manager to maintain this focus becomes a key valued skill set.

As further reinforcement and assessment of student performance, the students complete two essays of no longer than 5 pages each (fully referenced) on one of the topics, cases or situations that was discussed and peaked their particular interests. Often the in-service students concentrate on an actual issue they are confronting at work, thus having an immediate impact in problem solving.

In addition to meeting our learning goals (MBA Goal 4) in writing skills, this gives the MBA student further depth of inquiry into a topic germane to their specific field of specialization or particular interests. The grading rubric for the essay appears as follows. [Note the critical thinking assessment focuses strongly on the student's response to Part 3-*implications of the issue to business management decision making and conclusions.*]

TABLE 1: ANALYSIS ESSAY ASSESSMENT GUIDELINES (100 points): MBA 651⁴⁶

Maximum Points = 100		
20		1. BUSINESS LEGAL ISSUE Demonstrates a clear and complete explanation and summary of the key elements of the legal issue, its constitutional-statutory basis of authority.
30		2. BASIS OF THE BUSINESS LEGAL ISSUE Demonstrates and provides clear and complete discussion of the evolution of the legal issue by way of discussion of key case decisions from the Courts of Appeal or Supreme Court, regulatory and legislative actions.
30		3. IMPLICATIONS OF THE ISSUE TO BUSINESS- MANGEMENT DECISION MAKING AND CONCLUSIONS Demonstrates graduate level critical thinking skills by way of identification and discussion of the implications of the law to business decision making for a managers, corporation or organizations. Includes appropriate identification of strategic changes to businesses to ensure compliance and to use the law/regulation to competitive advantage
20		Professional Presentation of Research at Graduate Level: Professor's overall judgment of professional presentation and demonstration of research by MBA student including but not limited to: writing composition, professional appearance, organization, adherence to assignment directions, documentation, and grasp of the issue's. legal and managerial concept

EXAMPLE OF A TOPICAL THEME: MBA 651

Below is an example of one of the *topical themes* from the course, this one being Theme 1. Students in MBA 650 have read the text and participated in the live lecture on the evolution of the regulation of business in the U.S., particularly the history of the assigned, prominent *Commerce Clause* (U.S. const. art. 1, sec. 8 cl.3). They then read three famous Supreme Court cases, one from the 19th Century applicable today to technology regulation (*Pensacola*

⁴⁶ Henry Lowenstein, *Fall I and Fall II 2014 Syllabus, MBA 651-Legal Topics for Managers*, Wall College of Business, Coastal Carolina University, at 8.

Telegraph) and two recent Supreme Court cases involving the limits of local government to interfere with “interstate commerce” (*American Trucking*) and the now infamous case limiting government interference in religion of a closely held corporation (*Hobby Lobby*).

Each class proves different based on participating students’ tastes & preferences. This being South Carolina, a conservative state, it was no surprise, students drilled down in intense discussion on the *Hobby Lobby* decision in the Fall 2014 course.

TABLE 2: Sample: MBA 651: Theme 1 Discussion Topic⁴⁷

<p>HISTORICAL BACKGROUND, CONSTITUTION AND BUSINESS REGULATION IN THE U.S.</p> <ul style="list-style-type: none"> • Role of Government in Business Environment • Judicial-Regulatory System and Structure 	<p>CASE READ: <i>Pensacola Telegraph Co. v. Western Union Telegraph Co.</i> 96 U.S. 1 (1877)</p> <p><i>American Trucking Asso. v. City of Los Angeles</i> U.S. Supreme Court, Case No. 11-798 June 13, 2013</p> <p><i>Burwell v. Hobby Lobby, Inc.</i> U.S. Supreme Court, Case No. 13-354 June 30, 2014</p>
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What students discovered and readily communicated to the professor is that this technique forced them to “tune out” the hyperbole of the news media, read the decision themselves and come to their own conclusions about the applicability of the court’s actual decision to the situation involved, but more importantly, its implications to their private businesses and organizations. Here was the real power of inductive learning. Even those who opposed the *Hobby Lobby* decision, rendered their analysis based on more factual assertions and not unfounded opinion.

The students commented (many stated shock) on how what was reported in the main stream news media was so at odds with what the court actually said in its written opinion. Here they discovered the implications of media bias (left or right), media “hyle” and its potential impact on their management decisions. When one makes a management decision with public implications, will the public understand it, will the press accurately report it, will it impact sales, profitability or generate costly non-meritorious litigation? All these questions among others come into play in the student on-line discussions each week.

VII. EARLY RESULTS: MBA 651 INDUCTIVE LEARNING

MBA 651 completed its second round of presentation in Fall 2014. Early assessment results of the first round were encouraging. Students were effusive about the process, the learning and the inductive learning approaches. The MBA students confirmed it was challenging to them both professionally and personally with outcomes they found highly valuable.

The depth of learning was clearly reflected in the caliber of most of the essays submitted by students. In many cases, MBA students took a case or topic on which they had previously written in MBA 650, researched it in further depth as part of the ongoing weekly theme discussion and then professionally summarized the results into a cogent essay on the subject.

What was apparent was the higher level of precision and depth of thought demonstrated

⁴⁷ *Id.* at 13.

by the students as they progressed through the process. These observations of course, are subjective, qualitative assessment from student feedback. In law and legal matters that is often the case and consistent with the discipline. The assessment process itself does not lend itself to an effective fixed quantitative measurement. But this is the nature of the critical thinking skill debate.

After all, as those commenting on the subject note, the concept is known but the defining metric not. Jerry Houser, Associate Dean at Willamette University (Salem, Oregon) put it in this way (familiar to most business law faculty), “Critical thinking may be similar to U.S. Supreme Court Justice Potter Stewart’s famous threshold for obscenity. You know it when you see it.”⁴⁸

Of the work product submitted (all assessment is written case analysis), the early results suggest student performance consistent with that submitted in the live in-class sections (MBA 650). Variation in the standard deviation was not significant and may well be a function of the small sample size in the initial run of the course.

TABLE 3: WRITTEN ASSESSMENT PERFORMANCE⁴⁹
Means and Standard Deviations

	Deductive Class Live Sections MBA 650	s.d	Inductive Class-On-Line MBA 651	s.d
Fall I	91	4.8	91	8.8
	n=25		n= 19	
Fall II	89	6.9	91	7.9
	n=25		n=14	

From the early stages we have observed the following:

1. **Having the technology up, running and reliable is essential to the effectiveness of the course.** Early on, we encountered technical difficulties with the email blog system. Once the university IT technicians had it up and running reliably, the learning system proceeded. However early glitches can derail early enthusiasm by students for the process. Students were easily frustrated at first until the system ran smoothly. Students today use technology quickly and their motivation can be easily frustrated when the technology does not work as expected.
2. **Handling *Free Riders*:** For the vast majority of MBA students, the quality and intensity of participation runs naturally for many of the reasons of maturity and work experience mentioned previously in this article. However, there are a small proportion of MBA students who may lack the requisite self-motivation. They may be those who enter an MBA program directly from undergraduate school perceiving it as a “5th year” of their

⁴⁸ Korn, *supra*. note 10. (The comment is in reference to Justice Potter Stewart’s quote in *Jacobellis v. Ohio*. 378 U.S. 184 (1964): *I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [“hard-core pornography”], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.* *Id.* at 197)¹

⁴⁹ Wall College of Business, Coastal Carolina University Fall 2014 MBA Goal 4 Assessment.

B.S. degree, are individuals who require more direction or others who simply view the course as an “easy” way to pick up an elective. This can be mitigated by placing a point value on participation and some rubric on the quality of participation; an area we will examine for revision in next year’s offering.

3. **Timing of Discussion: Waiting for the “First Mover”:** We discovered great variation in the timing students chose to participate. The most enthusiastic students initiated their comments continuously from Tuesday to Friday, stimulating others to participate. This made it quite easy for the professor to summarize in crafting the end of week commentary. Yet, quite another section demonstrated a degree of procrastination, one normally sees in less experienced undergraduate students. Students would literally hold back until someone or two students made the first comment. Then, the bulk of students would cascade in to Friday and even Friday night deadline. Delayed student discussion, however does impact the richness of content the professor can provide via the end of week commentary each week. This can be mitigated in the future by shortening the discussion timing and other strategies. To a degree, this is a function of the mix of students each term taking the course.
4. **Student Perceptions of On-Line Course Rigor and Expectations-** Business schools were one of the early adopters of hybrid, asynchronous and later on-line instruction as a means of expanding opportunities for students. However, many of the early adopters were non-accredited programs offering MBA’s that lacked the rigor and accountability that is required among AACSB accredited programs. These non-accredited on-line graduate degrees continue to create a challenge to the rigor of accredited programs. AACSB, itself, developed guidelines and assistance to business schools in 2007. Even here, early adopters of on-line instruction were slow to adapt their Assurance of Learning (AOL) systems to better maintain consistency with the rigor and output of live instruction classes.⁵⁰

Notwithstanding, much advance notice to students about the expectations of rigor, learning expectations, deadlines and personal responsibility, a marked number of students in the early offering of inductive learning harbor perceptions that an on-line course is easier or has less expected rigor than a traditional lecture class. We discovered the need in the early stages to repeatedly reinforce the expectations. Early grading quickly signaled the seriousness of the course to students who had inaccurate perceptions of the class’s intended rigor. Out of approximately 45 students in the initial two offerings of MBA 651, only three withdrew (6.6%). This is not significantly different than normal attrition in live lecture courses. On-line modalities may serve to improve the quality of the inductive learning process where the remaining students are serious dedicated learners.

All of these in the overall view of the learning technique are relatively minor technical matters that may be mitigated and improved. They do not take away from the power of the learning experience to MBA students and the early success this process has revealed to date.

⁵⁰ See for example; Jorge Gaytan, *Ensuring Quality in Online Courses: Applying the AACSB International's Distance Learning Quality Issues*, ONLINE J. DISTANCE LEARNING ADMIN., 16 (4) (Winter 2013)

Inductive learning offers much potential to effective legal studies in business within MBA programs. Continual refinement can position the technique as a powerful and effective learning strategy for business students and future business leaders.

VIII. CONCLUSIONS

The evolution and change in the environment of business through its domestic and global legal and regulatory environment has become a critical success factor for any business in our global economy. Clearly, attainment of effective *legal astuteness* skills, applying critical thinking to business decision-making is an essential skill for any top management team and its professional managerial members. This imperative challenges AACSB accredited schools of business to find innovative ways of expanding management education to effectively address the legal environment of business, not by more pure law courses, but by using business law and legal environment instruction as a vehicle for multi-dimensional/multi-faceted decision making skills so needed in today's organization managers. This clearly is the objective of AACSB's *Learning and Teaching* standards including curricular expectations.

This article has postulated that the use of *inductive learning* techniques in legal studies in business courses at the graduate level as offering great promise for addressing the *critical thinking* skill development challenge posed by employers. Both the nature of MBA education and the nature of most MBA students present strong potential for student-centered learning that is effective using modern modalities such as on-line/distance learning instruction together with inductive learning techniques.

The MBA 651 experiment at Coastal Carolina University's MBA program has produced early successes in this regard. Further offerings and greater number of assessment points will provide a clearer picture of the effectiveness of inductive learning pedagogy in the future.

In the meantime, it is worth the element of change and the attention of members of the Academy as we continue to advance the state of the legal studies in business discipline in AACSB business schools and into the future of management education. In this way, the positive impact of our discipline will resonate far beyond the subject matter into better management and ultimately business societal practices.

ETHICS AND LAW SCHOOL MARKETING PRACTICES¹

MARTY LUDLUM²

JENNIFER BARGER JOHNSON³

This paper explores recent, dramatic problems in law school marketing practices. To that end, we will first discuss the job market for new lawyers today. Next, we will explore some marketing practices of certain well-known law schools which appear to mislead potential students. Following that, we will discuss the economics of law school. We will conclude with implications for the ethical duty of undergraduate legal studies professors and pre-law advisors to inform potential law students and propose a modest trio of solutions.

“If the economy will provide jobs for only 218,800 new lawyers over the current decade, should we really produce more than twice that number of law school graduates?”⁴

The sad truth is that for thousands of law school graduates a legal career is just an illusion. After spending three years of their lives and a large pool of borrowed money, their job prospects will not have improved.⁵ Tragically, few, if any of the potential law students were warned of this possibility. Evidence suggests that many were likely deceived and manipulated into purchasing a product (legal education) that may be of little value in their career.

This paper explores recent, dramatic problems in law school marketing practices. To that end, we will first discuss the job market for new lawyers today. Next, we will explore some marketing practices of certain well-known law schools which appear to mislead potential students. Following that, we will discuss the economics of law school. We will conclude with implications for the ethical duty of undergraduate legal studies professors and pre-law advisors to inform potential law students and propose a modest solution.

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⁴ Deborah Jones Merritt, *The Law School in the New Legal Environment: The Job Gap, the Money, Gap, and the Responsibility of Legal Educators*, 41 WASH. U.J.L. & POL'Y 1 (2013) at 28.

⁵ Steven J. Harper, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS*, 161 (2013).

FEWER JOBS IN LAW

For today's law school graduates, the news is nearly all bad. By most accounts, the job market is terrible for new lawyers,⁶ and has been referred to by some scholars as the worst for lawyers in the last fifty years.⁷ For example, fewer than half the current group of law grads will make a career practicing law.⁸ Many will not even garner a single job opportunity based upon his or her law degree. Why are things such a crisis? Several problems coincide to brew the perfect storm of strife for the recent law graduate.

First, law schools are producing lawyers at twice the rate as the economy can hire them.⁹ This overproduction is not a new phenomenon, but it has recently grown worse. As previously suggested, a large percentage of law grads will not find full-time, long-term employment as a lawyer.¹⁰ Today, the reality is, we do not need as many lawyers as America currently produces.

The problem has been not just about quantity, but also quality. Critics of law degree quality find that legal education has been too theoretical and detached from the practice of law.¹¹ Some have advocated dropping the third year of law school altogether, replacing it with an apprentice program.¹² Increasingly legal education has become alienated from the reality of practicing law.¹³ Legal education does not always cover the basics of practicing law or managing your own small business – leaving a graduate unprepared.¹⁴ As a result, the value of a law degree has declined.¹⁵

Second, lawyers currently with a job should also be worried, because small town lawyers have not been the only ones suffering. Elite law firms have been downsizing lawyers and staff in large numbers, minimizing new hires, and lowering starting salaries.¹⁶ The nation's largest law firms (known for being financially successful and hiring the best graduates) have cut nearly 10,000 lawyer positions in recent years.¹⁷

⁶ Katherine Mangan, *Unemployment among Recent Law Graduates is as bad as it's ever been*, CHRON. HIGHER EDUC. (June 7, 2012).

⁷ Andrew S. Murphy, *Redeeming a Lost Generation: "The Year of Law School Litigation" and the Future of Law School Transparency Movement*, 88 IND. L.J. 773 (2013).

⁸ Merritt, *supra* note 4 at 1.

⁹ *Id.*

¹⁰ Lincoln Caplan, *Editorial, An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012 at SR10.

¹¹ Eli Wald and Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403 (2011).

¹² Harper, *supra* note 5 at 160-161.

¹³ Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

¹⁴ Paul Campos, *Perspectives on Legal Education Reform: The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177 (2012).

¹⁵ Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651 (2012).

¹⁶ Bernard A. Burk and David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1.

¹⁷ David Brown, *The NLJ 250: Editor's Note*, NAT'L L.J. (Apr. 25, 2011).

Nine months following graduation, only 57 percent of law graduates from the Class of 2013 have been employed in long-term/full-time employment which required a law degree.¹⁸ In other words, just over half of 2013 law school graduates got the jobs they expected when they started law school – much less than most would anticipate. This number has steadily declined since 2008, while the number of law school graduates has increased only moderately.¹⁹

Third, the Great Recession has harmed the already weakened job market for attorneys. An illustration of this is in the layoffs and/or downsizing of the big law firms. Between 2008 and 2010, big law firms laid off 14,347 people.²⁰ Even before the downturn, the job market was dismal for law graduates with an average unemployment rate of 33 percent.²¹ Post-recession, the figure hovered around 50 percent.²²

Why was the crisis so extreme? One factor is that the amount of our economy spent on legal services has been steadily shrinking.²³ Legal jobs have not been as plentiful as previously expected because law firms want fewer lawyers working longer hours. In addition, many resources have emerged for *pro se* litigants in addition to expanding *pro bono publico* services. Both of those factors reduce the opportunities for basic legal service providers. Additionally, international trade is also affecting the legal job market because today more than ever low level legal work is being shipped overseas, especially to China and India, where work can be done for much less expense.²⁴

A large disconnect between the expectations of incoming law students and the reality of the job market upon graduation exists. This disconnect is not simply due to a lack of information, outright deception of certain parties has contributed to it.²⁵ Legal education should be provided in such a quantity and at a quality where graduates have a realistic prospect of getting a job in field. Despite many law professors' claims to the contrary, students do not flock to law school to learn the intricacies of comparative styles of legal reasoning or the joys of legal research. Instead, law students are looking for a job after completing law school. Legal education without the realistic prospect of getting a job is like training a student to fish, then setting her loose in the Sahara desert with a fishing pole.²⁶

LAW SCHOOL RECRUITING

¹⁸ American Bar Association's 2013 LAW GRADUATE EMPLOYMENT DATA http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_graduate_employment_data.authcheckdam.pdf (last visited Aug. 2, 2014).

¹⁹ Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries>.

²⁰ Burk and McGowan, *supra* note 16 at 29.

²¹ Campos, *supra* note 14 at 200.

²² *Id* at 202.

²³ *Id* at 178.

²⁴ Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503 (2013).

²⁵ Ben Trachtenberg, *Regulators Mount Up*, 5 NEB. L. REV. BULL. 22, 25 (2013).

²⁶ Paul Horowitz, *2013 Survey of Books Related to the Law: Book Review: What Ails the Law Schools?*, 111 MICH. L. REV. 955 (2013).

Some law schools have been dishonest in recruiting efforts.²⁷ This deception was not a few inadvertent mistakes, inattention to certain details, or mere puffery. Instead, it was an outright fabrication of information and distortion targeted at the students.²⁸ Professor William Henderson of Indiana University characterized the problem as “immoral in the extreme” in his 2012 article.²⁹ Using wildly misleading statistics,³⁰ many law schools recruit a new crop of tuition-payers each year. Such deception includes the use of statistical gimmicks to hide the declines in job opportunities with creative wording.³¹ For example, many schools claimed “some” students will get starting salaries over \$150,000. However, this was less than candid as illustrated by Professor Brian Tamanaha of Washington University School of Law who explained: “Outside of the top 50 or so ranked law schools, * * * most place fewer than 5 percent [or less] of their graduates in these coveted jobs.”³²

Recognizing the value of the U.S. News & World Report (USN&WR) annual comparison of law schools³³ as one of the best tools for ranking schools, often schools manipulated data to elevate their rankings within the report by “intentionally misleading”³⁴ users. Students may know little about the law school and tend to rely on these rankings for an unbiased comparison of the market. As a result, recruiting for every law school in the United States has been influenced.

Several deceptions will be highlighted, primarily because each is well-documented, not because these are the only law schools suspected of misleading recruiting. Two schools (Illinois and Villanova) changed student records to raise individual rankings on the list. Two others (Rutgers-Camden and New York University) exaggerated job prospects and potential salaries for those who got job offers to achieve the same end. Others manipulated the definition of “employed” to suit the law school’s statistics to illustrate all students who found jobs in any field not just that law students wanted in the field of law.

According to a law review article by Ben Trachtenberg, Paul Pless, the Assistant Dean for Admissions of the University of Illinois College of Law, repeatedly lied about GPA and LSAT scores of 109 incoming students to raise the school’s evaluation by the American Bar Association and U.S. News & World Report’s rankings.³⁵ Pless did not change the law school grades of any students.³⁶ Instead, he raised the undergraduate grades of incoming students to make the University of Illinois seem more exclusive and selective.³⁷ This exclusive admissions

²⁷ Daniel S. Harawa, *Note, A Numbers Game: The Ethicality of Law School Reporting Practices*, 24 GEO. J. LEGAL ETHICS 07 (2011).

²⁸ Trachtenberg, *supra* note 25 at 25.

²⁹ Bill Henderson, *Federal Funding of Higher Education – A Bubble that is Going to Burst*, THE LEGAL WHITEBOARD (Aug. 10, 2012).

³⁰ Kyle P. McEntree and Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1 (2012).

³¹ Merritt, *supra* note 4 at 6.

³² Brian Z. Tamanaha, *FAILING LAW SCHOOLS* (2012) at 134.

³³ See U.S. NEWS & WORLD REPORT, *Law School Rankings for 2014*, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=992008>.

³⁴ Steven L. Willborn, *The Law School in the New Legal Environment: Legal Education as a Private Good*, 41 WASH. U.J.L. & POL’Y 89 (2013).

³⁵ Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866 (2013).

³⁶ *Id.* at 867.

³⁷ *Id.*

policy would raise the school's overall evaluation in USN&WR rankings, which would make the school more appealing to the next batch of incoming students.³⁸ The Villanova Law School Dean, Mark Sargent is accused of exactly the same activity.³⁹

Some schools were caught making wildly misleading reports of job prospects for their students. For example, Rutgers-Camden Law claimed in a mass e-mail to potential students that the average starting graduate's salary was over \$74,000 with "many top students accepting positions with firms paying in excess of \$130,000."⁴⁰ In reality, the \$74,000 "average" was taken using only half the class, and the real number was only \$60,000 – 25 percent less than advertised.⁴¹ In addition, only six graduates of a class of 242 – or only 2.48 percent of all graduates – had a salary in excess of \$130,000.⁴² Less than 2.5 percent is clearly not "many" by most definitions. New York Law School also got caught being creative in reporting salaries of graduates when it reported that its graduates attained jobs in business ranging from \$50,000 to \$150,000 – which was only representative of 10 out of 111 graduating students that year.⁴³

While all four of these law schools faced reprisals from the American Bar Association, in its capacity as the accrediting body for all American law schools,⁴⁴ all of these law schools also stayed in full operation and were allowed to continue recruiting full classes of starting law students each fall semester. These are only a few examples of unethical law school marketing practices. Many other law schools been caught participating in similar unethical actions.

Besides USN&WR rankings, many schools have trumpeted the job prospects of their graduates as a key tool in the recruiting battles with other schools. However, these reports were equally suspect. Most law schools reported "employed" rather than "employed in the legal field." This manipulated the term as intended and understood by incoming students. By that methodology, law schools could report a law school graduate working at Starbucks as being "employed" for official reports.⁴⁵ In the past, reports did not distinguish between full-time and part-time jobs. As a result, a law school graduate who worked part-time at the food court in the mall was just as "employed" as someone who got a full-time job in a premier law firm, at least according to the recruiting materials from the law schools. This was deceptive.

Of course, this information could be discerned upon close examination. However, we should expect law schools to be honest in recruiting efforts, and not place the burden on incoming students to screen the deceptive efforts of the law schools. Many schools reported employment percentages that were higher than bar passage rates,⁴⁶ which means many of the claimed jobs could not have been in the legal profession.

³⁸ *Id.*

³⁹ *Id.* at 867-68.

⁴⁰ Paul Campos, *Rutgers-Camden Goes Old School*, INSIDE L. SCH. SCAM (May 18, 2013) <http://insidethelawschoolscam.blogspot.com/2012/05/rutgers-camden-goes-old-school.html> (last visited Aug. 1, 2014).

⁴¹ Trachtenberg, *supra* note 35 at 875.

⁴² *Id.*

⁴³ *Id.* at 878.

⁴⁴ See American Bar Association, www.americanbar.org (last visited August 3, 2014).

⁴⁵ Harawa, *supra* note 27 at 7.

⁴⁶ Tamanaha, *supra* note 32 at 74.

Similarly, the statistics provided to potential students by law schools have been less than truthful. One way of boosting the results was to omit reporting the unemployed. This has been common among many law schools. Rutgers-Camden Law job reports excluded sixteen percent of graduates whose employment status was unknown (or known to be unemployed).⁴⁷ Another law school, Santa Clara Law's webpage contained various reports of employment outcomes, but all three graphs ignored the unemployed graduates and none of the reports indicated if the jobs claimed were full-time, permanent jobs which required a law degree.⁴⁸ Gonzaga School of Law's website also ignored the unemployed in its charts, and its figures were three years out of date (reporting 2009 graduates in 2012).⁴⁹

Atlanta's John Marshall Law School reported to potential law students that 111 of 132 graduates were employed, but its report to the ABA indicated that less than half that number – only 54 instead of 111 – had long-term employment which required a law degree.⁵⁰ The claim of 111 jobs made a law job seem a certainty upon graduation. However, if students learned that over half of those 111 with a job were actually waiting tables, driving a taxi, or bartending, the recruiting efforts would likely not be as successful.

One school took a very interesting action in reporting its job results for graduates. Thomas M. Cooley School of Law convinced the ABA to accept as a “default” that all jobs were full-time and long-term unless the school specifically learned otherwise.⁵¹ This rationale was surprising (to assume all graduates have a job), since in 2011 only 38 percent of its nearly one thousand law graduates obtained a job that required passing the bar exam.⁵² One question is how much effort the school will use to honestly evaluate this measure of employment prospects for law students if the default answer is complete success.

If law graduates are not finding jobs in the market, how can a law school boost their USN&WR ranking and employment numbers (other than by fraud)? The answer was simple, yet creative: Law schools hired their own graduates for short term employment to boost the numbers. Washington & Lee, the University of Virginia School of Law, and Vanderbilt Law School each hired at least eleven percent of their own graduates to boost employment numbers.⁵³ UCLA School of Law hired 64 of its own graduates.⁵⁴ Boston University School of Law hired twenty-two percent of its own graduates, substantially boosting the employment outlook for incoming students.⁵⁵

Another step taken by law schools which was wildly misleading was to report on only a select portion of the graduating class. Wayne State University reported figures based on only 51 members of its graduating class of 145.⁵⁶ Seventy law schools reported employment numbers

⁴⁷ Trachtenberg, *supra* note 35 at 875.

⁴⁸ *Id.*

⁴⁹ *Id.* at 885.

⁵⁰ *Id.* at 886.

⁵¹ *Id.*

⁵² Harper, *supra* note 5 at 163.

⁵³ Trachtenberg, *supra* note 35 at 884.

⁵⁴ *Id.* at 888.

⁵⁵ *Id.* at 866.

⁵⁶ *Id.*

based on less than half the graduates being surveyed.⁵⁷ Four law schools used figures which included only ten percent or less of graduating classes.⁵⁸

Finally, when potential law students see job reports of law schools in marketing materials, it was assumed these jobs were long-term jobs. Like Washington & Lee Law, University of Virginia Law, and Vanderbilt Law, other schools counted short-term jobs the same as a long-term job even though the law school's job reports only looked one year after graduation.⁵⁹ What about two years or more? It is unrealistic to think that a person attended law school for three years and only hoped to get a job for one year as a result. Additionally, some law schools reported employment agreements without a paycheck, whereby attorneys only earn what they bring to the firm, and still count them as "employed." Clearly, the need exists for specificity in reporting of employment prospects of graduates. Even U.S. News & World Report wants more transparency and honesty in the job reporting.⁶⁰

With the foregoing manipulation tactics in play, one school has found a questionable solution: Thomas M. Cooley Law School developed its own ranking system.⁶¹ By developing its own ranking system, this law school could creatively combat low rankings in certain areas, and "objectively" evaluate its own school as exemplary in certain comparable areas. While the U.S. News & World Report put it in the bottom tier of all law schools, Cooley's own ranking system had it second in the nation.⁶² How? Since Cooley was one of the largest law schools (3500 students across several campuses), it had an advantage. Cooley's ranking system used some unique criteria, including the total number of applications, the total number of students, the total number of minority students, the total number of faculty, the total number of minority faculty, etc.⁶³ As one of the largest law schools, Cooley's rankings were high under these criteria. Many question if these factors had any influence on the quality of the education provided.

COSTS OF LAW SCHOOL SKYROCKETING

If the problem was only a temporary shortage of law jobs, a remedy might be realistic. However, a long-term shortfall of legal jobs has existed for our ever growing law school graduate numbers. Many entities have profited because of this overproduction of graduates. First and foremost were the suppliers of legal education, the law schools. Law schools have increased in size, pushed for more and newer facilities and larger budgets, often justified by an increasing number of students who are each paying more and more for tuition.

⁵⁷ Tamanaha, *supra* note 32 at 146-147.

⁵⁸ *Id.*

⁵⁹ Campos, *supra* note 14 at 199.

⁶⁰ Bob Morse, *U.S. News Urges Law School Deans to Improve Employment Data*, U.S. NEWS & WORLD REP. (March 9, 2011).

⁶¹ Thomas E. Brennan & Don LeDuc, *JUDGING THE LAW SCHOOLS 1* (12th ed. 2010): available at <http://www.cooley.edu/rankings/docs/Judging12thd2010.pdf>.

⁶² *Id.*

⁶³ *Id.*

In the last ten years, law school tuition has dramatically increased⁶⁴ going up at six percent a year for some time,⁶⁵ and has risen up to 5.4 times as fast as inflation.⁶⁶ Professor Paul Campos of the University of Colorado Law at Boulder noted that the costs for the University of Michigan have increased ten-fold in the past forty years.⁶⁷ Professor Stephen R. Smith of California Western School of Law found that from 1985 to 2010, law school tuition increased an incredible 405 percent.⁶⁸ Law school costs have gone up significantly more than inflation.⁶⁹

Law school costs diminished legal education's status as a public good.⁷⁰ Public law education costs are often more expensive than private school costs just a few years ago.⁷¹ Costs for public schools have increased at a much faster rate than the costs of private schools.⁷² The loss of state funds has led to tuition to dramatically increase to market (private school) levels.⁷³ Costs have gone up even for law schools designed to serve the lower economic strata.⁷⁴ Since law students generally are not financially independent, a system must exist which allows students to acquire an education they cannot afford. That system is wide-scale borrowing.

STUDENT LOANS GROWING

Law students have been paying and continue to pay for the dramatic increase in tuition costs with debt.⁷⁵ Student loans have been easy to acquire, while a job upon graduation has been too difficult to find.⁷⁶ Student debt amounts are not sustainable.⁷⁷ Most students now are leaving law school with \$100,000 or more in educational debt.⁷⁸ For the class of 2011, the national average of debt was \$108,815 per student.⁷⁹ This system can only continue because of federally guaranteed student loans.⁸⁰ This begs the question: "Why is the federal government issuing billions of dollars of taxpayer subsidies every year to produce twice as many lawyers as

⁶⁴ Katy Hopkins, *As Law School Tuitions Climb, so does Demand*, U.S. NEWS & WORLD REP., July 14, 2010.

⁶⁵ Steven R. Smith, *Financing the Future of Legal Education: "Not what it Used to Be"*, 2012 MICH. ST. L. REV. 579 at 591 (2012).

⁶⁶ Merritt, *supra* note 4 at 2.

⁶⁷ Campos, *supra* note 14 at 179.

⁶⁸ Steven R. Smith, *Financing the Future of Legal Education: "Not what it Used to Be"*, 2012 Mich. St. L. Rev. 579 (2012), 600.

⁶⁹ Campos, *supra* note 14 at 180.

⁷⁰ Willborn, *supra* note 34 at 90.

⁷¹ Campos, *supra* note 14 at 180.

⁷² Horowitz, *supra* note 23 at 975.

⁷³ Smith, *supra* note 68 at 600.

⁷⁴ Garth, *supra* note 24 at 503.

⁷⁵ Horowitz, *supra* note 26 at 960.

⁷⁶ Harper, *supra* note 5 at 158.

⁷⁷ Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability*, 38 WM. MITCHELL L. REV. 1185 (2012).

⁷⁸ Burk and McGowan, *supra* note 16 at 102.

⁷⁹ Staci Zaretsky, *The Law Schools with the Least-Indebted Graduates*, ABOVE THE LAW, (Apr. 30, 2014) available at <http://abovethelaw.com/2014/04/the-law-schools-with-the-least-indebted-graduates/#more-315776>.

⁸⁰ William D. Henderson and Rachel Zahorsky, *The Law School Bubble: How long will it last if Law Grads can't pay Bills?*, A.B.A.J., Jan. 2012, at 30.

the economy can absorb?”⁸¹ No answer has been satisfactory. Too many creditors have made profits from the growing surplus of lawyers.⁸²

Is society benefiting from the surplus of lawyers? Tuition has gone up, student debts have gone up, the job market has shrunk, and law graduates changed careers. With many law graduates not practicing law, some legal needs are not being met. Some areas like family law and criminal defense have been underserved. High student debts have made it difficult to serve lower or middle income clients.⁸³ As a public policy, should we expend billions in public funds to train lawyers only to represent the upper income class?

From an individual law student’s perspective, as an investment, law school education has a negative net present value, at least for most graduates.⁸⁴ After factoring in \$100,000 in borrowed money, spending three years of your life without income, and adding poor job prospects upon graduation, legal education is a bad investment for most. Why has no one told potential students that law school is likely a bad idea?

FRAUDULENT SCHOLARSHIPS

To combat the high tuition costs and the apprehension of high levels of borrowing, some schools use dubious scholarship offers as a recruiting tool.⁸⁵ Many schools offer substantial scholarships to many first year students, knowing that only a small percentage of those will be able to continue the scholarships after the first year.⁸⁶ Such scholarships often have conditions for renewal for the second and third year of law school, conditions that are impossible to meet for all the scholarships being offered.⁸⁷

Suppose we have an incoming law class of 100 people. We offer 30 students a full scholarship for the first year. The scholarship is renewable each year provided the student is in the top 10 percent of the class. Of course, each law student excelled in undergraduate school, so is confident he/she will be in the top 10 percent. However, only ten students will be in the top 10 percent, or 10 out of 100. This means 66.6 percent of scholarship students will not be able to keep their scholarships after the first year. Most will find a way to continue – most likely using loans – since a year of their lives have already been “invested” into a law school education. The high cost of tuition in years two and three help subsidize the free or discounted price of the first year. As a result, the school is financially solvent on tuition over the three years of a student’s education. The benefit for the school is that the scholarship offer (free tuition) attracts students who might have chosen another law school. In any other market, we would condemn this behavior as deceptive or predatory consumer practices. Why is it not condemned in legal education?

⁸¹ Paul Campos, DON’T GO TO LAW SCHOOL (UNLESS) (2012) at 51.

⁸² Harper, *supra* note 5 at 155.

⁸³ Horowitz, *supra* note 26 at 955.

⁸⁴ Campos, *supra* note 14 at 180.

⁸⁵ Trachtenberg, *supra* note 35 at 896.

⁸⁶ *Id.*

⁸⁷ *Id.* at 893.

LAWYER SALARIES DROPPING

For those lucky enough to graduate and pass the bar exam, attorney starting salaries have dropped,⁸⁸ losing over nine percent of their purchasing power in the last two decades.⁸⁹ Most starting legal jobs pay between \$35,000 and \$60,000.⁹⁰ Most incoming law students would not believe this salary range even ten years ago. Many law students could make more as the manager of a fast food restaurant, hardly justifying the students' loans or three years of time.

Law school reports also do not differentiate the “eat what you kill” arrangements.⁹¹ Those are legal jobs without a salary, where the new lawyer works for the law firm but only garners the income when his fledgling law practice generates some revenue.⁹² Of course, most law students leave law school without a pool of eager clients, so the income will likely be modest. Most starting lawyers struggle and accumulate more debt during this kind of arrangement, heightening the financial crisis of law school. At the same time, law schools can report them as “employed” on the official reports.

The low starting salaries of \$35,000 to \$60,000 for those fortunate enough to be employed is lower than the break even salary needed to pay off the education debt of law school.⁹³ To pay off the average law school debt (now over \$100,000), student loan payments will take the first \$21,000 of income each year.⁹⁴ Professor Herwig Schlunk of Vanderbilt University Law School analyzed the economics of legal education and explained that law school pays off for twenty-one percent of good students and thirty-one percent of exceptional students.⁹⁵

While for some law school is a positive financial experience, the majority of even exceptional students would be financially better off by avoiding law school. Professor Schlunk explained that keeping (not borrowing) the \$100,000 in tuition, saving three years of their career to work, and the poor chances of finding a law job, make attending law school a bad financial decision.⁹⁶

SUPPLY AND DEMAND PROBLEM

According to law school recruiters, the times have never been better. Law schools are in the business of selling legal education. As a result, they need a new crop of customers every year. However, a shrinking demand exists for the resulting product law schools are selling.⁹⁷

⁸⁸ Tamanaha, *supra* note 32 at 141.

⁸⁹ Merritt, *supra* note 4 at 19.

⁹⁰ Campos, *supra* note 14 at 203.

⁹¹ Trachtenberg, *supra* note 35 at 879.

⁹² Campos, *supra* note 14 at 202.

⁹³ *Id.* at 207.

⁹⁴ *Id.* at 177.

⁹⁵ Herwig Schlunk, *Is a Law Degree a Good Investment Today?*, 36 J. LEGAL PROF. 301, 327.

⁹⁶ *Id.*

⁹⁷ Caplan, *supra* note 10.

The number of law school applicants has been decreasing nationwide.⁹⁸ The number of new law school applicants for fall 2013 was down to 46,600 – an 18 percent decrease compared to 2012 and less than half of the 100,600 who applied in 2004.⁹⁹ However, since each law school operates independently, knowing too many law graduates exist does not mean that a specific law school will cut back on the number of graduates it produces annually. Some do as part of their strategic operation, but most do not.

With the desire for new buildings and endowed chairs, law schools scramble for tuition dollars. This necessitates having every incoming law school class filled to capacity, at any cost. An empty seat in an incoming class represents three years of lost potential income to the law school (lost tuition dollars). For many schools, entrance standards keep dropping, keeping them as high as possible while making sure the incoming class is filled to capacity. Every seat needs to be full to ensure enough income to maintain the law school.

While the number of law school applicants is decreasing, the number of law schools has actually increased by almost fifteen percent in the last twenty-five years, adding 26 new law schools, an average of one new law school every year.¹⁰⁰ Both the University of North Texas and Indiana Tech University are adding new law schools in 2014-2015.¹⁰¹ Despite the fact that we already have too many law graduates for the job market, American has not downsized but instead, it has added more law schools and thereby more law graduates to the mix, which is clearly the opposite of a supply-demand response. This is a recipe for an even more desperate future for graduates.

FIGHTING BACK

Law school graduates are not happy. After spending three years and \$100,000 of borrowed money, law graduates ultimate outcome is to obtain a job. Once they realized that certain law schools were finished with students' concerns once the last tuition check was cashed, the students reacted. Some resorted to hunger strikes and formal requests for tuition refunds.¹⁰² While these activities resulted in media attention, the real solution may lie in the courts.

Disgruntled former law school students have filed lawsuits against Thomas Jefferson School of Law, Thomas M. Cooley Law School, and New York Law School for their allegedly deceptive recruiting practices.¹⁰³ The suits allege that these law schools made false claims about the education the students were purchasing. The students did receive a legal education, but part of the promise made by the schools was the job prospects of the graduates. These suits allege that the claims of job potential by the law school recruiters were false when they were made. These cases will take years to work through the court system.

⁹⁸ Debra Cassens Weiss, *Law School Applications for fall 2012 Drop More than 15 Percent*, A.B.A.J. (Jan. 20, 2012).

⁹⁹ Elizabeth G. Olson, *Law Schools: Still Hiding the Sad Truth from Students?* FORTUNE, Mar. 20, 2013, available at <http://management.fortune.cnn.com/2013/03/20/law-school-misrepresentation>.

¹⁰⁰ William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013).

¹⁰¹ Jennifer Smith, *Crop of New Law Schools Opens amid a Lawyer Glut*, WALL STREET JOURNAL, Jan. 31, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323926104578276301888284108>.

¹⁰² McEntree and Lynch, *supra* note 30 at 1.

¹⁰³ Murphy, *supra* note 7 at 773.

While the law school recruiters were at least careless with the truth, victory for the students is far from certain. The lawsuits have some difficult steps ahead, including being able to prove reasonable reliance on job prospects that were made three years in advance. One ironic result is that these particular law schools trained people to sue others and promised job opportunities that did not exist. Now, those out of work law graduates are using their training to call to task the schools that trained them.

A very positive result has been an emphasis on more information for potential law school students. In 2009, two Vanderbilt law students,¹⁰⁴ Kyle McEntee and Patrick Lynch, created Law School Transparency (LST).¹⁰⁵ The purpose of the LST website was to help prospective law students make informed decisions about law school admission and to make legal education affordable.¹⁰⁶ LST has an extensive website that lists official reports of job prospects for graduates, LSAT scores, and grade point averages, which often are counter to the information provided by law school recruiters.¹⁰⁷

ETHICS AND THE PRE-LAW ADVISOR

“Should I go to law school?” Every legal studies professor and pre-law advisor has heard that question from students. What should an educator do? What ethical burdens does a pre-law advisor have, and to whom? Pre-law advisors need to administer some harsh reality for those pondering law schools.¹⁰⁸ Some of the reaction may be based on personal experiences. After having been pre-law advisors for years, we have made some interesting discoveries. First, law school recruiters (once long-term staff who served many functions besides recruiting) are now being replaced with out of work recent law school graduates, hired by their alma mater to boost employment reports. As a result, many law school recruiters may not be experienced marketers and similarly may not be interested finding the most accurate data for potential students.

One of the ways the schools compete is by emphasizing the job rates of their graduates. Law schools need to find jobs for graduates. Existing and new law schools need more recruiters to fill a full class of students each year. How can a school accomplish both goals simultaneously? A law school can hire their unemployed recent law school graduates to work as recruiters for the law school. Although it is ironic, it achieves both goals. It is truly a sad statement that the only available job for many law graduates is to sell legal education to the next round of potential students.

It has also been noted that the more costly the tuition, the higher the degree of “distortion” of the job market. Expensive private schools give glorious reports of job prospects, perhaps to take the sting out of high tuition costs and seem more competitive than state schools. State schools traditionally cost less and thereby have a less exaggerated view of the job prospects, but some are still not completely accurate.

¹⁰⁴ Harper, *supra* note 5 at 163.

¹⁰⁵ See Law School Transparency, <http://lawschooltransparency.com>.

¹⁰⁶ See Law School Transparency, <http://lawschooltransparency.com/blog/about/team>.

¹⁰⁷ *Id.*

¹⁰⁸ Harper, *supra* note 5 at 165.

While the ABA has new accreditation reporting requirements (distinguishing full-time/part-time employment, as well as short-term/long-term), some law schools are also responding to these new requirements in a unique way: by using out of date figures presumably to circumvent the intent of the new reporting requirements. We have witnessed several schools providing potential law students with out of date records under the old reporting scheme and casually dismiss why the reports are out of date (“new ones are being printed...”). Most potential law students do not know that the reporting requirements have changed, so are not suspicious of the older information. Obviously, schools cannot use outdated information forever. Eventually, students will be increasingly suspicious as the reported information is further out of date.

In the fall of 2014, a recruiter from a lower tier law school visited our Pre-Law Society students.¹⁰⁹ At this meeting with potential law students, the recruiter claimed that over 93 percent of its graduates attained a job upon graduation.¹¹⁰ The audience understood this to mean that 93 percent of the graduates got a job as a lawyer.¹¹¹ In fact, Law School Transparency Report indicated that this school has only a 56.5 percent job success rate in law related jobs for the class of 2013.¹¹² According to the LST Report for this law school, 37 percent of its graduates got a job, but either the job was not long term or was not related to law, and over 7 percent did not find any job after graduation. The figures from LST paint a very different view than the one offered by the recruiter.

How should a pre-law advisor or legal studies professor handle this myriad of law school marketing discrepancies and related issues? This exchange involves several parties who are owed an ethical duty. First, the pre-law advisor owes a duty to students to be honest and candid. Students would prefer the truth and the pre-law advisor would likely feel more comfortable making sure the students were accurately advised. However, there are some other roles which provide for conflicting ethical duties.

The law school advisor serves to advise students but also serves as a host to guests, including law school recruiters. A host should be accommodating and forgiving, not confronting toward law school guests at least in a social setting. Perhaps this ethical obligation (being a good host) should discourage the pre-law advisor from directly confronting the recruiter at that moment. This places the duties to different parties at odds (students want the truth, but you should not insult the guest/recruiter). One way to remedy this conflict is to allow the recruiters to give their presentation, and inform students of more accurate information at a later time.

Should the pre-law advisor’s ethical duty change depending on which school has made the presentation? Does a pre-law advisor or legal studies professor owe a greater duty of deference to his/her alma mater? Do not ask the alumni relations officer for an objective answer.

What duty do pre-law advisors and legal studies professors owe the profession? A legal profession will be needed in the future. To have a legal profession, society must have law

¹⁰⁹ The school was Oklahoma City University College of Law which is the closest law school in proximity to UCO.

¹¹⁰ This fact was also repeated in the literature provided to the potential students.

¹¹¹ Based on author’s personal discussion with the students at a subsequent meeting.

¹¹² See Law School Transparency, State Report: Oklahoma, available at <http://www.lstscoreports.com/state/OK/> (last accessed Feb. 1, 2015).

schools. Without jobs, the legal education market will fail.¹¹³ To keep law schools financially afloat, we might have to accept producing a generation of lawyers that will not have a legal job.

The National Association for Law Placement (NALP) has defined ethical standards for Law Schools and students as it relates to the placement of Law Students.¹¹⁴ However, these principles focus on job placement, not law school admissions. Under the Model Rules of Professional Conduct, attorneys are required to disclose all material facts to prevent fraudulent acts by a client, and to avoid making false statements of material fact or law, but this only relates to attorney/client conduct. The law school recruiter/student relationship does not rise to this level of representation. Currently no official ethical rules exist for law school recruiters, even if the recruiter is a licensed attorney.

POTENTIAL ACTIONS

Your authors advocate the American Bar Association to require three modest changes in how law schools report information to potential students. Neither change should create a significant cost or expense on the law schools. However, both changes would make the publicly reported information more accurate of the state of the legal job market.

First, law schools should be prohibited from reporting any job figures of graduates except long-term, law-degree-required jobs. Any other job related figures will not be publicly released. This change would incur several benefits. Reporting only jobs “as a lawyer” more accurately reflects what the consumers’ (students’) view as the desired outcome. In addition, non-law related jobs should be ignored. Law students (each with a bachelor’s degree in hand) could have obtained a non-lawyer job without the cost and expense of law school. Non-lawyer jobs really reflect little on any benefit gained from the legal education.

Second, law schools will no longer be able to count hiring their own students as “employed.” By eliminating these jobs created solely to bolster the statistics for the school, potential students will gain a more accurate view of the job market as a result of this education. Law schools can continue the practice of hiring their own graduates for short-term jobs. The only change would be that these jobs cannot count as “employed” for official statistics. Since these manufactured short-term jobs would not be as a lawyer and/or utilizing their legal degree, they should not show up in official figures. Schools could drop the pretense of giving recent graduates a short-term pointless job just long enough to be reported as “employed,” then dumped into the job market. Since those jobs will no longer be reported as “employed” this sham job creation should cease.

Finally, the authors also advocate that any reports using law school students must consider the entire graduating class. Law schools are no longer allowed to report percentages based on only a portion of the graduating class. We have previously shown how schools make broad claims based on only a portion of the class. Letting law schools cherry pick which students they report gives a distorted view of the job market of their graduates. We have

¹¹³ Henderson, *supra* note 100 at 467.

¹¹⁴ National Association of Law Placement, *Principles*, http://www.nalp.org/fulltextofnalpprinciplesandstandards#Part_II_Principles (last visited August 4, 2014).

previously shown that several make claims when only sampling less than a fourth of the graduating class. Such figures are rife with misinformation and false promises.

By requiring all law schools to report figures based on 100 percent of the graduating class, schools will have to give non-manipulated data. No more partial reports, listing only a portion of the graduating class. This requirement will put the burden on law schools to look for results, instead of hand selecting results and making broad claims from those figures.

Law schools may claim that they cannot keep records of all students. This is false. It is in the law schools' interests to keep records of graduates, if only to constantly ask for donations from alumni. The authors are law school alums who have received frequent requests for donations decades after graduation. We know that law schools can and do keep these records. The employment records of recent graduates should reflect equal intensity. Those graduates who do not respond should be reported as such and assumed to not have attained appropriate levels of employment.

Some might be skeptical of our proposed change, and rightfully so. Please be as skeptical of the status quo. Consider this hypothetical example. Suppose a law school produces horrid law students. None of the students could pass the bar exam, not one. None of their graduates could even read and write. However, after graduation each and every law student found employment working at the nearby shopping mall. From a lawyer's perspective, the law school is a complete and utter failure. No one passed the bar exam. No graduate is employed in the legal profession. The school is a disaster. However, with the current state of reporting rules, the law school could accurately advertise that "100 percent of its graduates were employed within six months of graduation" and imply that its 100 percent job rate is higher than any Ivy League school.

The current state of the reporting rules for law schools is little more than a sham. It allows schools with poor track records to claim overwhelming success by manipulating the definitions of "employed," hiring their own students in short-term busy-work jobs, and not properly distinguishing lawyer jobs from other jobs. If a student has the same job at the same business before law school and after law school, the legal education did not benefit the student.

LET THE BUYER BEWARE?

It is myopic to think that *caveat emptor* should apply to law students.¹¹⁵ The status quo is clearly unacceptable, placing the burden of discovering accurate information on potential law students. Law schools should not be allowed to advertise false and misleading figures with accurate details and explanations hidden in fine print, if disclosed at all. It is not ethical and it is not professional.

Of course, some of the blame should be on the students. Law students should be more critical. Hopeful lawyers, like all persons suffer from an optimism bias.¹¹⁶ Law students were successful in undergraduate work, and likely assume they will always be the top student in law

¹¹⁵ McEntree and Lynch, *supra* note 30 at 6.

¹¹⁶ Harper, *supra* note 5 at 155.

school.¹¹⁷ This may explain why, even after the publicity of the lawsuits, and the numerous articles about poor job prospects, and the decline in the number of applications, that there are still more optimistic law school applicants than spots in law school classes.¹¹⁸

Legal education market has been grossly distorted by easy access to credit and a societal misperception about lawyers and their potential income.¹¹⁹ Those misperceptions may have been created by television dramas, but they have been fueled recently by the steady repetition by law school recruiters. As a result, we have been overproducing lawyers for decades.¹²⁰ Our profession has been falsely selling a dream (becoming a lawyer) at a very high price while knowing for half the students, the dream is not going to be reality. “One voyage of the Titanic is bad enough; setting out deliberately on the same course, again and again, is inexcusable.”¹²¹ Law school marketing should be an ethical practice to recruit the future of an ethical profession. Currently, the economics of legal education have made the recruiting of law students less than ethical.

CONCLUSION

Most think that reducing the number of law school admittees will solve the problem of producing law school graduates twice as fast as the economy can absorb them. However, that is not a complete answer. This cannot be controlled since it is up to each school to limit their own attendance. Making law school more expensive so fewer can afford to attend is also not the answer. Many legal needs of the lower and middle income are already unmet. Driving up the price of law school will worsen that problem. Law schools are necessary because lawyers and the legal profession as a whole are both needed for society to function. Potential law students deserve the truth about law schools and the legal profession. Since those with the information are continually finding ways around the truth as evidenced in this paper, perhaps the solution is to create strong ethical standards for law school recruiters. However, since many of the recruiters are not lawyers, regulation by the bar associations would be ineffective.

A stronger, more realistic option is to modify the reporting requirements for law schools to make the changes we suggest. First, law schools should be prohibited from reporting any job figures of graduates except long-term, law-degree-required jobs. Any other job related figures will not be publicly released. Second, law schools should not report any employment initiated by the law school internally. Third, law schools can only report figures based on 100 percent of the graduating class. Schools will have to provide non-manipulated data. No more partial reports, listing only a portion of the graduating class. Law schools should market their product with the most accurate information. A profession should expect as much. It can only benefit all parties.

¹¹⁷ Tamanaha, *supra* note 32 at 144; Campos, *supra* note 14 at 180; and McEntree and Lynch, *supra* note 30 at 7.

¹¹⁸ Steven L. Willborn, *The Law School in the New Legal Environment: Legal Education as a Private Good*, 41 WASH. U.J.L. & POL'Y 89 (2013).

¹¹⁹ McEntree and Lynch, *supra* note 30 at 1.

¹²⁰ Henderson, *supra* note 100 at 461.

¹²¹ Horowitz, *supra* note 26 at 973 (2013).

MORAL DISENGAGEMENT AND LOCUS OF CONTROL IN BUSINESS SCHOOL FRESHMEN: GENDER DIFFERENCES

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Abstract

There are many examples of unethical business conduct where individuals acted in their own self-interest, without taking into account their ethical obligations to others. Using freshmen business majors, this study demonstrates that females tend to have lower levels of moral disengagement than their male counterparts. Females also showed a stronger internal locus of control which was correlated with lower levels of moral disengagement. As the results indicate, there is a positive correlation between an internal locus of control and lower levels of moral disengagement. Further, application of Waidato Environment for Knowledge Analysis (WEKA) for the nine categories of moral disengagement successfully classified females far more often than males, based on their levels of moral disengagement.

Cases of unethical business practices which have resulted in loss of financial resources for innocent parties are far too common. Examples of business people in this venue include Kenneth Lay of Enron, Mark Schwartz and Dennis Kozlowski of Tyco and Bernard Madoff of the security investment firm of his own name. In each case, the individual acted in his own self-interest without considering ethical obligations to others. Lack of concern demonstrated by the disassociation of one's actions and the results of those actions can be fueled by higher levels of moral disengagement. Moral disengagement allows one to disassociate one's actions from the consequences of those actions and removes the restraint of self-regulation. In other words, as a result of becoming morally-disengaged, individuals are freed from personal guilt associated with acting unethically. There are numerous reports of negative consequences that result when individuals or groups act in a morally-disengaged manner.

For example, the accounting scandals that were unveiled in the early 2000s and the 2008 financial crisis were partially caused by CEOs, CPAs, bankers and other business people who benefitted themselves at the expense of others. In one instance, Fabrice ("Fabulous Fab") Tourre, a Goldman Sachs vice president, helped create a sub-prime mortgage investment deal called Abacus 2007-AC1. The debt obligation defrauded investors and secretly allowed billionaire John Paulson's hedge fund to make a billion dollars by betting against the fund (International Business Times, 2013).

Other examples of unethical business practices abound. One need look only at the results of the Enron and WorldCom scandals to observe the impact of unethical behavior on the lives of others. Both financial disasters resulted in prison sentences for some of the individuals involved, as well as financial losses for investors, employees and other parties. In another instance, Tyco's Mark Swartz and Dennis Kozlowski were convicted of dozens of felony charges, including awarding themselves over \$100 million in unauthorized compensation and defrauding investors of \$400 million. Enron executives Jeffrey Skilling and Andrew Fastow conspired to commit securities fraud and dealt in insider trading. WorldCom was the largest accounting scandal in U.S. history until Bernard Madoff's Ponzi scheme was unveiled. Madoff, who built an empire from his own investment firm and developed technology that would later become the NASDAQ (Bandler, Varchaver, Burke, Kimes and Abkowitz, 2009), is currently serving a 150-year sentence in a maximum security prison. Madoff admitted to perpetrating a massive Ponzi scheme which covered several continents and lasted decades, defrauding his clients of millions. In each of the above examples, highly educated individuals decided to take actions that at the very least demonstrated a cavalier attitude toward the welfare of others.

The men involved in these events were in the midst of promising careers built on their talent and dedication to their individual industries. These men were also well educated, with some earning a graduate degree from a prestigious university (e.g., Fabrice Tourre earned a master's from Stanford; Jeffrey Skilling and Andrew Fastow both received MBAs from Harvard). The aforementioned individuals are examples of people who participated in schemes that defrauded hundreds of investors. In order to do so, they seemingly internally justified their actions, despite their business experience, knowledge and education. Further, because fraudulent activities committed by men are far in excess of those committed by women, gender differences may exist in regard to justification of unethical behavior (e.g., moral disengagement).

Many of the people involved in the aforementioned scandals earned business degrees (either undergraduate or graduate) from prestigious universities. Presumably, their curriculum included some sort of ethics course(s). However, successful completion of ethics coursework may not have resulted in ensuring ethical behavior. It is possible that no amount of ethics education affects those who are predisposed to act unethically. The question then arises as to whether students who choose to major in business have a predisposition toward moral disengagement. Further, whether an individual has an internal or an external locus of control may contribute towards that person's ethical or unethical actions. The purpose of this paper is to report the results of a study measuring locus of control and moral disengagement in undergraduate business students. More specifically, this study will focus on measuring gender differences in levels of moral disengagement and locus of control of college freshmen studying business. Additionally, Waidato Environment for Knowledge Analysis (WEKA) is used to determine the ability to accurately determine the gender of a study participant based on their level of moral disengagement.

Prior Research

Albert Bandura developed moral disengagement theory in 1986. The theory explained that an individual's "self-regulatory mechanisms do not operate unless they are activated" (Bandura, 2002, p. 102). This theory describes how some individuals are able to excuse themselves from inflicting suffering upon others and how the use of self-deceptive psychological maneuvers make actions (or lack of actions) palatable. Bandura indicates that high levels of moral disengagement allow one to disassociate from the results or implications of one's actions

even if these actions negatively affect others. Three categories of mechanisms used by individuals to achieve this disassociation are proposed. The first is cognitively restructuring behavior demonstrated by moral justification, euphemistic labeling, and advantageous comparison. The second is obscuring or minimizing one's active role in behaviors by displacing responsibility, diffusing responsibility, and disregarding or distorting the consequences of an action. The last category focuses on the unfavorable acts or traits of those negatively affected by dehumanizing victims and attributing blame to them.

Bandura's theory of moral disengagement has been applied to societal issues such as terrorism (Maikovich, 2005), the perpetration of inhumanities (Bandura, 1990), cubicle warriors (Royackers and van Est, 2010), executioners (Osofsky, Bandura and Zimbardo, 2005) and school bullies (Obermann, 2011). The implosion of our economy in 2008 and commission of fraudulent financial activities in the early 2000s, has generated interest in applying Bandura's theory to the workplace.

Some studies have been industry specific such as in White, Bandura, and Bero (2009), which looked at moral disengagement exhibited by harmful corporate research related to tobacco, lead, vinyl chloride, and silicosis. Ntayi, Eyaa and Ngoma (2010) delved into the unethical practices of public procurement officers in Uganda. Other studies such as Claybourn's 2011 investigation questioned whether work related variables and moral disengagement influence work place harassment. Moore, Detert, Treviño, Baker and Mayer (2012) investigated why employees do bad things in the workplace. Barsky (2011) and Anand, Ashforth, and Joshi (2005) researched moral disengagement and how it relates to the rationalization of unethical or corrupt acts in the workplace. They claimed that, based on their study, virtually every organization suffers from fraud. Christian and Ellis (2014) found a strong relationship between turnover intentions and the use of moral disengagement to justify deviant behavior in the workplace.

Use of student subjects has also intensified. Using undergraduate students as subjects, Hinrichs, Wang, Hinrichs and Romero (2012) examined the relationship between leadership beliefs and moral disengagement through displacement of responsibility. Tsai, Wang and Lo (2014) explored the relationships among locus of control, moral disengagement in sports and rule transgression of athletes, using members of a college sports team as subjects. Previous research in the area of ethical development differences between business students and students in other majors has also occurred. For example, Neubaum, Pagell, Drexler, Mckee-Ryan and Larson (2009) found no differences in personal moral philosophy between business and non-business students. However, Segal, Gideon and Haberfield (2011) found that business students were more willing to accept unethical conduct than criminal justice majors and Cory and Hernandez (2014) found that business students demonstrated higher levels of moral disengagement than humanities majors.

Previous studies have also focused on moral disengagement in students, such as Detert, Treviño and Sweitzer's 2008 study, which compared moral disengagement tendencies among college freshmen majoring in business and those majoring in education. The study tested the relationships between empathy, moral identity, trait cynicism, and locus of control compared to higher levels of moral disengagement. Ultimately, the study found a negative association between empathy and moral identity, but a positive association between trait cynicism and locus of control. The results also indicated higher levels of moral disengagement in business majors as compared to education majors.

Other studies concentrated on a particular behavior when testing moral disengagement tendencies. For example, Bing, Davison, Vitell, Ammeter, Garner and Novicevic (2012) performed an experiment with college students involving academic cheating. Morgan and Neal (2011) compared students' perceptions of ethical breaches with freshmen and upper level students in information systems courses. Baird and Zelin (2009) used undergraduate students to study whether a person committing fraud in a situation involving obedience pressure was judged less harshly than an individual committing fraud of his or her own volition. Each year more studies are being conducted using undergraduate students to research not only how these students view and judge moral disengagement, but how those views and judgments differ over time and when compared to students across disciplines.

Many studies have addressed gender differences in ethicality. Although results have been mixed, several studies have found that females tend to act more ethically than males (Tse and Au, 1997; Robin and Babin, 1997; Ritter, 2006; Wang and Calvano, 2015; Comer and Vega, 2008, Rucinski and Bauch, 2006, Peterson, Rhoades and Vaught, 2001, and Treviño, 1986). However, other than Samnani, Salamon and Singh (2014), whose study found a complex three-way interaction between negative affect, moral disengagement and gender, and Detert, Treviño and Sweitzer (2008), where their male subjects were more likely to be morally disengaged than their female counterparts, there is a paucity of research relating to gender differences in moral disengagement.

Method

Moral disengagement allows individuals to disconnect their behavior from their internalized values and mores in order to commit unethical acts. As discussed previously, Bandura proposed three categories of mechanisms used by individuals to achieve this disconnect: (1) cognitively reconstructing one's behavior (moral justification, euphemistic labeling and advantageous comparison), (2) minimizing one's role in the behavior (displacement of responsibility, diffusion of responsibility and disregarding or distorting the consequences) and (3) focusing on the unfavorable acts or traits of those being negatively affected (dehumanization and attribution of blame).

The moral disengagement survey used in this study, which was adapted from Detert, Treviño, and Sweitzer (2008), provided students with a list of 32 statements. Their survey was adapted from one developed and used in multiple studies by Bandura and others. The survey was designed in order to measure each of the eight components of moral disengagement equally with four questions per component. Because this survey, or one very similar to it, has been used in previous research (e.g. Detert, Treviño, and Sweitzer, 2008, Bandura, Barbaranelli, Caprara, Barbaranelli and Pastorelli, 1996, Pelton, Gound, Forehand and Brody, 2004) and previously tested extensively for validity, no further tests of validity were deemed necessary. Given that this is an exploratory study, no specific hypotheses are developed. Rather, differences in moral disengagement between genders are determined. Results may lead to further research in this area and perhaps changes in the ethics curriculum.

Students were asked to determine the degree to which they agreed with each statement, using a 7-point Likert scale, with 1 indicating "strongly disagree" and 7 indicating "strongly agree." used in measures for the above components of moral disengagement. Questions 1 through 4 measure moral justification, 5 through 8 measure euphemistic labeling, 9 through 12 measure advantageous comparison, 13 through 16 measure displacement of responsibility, 17 through 20 measure diffusion of responsibility, 21 through 24 measure distortion of

consequences, 25 through 28 measure attribution of blame and 29 through 32 measure dehumanization. First, the responses were re-coded so that “neither” was coded as 0, and responses to the right of “neither” were coded as 1, 2 or 3. Responses to the left of “neither” were coded as -1, -2 or -3. Hence, “strongly disagree” became -3 and “strongly agree” became 3 and a positive score indicated a higher level of moral disengagement. Finally, the responses for all 32 questions were added to get a total moral disengagement score. In order to measure each component, the score for each question relating to it were summed (e.g., the score for moral justification was computed by adding the scores for questions 1 through 4, etc.). This resulted in a maximum score for each component of 12 and a minimum score of -12.

Locus of control refers to the extent to which individuals believe they can control events affecting their lives. People with an internal locus of control believe they have more control over their lives than people who have an external locus of control. Individuals with an internal locus of control see connections between their own actions and the outcomes of their behavior. Individuals with an external locus of control tend to believe environmental factors over which they have no influence, powerful others, chance or fate have more control over their lives; resulting in less personal control. The survey measuring locus of control consisted of 10 pairs of statements. Students were asked to indicate which of each pair of statements they agreed with more. Agreement with an internal locus of control statement was coded as -1 and agreement with an external locus of control statement was coded as 1. Therefore, higher scores indicate a greater external locus of control. The maximum score is 10 and the minimum score is -10. Previous research has shown a positive relationship between an external locus of control and higher levels of moral disengagement (Detert, Treviño and Sweitzer, 2008).

The sample of 109 consists of the responses for freshman business students taking freshman level classes. In total, 101 surveys were usable when measuring both locus of control and moral disengagement, for a response rate of 92.6%. There were 49 males in the sample and 52 females. The average age of the sample was 18.2 years.

Results

First the data were analyzed to determine the mean and standard deviation in the locus of control scores, by gender. A t-test between the two means indicates a higher level of internal locus of control for females. See Table 1.

Table 1

Gender	Number	Mean	Std. Dev.	T-test for difference
Males	49	-1.156	3.343	**2.42
Females	52	-2.808	3.367	

The above table provides the means and standard deviations of the locus of control measurement by gender. The maximum possible is 10 and the minimum is -10. The lower the average score, the higher the internal locus of control. Therefore, females have a stronger internal locus of control than males. However, on average, both genders have an internal locus of control.

**significant at 5%.

Next, t-tests were used to determine any differences in the eight components of moral disengagement between genders. Results are shown in Table 2 below. The numbers in parentheses indicate the questions that were summed to get the score for each component. Four

of the eight components are significantly different between the genders. Additionally, the total score for moral disengagement differs between genders.

Finally, the correlations between the total locus of control measurement and each component of moral disengagement were computed. This is presented in Table 3.

Table 2

Moral Disengagement Component	T-Test for Differences Between Genders
Moral Justification (1-4)	***4.25
Euphemistic labeling (5-8)	**2.29
Advantageous comparison (9-12)	**2.39
Displacement of responsibility (13-16)	*1.79
Diffusion of responsibility (17-20)	1.55
Distortion of consequences (21-24)	***3.52
Attribution of blame (25-28)	*1.93
Dehumanization (29-32)	1.08
Total score (sum 1 through 32)	***3.35

The above table provides the t-test for differences in moral disengagement between genders. In all cases, males demonstrate higher levels of moral disengagement than females.

*significant at .10 **significant at .05 ***significant at .01

Table 3

Moral Disengagement Component	Males	Females	Total Sample
Moral justification (1-4)	***.48	.22	***.41
Euphemistic labeling (5-8)	**.29	***.35	***.38
Advantageous comparison (9-12)	**.28	**.32	***.37
Displacement of responsibility (13-16)	**.28	.22	***.30
Diffusion of responsibility (17-20)	.27	.03	.18
Distortion of consequences (21-24)	.19	.22	***.28
Attribution of blame (25-28)	.20	***.38	***.32
Dehumanization (29-32)	.10	***.40	***.29
Total score (1 through 32)	***.39	***.33	***.44

The above table shows the Spearman correlation between each moral disengagement component and the locus of control. The stronger the internal locus of control, the lower the measure of moral disengagement. ***Probability of no correlation 1%; **Probability of no correlation 5%

The last step in the analysis was to use Waikato Environment for Knowledge Analysis (WEKA) to classify responses by gender. WEKA is a collection of machine learning algorithms for data mining tasks, which can be applied directly to a dataset. WEKA, which is widely used in both academia and business, contains tools for data pre-processing, classification, regression, clustering, association rules, and visualization. It is also well-suited for developing new machine learning schemes, and is “recognized as a landmark system in data mining and machine learning” (Hall, Frank, Holmes, Pfahringer, Reutemann and Witten, 2009, p. 10). The tools used in WEKA for calculating the confusion matrices were classification using the J48 tree decision

algorithm and 10 fold cross validation (all of which are directly available in the WEKA software).

Results are shown in the nine confusion matrices below. In eight of the matrices, females were correctly classified more often than males. Males were correctly classified slightly more often than females for Attribution of Blame.

Confusion Matrices

Moral Justification	Classified as Male	Classified as Female	Correct
Actually Male	23	26	46.9%
Actually Female	16	36	69.2%
Total Percent Correct			58.4%

Euphemistic Labeling	Classified as Male	Classified as Female	Correct
Actually Male	14	35	28.6%
Actually Female	14	38	73.1%
Total Percent Correct			51.5%

Advantageous Comparison	Classified as Male	Classified as Female	Correct
Actually Male	15	34	30.6%
Actually Female	12	40	76.9%
Total Percent Correct			54.5%

Displacement of Responsibility	Classified as Male	Classified as Female	Correct
Actually Male	25	24	51.0%
Actually Female	15	37	71.2%
Total Percent Correct			61.4%

Diffusion of Responsibility	Classified as Male	Classified as Female	Correct
Actually Male	18	31	36.7%
Actually Female	21	31	59.6%
Total Percent Correct			48.5%

Distortion of Consequences	Classified as Male	Classified as Female	Correct
Actually Male	25	24	51.0%
Actually Female	9	43	82.7%
Total Percent Correct			67.3%

Attribution of Blame	Classified as Male	Classified as Female	Correct
Actually Male	26	23	53.1%
Actually Female	25	27	51.9%
Total Percent Correct			52.5%

Dehumanization	Classified as Male	Classified as Female	Correct
Actually Male	10	39	20.4%
Actually Female	11	41	78.8%
Total Percent Correct			50.5%

Total	Classified as Male	Classified as Female	Correct
Actually Male	30	19	61.2%
Actually Female	17	35	67.3%
Total Percent Correct			64.4%

These students are on the thresholds of their academic careers and will eventually enter the workforce. They all plan to major in a business discipline (e.g., accounting, finance, management, marketing, etc.), although the specific area of interest may not yet be determined and certainly may change after completion of more of the business curriculum.

Discussion and Conclusions

Both genders were found to have an internal locus of control, although it was slightly stronger in females. However, on average, neither gender had a strong internal locus of control (Table 1). An individual with an internal locus of control believes they have more control over their life than someone with an external locus of control. Hence, the correlations found between internal locus of control and all but one of the moral disengagement components would seem to imply that individuals with an internal locus of control are less likely to act in a morally disengaged manner (Table 3). In seven of nine measurements of moral disengagement, males were found to be more disengaged than females (Table 2). These findings are not unexpected, based on results of previous studies that found females were more ethical than males, but these results are interesting due to the fact that each category of moral disengagement was studied separately. Finally, as shown in the confusion matrices, application of WEKA was successful in correctly identifying females between 51.9% and 82.7% of the time, with strongest overall results found for Distortion of Consequences (67.3%) and weakest for Diffusion of Responsibility (48.5%). Finally, WEKA correctly identified females more often than males for eight of the nine moral disengagement measurements. This is good evidence of a strong association between gender and the likelihood of the occurrence of morally disengaging behavior.

The individuals in this study were first semester college freshmen who have declared a business major and thus, after graduation, may be expected to eventually become business leaders. At a minimum, after graduation and entrance into the business discipline of their choice, the individuals will be confronted with ethical dilemmas and pressures. Given that it seems males in this group have a stronger tendency to act in a morally disengaged manner, the question then arises regarding how to best deal with this issue in the business curriculum. This group is

on the threshold of a university education which should include at least one course in ethics, but that course may not address this particular issue.

Some have expressed skepticism about the ability to teach ethics to college students, given that character is formed in childhood and previous researchers have questioned the effectiveness of business ethics education (Jewe, 2008; and Waples, Antes, Murphy, Connelly and Mumford , 2009). However, others have shown that ethics can be taught (Wang and Calvano, 2015; Altmeyer, Yang, Schallenkamp and DeBeaumont, 2014; and Ritter, 2006) but dealing with student moral disengagement has not truly been fully explored. This is an avenue for future research so that those who teach business ethics can incorporate this important element into the classroom.

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VIRTUAL CURRENCY—PROPERTY OR FOREIGN CURRENCY? AN EXPLORATION OF THE TAX AND ETHICAL IMPLICATIONS

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Abstract

This paper explores the definition of virtual currency (also referred to as digital currency) and the implications, financial and ethical, of its treatment by the Internal Revenue Service (IRS) as property versus foreign currency on taxable income for nonbusiness users (individuals), business users (corporations), and gamers. The paper concludes that to change the treatment of virtual currency from its current IRS treatment as property to foreign currency would be more beneficial for business users and nonbusiness users spending virtual currencies for day-to-day activities, but less beneficial to nonbusiness users holding virtual currencies for investment purposes. Both methods of treatment for virtual currencies were determined to have potential problems when applied to gamers exchanging goods in virtual worlds. At this time, treating virtual currencies as foreign currency for tax purposes was determined to be the most suitable accounting treatment.

KEY WORDS: Virtual Currency, Digital Currency, U.S. Tax law, Capital Gain Treatment, Foreign Currency Treatment

HISTORY OF VIRTUAL CURRENCY TAX LAW

On March 25, 2014 the Internal Revenue Service (IRS) issued Notice 2014-21 and IR-2014-36 proclaiming virtual currencies as “property” for tax purposes (U.S. Department of the Treasury, 2014a; U.S. Department of the Treasury 2014b). However, this definitive finding by the IRS did not end the debate in the United States over how virtual currencies should be treated. In response to the IRS’s ruling, on May 7, 2014, HR 4602, the “Virtual Currency Tax Reform Act”, was introduced by Representative Steve Stockman, its purpose being to force the IRS to treat virtual currencies as foreign currencies for tax purposes (HR 4602, 2014).

This paper explores the definition of virtual currency (also referred to as digital currency) and the implications, financial and ethical, of its treatment as property versus foreign currency for nonbusiness users (individuals), business users (corporations), and gamers. The paper concludes that the treatment of virtual currency should be changed from property to foreign

currency and the IRS should take care to treat fairly gamers, who exchange goods in virtual worlds, when enacting more specific tax laws pertaining to virtual currencies.

VIRTUAL CURRENCIES DEFINED

The European Central Bank defined virtual currency in 2012 as: “a virtual currency is a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community” (European Central Bank, 2012). The European Central Bank further breaks virtual currency into three categories: (1) a closed virtual currency system in which, in theory, there is minimal impact on the real economy because the virtual money can only be used within a virtual community and no real currency is exchanged for the virtual money, examples of which include video games such as World of Warcraft; (2) a virtual currency system with unidirectional flow, whereby the virtual currency may be purchased using real currency, but the virtual currency may not be converted into real currency, examples of which include Facebook Credits; and, (3) a virtual currency system with bidirectional flow, whereby the virtual currency may be exchanged for real currency, and vice versa, based on the current exchange rate, examples of which include Linden Dollars issued by Second Life and Bitcoin (European Central Bank, 2012).

In 2013, the U.S. Department of Treasury defined virtual currency as: “a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction.” (U.S. Department of the Treasury, 2013). If the virtual currency can act as a substitute for a real currency or has an equivalent value in real currency, the Treasury Department considers it convertible virtual currency (U.S. Department of the Treasury, 2013).

Because anyone can create virtual currencies, there are hundreds in existence (Crypto Classroom, n.d.); however, not all of these are commonly accepted. For instance, Coinpayments.net is a service that acts as a crypto-exchange for buyers wanting to purchase items from a participating merchant’s business using virtual currencies (Coin Payments, n.d.). Currently, Coinpayments.net accepts only fifty-six different virtual currencies (Coin Payments, n.d.). Among the most popular virtual currencies are Bitcoin, Litecoin, and Dogecoin (Crypto Classroom, n.d., Miller, 2014).

STABILITY OF VIRTUAL CURRENCIES IN OUR FUTURE ECONOMY

Advantages of virtual money, such as Bitcoin, include the ability to make payments across borders, without any amount limits or concerns about bank holidays, and none or low transaction fees (Bitcoin, n.d., Coin Report, n.d.). In addition, if the virtual currency allows for anonymity with nonreversible transactions, customers are protected against identity theft and merchants have reduced risk since they do not need to be concerned about the money being reversed due to fraudulent transactions, and, thus, can more easily do business in areas with higher crime and fraud rates (Bitcoin, n.d., Coin Report, n.d., Newegg, n.d.).

However, except for the anonymity and twenty-four hour access, most of the advantages of virtual money reside with the merchants. Consumers are not protected against virtual currency fraud (Ember, 2014) and there is no protection against loss or theft, as often transactions are irreversible (Witzel, 2014). In addition, the price of virtual currencies can be volatile, leading to large gains or losses merely from holding the currency (Ember, 2014). This

can produce a limited consumer base for virtual currencies. But, strides are being made to protect consumers who use virtual currencies. A judge in East Texas ruled that Bitcoin was a currency, although not a conventional currency, and investments made with Bitcoins do fall under the jurisdiction of the SEC (Hill, 2013). Also, in July 2014, the New York State Department of Financial Services (NYSDFS) started accepting comments on a proposal for the regulation of virtual currencies (WITZEL, 2014).

In spite of issues with fraudulent crypto-currency exchanges (“The Cryptocurrency Times”, 2014), virtual currency theft by cybercriminals (Miners, 2014, Witzel, 2014), China barring its financial institutions from buying and selling crypto-currencies (Dougherty, 2013), and U.S. banks’ reluctance to associate with accounts exchanging bitcoin because of regulatory concerns (Dougherty, 2013), virtual currencies are gaining wider acceptance in the global business world. Even Apple has started to allow virtual currency transactions in applications sold in the Apple store” (Kharif, 2014). In addition, many companies have begun accepting virtual currencies, especially Bitcoin, because of resulting reduction in financial transactional fees and risk incurred from fraudulent transactions. (Bitcoin, n.d., Newegg, n.d.). Bitcoin’s acceptance by major businesses--such as, Overstock.com, Amazon, Target, PayPal, Ebay, Home Depot, Kmart, and Sears (Chokun, 2014)--and efforts to make bitcoins readily available through partnerships with French banks in 2012 (Subbaraman, 2012), plus the installation in 2014 of Bitcoin ATMs around the world (Coin Desk, n.d.), have helped to solidify acceptance of the long-term viability of virtual currencies and the investments of millions into its continued development (Reuters, 2013, Robischon, 2014).

CURRENT AND THEORETICAL TAX TREATMENTS FOR CONVERTIBLE VIRTUAL CURRENCIES

This section explores the current treatment of realized holding gains and losses for virtual currencies as property, and a theoretical treatment for virtual currencies as foreign currencies. The focus is on realized holding gains and losses since, when a virtual currency is used or accepted to purchase an item, it will be treated essentially the same regardless if it is considered a property or a foreign currency. If the virtual currency is treated as property, then the initial exchange will be treated as a barter, and a gain or loss would be booked equal to the fair market value, in U.S. dollars, of the virtual currency on the date of the exchange (IRS Notice 2014-21; I.R.C. §1.6045-1); this is the exact same basis that would be used if the virtual currency was treated as a foreign currency.

Current Virtual Currencies Tax Treatment--Property under the U.S. tax code

Capital gain treatment

Currently, virtual currencies are considered property. As such, a capital gain or loss ensues when the virtual currency is disposed. This section of the paper starts by examining the treatment of capital gains for individuals and corporations.

If, after offsetting capital losses, a noncorporate taxpayer has a net short-term capital gain, indicating the capital asset(s) left after offsetting were held for not more than 1 year (I.R.C. § 1222(1), I.R.C. § 1222(5)), the income is treated as ordinary income and taxed at the taxpayer’s normal tax bracket (RIA, 2014a).

If, after offsetting capital losses, a noncorporate taxpayer has a net long-term capital gain, indicating the capital asset(s) left after offsetting were held for more than 1 year (I.R.C. § 1222(3), I.R.C. § 1222(7)), the income receives capital gains treatment and is taxed as follows: 1) 0% tax rate for amounts that would have been taxed below 25% without the capital gains treatment (I.R.C. § 1(h)(1)(B)), 2) 15% for amounts that would have been taxed at 25% to below 39.6% (I.R.C. § 1(h)(1)(C)), and 3) 20% on amounts taxable at 39.6% (I.R.C. § 1(h)(1)(D)).

For corporations, long-term capital gains are taxed as if they are ordinary income, unless taxes would exceed 35%, in which case long-term capital gain taxes are capped at 35% (I.R.C. § 1201(a)). Since currently the highest tax bracket is 35% (I.R.C. § 11(b)(1)), short-term and long-term gains are both treated as ordinary income for corporations (RIA, 2014a).

Capital loss treatment

Next, the paper will consider the treatment of capital losses for individuals and corporations that ensue from treating virtual currencies as property.

Currently, the U.S. tax code allows corporate and noncorporate taxpayers to use losses on the sale of property (considered capital losses) to offset capital gains (I.R.C. § 1211). In addition, noncorporate taxpayers are allowed to deduct \$3,000 (or \$1,500 if married, filing individually) of a capital loss per year (I.R.C. § 1211(b)(1)); the rest may be carried forward until used (RIA, 2014a). When carried forward, the capital loss maintains the short-term or long-term characteristic of its originating year (I.R.C. § 1212(b)(1)).

For corporate taxpayers, capital loss caused from selling digital money--that does not qualify as a foreign expropriation capital loss (I.R.C. § 1212(a)(2))--should be treated as a short-term capital loss, regardless of whether it was short-term or long-term when incurred, and carried back for three years to the extent it can offset capital gains in prior years and does not create or increase a net operating loss, with the remainder carried forward for 5-years (I.R.C. § 1212(a)(1), I.R.C. § 1212(a)(1)(A)(i), I.R.C. § 1212(a)(1)(B)).

Theoretical Virtual Currencies Tax Treatment-- Foreign Currency Under the U.S. Tax Code

The paper next explores how gains and losses on the value of virtual currency would be taxed if treated as a foreign currency for tax purposes. For individuals engaging in personal transactions, gains would not be recognized unless a transaction exceeds 200 dollars; the excess on the transaction would then be taxable (I.R.C. § 988(e), RIA, 2014b). The gains are determined based on a transaction-by-transaction approach and not an annual basis (RIA, 2014b). Losses from personal transactions are generally not allowed as deductions (RIA, 2014b).

For businesses, in general, unless a company elects to designate the foreign currency gain or loss as a forward contract, a futures contract, or option (I.R.C. § 988(a)(1)(B)), foreign currency gains and losses are computed individually and treated as ordinary interest income or loss (I.R.C. § 988(a)(1)(A), I.R.C. § 988(a)(2)).

IMPLICATION FOR NONBUSINESS ENTITIES, BUSINESS ENTITIES, AND GAMERS

Nonbusiness Entities

The current treatment of virtual currency as property is generally excellent news for the nonbusiness user in the U.S. who intends to hold the currency as an investment. For nonbusiness users of virtual currency it means they will pay lower taxes on realized holding gains, provided they own the asset over a year. This is the same as what most individuals today experience with the tax effects of purchasing and disposing of stock investments, which also fall under property for tax purposes, so this method of recognizing gains and losses should be very familiar to users.

If the virtual currency lacks stability, individuals fare better if it is treated as property. This allows the individual capital gains and loss treatment, reducing the taxes paid on net capital gains for long-term investments ((I.R.C. § 1(h)(1)(B-D) and, unlike personal foreign currency transactions (RIA, 2014b), also allows individuals deductions for realized holding losses (I.R.C. § 1211). If, however, the virtual currency is relatively stable, the individual, especially an individual using foreign currencies for day-to-day transactions, would prefer the foreign tax treatment because gains of up to \$200 per personal transaction are excluded from income; however, as mentioned before, losses are not allowed to be deducted (I.R.C. § 988(e), RIA, 2014b), making record keeping much simpler.

From an ethical perspective, the treatment of virtual currencies as a property creates a large burden on the average person to maintain accurate records for each and every virtual currency transaction. As virtual currencies become more widely used, the risk of average taxpayers using the money for day-to-day transactions and neglecting to account for the items correctly will increase. These records are costly and time consuming to maintain, and will result in a higher relative burden being placed on lower socioeconomic individuals utilizing virtual currencies. Provided the gains stayed under \$200, the foreign currency treatment would facilitate the daily use of virtual currencies by reducing the cost of record keeping that would be required for each gain/loss received on a transaction-by-transaction basis for virtual currencies considered a property. The treatment of virtual currencies as a foreign currency would reduce the lack of justice outcome, found under the current property treatment, for those taxpayers who have fewer financial resources.

Business Entities

For a corporation, the treatment of gains and losses for the virtual money accepted in exchange for an item or service may not be that financially important provided the company converts the virtual money when it is received, as this will minimize any holding gains or losses recognized by the company, resulting in no real tax difference between the treatments. Evidence of this working in practice is presented by the University of Nicosia, the first accredited university to accept Bitcoin for tuition payments, which converts the virtual currency immediately into Euros to minimize holding gains and losses (Dixit, 2013). However, if a company does not convert the virtual currency immediately, it runs the risk of experiencing a realized holding gain or loss. Depending on the volatility of the virtual currency, this gain or loss may be quite large.

Since there is currently no difference in realized holding gains treatment for businesses, with regard to the treatment of virtual currencies as property or foreign currency, the focus is on realized holding loss treatments. Overall, corporations prefer foreign currency treatment of virtual currency because it allows them to offset realized holding losses from the virtual currency against ordinary business income (I.R.C. § 988(a)(1)(A), I.R.C. § 988(a)(2)). Such treatment would eliminate the requirement that occurs when virtual currency is treated as property, which requires losses to be offset only against capital gains, the benefits of which are permanently lost if not used in five years (I.R.C. § 1212(a)(1), I.R.C. § 1212(a)(1)(A)(i), I.R.C. § 1212(a)(1)(B)).

From a justice perspective, treatment of virtual currencies as foreign currencies would ensure that companies, which typically only accept virtual currencies to facilitate sales in a manner similar to a foreign currency transactions, would receive the same treatment as similar transactions occurring with a traditional legal tender. In addition, the treatment of virtual currencies as a property does not provide any additional benefits to a business, and can be seen as unfair if a company is unable to deduct a real loss it experiences in the ordinary course of business. Treatment of virtual currencies as a property may cause issues with the wherewithal to pay if the company deals primarily in virtual currencies that it holds and virtual currencies experience a prolonged decrease in value. Since the realized holding losses on virtual currency would not be deductible against the company's ordinary revenue, any resulting higher tax bill could potentially exceed the company's ability to pay. From an ethical perspective, it is best to treat virtual currencies as foreign currencies for business transactions.

Gamers

For gamers, the IRS's interest in virtual currencies can lead to unfavorable tax consequences, regardless of whether the virtual currency is treated as a property or as foreign currency. The IRS has only set standards for convertible virtual currencies, so casual gamers who play a game that has a closed virtual currency system will not incur taxable income from playing the game. The same is true for gamers playing games with a virtual currency system with unidirectional flow. However, for gamers who play games with a bidirectional flow, such as the Linden Dollar and, until early 2014, Diablo III, the virtual money earned may be considered taxable income regardless of whether it is treated as a property or a foreign currency. Currently, the IRS has ruled that obtaining bitcoins by mining creates a taxable event (IRS Notice 2014-21), even when the Bitcoin has not yet been converted to cash. Given the similarities to mining found in virtual world game play (collecting in-game currency in games through activities including completing quests, mining, and the creation and selling of items), playing an online game may technically lead to a taxable event, even if the game's virtual currency is not converted to a legal tender. In addition, it should be noted that the casual gamer runs the risk that any exchange made within the game between players may be considered a barter transaction, deemed taxable by the IRS. This is not an area the IRS has yet explored, but recently the IRS put gamers on notice that transactions in virtual worlds, including the exchanging of goods and services, may result in real world tax consequences (IRS, 2015). Had the IRS deemed virtual currencies to be foreign currencies for tax purposes, then money earned playing games, would, in fact, be taxable income.

From a justice prospective, the current and theoretical treatments offered for virtual currencies are unfair to gamers for two main reasons. First, since the IRS requires taxes be paid in U.S. dollars (IRS, 2014), gamers may lack the wherewithal to pay, as they may never intend to

exchange their virtual currency for cash unless they are forced sell real or virtual assets to be able to pay a tax bill. Second, until the government is able to determine a better way to track virtual currencies such as Bitcoin that are designed to be untraceable, taxing virtual currencies that can be more readily traceable, such as gaming virtual currencies, creates an inherent unfairness in the tax treatment of individuals using different types of virtual currencies. At present, the IRS has indicated that only gains, not losses, may be reported for virtual world transactions, a treatment similar to hobby rules, which, at first glance, seems reasonable, except that typical gains earned by other hobbies result in tangible cash that would be available to pay taxes. Many gamers, however, may never cash out their digital currencies. The IRS will need to consider the implications and fairness to gamers when passing future laws pertaining to virtual currencies.

CONCLUSION

Virtual currency is a nonconventional form of money that is here to stay. The IRS's ruling requiring virtual currency to be accounted for as property is good news for the nonbusiness investor. However, for business and for nonbusiness users utilizing virtual currencies for day-to-day transactions, treating virtual currencies as foreign currencies would be more beneficial from an ethical and financial perspective. Both the current and theoretical treatments pose ethical and wherewithal to pay issues for gamers. More guidance is needed in the area of virtual worlds to make the tax implications more clear.

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MAKING CONNECTIONS BETWEEN MORAL-ETHICAL
BELIEFS AND HUMAN PHYSIOLOGY: A NEW APPROACH
TO CLASSROOM INSTRUCTION

John L. Keifer⁺ and Mary Carter Keifer⁺⁺

Abstract

Science through the use of technology has done much to inform us when it comes to the human decision-making process. For instance, neuroscience-neurobiology has explained the role played by our emotions when it comes to our decision-making. It has also shown us that our emotional center (the limbic system of our brain) is incapable of articulation other than through neuronal expression evidenced by our feelings. Hence, our ability to feel when something is right or something is wrong is a normal expression of humanity (albeit sometimes overridden or rationalized through our rational thought processes). Science also has shown through experimentation involving primates and other mammals the consistency of feelings among them all across different contexts and provocations. This latter finding, it is argued, means largely that most, if not all of the religious, moral and/or ethical beliefs/theories come either directly from our innate understandings of right or wrong or are derivative thereof. It is further argued that this reality means that all classroom instruction should entail the genesis of our feelings of rightness and wrongness; otherwise, students will not be mindful that their sense of right and wrong is rooted in there very humanity and be left to the temptations of their own rationalizations or the rationalization of others.

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Introduction

The authors in the past have argued that teachings even of a religious nature can be used for instructional purposes to the extent that they are common to all peoples regardless of their religious belief or lack thereof.¹ In support of their position, the authors reviewed various sources showing that all persons across the ages, both believers and nonbelievers, have shared in some form a common belief in what Christians call the “Golden Rule” (i.e., doing unto others as you would have others do unto you).² This commonality was explained on the basis of research done in areas like psychology, neuroscience, neurobiology, and bio-ethics, which have been greatly aided through the use of functional MRI technologies.³ In fact, an experimental researcher at Yale University, Paul Bloom, the Brooks and Suzanne Ragen Professor of Psychology, has found that newborn babies are born with a sense of morality; disproving the belief that the natural instincts of newborns are purely selfish.⁴ What seems clear from the research is that there is an innate predicate to peoples’ sense of morality that serves to inform their behavior at some level. A necessary conclusion to be drawn from such findings is that moral or ethical instruction that fails to inform students as to the importance of their innate sensitivities to questions of right and wrong represents a failure of traditional pedagogy.

This paper looks to make the case that much of what we understand to be ethical theories or beliefs actually represent well-articulated statements of humanity’s innate feelings when it comes to issues of right and wrong. Before illustrating the truth of such contention, the authors will first discuss the role played by emotion when it comes to decision-making. In fact, science shows the absent of any emotion and resulting feelings when it comes to making decisions can stymie a person’s attempt to make even inconsequential choices.

The Role Played By Emotion in Decision-Making

A leader in the area of neuroscience and neurobiology is Antonio Damasio, a Portuguese-American neuroscientist/neurobiologist. He is a University Professor and the David Dornsife Professor of Neuroscience at the University of Southern California and an Adjunct Professor at the Salk Institute and the author of several books describing his

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³ De Waal, F., (2013). The Bonobo and the Atheist: In Search of Humanism Among the Primates. Norton Co.; and, Rifkin, J. (2010). The Empathetic Civilization: The Race to Global Consciousness in a World in Crisis.

⁴ Bloom, P., (2013). Just Babies: The Origins of Good and Evil. Crown, N.Y.

scientific thinking. "As a leading neuroscientist, Damasio⁵ has offered a theory on the relationship between the relationship between human emotions, human rationality, and the underlying biology." His theory is predicated on researching the effect of brain lesions on various manifestations of intelligence.⁶ In the course of his work, he (and his wife) focused their attention on the effects that lesions affecting the emotional aspects of the brain have on cognition where the other parts of the brain and in particular the parts of the brain capable of language and articulation were unaffected medically.

Based upon his work with such patients, he reported that in one case an entirely successful person who suffered this damage began making erratic and poor decisions resulting in the lose of his wealth and the ruination of his marriage. He discusses a second patient who simply could not bring himself to making simple choices such as where to go to lunch or dinner. This person would debate endlessly on the pros and cons of the various possible establishments. Damasio goes on to say the following concerning his patient, a man named Elliot:

The reason why [he] cannot choose is that [he hasn't] gotten this sort of lift that comes from emotion. It is emotion that allows you to mark things as good bad or indifferent...[I]t is that kind of emotional impetus that [he lacks] and cannot conjure up for a given situation; an emotional state that would decide [him] in one direction or another and of course this is something that we all can relate to. We constantly [can be] swayed in what we do...[by] our past experience with a certain kind of situation...[W]hat we remember from the previous situation ...is not just the facts, not just the outcome. [We remember] that it may [have been] good or bad. We also remember whether or not what we felt was good or bad... [S]omething that people need to understand is that when you are making decisions any day of your life and of course the choices you make are going to produce either a good on a bad outcome or something in between, you not only remember what the factual result is but also what the emotional result is...[T]hat tandem of artifact and associated emotion is critical and of course most of what the wisdom we construct overtime is actually the result of cultivating that knowledge about how our emotions behaved and what we learned from them.⁷

⁵ Damasio, A. (1994). Descartes' Error: Emotion, Reason and the Human Brain. Penguin. The title suggests Damasio's findings that "being" has to do with more than thought alone.

⁶ This approach to the study of cognition is not unique to Dimasio. See: Howard Gardner, PhD, Harvard Graduate School of Education (2011). Multiple Intelligences: The First Thirty Years, at <https://howardgardner01.files.wordpress.com/2012/06/intro-frames-of-mind_30-years.pdf>.

⁷ See: This Time With Feeling: David Brooks and Antonio Damasio Aspen Ideas Festival 2009 <http://library.fora.tv/2009/07/04/Antonio_Damasio_This_Time_With_Feeling>. See also: Damasio, A. (2000). The Feeling of What Happens: Body and Emotions in the Making of Consciousness. Houghton Mifflin Harcourt.

Damasio discusses how learning occurs and how emotions influence the choices we make in life. Most telling is his commentary on a person's indecisiveness in the absence of any emotional input (in Elliot's case, due to a brain lesion). When left totally to his reason, Elliot was incapable of making any decision even in the case of the most trivial of matters. If this was true in the case of moral or ethical learning, then our traditional method of instruction would make sense since one could go about constructing through examples and hypotheticals the appropriate emotions that would befit given situations. If it is not true, and that was the conclusion of the authors' earlier paper discussing the Parable of the Good Samaritan, then students are already wired (either hardwired or soft wired depending on one's beliefs) to experience emotions when confronted with those situations involving ethical or moral questions and the role of instruction should therefore be first to acknowledge the legitimacy of those feelings and then explore how theorists have worked to give expression or articulation to them. In other words, any such discussion should necessarily bring realization to the fact that people are not blank slates when it comes to questions of ethics or morals and that the role of pedagogy should be to bring amplification to what students likely innately feel through the articulation of ethical or moral teachings.

Making Connections Between Moral-Ethical Beliefs and Human Physiology

If it is true that we do innately have a sense of right and wrong, good and evil, what can be said of ethical or moral theory and its proponents? In other words, does referencing them serve any legitimate pedagogical purpose beyond filling additional credit hours of instruction? The clear answer to this question of relevance or importance when it comes to ethical instruction is that it certainly does have a place in our pedagogical repertoire. It is through such study that neural enhancement can result in deepening the analytical capabilities of our students when facing an ethical dilemma.⁸ Such theory building enables the ability of students to weigh the tradeoffs inherent in such situations that they may face in their professional lives. What is important, however, is that our students fully recognize that their feelings can serve the purpose of a trip-wire alerting them to the possible potential dangers of ethical infractions that they may come to confront.

The authors contend that much of ethical theory⁹ likely originated as insights that scholars drew

⁸ Levitin, D.J. (2014). The Organized Mind: Thinking Straight in the Age of Information Overload. Dutton.

⁹ When it came to the good (ethical) life, Aristotle and Plato for once were in agreement. They both agreed that the good life was one in which people follow their reason, not their passions or their emotions. Interestingly, Aristotle also believed that man's function was not just to think, but to do. See: Herman, A. (2013). The Cave and the Light: Plato Versus Aristotle and the Struggle for the Soul of Western Civilization. Random House. It is no wonder that it took more than two millennia and developments in science and technology to realize the exaggerated belief of both Plato and Aristotle in reason when it comes to human behavior and decisions related to getting things done.

from their feelings about societal phenomena.¹⁰ In fact, the authors would argue the reasonableness of the assumption that much of ethical thinking largely manifests multiple variations on the basic principle underlying the Golden Rule (i.e., treating others as you would wish to be treated). For example, equity theory postulates that people make comparisons to others when it comes to their treatment by an authority.¹¹ In addition, Rawls "veil of ignorance" asks decision makers to put themselves in the position of someone who may come out on the "short end of the stick" when deciding on a social or political policy.¹² Finally, the cornerstone of our Republic lies in the treatment of all equally in the eyes of the law.¹³ In every instance, such principles reflect a universal theme that all persons are deserving of respect and fair treatment.¹⁴

A Recipe for Ethical Instruction

¹⁰ There are admittedly anomalies that are hard to explain. For instance, the well-known trolley example finds most people willing to sacrifice the life of one worker to save five others by flipping a switch but would not make the same decision if it meant pushing an obese person off a bridge onto the tracks to derail a runaway train.

¹¹ Equity theory has largely been discussed in the literature of motivation and posits that people become distressed both in situations where they feel over-rewarded and under-rewarded in relationship to their referent group.

¹² Rawls belongs to the social contract tradition. Specifically, Rawls develops what he claims are principles of justice through the use of an artificial device he calls the *Original position* in which everyone decides principles of justice from behind a veil of ignorance. This "veil" is one that essentially blinds people to all facts about themselves so they cannot tailor principles to their own advantage. According to Rawls, this veil will lead to principles that are fair to all and, in doing so, will maximize the prospects of the least well-off.

¹³ The Fourteenth Amendment to the United States Constitution provides in pertinent that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Prior to its adoption, the Fifth Amendment provided for fair treatment of its citizens by the Government.

¹⁴ See: Lehrer, J (2009). *How We Decide*. Houghton, Mifflin Harcourt, at pages 194-195.

"...We are designed to feel one another's pain so that we're extremely distressed when we hurt others or commit moral transgressions. Sympathy is one of humanity's most basic instincts, which is why evolution lavished so much attention on mirror neurons, the fusiform face area, and those other brain regions that help theorize about other minds. As long as a person is loved as a child and doesn't suffer from any developmental disorders, the human brain will naturally reject violence and make fair offers and try to comfort the crying child. This behavior is just a basic part of who we are. Evolution has programmed us to care about one another."

Before launching into any discussion of ethics, the authors believe that a convincing case must be made that all persons are innately gifted with a sense of right and wrong. The case must be further made that ethics is not based on reason so much as it is based on this innate gift. Students must come to realize that their visceral reactions to situations is telling to the extent that they may feel distressed by what they see or what they are being asked to do. Only then will they be able to operate as independent, caring beings and not fall prey to the authoritative rationalizations of their superiors. As Ben Franklin is reputed to have said, “so convenient a thing it is to be a rational creature, since it enables one to find or make a reason for everything one has a mind to do.”¹⁵

The authors would urge the adoption of the following regime when it comes to the introductory part of any ethics instruction. First, students need to watch Frans De Waal’s TED talk entitled, “Moral Behavior in Animals.”¹⁶ In it, he shows how primates and other mammals have a sense of fairness, reciprocity, empathy and cooperation, traits typically thought of as human. This video, which is 18 minutes in length, should then be followed by a two-minute video by Paul Bloom, the Yale researcher, entitled “Are We Hard-Wired for Greed or Empathy?”¹⁷ Here he reports on his finding that children from birth exhibit empathy naturally; that is, it is not a learned behavior. Finally, this short two minute clip should then be followed by a short three minute clip of Antonio Damasio speaking on the relationship of emotion to decision making at the Aspen Institute.¹⁸

Between airing the videos, students should be queried as to their reactions to what they are seeing and hearing and implications thereof to their own lives. Ultimately, the goal is for them to find relevance in their feelings and to see how ethical theories are largely derived from certain basic emotions associated with different social phenomena. The goal is for them to see their own reactions as telling when it comes to judgments that they may be asked to make during their professional lives on matters of ethics.

Conclusion

Scientific developments now make it possible to show students that they are gifted by nature to have an innate sense of perspective when it comes to issues of right and wrong. This gift, if heeded, can serve as a trip-wire alerting them to the possibility that they face when confronting an ethical dilemma. While the decisions they ultimately make may be to the contrary, at least they will have had to grapple with the implications of what they have decided. In the absence of such training, students will not be mindful that their sense of right and wrong is rooted in there very humanity and they will be left to the temptations of their own rationalizations or the rationalization of others.

¹⁵ Circa 1791,

¹⁶ http://www.ted.com/talks/frans_de_waal_do_animals_have_morals

¹⁷ <https://www.youtube.com/watch?v=WABzcRMQ4h8>

¹⁸ https://www.youtube.com/watch?v=1wup_K2WN0I

RISK MANAGEMENT AND CORPORATE GOVERNANCE: SAFETY AND HEALTH WORK MODEL

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ABSTRACT

Currently, engaging in corporate governance practices has become more important than in years past. Federal and state agencies are charged with collecting and disseminating vast amounts of data related to breaches of regulatory oversight including safety. As corporations are faced with the growing trend of managing seen and unforeseen events, there is a need to develop a systematic approach to mitigating injuries, especially from falls or chemical-related accidents, in the workplace. Thus, the authors use information related to OSHA violations to develop and discuss the “Safety and Health Work Model” based on the premise that companies need strategic frameworks to manage business operations and control safety risks in the work environment. Additionally, the authors discuss some recommendations to secure a safe workplace included in risk management processes and conclude with some outcomes (outputs) that are linked to securing a safe workplace.

I. INFLUENCE OF CORPORATE GOVERNANCE ON RISK MANAGEMENT

Risk management and oversight are generally considered as a subset of overall corporate governance. While most researchers agree that no one meaning of corporate governance exists, the concept is often described using the broad definition set forth by the Organization of Economic Cooperation and Development as a “system by which companies are directed and controlled” (OECD, 1999; Nerantzidis, Filos, & Lazarides, 2012). The governance of business is derived from two sources: regulatory governance which is obligatory and mandated by government regulation, and risk-based governance, which is voluntarily undertaken by business firms. Initially, federal, state, and local statutes were presumed to be sufficient for business

organizations to follow in order to operate safely and in a responsible manner (Hutter & Jones, 2007). These regulatory schemes generally set forth specific standards and means of compliance. However, while the extant literature identifies the effect of regulatory law on businesses and for the most part concludes that state influence through law is necessary, it has become apparent that regulations do not provide a sufficient authority over the business of risk management (Gunningham & Kagan, 2005). Private interests are increasingly regarded as more effective in achieving business objectives while at the same time attending to the needs of their stakeholders (van der Berghe, 1999).

Several explanations account for a shift toward private responsibility for managing risk. First, during the late 1980s, a global trend toward limitations on state regulation evolved and resulted in laws that were more loosely written to provide general standards rather than express laws that businesses must adopt. This in turn strengthened the internal oversight of business (Yang, 2011). The lower the involvement of regulatory agencies in determining what levels of risk are tolerable and how much enforcement is needed, the more efficient private enterprise becomes in managing risk. Second, a variety of non-state players, such as non-government organizations and trade associations, became prevalent over the past thirty years, demanding more accountability and transparency from businesses. Private entities have played an increasingly important role in governance because of their decisive advantages of access to information and resources compared to governmental agencies (Kern & Bulkeley, 2009). Third, budget cuts at all levels of government forced their public management functions to be outsourced to private entities (Osborne & Gabler, 1992). Thus, the management of risk has moved from the government to corporate governance (Hutter & Jones, 2007). In response, businesses have adopted management systems to identify, assess, and control potential risks arising in a myriad of business operations, most notably finance, environment, and safety.

As corporations are faced with the growing trend of managing seen and unforeseen events, it is imperative for companies to think about various ways in which to manage these seen and unforeseen events, identified as risks in this paper. One approach is to encourage companies to use the risk management approach to manage risks which includes identifying safety risks, analyzing the impacts of the safety risks, responding to the risks and establishing monitoring and controlling mechanisms to avoid or minimize the impact of the safety-related incidents (Project Management Institute, 2013). In this paper, the authors (a) use propositions to develop a safety and health model, (b) discuss in detail the elements of the model including benefits, and (c) close with some concluding thoughts.

II. INFLUENCE OF THE OCCUPATIONAL SAFETY AND HEALTH ACT ON RISK MANAGEMENT

In 2012, 4,628 workers were killed on the job (About OSHA, 2014). This statistic equates to 3.4 per 100,000 full-time workers were killed while at work and more than 12 deaths every day. In order to monitor and control the deaths and accidents that occur in the workplace, Congress created the Occupational Safety and Health Administration (OSHA) via the Occupational Safety and Health Act of 1970. The purpose of OSHA is “to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance” (About OSHA, 2014, p. 2).

According to the OSHA website, “OSHA is part of the United States Department of Labor. The administrator for OSHA is the Assistant Secretary of Labor for Occupational Safety and Health. OSHA's administrator answers to the Secretary of Labor, who is a member of the cabinet of the President of the United States” (About OSHA, 2014, p. 2). “The Occupational Safety and Health Act of 1970 covers most private sector employers and their workers, in addition to some public sector employers and workers in the 50 states and certain territories and jurisdictions under federal authority. Those jurisdictions include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Northern Mariana Islands, Wake Island, Johnston Island, and the Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act” (About OSHA, 2014, p.2).

III. MODEL DEVELOPMENT AND PROPOSITIONS

Our proposed Safety and Health Work Model recognizes that threats exist in the workplace and firms must adopt practices that minimize risks. The model incorporates risk management and corporate governance as essential components.

Corporate Governance

The corporate governance framework in organizations should (a) promote transparency; (b) be aligned with governmental agencies and legal rulings; and (c) articulate the business goals and operations of an organization (OECD, 1999). Assumption of business risk is paramount to success in some industries; however, risks that threaten organizational success must be mitigated or prevented (Sobel & Reding, 2004). Risks that are related to safety risks include problems that are sometimes related to meeting strategic goals. Thus, corporate governance is a process and approach that can be considered as a means to provide direction, authority and implementation of activities that mitigate and prevent safety risks (Sobel & Reding, 2004).

Risk Management

Risk management includes the processes of planning, identifying, analyzing, responding, monitoring and controlling a risk (Project Management Institute, 2013). Risk management, within the context of workplace safety and health, is an ongoing process that is committed to identifying safety risks, analyzing the impacts of the safety risks, responding to the risks and establishing monitoring and control mechanisms to avoid or minimize the impact of the safety incidents to the employees as well as the organization. Therefore, the overall goal of implementing a risk management approach is to reduce the probability and impact of occurrences that threaten safety and health (Project Management Institute, 2013) in various workplace environments.

In the private sector, a holistic approach to risk management has been adopted by many companies in which attention to physical losses from natural or man-made disasters is combined with management of all possible threats to businesses (Drennan, 2004). Under an enterprise-wide risk management approach, all areas of potential risks are treated on a coordinated basis with oversight by upper management, yet treated as part of every employee's job (Beasley, Clune & Hermanson, 2005). Scholars note that while the board of directors, particularly the audit

committee, is charged with the oversight of the company including setting corporate governance policies, the complexity of the governance function has evolved to include risk management. The responsibility of managing risks must be a part of the overall culture of the company in order to be successful (Brown, Steen & Forman, 2009; Delarosa, 2006).

External forces driving risk management are primarily based on compliance with the Occupational Health and Safety Act and the Occupational Health and Safety Administration (OSHA). OSHA is an illustration where a government agency believes that it is more effective to require private firms to develop their own safety plans rather than following prescribed regulations (Donahue & Zeckhauser, 2011). In addition, threats of lawsuits and concerns over perceptions of corporate social responsibility drive the need for insuring a comprehensive safety program.

Since the Union Carbide chemical plant disaster in Bhopal, India over 30 years ago to the more recent Upper Big Branch mining explosion in 2010, the governance over risk management has focused on operational safety, in particular to minimize risks to employees and the public. Concerns over safety generally fall within two broad categories: product safety and process safety. The former involves the assurance that the product and services produced or rendered are safe to operate or receive by the user and typically includes quality checks, testing, labeling and other activities to insure product safety. The threat of lawsuits for injuries caused by unsafe products is also a factor insuring product safety. Process safety involves assuring that the manufacture of a product is safe and includes internal safety rules, protective gear, mandatory safety checks, and a culture of safe operations of machinery and other potentially dangerous equipment or materials. A good example of the difference can be seen by comparing two companies: Boeing and ExxonMobil. Safety at Boeing is primarily concerned with producing aircrafts that are safe to fly while ExxonMobil is concerned with insuring that oil and gas are extracted and refined in a safe and environmentally benign manner (Valenti, Carden & Boyd, 2014).

Chemical Safety Risks

The former president of Port Arthur Chemical and Environmental Services, LLC pled guilty in federal court for violating OSHA including providing a work setting in which employees were exposed to hydrogen sulfide without protection causing the death of an employee (Korky, 2013). Hydrogen sulfide is a dangerous gas identified as a smell of rotten eggs. The greatest health danger of hydrogen sulfide is that the gas can be inhaled and absorbed through the lungs and at certain levels can cause the body not to be able to use oxygen and can impact the central nervous system (chemical asphyxiation). There are health issues also related to lower levels of hydrogen sulfide including irritation of eyes, nose, throat, and other areas related to breathing. At high levels of intact hydrogen sulfide can impact the body including shock, convulsions, trouble breathing, coma, and sometimes death (Korky, 2013).

Fall-Related Safety Risks

The BLS Report (2014) noted that there were 19,710 injury and illness cases in the specialty trade contractor category which is based on a rate of 64.1 injuries and illnesses per 1,000 full-time workers during 2012. This equated to injured workers requiring a median of 10 days of job transfer or restriction before returning to work. Per the 19,710 noted above, (a) 19,330 were males; and (b) most were between the ages of 35-44. Some examples of injuries identified during 2012 in the specialty trade contractors section included: (a) overexertion and bodily reaction; (b) being struck by objects and equipment; (c) sprains and strains; (d) cuts and lacerations; and (e) musculoskeletal disorders (BLS Report, 2014).

Flin, Mearns, O'Connor and Bryden (2000) noted that employees and other stakeholders beliefs about a safe work environment relate to their perceptions of managements' attitudes and actions related to safety. The aforementioned authors acknowledged that the tone for a safe work environment can be established by setting standards and prioritizing resources; however, there is still a need to discuss how sanctions actually transfer into effective processes and procedures that will mitigate or prevent safety issues in the work place.

Proposition 1: Employees expect that corporations provide a safe work environment. However, in some organizations management may not be practicing adequate corporate governance related to the mitigation and prevention of safety risks, resulting in a greater number of work-related injuries and deaths.

Yuri Raydugin (2013) noted that safe environments and reputation are “soft” objectives that “are normally treated as additional goal-zero types of constraints: no fatalities or injuries, no negative impacts on environment and reputation” (p. 41). Raydugin (2013) further believed that having a safe environment is one of the objectives that provides the cornerstone of a risk management approach which is reflective of the company’s project initiatives that are important to stakeholders. Gorman and Pauken (2003) also noted that being an effective leader or manager means more than just meeting objectives and turning over profits (hard objectives); but also, mastering the content and techniques that are required to provide a safe and secure working environment. Cooling (2013) reported that there is a growing phenomenon for safety to be part of enterprise-wide risk management approach. The enterprise-wide risk management approach entails compliance “with all applicable company and industry safety requirements and standards, including zero-goal in terms of safety incidents” (Raydugin 2013, p. 42). This enterprise-wide business approach includes corporate governance tactics that are transferred into “high corporate standards operated more safely, more professionally, and, ultimately, more profitably” (Dolan, 2012, p. 25).

Proposition 2: Having a safe environment is one of the “soft” objectives related to a risk management program. A zero tolerance constraint will result in fewer work place injuries and deaths.

The absence of fall protection is one of the most frequently cited violations by OSHA during inspections of various worksites. For the fiscal year 2013, which includes time periods from October 1, 2012 to September 30, 2013, failure to provide protections from falls was the

number one cited violation by OSHA during its inspections at various companies (“Top 10 Most Frequently Cited Standards,” 2013). Other cited violations in order of the number of citations after falls include: hazard communication, scaffolding, respiratory protection, electrical, wiring methods, powered industrial truck, ladders, lockout/tagouts, electrical, general requirements and machine guarding (“Top 10 Most Frequently Cited Standards,” 2013).

In addition to being cited as the most frequent violation from October 1, 2012 to September 30, 2013, Huang and Hinze in their 2003 study also noted that inappropriate use of fall protection equipment and removal and inoperative safety equipment contributed to more than 30% of the falls in their study, which included fall statistics since 1997 on construction sites. Huang and Hinze (2003) further noted the following types of inadequate or inappropriate use of fall protection equipment: working on an elevator without a tied-off full body harness and unhooking the harness when moving from location to location.

Providing fall protection also includes adequate safety systems (Flin et al., 2000) and these systems not only consist of technology, but also supporting resources to ensure that the systems are working properly. The support resources include but are not limited to safety officials, safety committees, safety auditors and regulatory agencies. An example of a fall violation, which included implications for the entire safety system, occurred in Massachusetts when a contractor was cited by OSHA for “alleged willful, repeat, and serious violations of workplace safety standards regarding fall hazards” (Korky, 2013, p. 2) More specifically, the allegation was based on the claim that “workers at the site were exposed to fall risks from nine feet up to 30 feet due to inadequate or missing fall protection safeguards. Fall hazards related to front ladder misuse and inadequate personal fall arrest systems that could allow workers to fall more than six feet and stride lower levels in violation of OSHA standards were also found” (Korky, 2013, p. 2).

Although not as common as workplace falls, chemical related injuries are major concerns to OSHA because they occur in a variety of agricultural and manufacturing industries. Failure to implement adequate protections is often cited as the primary cause of injuries due to chemical releases and spills. In a recent report on the accident in Texas which claimed the lives of four workers, OSHA reported that the cause of the accident was the lack of safety precautions. “Had the company assessed the dangers involved, or trained their employees on what to do if the ventilation system stopped working, they might have had a chance,” said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels (OSHA Regional News Release, 2014).

Proposition 3: There is a relationship between lack of safety protection (failure to respond to risks) and safety and health issues.

IV. SAFETY AND HEALTH WORK MODEL

The safety and health work model is based on the premise that companies need strategic frameworks to manage business operations and mitigate risks in the work environment (Story & Price, 2006).

Safety Risks (Input)

As corporations are faced with the growing trend of managing seen and unforeseen events, it is imperative for companies to think about various ways in which to manage these seen and unforeseen events, identified as safety risks. This model is explained with reference to risks associated with falls especially in the construction industries, but the framework is equally applicable to any industry and any type of employment-related accident.

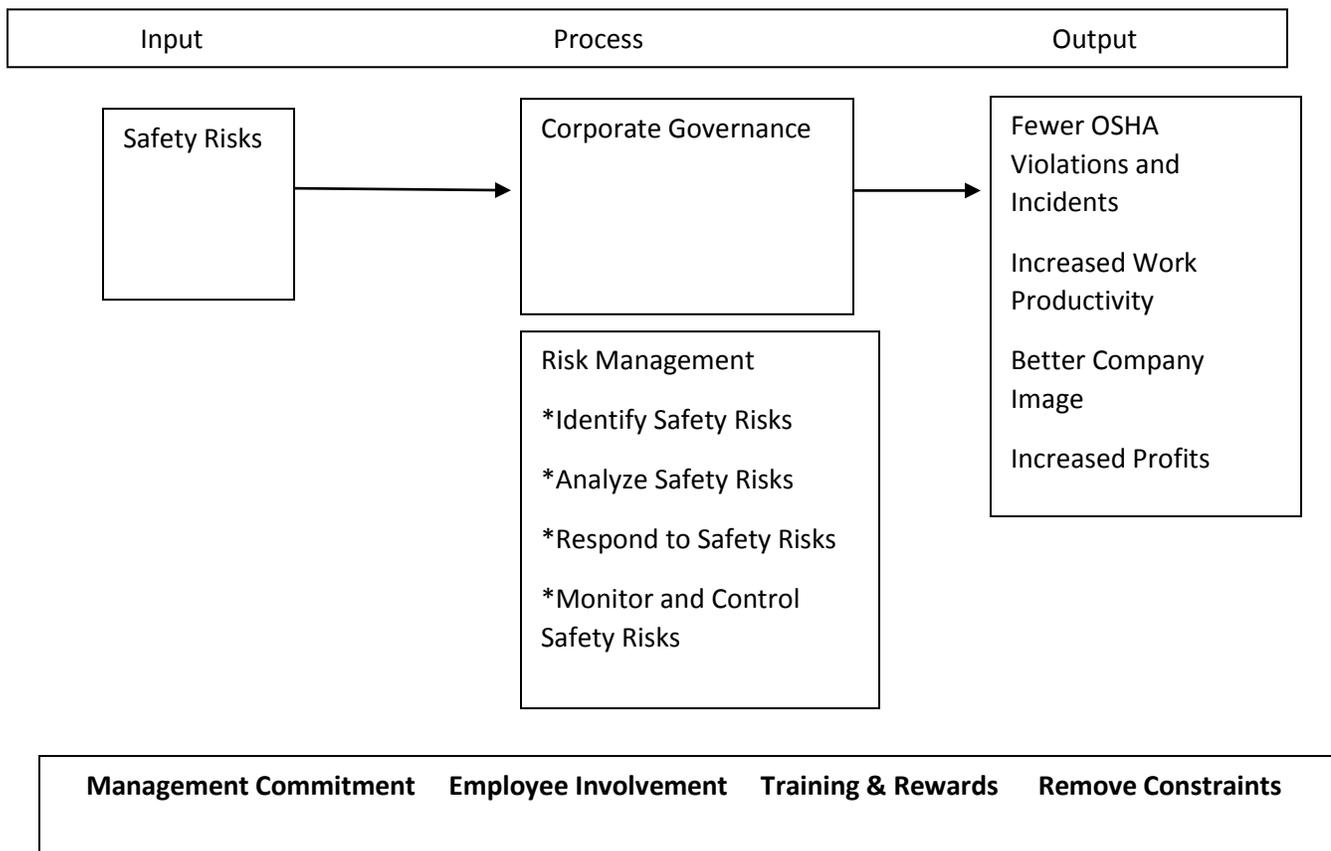


Figure 1: Safety And Health Work Model

Corporate Governance and Risk Management (Process)

As noted by Robert Cooling (2013), governance includes the system in which entities are controlled by their board of directions and includes a focus on identifying, analyzing, responding to and controlling risks (Project Management Institute, 2013). The authors contend that organizations should embrace zero-tolerance to safety infractions as a means of unbundling their corporate governance initiatives. Cooling (2013) has reported that there is a need for safety issues to be acknowledged by the entire board of directors and not just specific board members. Cooling (2013) believed that integrating safety issues into corporate governance activities was an effective way to involve all company workers. Thus, organizations need to develop a risk management plan to integrate all workers including: *identifying safety risks, analyzing the impacts of the safety risks, responding to the risks and establishing monitoring and controlling*

mechanisms to avoid or minimize the impact of the safety incidents (Project Management Institute, 2013). This risk management plan needs management commitment and employee involvement (Cooling, 2013; Korky, 2013) to ensure the risk management plan is effectively implemented.

The *identified safety risks* in this paper are related to injuries, especially falls, in the workplace. Thus, organizations need to include activities to ensure that there are plans to identify all hazards. For example, organizations can designate workers to complete worksite surveys including periodic reviews and observations to identify hazardous conditions. Additionally, there also needs to be a process in place for employees to report identified hazardous conditions without reprimands. This anonymous reporting may be in the form of phone calls or emails for the protection of the employees.

Analyze safety risk includes deciding how likely the fall incident will occur and the potential impact to the organization (Project Management Institute, 2013). In most instances assessing the risks also considers “balancing the level of risk against the measures needed to control the real risk in terms of money, time or trouble” (Health and Safety Executive, 2014, p. 2). The risk evaluation process should also include an examination of what the organization is reasonably expected to know about employee falls and the associated safety prevention. Some of the steps for assessment include conducting meetings with stakeholders to determine the likelihood of falls occurring in certain areas and discussing the impact of those falls, noting types of injuries most often caused by a fall (Project Management Institute, 2013). For example, managers may note that there is a high probably and high impact of falls when construction workers are replacing the roof, sidings and windows on a three-story residence.

Falls are the most frequently cited injuries in the OSHA standard for the construction industry and remain the leading cause of death (OSHA Regions News Release, 2014). Removing organizational constraints, such as time performance pressures, for certain types of jobs (Linguard & Rowlinson, 1998) help to ensure the ability to perform work safely in the areas where access to heights is required. Some of the other *responses to safety risks* include: preventing access to unsafe work areas, organizing work to reduce exposure to unsafe work areas and wearing protective equipment (Health and Safety Executive, 2014). Additionally, another response, as noted by the OSHA Regional News Release (August 5, 2014), includes fall protection equipment “such as guardrail systems, safety nets, warning-line systems or personal fall arrest systems” (p. 1). Thus, it is important for organizations to allocate resources for safety structures and equipment.

Monitoring and controlling processes include the processes for implementing, tracking and monitoring fall risks and include (a) processes such as executing risk responses; (b) tracking the identified potential fall risks to determine whether falls are likely to occur; and (c) evaluating the effectiveness of the overall fall risk management processes (Project Management Institute, 2013). An important consideration of monitoring and controlling processes includes regular reviews of the risk management process and evaluation of the following questions: (a) have there been any revisions in the fall prevention strategies?; (b) have all processes been implemented during the year?; (c) have workers identified additional fall problem areas?; and (d) have you identified lessons learned?

Monitoring and controlling processes also include training employees about safety processes (Cooling, 2013; Korky, 2013) and establishing rewards for adherence to zero tolerance practices (Linguard & Rowlinson, 1998). Safety training needs to ensure that all employees understand potential job hazards and are aware of the strategies to deal with the hazards. Additionally, the training needs to be updated and revised continuously based on changing work conditions.

Benefits of the Safe and Healthy Work Model (Output)

The benefits of implementing the safety and health work model include fewer OSHA violations (Danna & Griffin, 1999), fewer work place injuries or deaths, enhanced worker productivity (Cooling, 2013), improved company image (Dolan, 2012), and increased profits (Dolan, 2012). More specifically, the safety and health work model is focused on corporate governance practices that do not alienate stakeholders and humiliate various companies and professions (Cooling, 2013). These benefits are directly related to processes and procedures sanctioned by the board of directors and senior management levels and implemented by all employees in accordance with an enterprise-wide risk management approach.

In addition, maintenance of statistics helps to assess the overall safety and health risks and to identify activities to mitigate and reduce safety issues. “Statistics of work-related injuries and illnesses are an important aspect of occupational safety and health. These statistics provide the detailed information needed to make workplaces safer for the nation’s workers” (BLS Report, p. 35).

V. CONCLUSION

The idea that “OSHA is making a difference” (“Commonly Used Statistics, 2014” p. 1) is supported by data. OSHA along with state partners, employers, safety and health personnel, unions, and safety and health advocates have worked together as a unit to make a difference. For example, “since 1970, workplace fatalities have been reduced by more than 65 percent and occupational injury and illness rates have declined by 67 percent. At the same time, U.S. employment has doubled” (“Commonly Used Statistics, 2014” p. 1). Additionally, “worker injuries and illnesses are down-from 10.9 incidents per 100 workers in 1972 to 3.4 per 100 in 2011” (“Commonly Used Statistics, 2014” p. 1).

Danna and Griffin (1999) developed a framework that reported inputs and outputs related to the well-being in the workplace which is consistent with the model presented herein. The consequences of not having a safe and healthy workplace include (a) individual consequences related to physical, psychological and behavioral consequences, and (b) organizational consequences related to health insurance costs, productivity/absenteeism and compensable disorders/lawsuits.

While the transfer of risk governance to a private role is for the most part believed to be necessary, it is not without limitations. Private governance codes are often vague and are implemented without sufficient enforcement mechanisms. The potential for ignoring governance mandates or categorical disregard of internal policies in exchange for increased profits is an

attractive temptation. In the financial arena, we witnessed huge collapses of corporations such as Enron and WorldCom which were caused by governance lapses and, in reaction, were followed by Congressional passage of the Sarbanes-Oxley Act of 2002 and regulatory responses by the Securities and Exchange Commission as well as the New York Stock Exchange. Thus, scholars suggest that private governance must be supplemented by institutional pressures from both society and governmental agencies (Mayer & Gereffi, 2010). Risk management, accordingly, stems from both internal authority and federal and state law, and serves herein as an approach to mitigating and eliminating safety risks.

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FACEBOOK, SPEECH, AND THE NATIONAL LABOR RELATIONS ACT

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Social media is ubiquitous in our post-Internet society. Businesses are interested in marketing aspects of social media, prizing statistics such as Facebook likes or Twitter followers. Social media and publicity come at a cost, however, in many cases. Employees may post on social media sites information an employer finds objectionable or harmful to the employer's business, leading to employer restrictions on employee comments. Even in the realm of nongovernment employers, protections do exist for employee social media speech. The paper focus is on such protections flowing from the National Labor Relations Act.

I - Introduction

Employers in America today are aware generally of federal and state protections allowed workers regarding hiring, dismissals, and other employment decisions. Regardless of whether an employer is familiar with a specific employment law, there is a general familiarity with the notion that employment law restricts how an employer treats individual employees or job applicants. Managers realize, for example, that it is usually illegal to discriminate against a specific individual based on the individual's age, sex, or race. "Employment law" is the label used to identify the laws regulating individual employee rights.²

And the National Labor Relations Act ("NLRA" or "Act")? Ask most employers or employees about the Act and the answer is often the same. The NLRA does not apply unless the workers have organized a union or are organizing a union. "Labor law" is the label mainly used for issues involving labor and management relations under the NLRA.

The above labor law/employment law distinction may be the general perception in the marketplace, but the reality is different. The National Labor Relations Act is a law that protects both union and nonunion employees. That is, an employee is not required to belong to a union or to be engaged in union organizing to receive protection under the NLRA.³ Under the NLRA, nonunion employees have the right to strike. Firing employees for "walking off the job" may

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² A partial list of laws protecting employees/applicants includes the following: the Equal Pay Act, 29 U.S.C. § 206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-633a; the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678; the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461; the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq.; and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2617, 2651, & 2652.

³ See e.g., *Vencare Ancillary Services, Inc. v. N.L.R.B.*, 352 F.3d 318, 322 (6th Cir. 2003).

constitute an unfair labor practice. Nonunion employees complaints about pay, employment benefits, supervisory personnel, or other working conditions may be protected “concerted activities” under section 7 of the Act.

Of concern to employers today: employee complaints about the employer, poor managerial decisions, or deficient company policies, are posted in social media. These employee complaints may be “concerted activities” with attendant NLRA protection. Many employers appear to be unaware of legal protections flowing to employees through the NLRA.

II - The National Labor Relations Act

The National Labor Relations Act was passed and enacted into law in 1935.⁴ The purpose of the NLRA is summarized in the following language from section 1 of the Act:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁵

The stated purpose is broader than union organizing. Employee rights under section 7 of the Act do include the right to self-organize, join, or assist labor organizations. More broadly, however, section 7 includes also the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”⁶ Basically, if an employee is seeking improvements in pay, hours, safety, workload, or other terms of employment that benefit more than just the employee taking action, the employee behavior may be protected. Section 8 of the Act designates as an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”⁷

III - NLRB v. Washington Aluminum

As stated above, employee concerted activities for the purpose of collective bargaining or other mutual aid or protection are protected under section 7 of the National Labor Relations Act, even in the absence of union organizing. Employer retaliation or discrimination against an employee engaging in protected concerted activity may subject the employer to liability under NLRA section 8(a)(3) for an unfair labor practice. This legal fact was reinforced by the Supreme Court over fifty years ago in *NLRB v. Washington Aluminum Co.*⁸

In *Washington Aluminum*, concerted activity for mutual aid was clearly evidenced as seven employees banded together to protest cold working conditions. This was true despite the fact

⁴ The Act is found in 29 U.S.C. §§ 151-169.

⁵ 29 U.S.C. §151.

⁶ *Id.* at §157.

⁷ *Id.* at §158(a)(1).

⁸ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

that the employees involved were not unionized nor were they seeking to form a union. Generally, two or more employees acting together to address workplace concerns or improve workplace conditions are acting in a concerted manner. Even one employee acting alone, however, may satisfy the concerted requirement. When only one employee is involved in some manner of employment activity, the employee must establish that his behavior reflects more than a personal complaint. The employee must be acting beyond personal self-interest, attempting to improve other employees' working conditions.⁹

Not all employee conduct will be protected as concerted activities for mutual aid or protection. Behavior that is unlawful, too disloyal to the employer, or in breach of contract may not be protected.¹⁰ However, when it has been established that the employer's conduct adversely affects employees' protected rights under the NLRA, the burden falls on the employer to demonstrate legitimate and substantial business justifications for its conduct.¹¹

IV – Business and Social Media

Social media is part of our social fabric today. One leading social media site, Facebook, reported recently 1.23 billion monthly active users, and 757 million daily active users.¹² Businesses are interested in marketing aspects of social media, prizing statistics such as Facebook likes or Twitter followers.¹³ Social media and publicity come at a cost, however, in many cases. Employees may post on social media sites information an employer finds objectionable or harmful to the employer's business.

A Nordstrom employee in Portland, Oregon was responding to recent police shootings involving African American males. The employee posted on his personal Facebook page that "Instead of slamming the police, I prefer a Kenny Fort approach. Every time an unarmed black man is killed, you kill a decorated white officer, on his doorstep in front of his family." The employee was fired.¹⁴ This employee firing appears justified and legal under the NLRA.

In a different vein, consider the recent firing of SendGrid software developer Adria Richards. SendGrid is a firm that develops cloud-based e-mail service. Ms. Richards was a conference attendee at a PyCon conference in Santa Clara, California, in 2013. The conference invites computer software developers who code in the Python language. At the conference, Ms. Richards overheard sexual jokes she considered offensive and tweeted a photo of the individual offering the jokes, including his offensive remarks.

⁹ National Labor Relations Board v. White Oak Manor, 452 Fed.Appx. 374, 380 (2011).

¹⁰ See Calvin William Sharpe, "By Any Means Necessary"--Unprotected Conduct and Decisional Discretion under the National Labor Relations Act, 20 Berkeley J. Emp. & Lab. L. 203 (1999).

¹¹ National Labor Relations Board v. Great Dane Trailers, Inc., 87 S.Ct. 1792, 1798 (1967).

¹² TNW, "Facebook passes 1.23 billion monthly active users, 945 million mobile users, and 757 million daily users," available at <http://thenextweb.com/facebook/2014/01/29/facebook-passes-1-23-billion-monthly-active-users-945-million-mobile-users-757-million-daily-users/>.

¹³ George Pike, *Social Media and the Workplace*, 31 INFORMATION TODAY 1-1, 25 (Nov. 2014), retrieved from <http://ezproxy.library.astate.edu/login?url=http://search.proquest.com/docview/1625404665?accountid=8363>.

¹⁴ *Nordstrom Fires Employee Over Controversial Facebook Post*, USA Today, Dec. 16, 2014, available at <http://www.usatoday.com/story/money/business/2014/12/16/norstrom-oregon-facebook-employee-fired/20469007/>.

Later, Ms. Richards was fired for her tweet. In support of the firing, SendGrid made the following statement:

"To be clear, SendGrid supports the right to report inappropriate behavior, whenever and wherever it occurs," Franklin wrote. "Her [Ms. Richard's] decision to tweet the comments and photographs of the people who made the comments crossed the line. Publicly shaming the offenders – and bystanders – was not the appropriate way to handle the situation."¹⁵

A reasonable argument could be presented that the SendGrid firing is an unfair labor practice under the NLRA. That is, one could posit that attending a professional conference is a workplace activity. When Ms. Richards posted her account of sexual harassing comments at the conference, she arguably was alerting other employees of SendGrid (as well as others following her Twitter feed) of an issue affecting workplace conditions. Ms. Richard's Twitter post was not behavior that is unlawful, too disloyal to the employer, or in breach of contract, facts causing the tweet to lose NLRA protection. In summary, Ms. Richard's actions could be "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The SendGrid response to this behavior, firing Ms. Richards, could be an NLRA section 8(a)(3) unfair labor practice.

V. Unlawful Social Media Company Policies

The General Counsel of the National Labor Relations Board has provided an analysis of company social media policies that violate the National Labor Relations Act.¹⁶ Employer policies regarding social media are unlawful if the policies "would reasonably tend to chill employees in the exercise of their Section 7 rights," including the right to engage in concerted activities for the purpose of mutual aid or protection.¹⁷ From the report of the General Counsel, the following examples of social media policies from three different employers are presented.

Employer, Nationwide Retail Stores Chain – Selected Social Media Policy Provisions¹⁸

1. Don't release confidential guest, team member or company information
2. You should never share confidential information with another team member unless they have a need to know the information to do their job Never discuss confidential information at home or in public areas
3. If you believe . . . confidential information may have been misused, it is your responsibility to report that information. A violation . . . regarding confidential information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution.

¹⁵ Roger Yu, *SendGrid fires staffer for sex jokes tweet*, USA Today, March 23, 2013, available at <http://www.usatoday.com/story/tech/2013/03/21/sendgrid-fires-employee/2007605/>.

¹⁶ *Report of the Acting General Counsel Concerning Social Media Cases*, NLRB Office of the Gen. Counsel, Memorandum OM 12-59, May 30, 2012, available at <http://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies>.

¹⁷ *Id.* at 3, citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

¹⁸ *Id.* at 4-5.

Analysis: Employees' NLRA section 7 rights include the right to discuss wages and other working conditions with each other or third parties.¹⁹ Provisions #1 and #2, above, could be reasonably interpreted by employees to prohibit lawful exchange of information about terms and conditions of employment. Thus, the provisions are unlawfully broad. Provision #3 requires reporting to employers of employee activities under provisions #1 and #2. These employee activities could be lawful concerted activities for the purpose of mutual aid, rendering the mandated reporting of such activities unlawful.

Employer, Motor Vehicle Manufacturer – Selected Social Media Policy Provisions²⁰

4. If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.
5. Treat everyone with respect. Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional.
6. Report any unusual or inappropriate internal social media activity to the system administrator.
7. [Employer's] Social Media Policy will be administered in compliance with applicable laws and regulations (including section 7 of the National Labor Relations Act).

Analysis: Provision #4 has multiple legal problems. The phrase “completely accurate and not misleading” is overly broad and could suppress lawful employee speech under the NLRA, section 7. Criticism of employer policies and personnel, even if incorrect, are protected by the Act, absent malicious intent. The admonition to “not reveal non-public company information on any public site” is unlawfully broad as it serves to stop protected employee discussions about wages and terms of employment, even if such information is “non-public.” In a similar manner, provision #5 is unlawful. Protected employee rights of criticism and discussion regarding working conditions could be impeded by a restriction forcing employees to avoid “offensive, demeaning, or abusive” comments.

In the context of the employer's social media policy, provision #6 is unlawful. As other provisions are unlawful, e.g., provisions 4 and 5, requiring employees to report to the employer what should be lawful employee behavior will have a chilling effect on employee rights.

Last, the “savings clause” found in provision #7 is too vague to protect the employer. Employees are provided no guidance on what behaviors are protected by the NLRA. Employees would be required to interpret the law and decide which employer provision to follow or ignore, a task that is chilling to employee protections.

Employer, International Health Care Services Company – Selected Social Media Policy Provisions²¹

¹⁹ See generally Appendix B, following in this paper.

²⁰ Report of the Acting General Counsel Concerning Social Media Cases, *supra* note 16, at 6.

8. If during the course of your work you create, receive or become aware of personal information about [Employer's] employees . . . , don't disclose that information in any way via social media or other online activities.
9. Adopt a friendly tone when engaging online. Don't pick fights. Social media is about conversations.

Analysis: Provision 8 above is overly broad and unlawful as the prohibition on disclosing employee personal information could be interpreted to include a prohibition on discussing wage and other working condition issues, protected NLRA discussions. Provision #9 appears reasonable on its face. However, discussions about wages and working conditions may turn contentious. Provision 9 unlawfully restrains employee rights to discuss topics that ultimately may lead to serious disagreements.

VI – Conclusion

Employers today may desire to control all aspects of a company's social media presence. That desire, however, could conflict with employee rights protected under the National Labor Relations Act. Care should be taken to ensure legitimate company/employer concerns about social media do not infringe employee rights. With the preceding illustrations of unlawful social policy provisions, it may appear the potential for difficulty is great. However, employers may avoid trouble by modifications to existing social media policies. Removing ambiguity from existing policies and clearly identifying protected employee section 7 behaviors, versus behaviors violating company policies, is necessary to protect company and employee rights.

²¹ *Id.* at 9-10.

Appendix A

Social Media Site	Estimated Unique Monthly Users ²²
	900,000,000
	310,000,000
	255,000,000
	250,000,000
	120,000,000

²² *Top 15 Most Popular Social Networking Sites*, EBizMBA—the eBUSINESS GUIDE, available at <http://www.ebizmba.com/articles/social-networking-websites#.VOzVpBGKi84.email>.

Appendix B

Examples of Concerted Activities for Mutual Aid - Outside of Union Organizing

Case	NLRB Decision
Jones & Carter, Inc./Cotton Surveying Company and Lynda Teare ²³	Employee was wrongfully fired for discussing salary information with co-workers
Advanced Facial Plastic Surgery Center, PA and Karen Ann Connella and Vanessa Katherine Miller ²⁴	Employee was wrongfully fired for discussing workplace bonuses with other employees. Later another employee was unlawfully fired for speaking in support of the fired worker during employer group meetings.
Rain City Contractors ²⁵	Three employees were wrongfully fired for voicing their concerns in a YouTube video that the employer was forcing employees to work with foundation soil contaminated with toxins. The employees were building concrete foundations at a former Superfund site. The NLRB Regional Director determined that the YouTube video was protected because the employees voiced concerns about safety in the workplace (a legitimate workplace concern), and the public airing of their complaints did not lose NLRA protection because the employees accurately described their concerns about working conditions.
Northfield Urgent Care, LLC and Jennifer Grossman ²⁶	Two staff members at an urgent care center were wrongfully fired for sending an anonymous letter to the owner/doctor, asking him to reconsider a plan to cut wages and suggesting alternate ways to save money.
MCPC, Inc. and Jason Galanter ²⁷	The Board unanimously held the Respondent violated the NLRA by maintaining a confidentiality rule prohibiting dissemination of “personal or financial information” Such a rule chills employees from discussing their wages. Also, employee Jason Galanter was engaged in protected concerted activity when he mentioned an executive's salary in the course of complaining about workloads at a team-building meeting.
National Labor Relations Board v. Main Street Terrace Care Center ²⁸	The Court of Appeals held the NLRB properly concluded that the employer violated the National Labor Relations Act by promulgating a rule prohibiting employees from discussing wages with one another, even if rule was unwritten and not routinely enforced.
Texas Dental Association and Nathan Clark, Barbara Jean Lockerman, and Patricia St. Germain ²⁹	A supervisor at a dental association was wrongfully fired after she refused to divulge the names of employees who had anonymously signed a petition protesting top management; employees who signed petition were unlawfully fired after complaining about unfair treatment by top management.

²³ No. 16-CA-027969, 2012 WL 5941221 (N.L.R.B. Div. of Judges 2012).

²⁴ Nos. 16-CA-027886, 16-CA-066734, and 16-CA-070169, 2013 WL 2367922 (N.L.R.B. 2013).

²⁵ No. 19-CA-31580.

²⁶ No. 18-CA-019755, 2012 WL 889526 (N.L.R.B. 2012).

²⁷ No. 06-CA-063690, 2014 WL 495815 (N.L.R.B. 2014).

²⁸ 218 F.3d 531 (6th Cir. 2000).

²⁹ No. 16-CA-025349, 2008 WL 1732928 (N.L.R.B. Div. of Judges 2008).

<p>Hispanics United of Buffalo, Inc. and Carlos Ortiz ³⁰</p>	<p>Five employees of Hispanics United of Buffalo were wrongfully fired after they posted comments on Facebook concerning working conditions, including work load and staffing issues. The NLRB held the employees' Facebook discussion was protected concerted activity because it involved a conversation among coworkers about their terms and conditions of employment, including their job performance and staffing levels.</p>
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³⁰ No. 03-CA-027872, 2011 WL 3894520 (N.L.R.B. Div. of Judges 2011).

INSURANCE REGULATIONS AND UNCLAIMED PROPERTY: A DILEMMA FOR LIFE INSURERS

Stephen L. Poe¹

Abstract

State regulators have become increasingly concerned about the amount of unclaimed death benefits retained by insurers and whether these companies have complied with their duties as holders of unclaimed property under state law. The purpose of this paper is to describe the dilemma faced by life insurance companies when attempting to comply with these duties, and to propose a framework for a solution to this conflict. To this end, an overview of the history giving rise to this conflict is presented, the concerns of both state regulators and insurers are discussed, and a critique is offered as to the usefulness of requiring insurers to periodically check a public database known as the Death Master File in order to ascertain death information about their insureds. The changing environment for life insurers in this area is noted, which has caused many life insurers to adjust their death benefit payment practices accordingly, whether pursuant to the terms of settlement agreements, recent updates to state regulatory requirements, or as a matter of adopting best practices. The paper concludes by proposing a framework for a solution that might ease this dilemma, resulting in clarity for insurers and faster payment of benefit to beneficiaries.

INTRODUCTION

Traditionally, the payment of the death benefit under a life insurance policy has been a fairly straightforward matter. Once a claim is made and proper documentation of the insured's death has been submitted, the insurer issues a draft in the amount of the death benefit and delivers it to the beneficiary. This payment process assumes, of course, that 1) the beneficiary or other interested party knew of the policy's existence and its whereabouts, and 2) he or she actually made a claim and was able to obtain proper verification of the insured's death. Unfortunately, one or both of these assumptions may be inaccurate, resulting in the policy not being paid and the death benefit funds remaining with the company. It has been estimated that at one point perhaps as much as one billion dollars of such unclaimed funds have been retained by life insurance companies (Hartley, 2012, at 364). At some point, these funds are required to be delivered to the state's treasury according to the provisions of the state's unclaimed property regulations – a process known as escheatment.

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Over the past five years, state regulators have become increasingly concerned about the amount of unclaimed insurance benefits retained by insurers and whether these companies have complied with their duties as holders of this property under state law. This concern has led to multi-state investigations into the payment practices of life insurers and their compliance with state unclaimed property regulations, pursuant to which some of the largest insurers in the industry have been subjected to audits and insurance market conduct examinations. During the course of these investigations, some insurers have entered into settlement agreements with state authorities, and litigation has been brought by policy holders and state agencies throughout the country. In light of these events, the environment has changed dramatically for life insurers, many of whom have adjusted their death benefit payment practices accordingly, whether according to the terms of the settlement agreements, recent updates to state regulatory requirements, or as a matter of adopting best practices. The purpose of this paper is to explore these issues more fully and to propose guidelines states might adopt to assist insurers in light of this new environment.

Background and History

As indicated above, the claim process under a life insurance policy is ordinarily straightforward. For certain policies, however, determining whether the insured has died and locating the beneficiary is not always an easy process.

In the first half of the 1900s, life insurance companies sold smaller policies by having their agents solicit business door-to-door from individual customers (Scism, 2012). Information collected during these sales transactions generally did not include the policy holder's social security number since policy proceeds generally were not taxable to the policy holder or the beneficiary. Agents had strong incentives to push these policies as they received commissions not only from the original sale but each year the policy was renewed. Customer satisfaction with these policies was not very great, however, as premiums were high when compared to the amount of coverage provided. Due to policy holders' complaints about cost and the insurer's desire to save money on agent commissions, insurers began to phase out sales of these smaller policies in the 1960s (Scism, 2012). Many existing policies were declared to be fully paid, so policy holders would no longer have to pay premiums on them.

Since policy holders no longer had to pay premiums on their policies, they had no reason to maintain contact with their insurers. Over time, many policy holders relocated to other addresses. As a result, the policy holder's family often lost track of the policy and thus did not know to file a claim following the policy holder's or insured's death. And even when the insurer learned of an insured's death from outside sources, payment of the death benefit was made difficult due to the insurer's inability to locate the beneficiary (Scism, 2012).

Absent a claim or notice of death, the death benefit could not be paid, so these funds remained in the life insurer's accounts. Eventually, when the insured would have reached a certain age stipulated in the policy - typically 90 to 95 - the policy and the benefit monies would be considered "abandoned" for purposes of state unclaimed property regulations. At this point, the dormancy period would begin (lasting three-to-five years typically), and following expiration of this period, the funds used to pay the death benefit would be turned over to the state treasury's unclaimed property division, a process known as escheatment.

In the late 1990's and early 2000's, many mutual life insurers desired to "go public" and become stock-owned public companies. To accomplish this conversion, they had to purchase the ownership interests of their existing policy holders as well as all other owners of the insurer with either cash or stock (Hartley, 2012, at 370-371). Some policy holders could not be located, but many insurers did not check to see if they were still living. The insurers then compensated these policy holders (and paid off the policy) by immediately escheating the death benefit amount to the state so that demutualization could be

completed (Hartley, 2012). As a result, the amounts escheated to the states during this period were much higher than amounts escheated in prior years. In fact, one estimate has put the total amount of these funds over a twenty year period at more than several billion dollars (Stanley, 2013). This large increase in escheated funds caused both state regulators and consumer advocates to take notice.

The Problem: Unclaimed Property Regulations/Escheatment

In the days of the early English common law, real property could be claimed by the king under certain circumstances. This power to “escheat” was later appropriated by the states as part of their police powers (King, 2012). Over time, states began to expand this power to include personal property; specifically unclaimed property. As this doctrine developed, states did not take ownership of the property, but instead acted as a custodian of the property until the rightful owner stepped forward to claim it.

Today, all states have rules imposing duties on property holders that must be followed once the held property is deemed to have been abandoned by the rightful owner. Most states derive their rules from a model statute, such as the Uniform Unclaimed Property Act (UUPA), first proposed by the National Conference of Commissioners on State Laws in 1954 (Solares and Fichera, 2012).

Pursuant to these rules, custodians of unclaimed property must report the property to the state each year and then surrender the property to the state following the expiration of a dormancy period (King, 2012, at 1256-1257). Each state establishes the circumstances when money or other property is presumed to be abandoned, and these circumstances vary from state to state and depend on the type of property involved. The length of the dormancy period also differs from state to state, although it is typically from three to five years (King, 2012). Once property is presumed to be abandoned, all states require the holders of the property to deliver it to the state following the expiration of the dormancy period. This surrender of property is known as escheatment.

Before property escheats to the state, however, these statutes require the holder to use due diligence to contact the owner at his or her last known address in an effort to return the property to the owner. If the owner cannot be located, the holder must then surrender the property to the state and furnish the state with the owner’s name and last known address. The holder’s obligations regarding the property are then completed, and typically the state's unclaimed property division retains the property until it is claimed by the rightful owner (Solares and Fichera, 2012).

These statutes also provide measures to ensure that property holders comply with these requirements. For example, states are authorized to audit property holders to monitor compliance over a period of time. If the holder does not have sufficient information in its files to document the proper amount to be turned over to the state, the state may apply statistical sampling methodology to determine the amount due (King, 2012, at 1256). If violations are detected, the state may impose what can be substantial fines and initiate actions to collect all of these amounts, together with interest. As discussed below, states recently have made good use of these enforcement measures in an effort to ensure that life insurers are fulfilling their duties under these regulations.

APPLICATION OF STATE UNCLAIMED PROPERTY REGULATIONS TO INSURANCE BENEFITS

Although each state has regulations that establish the circumstances when different types of property are presumed to be abandoned, it is not always clear how these regulations apply to insurance policies or their benefits. Life insurers argue that these properties cannot be considered to be “abandoned”

until the insurer has an obligation to pay (Frank, 2012). And, under the terms of the policies themselves and the state insurance regulations, the insurer is not obligated to pay the death benefit until a valid claim has been filed with the company, together with proper verification of the insured's death (such as a copy of the death certificate).

On the other hand, states have argued that these policy provisions and regulations do not discharge the insurer's duty as a property holder under the state's unclaimed property laws (Cruz-Brown, 2012, at 261). In some states, for example, an unclaimed death benefit is considered to be payable the moment the insurer receives knowledge that the insured has died (Florida Statutes §717.107). At that moment, the statutory dormancy period may begin and other duties of a property holder under the unclaimed property law may kick in.

Death Master File

Under state unclaimed property regulations, the holder of property has the duty to use due diligence to locate the property's rightful owner (Solares and Fichera, 2012). Many states have recently interpreted this duty to require insurers to periodically check outside sources to determine whether their policy insureds have died.

Outside sources used to verify death information may be found at the local, state and national level. The best known source is the "Death Master File" (DMF) – the common name of a national database of death records maintained by the Social Security Administration (SSA) – which scientists, medical researchers, hospital administrators and members of the public have consulted for many years to check death information (Sack, 2012). The DMF contains data on over 90 million Americans who have died since 1962, including names, Social Security numbers, zip codes, death dates, and other information made available to the SSA (Sack, 2012). It is updated weekly through information obtained from a variety of sources, including families, funeral homes, hospitals, and state agencies. The DMF does not purport to contain death records of all individuals who have died, however, so the fact that a person's information is missing from the database does not mean that person is still living. Although the DMF has existed for many years, it was not until 1980 that it became accessible for sale to the public (American Council of Life Insurers, 2013). Since then, it has been used by researchers for a variety of purposes as it is the least expensive and the most up-to-date national index of death information.

Despite its usefulness and popularity, the SSA has in recent years limited the amount of information that it makes available to the public through the DMF (Sack, 2012). This announcement has understandably generated a great deal of controversy as the usefulness of the DMF as a reliable, current source of death information has been substantially decreased (see Relying on the DMF Raises Concerns section, *infra*). To date, the SSA has not been particularly sympathetic, noting that its primary task is to manage the social security system, not maintain death information records (Sack, 2012).

Insurer Practices Questioned

For many years, some life insurance companies have searched the DMF to determine whether the owners of their current life annuity contracts have died. They certainly have had a financial incentive to do so: once the contract owner has died, the company no longer has any obligation to pay under the annuity (Ambrose, 2012). On the other hand, should life insurers regularly check the DMF to determine whether any of their insureds have died? In this case, little financial incentive exists for them to do so. First, until such a determination has been made and a proper death claim has been made, the insurer may continue to use the death benefit funds and collect interest on these amounts. Second, if the policy has an anti-forfeiture provision, the insurer could conceivably use the cash value amount in a whole life policy to continue to pay premiums until the cash value is exhausted, at which point the policy is terminated

(Leefeldt, 2011). Third, the insurer has no clear obligation to incur the costs necessary to track down the beneficiary if the beneficiary cannot be located at the address in the insurer's policy records.

At least one industry observer has noted that perhaps as much as twenty-five percent of life policy proceeds may not be claimed by the persons entitled to them (Leefeldt, 2011). Some critics argue that such a high percentage of funds remain unclaimed because life insurance companies have not tried very hard to determine whether the insureds under their policies have died. These critics have also pointed out that this lack of effort does not extend to annuities, as insurers routinely and diligently search the DMF when it comes to checking on the status of their annuity owners (Scism, 2012).

A of a multi-state investigation (discussed below), it appears that these practices may have taken place throughout the industry (Ambrose, 2012). As a result of these discrepancies - checking the DMF when it is in the insurer's best interest to do so and not checking the DMF when it is in the best interests of the beneficiary to do so - the life insurance industry has encountered a great deal of criticism from state authorities and consumer advocates.

For their part, life insurers have good reason to check an outside, independent source like the DMF to get death information for annuity contract owners (Leefeldt, 2012b). Notice of the death of the annuity owner ordinarily terminates the insurer's obligation to make payments under an annuity contract, so the payee has little incentive to quickly notify the insurer about the death of the annuity owner. Accordingly, insurers opt to use independent sources of death information so as to prevent loss that might otherwise occur if the insurer were unable to recover excess payments made to the payee prior to receiving notice of death under the annuity. In the case of life insurance policies, however, the beneficiary (usually a member of the insured's family) is likely to be in a position to know of the insured's death and has a strong incentive to notify the insurer of that fact as soon as possible in order to collect the death benefit. When the beneficiary makes such a claim, he or she is required to provide a death certificate issued by the state, which is the most reliable source of death. Accordingly, the need for the insurer to consult other outside sources to verify death information (such as the DMF) is not as great.

Insurers have also claimed that they have not regularly used the DMF to ascertain death information since they have not traditionally collected the social security numbers of insureds, particularly on older, smaller policies, as noted above (Leefeldt, 2012a). Without knowing an individual's social security number, it is difficult to use the DMF to accurately verify death information as the search is then based only on name information, date of birth, and date of death. On the other hand, insurers have had to collect social security numbers from annuity owners for tax reporting purposes for many years, so the company readily has on file the information it needs to do an accurate cross-check on the DMF (Leefeldt, 2012a). Accordingly, it can be more effective to use DMF searches on annuity contracts rather than life insurance policies.

STATE REGULATORY INVESTIGATIONS AND SETTLEMENTS

In recent years, state regulators have decided to take action to hold life insurers more accountable for their handling of unclaimed life insurance benefits. As some states have differed in their approach to this problem, the following is an overview of the strategies that states have followed (with many adopting more than one strategy):

One approach has been to investigate and audit the largest insurers doing business in the state. Under this strategy, the state seeks to reach a settlement agreement with the target insurer, according to which the insurer will agree to pay the state millions of dollars in unclaimed policies and benefits, plus fines and interest (Laurie and Ostrowski, 2013). These agreements also may impose additional

obligations on the insurer, such as the duty to regularly check the DMF for death information on their insureds, and establish timelines for handling unclaimed benefits in the future, such as stipulating that the insured's death date, as ascertained from the DMF, triggers the beginning of the state's dormancy period under its unclaimed property regulations.

An example of this approach has been the establishment of a task force comprised of regulators in half a dozen states under the auspices of the National Association of Insurance Commissioners (NAIC), known as the NAIC Investigations of Life and Annuity Claims Settlement Task Force (Stanley, 2013). This multi-state task force launched an investigation into the payment practices of the largest life insurance companies in the market. The purpose of the investigation was to determine whether these practices violated insurance regulatory rules, state deceptive trade practices acts, or insurer's fiduciary duties to surrender unclaimed death benefits and other unclaimed amounts to the states under state unclaimed property rules (Cruz-Brown, et al, 2014). The investigation focused primarily on two practices: insurer compliance with state unclaimed property regulations (for example, whether insurers had been filing annual unclaimed property reports with each state in which they did business) and whether insurers had used the same procedure to determine deaths of insureds under life policies as they did to determine deaths of owners of annuity contracts (Solares and Fichera, 2012).

To assist with the investigation, the states retained auditors on a contingency basis to compare and contrast life insurer practices, and to examine insurers to verify compliance with unclaimed property regulations. In the course of conducting these audits, it appeared some insurers had indeed consulted the DMF on a regular basis to determine the death of annuity owners, but had not checked the DMF to determine the death of insureds under life policies. This apparent finding led some regulators to estimate that more than one billion dollars' worth of life policy payments had been kept by life insurers due to the failure of beneficiaries to make a claim (Schism, 2012). Accordingly, states began to take enforcement action: hearings were held at which life insurance officials were called upon to explain these practices, multi-state market conduct examinations were implemented, and additional unclaimed property audits were conducted. Insurers in some states also had to face actions initiated by the state attorney general's office, the state treasurer's office, and other state agencies (Solares and Fichera, 2012).

A second approach taken by some states has been to emphasize cooperation rather than coercion. Under this approach, states have implemented programs encouraging insurers to voluntarily disclose their unclaimed policies and benefits and then turn over such sums to the state. In so doing, the state would consider any claims for such funds to be paid in full (Laurie and Ostrowski, 2013). Some states further sweetened the offer by providing that insurers who gave written notice of their intent to participate by a certain date would not be subjected to an unclaimed property audit for a certain period of time.

Other strategies include the adoption of reform legislation based on a Model Act proposed by the National Conference of Insurance Legislators (NCOIL) (see section below). In addition, several states have implemented programs designed to help consumers to review the state's online databases for unclaimed insurance benefits (Laurie and Ostrowski, 2013). Finally, some states resorted to litigation by filing suit against insurers doing business in their state. Chief among the claims made is that the defendant insurance companies did not disclose or remit insurance benefits to the state even though the beneficiaries could not be found.

In the face of increased state action to monitor death benefit payment practices and to enforce unclaimed property rules, most insurers have been quick to cooperate with regulatory authorities, with some noting they had begun checking the DMF for death information even prior to initiation of settlement discussions (Scism, 2012). For example, as a result of the multi-state investigation, three of the largest life insurance companies in terms of market share - reached separate "global" settlement agreements with the respective state agencies in order to avoid having to go through a trial or regulatory proceeding on

these issues (Frank, 2012).² Pursuant to these agreements, the insurers agreed to make regular searches of the DMF in order to more timely identify insureds who had died (Hartley, 2012). Second, the insurers agreed to use due diligence to track down the beneficiaries of these policies and pay them the benefits they were owed, or turn over to the state's unclaimed property division the monies for beneficiaries that could not be located (Scism, 2012). These payments would be made based on the insurer's knowledge of death obtained from the search results, even though no death benefit claim or proof of death had been submitted (Ebadi et al, 2014). Finally, the insurers may be liable to pay out interest on these amounts, as well as costs to reimburse the states for the expenses of the investigation.

State regulators continue to push for settlement agreements with life insurers regarding their DMF practices and the payment of unclaimed insurance benefits. For example, in late 2013 Lincoln National Life Insurance Co. and two other life insurers entered into a multi-state settlement agreement under which they agreed to pay \$12.6 million (Jeffrey, 2014). In fact, it has been recently reported that over fifteen of the largest forty life insurers, representing more than half of the entire industry, have been investigated by state authorities, with many of these ending in settlement agreements (Florida Office of Insurance Regulation, 2014).

Criticisms of State Regulatory Action

It is no secret that many states in recent years have suffered significant budgetary deficits. In order to raise revenue without raising taxes, some states have begun to enforce their unclaimed property laws in a much more aggressive manner. For example, these states have now shortened the dormancy period for the escheatment of unclaimed funds from 5 to 3 years, and have now expanded their efforts to collect these funds beyond the life insurance industry, hiring outside auditors to determine whether banks and other fund holders are acting in compliance with these laws (Griffith, 2013; Stanley, 2013).

As a result of these efforts, states now possess a significant amount of unclaimed property.³ Even though they do not usually acquire ownership of escheated property that has escheated, they can benefit from the interest generated by such funds when state law allows cash to be deposited in state accounts or to use these amounts to finance governmental programs.⁴ Of course, if the rightful owner fails to come forward to claim the property (which is often the case), the state may get to use the funds into perpetuity - it has been estimated that on average as much as fifty to sixty percent of funds that escheat to the state are ever claimed by the rightful property owner (Scism, 2012; Stanley, 2013). As a result, it has been argued that states have converted "unclaimed-property laws and regulations into revenue-raising mechanisms that undermine their original, consumer-protection-oriented goal of reuniting missing owners with their property" (King, 2012, at 1251).

The approaches states have used to monitor life insurer compliance with unclaimed property regulations have also generated a certain amount of controversy and criticism. For example, it is claimed that using outside auditors can make the process last an unusually long time – maybe as long as three years (Stanley, 2013), and the cost of compliance with the audit request can also be significant for the insurer. In some cases both the anticipated cost and the length of the exam period has led the targeted insurer to settle to just bring an end to the process (Scism, 2012). Others have argued that the audit check system lacks due process, as audited insurers claim that they have had no meaningful opportunity to contest the need for an audit with state regulatory agencies (King, 2012). Also, since most unclaimed property rules do not provide a clear statute of limitations, insurers are being targeted not only for current

² For a more complete discussion of this investigation and these settlements, see Hartley, 2012, at 391-395.

³ King estimates that "\$35 billion of unclaimed property is currently held by states - an amount that continues to increase annually" (King, 2012, at 1250).

⁴ "For instance, California uses this extra source of revenue to alleviate budget shortfalls and supplement its general fund" (Hartley, 2012, at 367).

practices (like other market conduct examinations) but for conduct engaged in many years previously (Stanley, 2013). Although states had never before required insurers to use the DMF for any purpose, they are now unfairly seeking to penalize them for not doing so in the past, thus making the practice and the punishment retroactive (Cruz-Brown, 2012).

Finally, some insurers have complained about the way in which states have gone about resolving their concerns, which they have characterized as a radically different approach than that normally taken by regulators (Scism, 2012). Instead of following the usual regulatory process of notifying regulated insurers of proposed regulatory action, providing a period of notice and comment for the affected insurers and the public, and then revising the rules as necessary and adopting them prospectively, states today have chosen to aggressively enforce unstated standards through investigation and litigation, all in an effort to force settlements that are punitive in nature for the affected insurers. Such an approach seems especially unfair, as the applicable law on these issues – especially with regard to the life insurance industry - has not been clear in most states (Cruz-Brown, 2012).

ACTIONS BY OTHER INTERESTED PARTIES

Action by the National Conference of Insurance Legislators and Recent State Legislation

In July 2012 the National Conference of Insurance Legislators (NCOIL) approved an amended model legislation designed to require life insurance companies to check the DMF to determine death information for policy insureds and for owners of retained asset accounts (NCOIL, 2012). The proposed legislation, entitled the Model Unclaimed Life Insurance Benefits Act (Model Act), represents NCOIL's response to state investigations revealing that life insurers had been using the DMF to ascertain death information for annuity contract owners but not for the insureds under life policies (Solares and Fichera, 2012).

A number of states have now adopted legislation that is similar to or based on the Model Act. As many as nineteen states have adopted or are currently considering legislation that has requirements similar to the Model Act (KEANE, 2014). Insurers doing business in these states are required to check the DMF at least quarterly or semi-annually to ascertain death information for its insureds on all current policies and retained asset accounts and then compare this information with that in their own records. If the insurer is able to match the social security number or name and date of birth of an insured with information in the DMF, it must do the following within the following ninety days: (1) undertake and then document a good faith attempt to verify the death of the insured with a secondary source, (2) establish whether policy proceeds are payable under the policy, (3) undertake and then document a good faith attempt to find the beneficiary if payments are due, and (4) once a beneficiary has been located, send the beneficiary a claim form and instructions for providing official evidence of death in order to collect the benefits (NCOIL, 2012). If the beneficiary cannot be located, however, the policy proceeds plus accrued interest are to be considered unclaimed property, which may be subsequently reported and escheated to the state. In addition, insurers and their service providers may not recover the fees associated with the DMF search or subsequent verification from the policy holders or beneficiaries (NCOIL, 2012).⁵

RELYING ON THE DMF RAISES CONCERNS

In the course of investigating life insurance companies, state regulatory authorities have focused on the DMF as the proper source for ascertaining information on whether a policy insured has died.

⁵ For a brief discussion of recent litigation in this area, see Ebadi et al (2014).

Unfortunately, the DMF has some significant limitations that affect its usefulness for this particular purpose.

One such problem is that information in the DMF is not always reliable. According to a preliminary report issued by the General Accounting Office (GAO) in May 2013 (the GAO Preliminary Report), information on some individuals who have died is not included in the DMF, and some persons whose information has been included are not yet dead (GAO Preliminary Report, 2013). One commentator has cited sources estimating that as many as 1,000 individuals may be erroneously listed as deceased by the SSA on the DMF every month (Dilworth, 2014). These errors have apparently been caused at least in part by the fact that the SSA does not first determine whether death information it receives is accurate before it includes the information in the database. For example, the GAO reported that death information received from relatives and funeral homes was not checked before being included in the DMF, as SSA considered these sources to be accurate. The GAO also found that the SSA did not even include death information it received if the information did not correspond to that which was already on file with the SSA. According to the SSA, the reason for these practices is that the only purpose of the DMF is to note the death of Social Security beneficiaries so that government payment of benefits to these individuals would be stopped. The GAO concluded that the problem lay in the procedures employed by SSA to originate and update its death reports, which led to the inclusion of inaccurate information in the DMF. Subsequently, in its final report (the GAO Final Report) the GAO recommended that the SSA change these procedures accordingly (GAO Final Report, 2013).

The GAO is not the only agency to find problems with the DMF. In a report issued in May 2013, the Inspector General of the SSA noted that death information for over 180,000 individuals had not been placed in the DMF even though it had been included in the SSA Supplemental Security Records (Inspector General's Report, 2013). Accordingly, the Inspector General's office called on the SSA to regularly check information in the DMF and compare it to that in the Supplemental Security Records, and to make other changes in its procedures to make the DMF more accurate and reliable. This report also found that about ninety-eight percent (98%) of inaccurate death records included by the SSA in the DMF were from non-state governmental sources – sources whose information the SSA failed to verify prior to inclusion in the DMF (Inspector General's Report, 2013).

Life insurers have also noted the unreliability of death information resulting from a DMF search (O'Donnell, 2011). As a result, they have found it necessary to double-check a positive match with information from other sources or in other ways, a process that is often time-consuming, tedious, and extremely expensive.

An even greater problem with the DMF is that much of the information it contains is accessible only to federal agencies, and not to the public. The SSA announced that as of 2012, due to constraints imposed by the Social Security Act, death information provided to the DMF by state agencies pursuant to state contracts would no longer be available to the public from the DMF (Leefeldt, 2012a; Sack 2012). According to the GAO Preliminary Report, this action resulted in the immediate removal of approximately ten percent (10%) of the information in the publicly accessible DMF, an amount that the SSA believed would increase each year as the percentage of death information received pursuant to these contracts would continue to grow (GAO Preliminary Report, 2013). In fact, the report noted that forty percent (40%) of the death information received by the DMF in just the year 2012 was from state contracts, so none of such information would be available in the public DMF (GAO Preliminary Report, 2013, at 8 n. 22). As most erroneous information included by the DMF was from non-state governmental sources (see above), the information in the publicly available DMF is the least reliable information in the SSA's records. As a result, the GAO concluded in its final report that “[t]he death information included in the [publicly available] DMF is less complete and likely less accurate than that contained in SSA's full death file,” making the information “less useful” (GAO Final Report, 2013, at 22).

The lack of DMF information made available to the public has been compounded by Congress. Concerned that identity thieves and tax frauds would use the DMF information improperly, Congress has now passed legislation that would limit the ability of the public to access the DMF. According to this statute (passed as part of the 2014 Bipartisan Budget Act of 2013), starting March 26, 2014, no member of the public would be allowed to access death records in the publicly accessible DMF for three (3) years following the individual's death (Bipartisan Budget Act of 2013, Section 203, (Pub. L. 113-67); Postal, 2014). The only exception is for those who have been certified and are able to show a legitimate business or fraud prevention reason for needing such access. The statute then authorized the U.S. Department of Commerce to implement specific requirements and procedures for the certification process.

In March 2014, the National Technical Information Service of the Commerce Department issued an interim final regulation establishing such a certification procedure, allowing access to the publicly accessible DMF (Temporary Certification Program for Access to the Death Master File, 2014). Under this temporary program, persons meeting certain requirements could immediately access this database. As part of the regulatory process, applicants must agree to periodic and unscheduled audits, and are subject to penalties for inappropriate disclosure or use of DMF information. To obtain such access, applicants must pay a fee and certify "that access to the information is appropriate because such person (A) has (i) a legitimate fraud prevention interest, or (ii) a legitimate business purpose pursuant to a law, governmental rule, regulation, or fiduciary duty, and (B) has systems, facilities, and procedures in place to safeguard such information, and experience in maintaining the confidentiality, security, and appropriate use of such information," and meet additional requirements (Temporary Certification Program for Access to the Death Master File, 2014).

Despite these problems and the decreased utility of information in the DMF, many state insurance regulators and other officials continue to push to require life insurance companies to check this database to expedite payment of death benefits to beneficiaries. In fact, as noted above, requiring insurers to conduct regular searches of the DMF has been a central feature of NCOIL's proposed Model Act and the global multi-state settlement agreements negotiated by the NAIC task force.

A PROPOSED FRAMEWORK

As a result of investigations, settlement agreements, and recent legislation, many states are requiring life insurance companies to conform their death payment practices to new standards. Unfortunately, these standards usually require periodic checks of the DMF. If the true aim is to get money to the beneficiary as soon as possible, however, reliance on the DMF seems to be misplaced given the problems discussed in the preceding section. Perhaps a more effective solution would be for states to adopt an approach similar to what they have used with other types of unclaimed properties, i.e., funds in a bank accounts and other liquid assets.

In many states, a bank account is presumed to be inactive and the dormancy period begins to run if the account has had no customer-initiated activity (such as deposits or withdrawals) for one year. At the end of the statutory dormancy period, the bank notifies the account owner prior to delivering the escheated funds to the state (Gagliano, et al, 2011, at 3). Following this approach, states could establish a similar framework to enable life insurers to fulfill their duties under state unclaimed property regulations using the following guidelines:

1. To enable consumers to locate and verify the status of their life insurance policies, states should require all life insurers to provide and publicize a policy finder website similar to MetLife (*see*

Metropolitan Life Insurance Company). Each policy finder website would enable members of the public to search a database of individual policies issued by the insurer in order to obtain basic information about missing or forgotten policies. (The person conducting the search could then contact the insurer to get additional information about the policy.) These sites should be advertised by the company and by all state insurance regulatory agencies, so that all members of the public can get access to information about forgotten policies. If all insurers had such a system, no doubt third party search firms would offer arise to offer perform such services for a fee, much like they do today for those who want to claim escheated property from the state.

2. All insurers that do not currently do so should collect contact information (physical and email addresses, social security numbers and other identifying information, etc.) from the policy holder, insured and beneficiary. In the event the insurer receives verifiable information regarding the death of an insured, having such contact information will expedite the search for beneficiaries of a forgotten policy, as well as any required searches of the DMF.

3. Following the expiration of any two (2) year period from the time the insured has reached the limiting age under the mortality table on which the reserve is based (or would have attained this age if still living), during which time the insurer has received no documented contact (according to the records of the insurer) from the policy holder, the insured, or the beneficiary, the policy will be presumed to be abandoned. The limiting age has been defined as “the terminal age of the mortality table specified in the policy for calculating reserves and/or non-forfeiture values, or ... the terminal age of the mortality table used in calculating the cost of insurance for the policy.” (MetLife Regulatory Settlement Agreement, 2012, at p. 4). The limiting age is used as the “trigger” age in this proposal in order to be consistent with state statutes and multi-state settlement agreements that have addressed this issue. However, the limiting age has been characterized as “arcane” and its use in this context has been criticized as not helpful to beneficiaries:

“The limiting age is typically 100, so absent a DMF hit, a life insurance policy would only escheat to the state a set number of years (3 or 7 being common) after the insured would have reached their 100th birthday. So if an individual passes away at 85, it may be 18-25 years before that policy would escheat to the abandoned property fund. By that point, family members will no doubt long since have ceased looking for unclaimed property accounts” (Center for Research Center, 2014).

Perhaps a more useful alternative would be to use a trigger age that is more likely to be closer to the insured’s actual life expectancy, such as the life expectancy age provided by the Period Life Table published by the Social Security Administration for the year in which the policy was originally issued (Social Security Administration, Actuarial Life Table.) For example, according to this table the life expectancy age for an insured 45 year old male in 2011 would be 78.91, which would be the trigger age assuming that the policy was originally issued in 2011.

Once the policy is presumed to be abandoned, the insurer must notify the policy holder by sending a first class letter via certified mail and by e-mail to the last known address of such party requesting that he or she acknowledge the existence of the policy and that the insured remains alive. If any response is received from the policy holder, including the returned receipt signed by the addressee, then the presumption of abandonment terminates and the policy regains active status. If no response is received from the policy holder within one (1) month from the date of mailing then the insurer will report the policy as abandoned and remit the death benefit to the state.

4. If policy regains active status as provided in the last sentence of paragraph 3 (above), the procedure will be repeated following the expiration of any subsequent two (2) year period if during that

time the insurer has received no documented contact (according to the records of the insurer) from the policy holder, the insured, or the beneficiary.

5. If at any point during the above process the insurer actually receives verifiable evidence that the insured has died, then the insured must use due diligence to locate the beneficiaries. Once located, the beneficiaries must be provided with notice of the requirements necessary to file a claim and provided with the forms required to do so. If the insurer receives verifiable evidence that the insured has died prior to termination of the policy due to non-payment of premiums, then the policy will not be considered to have been so terminated.

The above guidelines are merely suggestions; however, they could form the outline of a system that is easier, quicker and cheaper for insurers to implement than the DMF search and verify process that has gained so much favor with the states. It is also a “tried and true” system since it is similar to procedures that banks and other depository institutions use for account funds, as well as – in some states – insurance contracts.⁶ Finally, as such a system is not dependent on access to the DMF, it is also more likely to be effective in getting funds into the hands of policy beneficiaries. Accordingly, it is proposed that states looking for an alternative to the DMF for verifying the status of life insurance policies consider such a system.

CONCLUSION

As this paper has discussed, there are times when a life insurance company is unable to pay the death benefit following the death of the insured, either because the beneficiary or policy holder’s family did not know of the policy’s existence and thus did not notify the insurer, or because the insurer learns of the death and is unable to locate the beneficiary. As a result, the policy remains unpaid and the death benefit remains with the insurer.

In order to provide a means for owners of unclaimed property to locate and recover their assets, states have established an escheatment procedure that requires the holders of such property to deliver these items to the state’s treasury pursuant to the provisions of the state’s unclaimed property regulations. As discussed above, the application of this procedure to the retention of death benefits by life insurers has generated a great deal of controversy in the past few years.

As a result of increased state enforcement of unclaimed property laws, life insurance companies are being required to conform their death payment practices to new standards. These obligations have been imposed by the states in an effort to force insurers to pay off claims in a timelier manner and/or to expedite the start of the state’s dormancy period so that unclaimed benefits will be remitted to the state more quickly.

Unfortunately, reform efforts of many states in this area seem to presume that the information in the DMF is accurate, complete, and entered on a timely basis. As noted above, that has not always been the case, and due to recent changes made by the Social Security Administration, the information that is accessible to the public is likely to increasingly be less accurate, less complete, and less available to the public. Accordingly, as this paper proposes, states should consider alternate approaches that are more consistent with that already used for other types of unclaimed property if they desire to implement effective reform – assuming that the true aim is to get money into the beneficiary’s hands as soon as possible.

⁶ See, for example, Michigan Statutes (2010) Section 567.228.

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