

**THINK LIKE A BUSINESSPERSON: USING BUSINESS SCHOOL
CASES TO CREATE STRATEGIC CORPORATE LAWYERS**

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INTRODUCTION: WHY TEACH BUSINESS STRATEGY TO LAW STUDENTS

For the past twenty-five years, my academic and professional pursuits have straddled the line between business and law. I majored in business administration in college and then worked as an analyst in the Corporate Finance department at a bulge bracket Wall Street firm. After completing a JD/MBA, I returned to investment banking with a focus on middle-market mergers and acquisitions (M&A) and subsequently practiced law with a focus on private equity and M&A. Finally, in 2004, I found my current home as a corporate law professor. In my courses, which include Mergers & Acquisitions, Enterprise Organization, and Investor Protection, I strive to teach my students the substantive law, the ethics surrounding the practice of law, the nuts and bolts of how to execute transactions, and how corporations can be better world citizens. Though imparting those skills is a significant undertaking in and of itself, it is not enough. I also want my students to appreciate the underlying business rationales for the transactions we discuss in class and to begin to develop an intuition for sound business strategy.

A basic understanding of a client's business, of course, aids with traditional transactional lawyering tasks, such as due diligence, negotiating a deal, and drafting acquisition agreements.¹ For example, if a lawyer knows that her client's acquisition target derives forty percent of its revenue from a particular customer, she will pay particular attention to that customer's contracts with the target during her due diligence review. She also will draft the M&A agreement's target representations and warranties section so that her client receives contractual assurances of full disclosure about the status of those customer contracts. However, in my teaching, I strive to go beyond giving my students this basic understanding. Perhaps I am too ambitious, but I

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1. Afra Afsharipour, *Incorporating "Business" in Business Law Classes*, 8 U.C. DAVIS BUS. L.J. 1, 5 (2007).

want more for my students than understanding just enough about business to draft merger agreement provisions effectively. I want them to begin to develop the ability to serve as lawyers who provide legal advice in a strategic context.

The type of business knowledge necessary to put legal advice in a strategic context is different from an understanding of accounting and finance terms or specific skills in drafting, negotiating, or performing due diligence. It is something more. While it is, of course, imperative to know your way around a balance sheet or understand which contracts are most critical to your client's business when performing due diligence, I believe the most effective transactional attorneys are those who appreciate their clients' overarching business objectives and understand how initiatives proposed from time-to-time further those objectives.

I encourage my students to take either business courses such as finance and accounting that are taught by our business school faculty or the mini-MBA courses offered at my law school (e.g., marketing for lawyers, finance for lawyers, accounting for lawyers) to learn basic business concepts. However, in my M&A class, in particular, I am trying to do something different. Through class discussions, I strive to provide my students with an interdisciplinary experience—an opportunity to make legal decisions in a context rich with facts about the strategic interests of the businesses involved.

Appreciating business strategy is important for a young lawyer's professional development.² General Counsel, for example, provide their clients (i.e., the corporations for whom they work) with sophisticated legal *and* business advice.³ As Marla Persky, former General Counsel for Boehringer Ingelheim Corporation, states “A General Counsel needs to be a business person first and a lawyer second—not a lawyer that understands the business, but a business person that happens to be a lawyer.”⁴ She is not alone in that view.⁵ An effective General Counsel understands not only the internal aspects

2. In a 2002 ABA article, attorney Eran Kahana proposed that lawyers move beyond traditional roles and become “strategic business lawyers (SBLs),” a cross between a lawyer and a business strategist. Eran Kahana, *Metamorphosis Inc. Turning a Business Lawyer into a Strategic Business Lawyer*, 11 A.B.A. BUS. L. TODAY, Jan./Feb. 2002, at 35. Kahana defines a SBL as “a lawyer who proves he/she can provide an intelligent distillation of alternatives, guidance, forecasting and planning at various strata within the context of legal and business considerations, while at the same time maintaining focus and purpose on refining the quality of legal services provided.” *Id.*

3. E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, *INDISPENSABLE COUNSEL—THE CHIEF LEGAL OFFICER IN THE NEW REALITY* 61–62 (2012).

4. PRASHANT DUBEY & EVA KRIPALANI, *THE GENERALIST COUNSEL—HOW LEADING GENERAL COUNSEL ARE SHAPING TOMORROW'S COMPANIES* 1 (2013).

5. *See, e.g.*, VEASEY & GUGLIELMO, *supra* note 3, at 62 n.93 (“Not only do General Counsel have non-legal responsibilities, but they are often business people first and lawyers second.”) (quoting Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced into*

of the business (e.g., products, what drives revenue, financial accounting, culture, etc.), but also the external ones (e.g., market and industry characteristics, regulatory environment, macroeconomic and political environment).⁶ Thus, the role of the general counsel is not merely that of risk assessor or fire fighter; rather, the general counsel is expected to be a full partner on the management team of the corporation.⁷ General counsel increasingly are consulted early on about corporate strategic initiatives, and not just to receive their views from a risk management perspective, but also due to their roles as knowledgeable members of the business team committed to the corporation's success.⁸

Though outside counsel generally do not have a regular seat at the management table and, thus, are not intimately acquainted with the day-to-day operations of their clients, outside counsel who can add value with their strategic vision are appreciated by their clients. When she hears about potential regulatory changes on the horizon, a good lawyer will think about how those regulatory changes will affect her client's business. A corporate lawyer who thinks strategically will, as well, but she also will think about whether the changing regulatory landscape presents an opportunity for potential expansion or acquisition that would be appropriate given her client's strategic position and core competencies. In addition, lawyers communicate with different businesses every day and will almost certainly become aware of business trends. If the lawyers are trained in business and able to translate what they are noticing into actionable steps, they can become invaluable advisors to their clients.

What seems clear is that not all corporate lawyers are strategic, but many clients wish they were. Peter Bragdon, general counsel at Columbia Sportswear Company, for example, laments the fact that very few of the outside lawyers with whom he works seem to understand the importance of investing the time to learn his business.⁹ As the role of the general counsel has evolved over time, general counsel have to be more business-savvy to do their jobs effectively. They, in turn, are expecting higher levels of business

the United States, What Could or Should Be the Role of General Counsel?, 9 FORDHAM J. CORP. & FIN. L. 1, 23 (2003)).

6. DUBEY & KRIPALANI, *supra* note 4, at 105 (quoting Marla Persky, former General Counsel of Boehringer Ingelheim Corporation).

7. "As Hilary Krane, Vice President and General Counsel of NIKE, Inc., said about her previous role as General Counsel of Levi Strauss: 'Once there, I realized [the General Counsel role] is not just about fire prevention and fire fighting—it is being a part of a team that is trying to run and grow a multinational business. You are a senior executive jointly charged with creating, nurturing, and projecting a sustainable future.'" *Id.* at xiv.

8. *Id.* at 10.

9. *Id.* at 105–06.

sophistication from the outside lawyers that service their corporations. One exchange is particularly telling.

At the InsideCounsel SuperConference, Ted Olson, former Solicitor General and partner at Gibson Dunn, asked a panel of General Counsel from Ford, Procter & Gamble, and Allstate Insurance what they look for in their outside lawyers (other than lower fees and alternative fee arrangements).¹⁰ The responses included good communication, candor, appreciation for how their business operates, and having “a point of view.”¹¹ On this last point, Deborah Platt Majoras, currently Chief Legal Officer at Procter & Gamble and former Chairman of the Federal Trade Commission, said,

Give me the advice. Firms think they do this. But actually, firms want to explain the law, give some legal thoughts, and then let you decide. I want you to understand our business enough, that when you give me legal advice, and we discuss it—it’s not usually yes or no, if it were that simple, we’d do it ourselves—. . . you . . . have a point of view. Too often, outside lawyers don’t have that.¹²

Perhaps not all clients would welcome strategic business advice from their outside counsel.¹³ However, with complicated transactions and business initiatives, it can be hard to draw a solid line between what is strictly legal and strictly business.¹⁴ Moreover, in my experience, if you have good ideas and useful suggestions, clients will listen. Therefore, there is ample reason to train our students, when possible, to understand business strategy.

I. MY APPROACH TO TEACHING BUSINESS STRATEGY

In my teaching, I employ a number of pedagogical methods: modified Socratic method, lecture, and problem sets. I find them all necessary to cover the material in my courses. However, one pedagogical tool is my favorite, not only because I enjoy teaching with it the most, but also because I believe it allows students to develop a skill set that they cannot develop using traditional

10. Kashmir Hill, *So You Wanna Be a General Counsel?*, ABOVE LAW (May 27, 2010, 10:16 AM), <http://abovethelaw.com/2010/05/so-you-wanna-be-a-general-counsel/>.

11. *Id.*

12. *Id.* (internal quotation marks omitted).

13. *See A Businessman’s View of Lawyers*, 33 BUS. LAW. 817, 823–24 (1978) (noting the objections of two of the businesspeople on the panel to business advice from their attorneys). Note, however, that this panel took place almost 40 years ago. In my experience, these views do not represent the majority view today and were challenged by other panel members then. *Id.* at 824–25.

14. *See id.* (“It seems to me that today matters are so complicated and so intertwined that it’s very difficult to draw the line . . . I welcome business advice from the lawyer. Most of the time I ignore it, but I do want to hear what he has to say, and I’m a little surprised that others would feel otherwise.” (quoting Jay A. Pritzker)).

law school course materials. The tool is the Harvard Business School (HBS) case study.¹⁵

Harvard Business School prides itself on the general management education it provides its students. Though Harvard Business School professors utilize lectures, simulations, and fieldwork, as appropriate, approximately eighty percent of classes involve instruction via the case method.¹⁶ The case method utilizes case studies, which are written primarily by Harvard faculty and generally feature a real, not fictitious, protagonist facing one or more critical business decisions.¹⁷ Though the professor acts as a guide during class sessions, she is not the focal point. Instead, the case method is a participant-centered education model in which the students play a leading role in their own learning and that of their peers.¹⁸

In the typical case, the main text is ten to twenty pages long, and there are five to ten additional pages of exhibits.¹⁹ The cases contain complex data and often have insufficient information to allow for fully informed decision making.²⁰ Despite the ambiguity, each student is required to develop a plan of action and come to class prepared to defend her approach. Case discussions are about much more than the transfer of specific skills or knowledge. Though cases and the accompanying discussions are designed to hone a student's diagnostic skills—important in today's business world of ever-changing technology and markets—and develop students' skills of persuasion, their primary purpose is to get students into the habit of taking decisive action on the basis of limited knowledge, a common situation facing businesspeople.²¹ In

15. I am not alone in my praise for the benefits of using at least business school-like cases as a teaching tool. See, e.g., Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 *TRANSACTIONS: TENN. J. BUS. L.* 9, 10–11 (2009); Bradley T. Borden, Professor of Law at Brooklyn Law School, How to Prepare Students to Meet Corporate Needs, Panel Discussion at the Chapman Law Review Symposium: The Future of Law, Business, and Legal Education: How to Prepare Students to Meet Corporate Needs (Feb. 1, 2013), in 17 *CHAP. L. REV.* at 195, 196–201 (2013) (presenting his use of the client file method, which combines the law and business school case methods to give law students an opportunity to apply the law to real-world facts).

16. *The Case Method at HBS*, HARV. BUS. SCH., <http://www.hbs.edu/teaching/inside-hbs/> (last visited July 29, 2014) [hereinafter *HBS Case Method*].

17. David A. Garvin, *Making the Case—Professional Education for the World of Practice*, HARV. MAG., Sept.–Oct. 2003, at 60, available at <http://harvardmagazine.com/2003/09/making-the-case-html>.

18. *Core Principles*, HARV. BUS. SCH., <http://www.hbs.edu/teaching/case-method-in-practice/core-principles.html> (last visited July 29, 2014).

19. Garvin, *supra* note 17.

20. *HBS Case Method*, *supra* note 16.

21. Garvin, *supra* note 17, at 61–62.

short, the case method is designed to develop what my former HBS accounting professor, Tom Piper, calls “the courage to act under uncertainty.”²² Cases are designed to train future business leaders who exercise good judgment—those who know which skills and analyses to apply in a situation and those who understand which facts are important and which can be ignored.²³

Though I have used a few HBS cases in my Enterprise Organization class, I find them to be most effective when teaching advanced students in M&A. In M&A, I use HBS cases to address what I perceive to be a gap in my students’ educations. The rest of the law school curriculum helps them “think like a lawyer.”²⁴ As a law professor, I, of course, believe “thinking like a lawyer” is important. Having the ability to think carefully and with precision, to read and speak in a manner that demonstrates attentiveness to detail and nuance,²⁵ to recognize the importance of small differences and understand that legal outcomes can turn on fine distinctions,²⁶ and to exercise judgment that allows one to distinguish good arguments from bad ones²⁷ is invaluable. Honing these skills is something at which traditional legal education excels.²⁸ However, I also want my students to begin to “think like a businessperson” in the context of real situations that face lawyers.

I use HBS cases for a variety of purposes, including skills training and supplementation (e.g., illustration of valuation analyses, review of M&A tax principles, review of state antitakeover provisions). I also use a modified version of the Darden Business School case *Takeover! 1997 (A)*²⁹ as the basis for a three-hour hostile takeover simulation. The simulation serves as the capstone for my M&A course, and though it is set in the context of a hostile takeover, which constitutes a small percentage of deal activity, the lessons (on fiduciary duties, negotiation, deal strategy, deal structure, valuation, and regulatory constraints on M&A activity) are transferable to negotiated transactions.

22. *Core Principles*, *supra* note 18 (internal quotation marks omitted).

23. *See HBS Case Method*, *supra* note 16.

24. Admittedly, most of my course does, as well, since a small percentage of my class hours are spent on HBS cases.

25. Anne-Marie Slaughter, *On Thinking Like a Lawyer*, HARV. LAW TODAY, May 2002, available at <http://www.princeton.edu/~slaughtr/Commentary/On%20Thinking%20Like%20a%20Lawyer.pdf>.

26. Garvin, *supra* note 17, at 59.

27. Slaughter, *supra* note 25.

28. *See* Geoffrey R. Stone, *The Importance of Law School*, N.Y. TIMES (last updated July 25, 2011, 11:41 AM), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/the-importance-of-law-school> (“First, and most important, [legal education] can teach students to ‘think like a lawyer.’ . . . In general, legal education does this brilliantly. This is at the very core of a legal education.”).

29. ROBERT F. BRUNER, TAKEOVER! 1997 (A) THE TARGET: GLOBAL FOODS CORPORATION 1 (1997) (Darden Business School case study) (on file with author).

Most notably for present purposes, I use HBS cases to introduce students to business strategy in an M&A context. I do not teach a course in business strategy, so I do not have the luxury of choosing from among the hundreds of HBS strategy cases. Rather, the cases I choose have to do double-duty as “strategy plus M&A law” cases. I use cases to allow students to engage in legal decision-making in the shadow of corporate strategy. This limits the cases that are suitable for my purposes.

The basic question with which we are concerned in our strategy discussions is essentially “Why are we here?” Without some business strategy, there is no (or at least there should not be a) company, much less a deal. All the things we study over the course of the semester in M&A on, for example, when it makes sense to structure the transaction as a reverse subsidiary merger rather than as a cash tender offer; when to file a Schedule TO or Form S-4; or whether, if challenged, the board’s actions will be reviewed under the entire fairness standard or the more deferential business judgment rule is irrelevant if there is no transaction.

Admittedly, it sounds strange to say this, but law school is, in many ways, too law-centric. Nowhere is this perhaps truer than in courses such as Mergers & Acquisition that purport to prepare students for transactional practice. There is no “chicken and egg” problem in deals. The business rationale for the transaction precedes the legal processes by which the transaction is executed. No CEO ever thinks, “My career will not be complete unless I can put ‘oversaw forward triangular merger subject to the business judgment rule’ on my resume.” The strategic rationale should always precede a consideration of deal mechanics and fiduciary duties.

Thus, in my view, business rationale discussions are not just “nice to have” in corporate law classes. They are fundamental to the educational enterprise. Just as many would not consider someone who does not appreciate the historical and political contexts underlying the evolution of constitutional legal doctrine well versed in constitutional law, I argue that we should not consider someone who lacks an appreciation for the strategic rationale of transactions well versed in corporate law either.

A. *Strategic M&A Analysis*

The first assignment in my M&A class is *Strategic M&A Analysis*, a note written by business school professor L. J. Bourgeois. I make this note the first thing students read for my course so they begin the semester understanding that, as Professor Bourgeois states, “[s]trategy should be the guiding light of any M&A transaction.”³⁰ Though transaction structure, valuation, and post-

30. L.J. BOURGEOIS, STRATEGIC M&A ANALYSIS 1 (Darden Business School case study 2012) (on file with author).

merger integration plans are significant components of the acquisition process, “the starting point in M&A is and always should be strategy.”³¹ Professor Bourgeois’ note describes how strategic M&A analysis, which requires a deep understanding of the business motivation behind a deal, can increase the likelihood of enhanced shareholder value and deal success.³²

At the conclusion of the first assignment (typically day two of the course), I do a wrap-up that highlights the leading reasons for M&A activity, which include transactions motivated by the desire to (1) respond to strategic threats and opportunities, (2) acquire special capabilities, (3) achieve economies of scale and scope, and (4) pursue opportunities provided by changing industry dynamics and regulatory environments.³³ My hope is that my students, over the course of the semester, will begin to develop the ability to answer the following questions: What is motivating this transaction? Does the transaction make business sense? Even if the deal makes strategic sense, what is the price at which it no longer makes sense for the acquirer to go forward? If the acquirer is justifying the price with expected synergies, are those synergies likely to be realized?

I assign discussion questions in advance for all of the business school case studies we study. The first question is always some variant of the following: Why are the two companies merging or why is Company A making a hostile bid for Company B? I want to ground our conversation in the business rationale underlying the transaction before we talk about the law.

HBS cases provide an opportunity to explore M&A transactions that happen in a wide variety of industries and for a wide variety of strategic reasons. In a typical semester, business school cases comprise only five or six of a total of twenty-eight assignments, but I would use more cases if I could find relevant ones and had more space on my syllabus. Below I describe a few of the business school cases I use in my M&A course and the ways in which the case materials allow me to discuss business strategy with my students.

B. *Time Warner*

In addition to the note on strategic M&A analysis, the first day’s assignment also includes the *Time Warner*³⁴ case study. The *Time Warner* legal opinion is among the most famous in corporate law. We read the opinion later in the semester during our unit on fiduciary duties, but I like to begin the semester with a discussion of the business school case study. Though the case is challenging for students because we have not yet covered any of the

31. *Id.* at 11.

32. *Id.*

33. See ROBERT F. BRUNER, APPLIED MERGERS AND ACQUISITIONS 5 (2004).

34. LISA K. MEULBROEK ET AL., TIME INC.’S ENTRY INTO THE ENTERTAINMENT INDUSTRY (A) (1993) (Harvard Business School case study) (on file with author).

substantive legal or business concepts discussed in the case, beginning the course here provides at least two advantages. First, the case study provides a broad overview of the topics we will cover over the course of the semester, including strategic analysis, synergy analysis, transaction structure, deal consideration, valuation, deal strategy, fiduciary duties, and the effect of the law on the market for corporate control. Second, since we discuss the case during “shopping period,” students who are less than enthusiastic about the sophisticated legal and business analysis required in my M&A course still have time to drop the class and find another course to fill their schedules.

The *Time Warner* case study, written from the point of view of the Time, Inc. (Time) management team, describes how a hostile bid from Paramount Communications (Paramount) threatens Time’s planned merger with Warner Communications (Warner) in 1989.³⁵ In class, the discussion begins, as all my case discussions do, with an exploration of the factors underlying Time’s interest in merging with Warner. We discuss industry trends and the changing regulatory climate, as well as reasons specific to Time’s individual needs and the benefits, including substantial synergies, the Time management team predicts will flow from a combination with Warner.³⁶ We also explore Time management’s incentives in the transaction, including softer cultural factors, and how, if at all, they may differ from those of Time’s shareholders. The classroom discussion also includes an examination of Paramount’s likely reasons, including those related to business strategy and otherwise, for launching a hostile bid for Time. An important component of the discussion is the likely reaction of Time’s shareholders to Paramount’s high-premium bid and the factors that would lead to those shareholders, despite Time’s claims of the superiority of a combination with Warner, to prefer Paramount’s offer. This discussion also gets students thinking about M&A policy. Are hostile bidders the bad guys who break up good companies or heroes who create value by displacing inefficient management with misguided business strategies? Or are they a mixture of both? This is a theme to which we return many times during the semester.

C. *Conrail*

The *Acquisition of Consolidated Rail Corporation*³⁷ (Conrail) case study focuses on the proposed 1996 merger of CSX Corporation (CSX) and Conrail,

35. *Id.* at 1.

36. *Id.* at 3–8.

37. BENJAMIN C. ESTY & MATEO MILLETT, THE ACQUISITION OF CONSOLIDATED RAIL CORPORATION (A) (1998) (Harvard Business School case study) (on file with author) [hereinafter ESTY & MILLETT, ACQUISITION (A)]; BENJAMIN C. ESTY & MATEO MILLETT, THE ACQUISITION OF CONSOLIDATED RAIL CORPORATION (B) (1998) (Harvard Business School case study) (on file with author) [hereinafter ESTY & MILLETT, ACQUISITION (B)].

the first and third largest railroads in the Eastern United States, and the bidding war that ensues after Norfolk Southern, the second largest railroad in the Eastern U.S., makes a hostile bid for Conrail.³⁸ The case affords an opportunity to explore, not only the fight for control of Conrail, but also how state law—in this case, the Pennsylvania antitakeover laws—regulates the market for corporate control.³⁹

We begin class with a discussion of why CSX wants to buy Conrail and focus on railroad industry trends, deregulation, as well as the substantial synergies and competitive advantages CSX could achieve through this business combination. We also spend time on the question of why Norfolk Southern entered the fray. We look not only at the benefits of a Norfolk Southern-Conrail combination, but also at what the competitive landscape looks like for Norfolk Southern as a standalone company with a combined CSX-Conrail as a competitor. To aid in this discussion, we spend time in class reviewing a case study exhibit that contains a map of the rail network controlled by Norfolk Southern, as well as that which would be controlled by a pro forma CSX-Conrail.⁴⁰ We also study graphics that show the impact of a CSX-Conrail merger on operating efficiency for Norfolk Southern and a combined CSX-Conrail.⁴¹ Understanding the importance of Conrail's rail lines and the business prospects for the loser of this battle helps students appreciate the choices firms face in high-stakes situations.

D. *Hewlett Packard*

The *Hewlett Packard* case study describes the six-month proxy fight between Hewlett Packard heir and director Walter Hewlett and Hewlett Packard management surrounding the proposed merger between HP and Compaq, two companies in the low-margin PC business.⁴² This case allows us to explore a significant disagreement about the strategy of a company and the struggle for primacy. As always, we begin the case with a discussion of the reasons HP's management wants to merge with Compaq. In this discussion, we explore the dynamics of the fiercely competitive hardware industry in 2001 and the significant business challenges facing HP during this time. We assess management's claims of the strategic benefits, as well as the claimed synergies and sizable cost savings that would flow from an HP/Compaq combination.⁴³

38. ESTY & MILLET, ACQUISITION (A), *supra* note 37, at 1; ESTY & MILLET, ACQUISITION (B), *supra* note 37, at 1.

39. ESTY & MILLET, ACQUISITION (A), *supra* note 37, at 4–5.

40. *Id.* at 15.

41. *Id.* at 16.

42. KRISHNA PALEPU & JONATHAN BARNETT, HEWLETT-PACKARD-COMPAQ: THE MERGER DECISION (2004) (Harvard Business School case study) (on file with author).

43. *Id.* at 10–12.

We spend an equal amount of time exploring the basis for Walter Hewlett's fierce opposition to the transaction. Specifically, we evaluate Hewlett's claim that the strategic benefits touted by HP's management are unlikely to materialize, as well as his claims about the execution risk inherent in a transaction of this sort.⁴⁴ This debate about fundamental corporate strategy leads to a lively classroom discussion. There are a number of legal issues to explore in the case, as well, as it exposes students to the concept of proxy fights and affords an opportunity to assess the propriety of the actions of a board member (Walter Hewlett) who votes for a transaction then wages a proxy contest to prevent shareholder approval of that same transaction.⁴⁵

E. Taking Dell Private

The *Taking Dell Private*⁴⁶ case describes the decision-making process surrounding the Dell board's 2013 decision to accept an offer from company founder, Michael Dell, and his private equity partner, Silver Lake Partners, to take the public company private.⁴⁷ The Dell board has to decide whether this deal is in the shareholders' best interests and must make the decision in the face of an aggressive campaign by famed activist investor, Carl Icahn, opposing the transaction.⁴⁸

There are a number of legal and business issues to explore in this case. For the legal analysis, I supplement the HBS case study heavily with news accounts to allow exploration of the many issues litigated in connection with this going private transaction (e.g., whether the board can postpone its annual directors' election, move the record date back two months, and change the voting standard for approval of the transaction from a majority-of-the-absolute minority to a majority-of-voting-minority shareholders without running afoul of Delaware law). For the business and strategy analysis, we focus on why Michael Dell is interested in taking the company private, the key strategic issues affecting Dell's business, an assessment of whether a going private transaction makes sense for the company, an evaluation of the board's decision making and sale process, and, finally, a discussion of whether the board should have accepted or rejected Michael Dell's buyout offer.

To explore the strategic considerations, we use the case exhibits, which give us a window into the facts that informed the special committee and full board deliberations.⁴⁹ The exhibits contain a great deal of rich primary source

44. *Id.* at 14–15.

45. *Id.* at 12–13.

46. DAVID COLLIS ET AL., *TAKING DELL PRIVATE* (2013) (Harvard Business School case study) (on file with author).

47. *Id.* at 2–3.

48. *Id.*

49. *See id.* at 5–36.

material. The case study features five pages from the special committee's presentation on Dell's strategic position and eight slides from the Boston Consulting Group's presentation to the Dell board on the viability of pursuing various strategic initiatives.⁵⁰ There also is an exhibit containing Carl Icahn's letter to the board of directors proposing an alternative transaction and giving Icahn's views on the optimal strategy for a Dell turnaround.⁵¹ The exhibits also contain seven pages from the special committee's slide presentation recommending Dell's MBO.⁵² The presentation describes the rationale for the going private transaction as it explores and rejects a number of alternatives for increasing shareholder value, including sale to a strategic acquirer, transformative acquisitions, selling off business units, increasing the dividend, and pursuing a leveraged recapitalization (share buyback or special dividend).⁵³

We discuss the challenges facing Dell at the time of the case and the options facing the board. In particular, I focus the students' attention on the following: How should the board decide if Michael Dell's assertions about the likely continued decline of Dell as a public company are credible? Is Carl Icahn, who has proposed an alternative transaction, credible? If you were corporate counsel to the board, what would you advise?

II. BENEFITS AND DOWNSIDES OF USING HARVARD BUSINESS SCHOOL CASES

A. *Benefits*

There are a number of benefits to using HBS cases as a teaching tool.

1. The Human Element

The typical M&A judicial opinion discusses the motivations of the parties only to the extent they are relevant to the legal analysis the judge is undertaking. Providing deep psychological insights and background context is not the responsibility of the judiciary, of course. Judges are resolving disputes and do not provide context that is not germane to that enterprise. Most opinions, therefore, leave out the context surrounding how business decisions are made. However, in my view, coming to understand this context is a key part of my students' education. HBS cases can fill in the gaps by providing a number of rich details about the protagonists' backgrounds and the considerations that drive their actions.⁵⁴

50. *Id.* at 14–19, 21, 23–29.

51. COLLIS ET AL., *supra* note 46, at 13.

52. *Id.* at 6–12.

53. *Id.* at 10, 11.

54. Of course, one could enrich judicial opinions by performing research on the casebook litigants. See Hammond, *supra* note 15, at 32 (describing how Michael Mogill shares the stories

A particularly good example of this is the *American Cyanamid*⁵⁵ case study, which provides a window into managerial attitudes during a hostile takeover. American Cyanamid, a pharmaceuticals company, is negotiating for an asset swap with SmithKline Beecham when American Home Products launches a hostile bid.⁵⁶ The American Cyanamid board ultimately agrees to accept AHP's offer, which results in a substantial number of employee layoffs.⁵⁷ The case study affords an opportunity not only to discuss corporate strategy, deal structure, and the law surrounding hostile takeovers, but also the management team's actions in light of the interests—the human interests—they were taking into account during this process. Particularly telling is a case exhibit containing a letter from the CEO that describes the emotional tie he has to the company he has served for thirty-seven years and the responsibility he feels to the employees who, in his words, “had given their best to the company.”⁵⁸

Another example is *Circon*.⁵⁹ This case study focuses on Circon Corporation, a medical device maker that becomes the subject of a hostile attack from U.S. Surgical Corporation.⁶⁰ The case, co-written by Harvard Law and Business School Professor Guhan Subramanian,⁶¹ is one of my favorites to teach. The case is rich with information that affords an opportunity to explore Circon's business strategy, the reasons why Circon became a target of U.S. Surgical's unwanted advances, U.S. Surgical's takeover strategy, and Circon's defense strategy. One of the nicest features of the case is that it provides the students with a window into the thoughts and actions of managers during a hostile raid. In class, we discuss a board member's seeming struggle between loyalty to his friend, the CEO, and the fiduciary duties he owes to the corporation and the shareholders.⁶² We also critique the CEO's actions, as he struggles to keep the business together during the hostile raid, while seemingly

of the litigants with his students to “help[] add some flesh to the mere bones of the typical casebook.” (internal quotation mark omitted). I do this, on occasion. However, having this information pre-packaged is a nice feature of using HBS cases.

55. KAREN HOPPER WRUCK & SHERRY PELKEY ROPER, *AMERICAN CYANAMID (A) & (B) COMBINED* (1997) (Harvard Business School case study) (on file with author).

56. *Id.* at 2–3.

57. *Id.* at 9, 24.

58. *Id.* at 21–22.

59. BRIAN J. HALL ET AL., *CIRCON (A)* (2001) (Harvard Business School case study) (on file with author); BRIAN J. HALL ET AL., *CIRCON (B)* (2001) (Harvard Business School case study) (on file with author); BRIAN J. HALL ET AL., *CIRCON (C)* (2001) (Harvard Business School case study) (on file with author).

60. HALL ET AL., *CIRCON (A)*, *supra* note 59, at 1.

61. *Guhan Subramanian Biography*, HARV. LAW SCH., <http://hls.harvard.edu/faculty/directory/10868/Subramanian> (last visited Nov. 1, 2014).

62. HALL ET AL., *CIRCON (A)*, *supra* note 59, at 9, 11–12, 14.

putting up roadblocks for any sale of the company.⁶³ Students debate whether the CEO is out of touch and needs to be reined in or whether he is a man with three full-time jobs (i.e., running his pre-existing business, integrating a new major acquisition, and fighting off a hostile bid) who is simply trying to protect the company he built from an attack that unfairly takes advantage of temporary weakness.

2. Student Interest

My students love the HBS cases and wish we did more of them during the semester. As the quotes below illustrate, over the years, I have received a great deal of positive feedback from students about the use of HBS cases: “The course was especially helpful for me due to the HBS case studies [that] exposed students to business considerations that are at play in M&A”,⁶⁴ “There were moments when the class felt more like a business school class (which I loved) and I believe these helped us to understand the underlying rationales behind the transactions . . . we were discussing.”⁶⁵

Cases have interesting fact patterns and are usually written in an entertaining fashion (“X was staring outside the window at his villa on a rainy day wondering what to do about xyz business problem”). In one case, after being ousted by the board, the CEO goes into the boardroom in the middle of a board meeting and starts removing personal artwork. Also, comically, in the *Circon* case, an insurgent director who wins election to the board in connection with a proxy fight is housed in a low-budget motel room that he describes as “pretty long in the tooth, complete with a paper sanitary band over the commode.”⁶⁶ He is told he has to stay there because supposedly there is no room for him anywhere else in the entire city.⁶⁷ It is clear that he is not welcome. The colorful storytelling in the HBS cases is something my students enjoy.

3. Primary Source Documents

Another nice feature of HBS case studies is that they often contain multiple relevant primary source documents, something not available in judicial opinions. As mentioned above, the *Dell* case has copies of the actual slides presented by the special committee, consultant and financial advisor.⁶⁸

63. *Id.* at 4–5, 8–9.

64. University of Michigan Teaching Evaluations from anonymous M&A Student (Winter 2011) (on file with author).

65. University of Michigan Teaching Evaluations from anonymous M&A Student (Winter 2010) (on file with author).

66. HALL ET AL., *CIRCON* (A), *supra* note 59, at 10.

67. *Id.*

68. COLLIS ET AL., *supra* note 46, at 5–36.

This allows the students to look at the material the board members were reviewing as they were deciding on a course of action. The *Circon* case contains one of numerous letters from angry and disappointed shareholders urging the CEO to get serious about selling the business and threatening him with (another) proxy contest.⁶⁹ In *American Cyanamid*, there are reproductions of a press report and letters from managers giving their perspective on what happened during the hostile raid.⁷⁰ In a letter to the board, the CEO states that he thinks a celebratory board dinner to commemorate the end of management's tenure would be inappropriate,⁷¹ presumably because a lot of employees lost their jobs following the takeover. It is one thing for me to tell students that shareholders can be activists or that managers care about their employees; it is another for them to hear from actors in real business situations in their own words.

The *Circon* case comes with a video that professors can purchase that not only features a wonderful policy discussion on the use of the poison pill by a panel of corporate governance experts, including Judge Jack Jacobs, then Vice Chancellor of the Delaware Chancery Court, but also showcases the two main characters in the case study, the CEO and his long-time friend and fellow *Circon* board member, presenting their perspectives on the events that transpired.⁷² These materials serve as a foundation for a more enriched case discussion than typically exists when the only source material is a judicial opinion.

4. Forward-Looking Orientation

Business school cases are designed to provide a problem to solve. Students often are put in the role of the protagonist (the CEO, the Board) and forced to answer the questions "What would you do and *why*?" Instead of a post-mortem on a deal gone bad or accusations from shareholders of fiduciary duty breaches, in business school case discussions, we can take a forward-looking approach and ask what *should* happen. This forward-looking perspective lends itself to open-ended exploration that allows students to be more creative and flexible.

B. Potential Downsides

HBS cases as a pedagogical tool also have some limitations, as described below.

69. HALL ET AL., *CIRCON* (A), *supra* note 59, at 14, 34.

70. WRUCK & ROPER, *supra* note 55, at 17–19, 21–29.

71. *Id.* at 28–29.

72. Videotape: Brian J. Hall & Guhan Subramanian, *Circon* (Harvard Business Publishing Corporation May 1, 2001) (on file with author).

1. Law Student Capabilities

There is a lot of material that will be unfamiliar to law students—not just the accounting and financial terms, but information on operations, marketing, and strategy, as well. HBS cases are intentionally designed so that they cannot be “cracked” by just one person. Business school students review the cases with their study groups, often made up of students from diverse professional backgrounds, which makes it easier for the students to prepare for class. During class, resolution is achieved by drawing on the expertise of all the students in the room, whether it is in finance, marketing, operations management, strategy, accounting, or general management. This diversity of experience is almost always lacking in a law school classroom where many students have very limited work experience in a business capacity. As a law school professor, I fill in far more blanks during case discussions than my business school professors did when I was a student.

I am usually fortunate enough to have at least a couple of JD/MBA students in my class (and sometimes, just MBA students) with business school case method experience and substantive business knowledge. They are also experienced in case analysis and can provide insights that move the discussion along. In winter 2014, I taught the *Dell* case for the first time and was fortunate to have a student who worked for Dell in a technical capacity before coming to law school. During our class discussion, the student was able to offer insights on Dell’s culture and historical strategy. I am not usually this lucky.

2. Instructor Workload

Preparing for any class is a lot of work, but I find that preparing a new HBS case can be far more time-consuming than preparing to teach the typical judicial opinion. Most of the cases have teaching notes, but not all of them do. When teaching a case without a teaching note, I have found that it takes me several hours (often in excess of a whole day’s work) to perform the analyses and background research to teach the case effectively. Even with a teaching note, a substantial amount of time must be invested in fully understanding the case and adapting it for a law school classroom. I have a Harvard MBA, so I spent two years analyzing business school cases. I also spent several years in practice as a banker and a lawyer, so I have had the opportunity to see a number of different enterprises and challenges faced by companies as they were making decisions about financing and M&A activity. Even with this background (which I acknowledge many law professors do not share), studying cases to fully understand the drivers of a particular company’s strategy takes a great deal of time. In addition, supplementing the case study with additional legal materials and finding ways to introduce legal concepts into the discussion are necessary to make a case most useful for teaching law students. I also have to develop teaching plans to help me guide the in-class discussion so that it is

neither too tightly controlled, nor too discursive. These activities also take time. However, I find the effort to be well worth it.

3. Potential for Knowing What Happened in Advance

The best case studies are those that do not reveal the outcome of the dilemma. It is easier for students to advocate for one position when they do not know what the protagonist decided. However, though that is the ideal, some cases are not structured that way. The *Hewlett Packard* case, for example, reveals that the shareholders approved the HP/Compaq merger, albeit by a slim margin.⁷³ So, as opposed to the students making a decision about the best course of action *ex ante*, the students know the outcome in advance and are asked to assess the decision making process and whether the decision was likely to be a good one for HP.

Likewise, class discussions are richest when students do not know how the decision turned out (e.g., in the long-run, was acquiring Compaq a good move for HP?) because students are more willing to take sides in a debate when they do not know what the so-called “right” answer is in advance. Unfortunately, the cases that are most relevant for a law school M&A class and the ones I use tend to involve high-profile subjects such as Hewlett Packard and Time Warner. Though some of my students are more in tune with the business press than others, even students that rarely or never pick up *The Wall Street Journal* have some sense for how these business combinations have fared over time.

CONCLUSION

In this Article, I have described how I use HBS cases in an effort to develop students who understand the underlying rationales for M&A transactions and appreciate the complexity of business strategy. In-house lawyers today are expected to function as full members of the senior business management team, and outside counsel who understand not just the “what” of deal mechanics but also the “why” of corporate strategy can be highly valuable to their corporate clients. Operating from a place of information allows a legal advisor to be more imaginative and more realistic when providing advice. Lawyers do not have to be passive vessels who only respond to deals and other initiatives brought to them by clients; they can be valuable partners in the strategic enterprise. I hope that by using HBS cases for course instruction I am planting the seeds for the next generation of lawyers who will take up this charge.

73. PALEPU & BARNETT, *supra* note 42, at 1.

