

TRANSFORMING TREPIDATION INTO TRANSACTIONAL LAWYERING

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INTRODUCTION

Those of us teaching the Business Associations course in law schools are almost universally presented with a combination of circumstances that provides a unique opportunity for transformative teaching. These circumstances start with the outstanding quality of our students but also include their limited educational exposure and experience in business matters, their indoctrination into the “lawyer as litigator” model of the first-year curriculum, their lack of contact with transactional and collective decision making, and their unfamiliarity with the concept of lawyer as value creator.

At the same time, and now more than ever, law schools are being criticized for allegedly failing to produce practice-ready graduates. Critics range from the American Bar Association to the President of the United States.¹ There is continued pressure from law firms, which find that clients are unwilling to pay for on-the-job training of young associates. Law students themselves particularly feel the need to be more prepared to practice law upon graduation due to a combination of heavy debt loads and fewer traditional employment opportunities.²

These circumstances, though challenging, provide those teaching Business Associations with an opportunity to meet the needs of our students in a remarkable way. The resulting successful Business Associations course is comprised of four relatively equal pieces: 1) traditional doctrine and theory, 2) introduction to business and transactional terminology, 3) exposure to the fundamental business perspective of transactional lawyering, and 4)

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1. See *infra* notes 26, 33 and accompanying text.
2. See *infra* note 31 and accompanying text.

empowering students to create value in their clients' situations and transactions by introducing basic transactional lawyering skills.³ As discussed in this Article, if done well, the melding of these pieces can result in a remarkable transformation for even the most business-uninitiated and nervous law student. The pedagogical heuristic here involves teaching the doctrinal law and policy, while allowing the student to be exposed to, explore, and potentially embrace the role of the transactional business lawyer. He or she can go from thinking, "I don't know or care anything about business and am going to hate this course" to feeling "This material and these concepts aren't as difficult as I thought" to considering "I did not realize that transactional lawyering was this creative" to believing "I not only *could* practice this kind of law—I might even *want to*" to resolving "This is the way I would like to practice law, by being a value creator for my clients and their businesses."

I. UNDERSTANDING THE AUDIENCE AND THE MARKET

The typical Business Associations course spans a great variety of potential entity forms, group decision-making concepts, and state and federal laws and regulations.⁴ For many years, professors have bemoaned the difficulty this mass of material and these disparate sources of regulations present.⁵ Business Associations can be taught in a traditional doctrinal method, using some combination of lecture or Socratic style, moving from business form to business form and from state to federal regulation, with little harm done.⁶ The students will learn the legal concepts, spew them back on the exam, and create a bell curve of student performance that allows the professor to believe that an adequate job has been done.

3. Part II of this Article will assume that the first piece, teaching traditional business law and theory, is done in every Business Associations course. The discussion will focus on the other pieces identified, which introduce the transformational terminology, perspective, and skills of business and transactional lawyering.

4. The Business Associations course goes under various names at law schools, such as Business Associations, Business Organizations, Corporations, and a number of others. I use these terms interchangeably herein to refer to the introductory course in basic business types, functions, and operations.

5. David W. Carroll, *Clark, Corporate Law: A Paradigm for Future Student Textbooks*, 62 S. CAL. L. REV. 187, 187 (1988) (book review) ("I hate teaching Corporations. . . . The course creates an impact similar to the target pattern of an open-choke shotgun fired from a great distance."); Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. & TECH. L. 175, 175 (2013) ("This essay consists of ruminations of a frustrated, yet doggedly determined, business law instructor.").

6. At least one professor dissents from this sanguine view. See Carroll, *supra* note 5 ("This approach, however, develops into an un nourishing, intellectual gruel. Indeed, there is danger of inflicting irreversible brain damage on students during the period when basic corporate concepts are being imparted.").

Most of us, however, are not satisfied with this approach, either as a matter of professional pride or as a stanchion of successful pedagogy. How should it be altered? The options are as varied as the professors teaching the course: from teaching from a litigation perspective,⁷ incorporating problems or simulations,⁸ using economics or cognitive learning theories,⁹ employing an international angle¹⁰ or a professional responsibility viewpoint,¹¹ focusing almost exclusively on Delaware law,¹² or, indeed, focusing almost exclusively on federal law.¹³ These approaches seem driven primarily by some preference or expertise of the individual professor. As a means of energizing the professor—and thereby the class as a whole—to move beyond the most mundane form of presenting Business Associations, they are certainly a step in the right direction.

A more fundamental modification to teaching Business Associations successfully, however, would focus initially on the intended audience rather than the peculiarities of the subject matter or the predilections of the professor.¹⁴ These then become the relevant questions: What are elements of the profile of the students taking the Business Associations course? What are

7. See, e.g., Jill E. Fisch, *Teaching Corporate Governance Through Shareholder Litigation*, 34 GA. L. REV. 745, 745 (2000) (illustrating the relevance of shareholder litigation in teaching basic corporate law concepts); Ann M. Scarlett, *Incorporating Litigation Perspectives to Enhance the Business Associations Course*, 8 J. BUS. & TECH. L. 204, 204–05 (2013) (discussing the use of litigation scenarios in teaching Business Associations).

8. See, e.g., Carol R. Goforth, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851, 851 (2000) (discussing her experiences of using simulations in class).

9. See, e.g., Robert B. Thompson, *Teaching Business Associations: Norms, Economics and Cognitive Learning*, 34 GA. L. REV. 997, 1001 (2000) (describing cognitive learning used to enrich the rational choice model).

10. Shruti Rana, *Teaching Amidst Transformation: Integrating Global Perspectives on the Financial Crisis into the Classroom*, 8 J. BUS. & TECH. L. 197, 198 (2013) (describing utilization of comparative law perspectives).

11. Theresa Maynard, *Teaching Professionalism: The Lawyer as a Professional*, 34 GA. L. REV. 895, 896 (2000) (illustrating the importance of incorporating professionalism into classes).

12. Charles R.T. O’Kelley, *Delaware Corporation Law and Transaction Cost Engineering*, 34 GA. L. REV. 929, 929–30 (2000) (noting the value in structuring a Corporations course around Delaware law).

13. Verity Winship, *Teaching Federal Corporate Law*, 8 J. BUS. & TECH. L. 217, 217 (2013) (proposing teaching federal corporate law).

14. “Transformative teaching requires a fresh approach to teaching and learning. It must be much more self-conscious about its objectives and methods. It must adopt a learner-centered rather than an instructor-centered approach.” *Transformational Teaching*, COLUM. U. GRADUATE SCH. ARTS & SCI. TEACHING CENTER, <http://www.columbia.edu/cu/tat/pdfs/Transformational%20Teaching.pdf> (last visited Nov. 9, 2014).

their needs in approaching a career that may include practice in a transactional or business law context?¹⁵

As for the student profile, law school admissions are competitive, which makes getting into law school a challenging task.¹⁶ The men and women who matriculate to law school are among the best and the brightest of their generation. These are individuals who have been successful throughout their academic careers.

As a group, however, their exposure to business concepts, culture, and practices is extremely limited. Neither their education nor their experience provides them with an entrée to the business world that would make them comfortable entering the Business Associations course. On this matter, two aspects of the law student profile are particularly relevant. First, most law students are young, that is, the majority of all law school applicants are age twenty-four or under.¹⁷ At my school, the average age of the matriculating students in the fall of 2013 was 24.88 years.¹⁸

This means law students are coming to law school with relatively little non-academic experience. They have spent their lives being students. No

15. I am aware that the use of the terms “transactional” as opposed to “business” lawyer or practice in describing the role of the lawyer who primarily represents business clients in a non-adversarial setting may have slightly narrower connotation. *See, e.g.,* George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 *BUS. LAW.* 279, 295–309 (2009) (discussing the categories of non-transactional practice). In this Article, however, the two terms are used interchangeably and synonymously.

16. As to these matters, I speak from personal experience, having reviewed student admission files and participated in admissions policymaking for over a decade as member, chair, or co-chair of the University of Minnesota Law School admissions committee. For the 2012–13 entering class, there were only 872 applicants admitted out of a pool of 2902, for an admission rate of approximately thirty percent. *See LSAC Official Guide to ABA-Approved Law Schools*, LSAC (April 2014), <https://officialguide.lsac.org/RELEASE/SchoolsABADData/SchoolPage/SchoolPage.aspx?sid=89> (comparing total applications received to students admitted).

17. KIMBERLY DUSTMAN & PHIL HANDWERK, *ANALYSIS OF LAW SCHOOL APPLICANTS BY AGE GROUP: ABA APPLICANTS 2005–2009*, at 2–3 (2010), available at [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/analysis-applicants-by-age-group.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/analysis-applicants-by-age-group.pdf) (“The age distribution of applicants changed little from 2005 to 2009. About half of the applicants each year were between the ages of [twenty-two] and [twenty-four].”).

This statistic has remained stable. *See* LINDA F. WIGHTMAN, *LEGAL EDUCATION AT THE CLOSE OF THE TWENTIETH CENTURY: DESCRIPTIONS AND ANALYSES OF STUDENTS, FINANCING, AND PROFESSIONAL EXPECTATIONS AND ATTITUDES* 15, tbl.2 (1995) (showing a majority of first-year law school students in 1991 class to be twenty-four and under) (copy on file with author and *Saint Louis University Law Journal*).

18. Univ. of Minn. Law School, *Matriculants by Age and Major (2009–2013)* (on file with author and *Saint Louis University Law Journal*). Indeed, the average age of matriculating students has declined from an average of 29.212 years for the class entering in 2009 to the current 24.88, with the average for the years in the interim showing the gradual decline: 27.82 (2010), 27.38 (2011), 25.73 (2012). *Id.*

doubt, many have been involved in extracurricular activities. Many may also have volunteered in various service-related organizations and activities. A number have held summer employment or internships. Still, the relatively young age of law school students means that they have had little personal exposure to working in the business world or being exposed to the operations and dynamics of a business organization. Contrast this lack of experience with the requirements of Masters of Business Administration (MBA) programs, which typically require several years of work experience before students are allowed to apply.¹⁹ Indeed, students at top business schools average four or more years of prior business-related experience.²⁰

Second, law students' academic backgrounds do not often include substantial education in business-related disciplines. These disciplines would include accounting, business administration or management, finance, and marketing. According to most recent data, successful law school applicants with these majors comprise less than ten percent of the total number of all admitted applicants.²¹ This figure has been steadily declining over the past several years.²² Statistics for my law school's enrolled students over the same general period show an even lower percentage of students with business-related majors, with 6.7% for the 2012 entering class.²³

Professors teaching Business Associations, therefore, must recognize that their students do not come to the course with the experience or education that would make them immediately comfortable with the subject matter. Indeed, my own experience is that most students recognize this fact. They also seem to feel, although not justified, that the other students in the class have a more

19. "You are correct in saying that the MBA is somewhat unusual among postgraduate qualifications in generally demanding that students already have some experience in the area it professes to teach (management and business).

Most notably, the two professions of law and medicine do not require this, instead including large amounts of "on-the-job" learning as part of the teaching process. (Few people, of course, would want a doctor to be allowed to practise before being qualified.)" George Bickerstaffe, *Ask the Expert: Why Do I Need Work Experience?*, WORDPRESS.COM (Jan. 7, 2008, 4:11 PM), <http://whichmba.wordpress.com/2008/01/07/ask-the-expert-why-do-i-need-work-experience>.

20. The average work experience at five top business schools, Stanford, Harvard, UCLA, Northwestern (Kellogg), and Duke ranges from forty-seven to sixty-six months. *MBA Work Experience*, SKOOLIX, <http://skoolix.com/MBA-Admissions-Work-Experience.aspx> (last visited Nov. 9, 2014).

21. LAW SCH. ADMISSION COUNCIL, APPLICANTS BY MAJOR: UNDERGRADUATE MAJORS OF 2013–2014 APPLICANTS TO ABA LAW SCHOOLS (Of 38,207 enrolled students, only 3,780 had these undergraduate majors, resulting in 9.89%) (copy on file with author and *Saint Louis University Law Journal*).

22. *Id.* Figures for the prior three years show 10.6% (2012–2013), 11.3% (2011–2012) and 11.7% (2010–2011). *Id.*

23. Univ. of Minn. Law School, Entering Class Information: Class of 2012 (on file with author and *Saint Louis University Law Journal*).

substantial foundation. The result is that students often feel ill-equipped to succeed in the Business Associations course. Indeed, they dread it. If the subjects taught in that course were not part of the group often tested on bar exams, I believe that many of them would never take the course at all.²⁴

Now, let us consider what the profession considers to be important in training law students to be successful lawyers. Unlike their MBA counterparts, law students are not expected to come to law school with significant experience. Unlike their medical school counterparts, law students are not provided a formal multi-year residency where students can apply the skills they have been taught in class.²⁵

In 1992, the American Bar Association Section on Legal Education and Admissions to the Bar published a report evaluating the legal education system.²⁶ This report, referred to as the MacCrate Report, posited a gap between formal legal education and the reality of practicing law:

It has long been apparent that law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers licensed to handle legal matters. Thus a gap develops between the expectation and the reality, resulting in complaints and recriminations from legal educators and practicing lawyers.²⁷

Following from that premise, the MacCrate Report identified ten “fundamental skills and values that every lawyer should acquire before assuming responsibility for the handling of a legal matter.”²⁸ These ten fundamental lawyering skills identified are: 1) problem solving, 2) legal analysis and reasoning, 3) legal research, 4) factual investigation, 5) communication, 6) counseling, 7) negotiation, 8) litigation and alternative dispute resolution, 9) organization and management of legal work, and 10) recognizing and resolving

24. Anecdotally, this attitude is reflected in the first-year curriculum as well. I teach first-year Contracts. When I ask the students which of their first-semester first-year courses (Civil Procedure, Constitutional Law, Contracts and Torts) they are most concerned about at the outset, the large majority identify Contracts. When I ask them why that is so, they most often identify the presumption that it is a “business course” and that they do not have any background in business-related matters.

25. “Medical residency is a minimum of three years for primary care physicians and some other specialties, up to five years for some surgical specialties. (Some medical specialties require additional years of fellowship training in addition to the three to five years of residency training).” Andrea Santiago, *What Is Medical Residency Training? All About Medical Residency Training*, ABOUT.COM, <http://healthcareers.about.com/od/medicalschooldoctors/a/MedResidency.htm> (last visited Nov. 9, 2014).

26. A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf.

27. *Id.* at 4.

28. *Id.* at 7.

ethical dilemmas.²⁹ Review of this list, even from the perspective of today's law school classroom, underscores the fact that very few of these skills are part of the typical law school offering. Moreover, skills such as problem solving, communication, counseling, and negotiation all take on a significantly different hue if seen through the lens of the typical business lawyer involved in primarily transactional matters.³⁰

The Great Recession sharpened both the criticism of the legal academy and the consternation felt by our students about being effectively equipped to enter the legal market.³¹ For present purposes, this criticism importantly highlights the failure to teach practice-ready thinking and skills.³² Even the President jumped on the bandwagon:

This is probably controversial to say, but what the heck, I'm in my second term so I can say it. . . . I believe, for example, that law schools would probably be wise to think about being two years instead of three years because [. . .] in the first two years, young people are learning in the classroom. In the third year,

29. *Id.* at 135.

30. Many subsequent studies have also criticized legal education for its lack of focus on broader, practical, transactional skills development. For example, a 2007 report from the Carnegie Foundation entitled "Educating Lawyers" echoed that doctrinal, litigation-oriented focus of legal education limited the emphasis on lawyering practice skills. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 89–91 (2007).

31. *See Draft Report and Recommendations*, 2013 A.B.A. TASK FORCE ON FUTURE LEGAL EDUC. 15, available at http://www.americanbar.org/content/dam/aba/images/news/PDF/draft_report_of_aba_task_force_september_2013.pdf ("The legal profession increasingly began to assign, or try to assign, more responsibility to law schools for the practical and business aspects of the education of lawyers, mainly for economic reasons (including unwillingness of clients to subsidize the education of new lawyers). The result has been increased pressures on law school curricula."); *Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary*, 2013 A.B.A. SEC. ON LEGAL EDUC. & ADMISSIONS TO BAR 7, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf ("Law schools have been exhorted to teach more skills, to develop habits and values, to modify or expand the curriculum to prepare students for the global, regulatory world we live in, and to ensure that students understand the economics of the market and are business-literate.").

32. *See* David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1. *See also*, Michele Goodwin, *Law Schools' Failure to Prepare Students . . . It's Complicated*, CHRON. HIGHER EDUC. BLOG, Dec. 13, 2011, chronicle.com/blogs/brainstorm/law-schools'-failure-to-prepare-students...it's-complicated/42163 ("Recent reports in *The New York Times*, *Washington Post*, and other national media [describe] . . . [law] [f]irms['] claim[s] that law students are not prepared to perform basic tasks such as drafting contracts, negotiating mergers, and other key features of law practice."); Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 20 (2013) ("A third shortcoming of the casebook method is its limitations in teaching transactional and other non-litigation law practices, particularly the work of business lawyers.").

... they'd be better off clerking or practicing in a firm, even if they weren't getting paid that much. . . ."³³

Lacking the experience and education that would allow new law students to at least be aware of and open to the business-related materials that underlay the typical Business Associations course, their introduction to the study of law in the first year not only does not remedy this deficiency, it provides a dominant portrait of the role of the lawyer as a litigator. A typical first-year curriculum includes courses in Civil Procedure, Constitutional Law, Contracts, Criminal Law, Property, Torts and some form of Legal Research and Writing program. Each of these courses, with the potential exception of Contracts, is grounded in pursuing legal rights through litigation. Even Contracts, which poses the possibility of exploring a transactional and business-related focus, is typically taught from "casebooks" made up significantly of personal or consumer dispute-related contract fact patterns. The Legal Research and Writing course usually emphasizes dispute-oriented research and writing.

The net result of these factors is that the law student embarking on upper level coursework views the lawyer as litigator, with the only need to understand business structures and practices being to decide whom to sue and how they are to be served with legal process. They have no clue as to the vast, creative field of legal practice that is transactional in nature, where the goal is not the winner-takes-all approach of litigation, but reaching a positive, value-added outcome for all participants.³⁴ They do not yet see the significant potential career opportunities that exist in that arena, from M&A attorney to contracts lawyer to human resources specialist to tax advisor. They are unexposed to the skills of this type of practice, such as providing business/legal advice, structuring entities and transactions, interviewing, counseling, negotiation, and drafting. The teacher of Business Associations, thus, is presented with an audience whose perspective is not initially conducive to being transformed into students who understand the concept and embrace the prospect of becoming business lawyers:

Teachers of the introductory Corporations course must deal with three universally recognized phenomena. First, Corporations is viewed by many students as a "bar course." Thus, while it is usually not a prerequisite for

33. Colleen Flaherty, *2 Years for Law School?*, INSIDE HIGHER ED, (Aug. 26, 2013) (internal quotation marks omitted), available at <http://www.insidehighered.com/news/2013/08/26/president-obama-calls-cutting-year-law-school#sthash.0ZPPlz49.dpbs>.

34. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243 (1984) (positing that lawyers add value to transactions by functioning as "transaction cost engineers"); Dent, Jr., *supra* note 15, at 281 (viewing the role of business lawyers as broader "enterprise architects"); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487 (2007) (empirically testing Gilson's hypothesis).

graduation, most law students feel compelled to take it. Second, Corporations is a “business” course. Many of the students who reluctantly take Corporations because they feel they must, will do so with extreme disinterest and with a certainty that they lack the background to do well in the class. Finally, almost all of the students in the class will have experienced a strange transformation sometime during or at the end of their first year of law studies that makes them uninterested in preparing for, or participating in, the bulk of their classes. Instead, they save their energy and passion for the courses, particularly advanced courses, in the areas in which they hope to practice, and for extracurricular activities, clinics, externships, and part-time employment.³⁵

II. THE TRANSFORMATION PROCESS

So where does this leave the professor tasked to teach the basic Business Associations course? He or she faces a class of extremely intelligent students who have little exposure to or education in business concepts, who have been taught that the role of the lawyer is primarily as a litigator involved in dispute resolution, and who likely believe that their best chance to secure a legal job to support their lives (and pay their student loans) is to follow a path that explores and expands that route. Still, they may take the Business Associations or Corporations course because their state bar exams include Business Associations or Corporations as a topic of potential testing³⁶ or they understand that this area is a difficult one to learn on your own and they may need to use it someday for a client, friend, or family member. That is, how do you deal with, much less overcome, “students’ fear, loathing, and disinterest in the Corporations class”?³⁷

In my view, there are two fundamental premises to successful teaching in the Business Associations course. First, in order to truly introduce students to the role of the business lawyer, the professor must help the students recognize that the Business Associations course is at least as much about business as it is

35. O’Kelley, *supra* note 12, at 931–32.

36. *See, e.g.*, THE STATE BAR OF CAL. COMM. OF BAR EXAMINERS/OFFICE OF ADMISSIONS, SCOPE OF THE CALIFORNIA BAR EXAMINATION 1, available at <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=VQF73Jr-8iE%3D&tabid=250> (“Applicants should be prepared to answer questions that have issues concerning a variety of Business Associations, including, but not limited to Corporations, Sole Proprietorships, Partnerships (General Partnerships, Limited Partnerships, Limited Liability Partnerships), Joint Ventures, Limited Liability Companies, and the principles of Agency inherent in business relationships.”); *The Uniform Bar Examination*, NAT’L CONF. BAR EXAMINERS, <http://www.ncbex.org/about-ncbe-exams/ube> (last visited Jan. 12, 2015) (The Uniform Bar Examination (UBE) has gained popularity and now is used in fourteen states); *The Bar Examination*, W. NEW ENG. SCH. L., <http://www1.law.wne.edu/academics/index.cfm?selection=doc.8221> (last visited Jan. 12, 2015) (On the Multistate Essay Examinations portion of the UBE, one testable topic is “Business Associations (Agency and Partnership; Corporations and Limited Liability Companies)”).

37. O’Kelley, *supra* note 12, at 932.

about law. The students need to understand that the law they will be learning merely applies to guide the otherwise fundamental goals that are invigorating the activities of the entrepreneur or others involved in starting or running a business. That is, in order to be a good business lawyer you need to know what your clients want to accomplish. In order to understand what they want to accomplish, you need to understand business perspectives, generally, and their business, specifically. Your role is to help them get there in the most effective way possible. Knowing the law is not enough and may even be counterproductive:

Executives often suggest that lawyers who are ultraconservative in their approach to issues deserve the moniker “naysayers.” These lawyers find that the easiest and safest answer to a client question is “no.” Always playing it safe can discourage clients from seeking a lawyer’s advice and counsel. Playing it safe also suggests a lack of creativity on the part of the lawyer. Strong legal skills alone are not enough to be a top performer. The nay-saying lawyers either haven’t learned enough about the company or haven’t kept up with the rapidly changing business environment. New lines of business, reorganizations, and increasing competition require that lawyers spend time and effort keeping up with the company’s strategic approach.³⁸

Second, and even more foundational, the successful Business Associations professor must never forget how little he or she knew when they were students in the Business Associations course. Some self-deprecating story about the professor’s own lack of business acumen or knowledge from earlier times makes the professor more real to the students and the goal of acquiring business sophistication appear more attainable.³⁹ It is enlightening to realize that relative expertise can be accomplished from a minimal base of knowledge and experience. Only if the professor can empathize with the students’ trepidation can there be hope that the student and professor can start together at a point that allows the student to understand and maybe even embrace the role of the business lawyer.

38. Daniel J. DiLucchio, *Are You a Go-to Lawyer?*, CORP. COUNS. (June 2006), http://www.altmanweil.com/dir_docs/resource/a1cc4736-7300-4ab5-b025-8d0ff83ab726_document.pdf.

39. I tell the students the true story that I was a practicing litigator when I went on the academic job market. The subjects that I stated that I felt competent to teach were Civil Procedure and Antitrust. When I interviewed at the University of Minnesota Law School, the Dean told me that they didn’t need what I wanted to teach but rather needed a Business Organizations and Contracts teacher. I end the story by saying: “I told the Dean, ‘I can do that,’ and today, some thirty-plus years later, I am a corporate guru of sorts. And if I could learn about being a business lawyer with no prior background or training, so can you.”

A. *Learning the Language of Business and Business Transactions*

Part of the process of becoming an expert in a subject area is becoming facile in its vocabulary, both in knowing what words to use and also what they mean. One of the most difficult parts of the first-year rite of passage in studying law is learning law's peculiar language. Students spend much time looking up new legal terminology, such as "briefs," "citation," "civil," "criminal," "demurrer," "holding," and "procedural posture," not to mention untold Latin phrases like "*amicus curiae*," "*certiorari*," "*dictum*," "*mens rea*," and "*res ipsa loquitur*." When they get to the upper-level Business Associations course, students assume that the legal dictionary can for the most part be put aside. That is true, but now they must learn a whole new language, namely, that of the business world. Business, like law, has its own language.

Learning the language of business is not difficult, but it must be approached intentionally. Use the materials that the students are reading. One of the most popular cases introducing partnerships is *Martin v. Peyton*,⁴⁰ where one group of business associates sought to help the K. N. & K. partnership through some financial difficulties.⁴¹ The law of the case is not difficult, namely, that whether one becomes a partner in a partnership depends on whether the putative partner shares in the profits and exercises control consonant with co-ownership.⁴²

If that is all the student learns, however, a great teaching moment in the growth of potential business lawyers is lost. In discussing the facts, the court notes that the associates seeking to assist the partnership do so by lending the partnership some assets:

The respondents were to loan K. N. & K. \$ 2,500,000 worth of liquid securities, which were to be returned to them on or before April 15, 1923. The firm might hypothecate them to secure loans totaling \$ 2,000,000, using the proceeds as its business necessities required.⁴³

Now, the business learning begins: what are *securities*, what are *liquid securities*, and what does it mean to *hypothecate* them? These terms are not particularly difficult to understand in a basic sense—rather, they are just foreign to the students. Learning about business through learning its language, like learning any language, is accretive.⁴⁴ We learn the words and their

40. 158 N.E. 77 (N.Y. 1927).

41. *Id.* at 79.

42. *Id.* at 79–80.

43. *Id.* at 79.

44. Accretive means "The process of accretion, which is the growth or increase by gradual addition, in finance and general nomenclature. An acquisition is considered accretive if it adds to earnings per share." *Accretive*, INVESTOPEDIA, <http://www.investopedia.com/terms/a/accretive.asp> (last visited Nov. 9, 2014). Selective use of business terms, like "accretive," in normal

meanings a little at a time. Nobody wakes up one morning conversant in a foreign language, whether it is Mandarin or law or business. But, we can all learn a new language over time. During the first week of Business Association, the students must understand that a new language is involved and that their classmates know that language no better than they do at the outset. To prove the point, ask for a volunteer to tell you what “hypothecate” means without looking it up. In thirty-plus years of teaching, I have never had a student who knew what it meant initially but, once the term is explored in the context of the case and the sentence quoted above, the class quickly learns that it means “[t]o pledge property as security or collateral for a debt.”⁴⁵

In addition, from the outset, students should be encouraged to explore the language and practices of business by reading business news, whether it is explored online from any of a number of national sources⁴⁶ or through the business section of their local newspaper. *The Wall Street Journal* offers a marvelous short-term subscription to students for just \$1 per week for 15 weeks.⁴⁷ I often start the class with a discussion about some trending business story, and I encourage students to follow the business news and to come to class with questions about current business issues.

B. *Changing the Fundamental Approach: The Business Perspective*

Students entering the Business Associations course know how to approach law school class preparation: they read primarily appellate cases and prepare case briefs, focusing on the legal rationale for the court’s resolution of the case, with possible interest given to how that rationale differs from the one below or from concurring or dissenting opinions. The case brief they prepare includes sections on the facts, the procedural posture, the issue, the court’s ultimate holding and the court’s reasoning. This process focuses primarily on legal principles in a dispute context and their potential future applicability.

The Business Associations teacher must radically change the students’ approach to legal materials. True, a perusal of Business Associations course books reveals that they are still almost exclusively *casebooks*; that is, the

contexts, as used in the noted sentence, can give the students in class business language knowledge and a way to use business terms in everyday speech and writing.

45. *Hypothecate*, FREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/hypothecate> (last visited Jan. 12, 2015).

46. See BUS. WK., <http://www.businessweek.com> (last visited Nov. 9, 2014); CNN MONEY, <http://money.cnn.com> (last visited Nov. 9, 2014); FORBES, <http://www.forbes.com> (last visited Nov. 9, 2014); N.Y. TIMES BUS. DAY, <http://www.nytimes.com/pages/business> (last visited Nov. 9, 2014).

47. This includes print, online, tablet, and smartphone access. See *Get The Journal at Low Student Rates!*, WSJ.COM, <https://buy.wsj.com/offers/html/JIEofferWPP151.html?trackCode=aaqb9wc7> (last visited Nov. 9, 2014).

primary resource material is still dispute-oriented appellate cases.⁴⁸ When students read cases in their Business Associations course, however, the focus must be on the business participants, what they were trying to accomplish, where it went awry, and how the students would change the approach *to avoid the dispute and the resultant litigation*. Put another way, the legal result and reasoning of the case is nearly irrelevant, although it can be covered quickly just so the students do learn the legal principle involved.

The key here is to introduce students to the business perspective by having them try to understand the business background and situation that underlay the case. That is, business people generally abhor litigation and do not start a business with the thought that litigation will be a part of their business plan. In effect, the students need to engage in a reverse engineering of the underlying business context in order to understand what the participants were trying to accomplish, what went wrong, and how the litigation result could have been avoided by pre-planning through counseling from a competent business lawyer, namely, them.

In this context, questions such as “what is the procedural posture of the case” are never part of the class. Rather, the students are guided, whether explicitly or not, through the following analysis:

1. Who are the participants (not “parties”) in the underlying business venture?
2. What were they seeking to accomplish?
3. What issue or situation was presented that ultimately gave rise to the litigation?
4. Could they have avoided the litigation altogether, that is, by pre-planning? [Almost always a “yes” answer].
5. What alternatives did they have to address this situation in advance?
6. What are the benefits and weaknesses of each alternative?
7. Which of these alternatives appears to best meet their needs?
8. How would you, as lawyer, have broached the issue with the clients in advance from a planning perspective and how would you have assisted them in addressing it without jeopardizing their otherwise positive business relationship?

Cases in the Business Associations course should be treated like case studies in business school, that is, from a planning and problem-solving perspective. Ideally, the students and professor work together to explore (read

48. Indeed, most of these books contain the word “Cases” in their titles. Even possible exceptions to this casebook domination theme are case heavy. *See* DWIGHT J. DRAKE, BUSINESS ORGANIZATIONS IN A PLANNING CONTEXT: CASES, MATERIALS AND STUDY PROBLEMS (2013) (containing over eighty “principal” cases); DAVID EPSTEIN ET AL., BUSINESS STRUCTURES (3d ed. 2010) (containing over sixty “principal” cases).

as: learn) the business point of view of the participants, the practical constraints under various approaches, and potential resolutions. It is profoundly more rewarding to avoid a problem that might occur than to simply fight over who is wrong once it has already happened. Here, the lawyer serves the role of listener, problem solver, counselor, and legal advisor instead of litigator. This approach posits the lawyer as a partner in the client's business adventure, adding value and indeed leading in helping the client to succeed:

[T]he [business school] case method is a profound educational innovation that presents the greatest challenges confronting leading companies, nonprofits, and government organizations—complete with the constraints and incomplete information found in real business issues—and places the student in the role of the decision maker. There are no simple solutions; yet through the dynamic process of exchanging perspectives, countering and defending points, and building on each other's ideas, students become adept at analyzing issues, exercising judgment, and making difficult decisions—the hallmarks of skillful leadership.⁴⁹

If implemented in the Business Associations course, this approach highlights for the students several important life skills. In order to understand the perspectives of the business participants at the outset of the relationship that led to the litigation they are reading about, students must learn to listen. They must also have empathy. Moreover, in order to empathize with these business actors, the students must understand the business context and the real financial and practical constraints. They can come to realize that the legal issues are secondary to the goals of the participants: the role of the lawyer is to use the law to assist in bringing the client's goals to fruition by providing a combined business and legal framework for that to occur. In other words, in this pedagogy, the students:

- Are put squarely in the shoes of real people wrestling with real dilemmas.
- Learn how to approach and solve problems.
- Interact with their peers through debate, presentations, and ad hoc role plays.⁵⁰

For most students, this is at once a frightening and enlightening experience. It is frightening because most law students have never viewed matters from the perspective of the client who is starting or running a business. Law students are taught to look back in time from an adversarial viewpoint and

49. *The HBS Case Method*, HARV. BUS. SCH., <http://www.hbs.edu/mba/academic-experience/Pages/the-hbs-case-method.aspx> (last visited Jan. 12, 2015). See generally WILLIAM ELLET, *THE CASE STUDY HANDBOOK 1* (2007).

50. *The Case Study Teaching Method*, HARV. L. SCH., <http://casestudies.law.harvard.edu/the-case-study-teaching-method> (last visited Jan. 12, 2015).

attempt to remedy or defend a wrong that has been allegedly committed. Looking forward from a planning perspective is new.

This forward-looking problem-solving perspective is enlightening because it expands the students' horizon, often for the first time, of what the role of a lawyer might be. In the business-counseling context, a lawyer can play a productive and creative role in helping a client avoid unnecessary speed bumps in the path of their business. The lawyer can become a partner in the success of that business instead of an advocate asserting or defending against claims that have already occurred. The ultimate goal is for the lawyer to be viewed by the client as more than merely a legal resource, but rather, for the client to seek the lawyer's guidance as a *trusted advisor* on both legal and non-legal issues and situations.

C. Empowering the Student: Introduction to Transactional Lawyering Skills

The lawyer as business counselor viewpoint also opens up the class to the introduction of previously unexplored skills and role-plays, such as transactional interviewing. For example, a student volunteer who has always wanted to start a business (there are usually a couple in every class) can play the entrepreneur. Another student can be the lawyer meeting with the client for the first time. Unlike advising a client on a potential lawsuit, here, the student lawyer must first discover what the client's business is going to be and what relationships will be important to get the business going. Is a lease for space or purchase of equipment necessary? How will the business be financed? Does the entrepreneur have or expect to have other investors? Will there be employees? Is there intellectual property to be protected? Has the client already taken any actions to start the business? Once one student lawyer has run out of questions, the professor can ask for a volunteer to continue, adding insight into what a transactional lawyer needs to find out to assist the entrepreneur.

The students learn to listen to their clients, to explore the client's goals, and to meet the client's needs with the legal tools available. The business acumen of the students is raised as they consider the current and prospective needs of the client. They begin to understand the business viewpoint and how the transactional lawyer can become a valued and value-adding advisor.

In all of this, the law is not irrelevant. Business organization law, however, has several unique aspects that the students can be led to discover in this pedagogical format. First, unlike most of the other substantive law that they have studied, such as torts or criminal law, business law is not regulatory, but enabling.⁵¹ It does not tell participants how they must act to avoid liability, but

51. Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 888 (2005) ("U.S. corporate law follows a clear and consistent 'enabling' approach.").

rather, provides a framework for their business activities. Second, and closely related to this enabling nature, business law is primarily composed of default rules that the parties can vary with the lawyer's assistance. The default rules provide an "off-the-rack"⁵² baseline for business organization activities. Students get to explore the concept of changing the default rules to meet the specific needs of the client. This is fundamentally a positive and creative endeavor—one that is foreign to the lawyer as litigator role that the students have effectively been taught to believe is their only career option.

For example, the students can role-play to advise another student client on the importance of choosing a limited liability entity form for the business. In this context, they must know and be able to communicate, in lay terms, the differences between the possible choices, such as a limited liability company, Subchapter S Corporation, or limited liability partnership. Additionally, they must provide to the client a rationale for which entity to choose. They must be able to respond to the client's questions in common sense terms and language.

This leads to introduction of another transactional lawyering skill: drafting. Once the appropriate limited liability form is chosen, the formative documents must be drafted. Having the students draft the articles of organization for a limited liability company, for example, requires them to consider not only what is best for the client but also whether the statutory default provisions meet those needs or should be changed. This exercise challenges both the students' statutory interpretation skills and their drafting skills. Review of these draft articles of organization by the professor with comments and a second draft by the students can serve as a tremendous introduction to transactional drafting.

In another scenario, where several individuals are seeking to start a business together, the student lawyers can be provided an opportunity to explore a wealth of potential issues with students representing the business parties. What is each party going to contribute to the business? What roles will each play in the business operations? Do the participants expect compensation for these activities? What ownership interest will each have? How are decisions to be made—by majority of the participants or majority of ownership interests or unanimously on some items or by some other method?

This multi-person scenario allows the students to recognize that difficulties can arise when more than one potential client is involved. From a professional responsibility standpoint, whom does the student represent? Each of the parties may have different answers to questions of investment, ownership, and control. That is, they have both current and potential conflicts of interest in how the business ownership and control are structured. Do these conflicts prevent the

52. Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 237 (2005) ("Corporate law provides a set of off-the-rack rules that provide a basic hierarchical structure.").

lawyer from simultaneously representing both (or if more, several) of the individuals starting the business?

Under the Model Rules of Professional Conduct, a lawyer generally “shall not represent a client if the representation involves a concurrent conflict of interest” with another client.⁵³ Nevertheless, and crucial to the students’ understanding of the role of the transactional lawyer, the people starting a business together, even while wanting the best arrangement for themselves individually, have the success of the overall venture as paramount. That is, they are not at odds with each other fundamentally, as in litigation or being on opposite sides of a real estate transaction. Rather, they seek to subsume their individual expectations to the business as a whole. The comments to the Model Rules of Professional Conduct recognize and approve the unique role of the business lawyer in this context:

Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.⁵⁴

This multi-participant business start-up also introduces students to another unique feature of business organization law, namely, that it often involves collective decision making by the business participants. Whether the action is by partners in a partnership, members in a limited liability company, or a board of directors or shareholders in a corporation, each of these situations necessitates group decision making of a kind not previously part of the law school curriculum. The relevant business organization law sets out default rules for those group decisions, but the lawyer has the ability to adjust those rules to meet the clients’ interests and preferences. Once again, this involves a process that is both empathetic and creative.

An important corollary of this student-as-putative-transactional-lawyer approach to teaching Business Associations is that students begin to discern what additional education, skills, or assistance they may need to effectively represent business clients. For example, students in a Business Association course taught in the case study counseling method quickly recognize that they may need to gain (or seek someone else to provide) tax analysis and advice on choice of business form. They may realize that they need to learn basic

53. *See* MODEL RULES OF PROF’L CONDUCT r. 1.7(a) (2002).

54. MODEL RULES OF PROF’L CONDUCT r. 1.7(a) cmt. 28 (2002).

accounting and finance principles in order to assist the clients in approaching and negotiating with potential investors or lenders to the business. They come to recognize that enterprise valuation may be necessary in order to determine how to structure and set the price in drafting a buy-sell agreement between the parties. All of this occurs by self-recognition, rather than the professor pontificating that “any serious business law student would be well advised to take an independent introductory financial accounting course.”⁵⁵

Most fundamentally, if approached by the professor as a joint exercise in discovery, the students learn that they can help clients in an endeavor where all the participants come out winners. They can see themselves doing that type of work because they have been exposed to and explored what it entails in the classroom. They can visualize the potential for them to successfully lead in that process. Their appetites may even be whet to consider exploring other opportunities to learn more about this unique practice area, such as a business law concentration, clinic, or corporate externship.⁵⁶

As a final benefit of this approach, the students might be led to consider transactional-related job opportunities. All of us are aware of the current difficulties in the legal job market.⁵⁷ Teaching the Business Associations course in a manner that informs students about a whole new non-litigation route to practice expands their employment perspective and prospects. I have literally seen hundreds of students go from saying something like “I plan on practicing some form of litigation” to “I would like to be a transactional lawyer.” They can be aided in changing their outlook and seeing those new employment opportunities if the professor brings transactional guest lecturers to the class. Lawyers who are working directly with start-ups or in a company contracts group or in employee benefits or human resources can enlighten the students to those alternative career paths.

55. Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 383 (2009).

56. All of these options are offered at the University of Minnesota Law School. See *Business Law Concentration and Certification*, U. MINN. L. SCH., <http://www.law.umn.edu/corporateinstitute/business-law-concentration.html> (last visited Jan. 12, 2015); *Business Law Clinic*, U. MINN. L. SCH., <http://www.law.umn.edu/corporateinstitute/business-law-clinic.html> (last visited Jan. 12, 2015); *Corporate Externships*, U. MINN. L. SCH., <http://www.law.umn.edu/corporateinstitute/corporate-externships.html> (last visited Jan. 12, 2015).

57. See Joshua Wright, *The Job Market for Lawyers: Side Work on the Rise Amid Continuing Glut of New Grads*, FORBES (Jan. 10, 2014, 11:20 AM), <http://www.forbes.com/sites/emsi/2014/01/10/the-job-market-for-lawyers-side-work-on-the-rise-amid-continuing-glut-of-new-grads>; Bureau of Labor Statistics, *Occupational Outlook Handbook: Lawyers*, U.S. DEP'T LAB. (Jan. 8, 2014), <http://www.bls.gov/ooh/Legal/Lawyers.htm> (“Competition for jobs should continue to be strong because more students graduate from law school each year than there are jobs available.”).

D. *Injecting Levity into the Learning Process*

Law students work hard. Most lawyers will tell you that they work even harder than they did as law students. That is not surprising. The role of the professional, especially lawyers and doctors, means assisting clients (or patients) at their time of greatest need, whether it is legal or medical. These professionals are on call at all times.

Balance is important. The law of diminishing marginal returns shows us that, at some point, extra work effort produces declining productivity.⁵⁸ We can only try to do so much before we are not getting much benefit from more effort. We see this in the law classroom as students struggle to maintain attention through fifty to ninety minute classes.

Active learning, such as the role-play discussed earlier, helps to combat attention lapses.⁵⁹ I have also discovered that students appreciate episodic moments of entertainment or fun in the learning process. Indeed, a professor can highlight the importance of a particular legal point to the understanding of the law by portraying it in a new medium. One example, focusing on the classic case of *Meinhard v. Salmon*⁶⁰ in setting the standard of fiduciary duty of loyalty for partners, might be to recite a limerick to summarize the case:

Meinhard v. Salmon

Among partners, in matters compensative,

Cardozo, opining most pensative

Held out as the standard—

As attention meandered—

The punctilio of an honor most sensitive.⁶¹

58. Thomas A. Olson, *How to Improve the Definition of Design Defect*, 33 GONZ. L. REV. 669, 678–79 (1997) (“The law of diminishing returns can be stated as follows: ‘As more and more of some input, *i*, is employed, *all other input quantities being held constant*, eventually a point will be reached where additional quantities of input *i* will yield diminishing marginal contributions to total product.’”).

59. *Teaching Center: Are You with Me? Measuring Student Attention in the Classroom*, WASH. UNIV. ST. LOUIS (May 23, 2013), <http://teachingcenter.wustl.edu/Journal/Reviews/Pages/student-attention.aspx#.U8IIInvVOWfA> (“The third—and possibly most intriguing—finding of this study was a relationship between the timing of active-learning, or “student-centered,” pedagogies and the pattern of reported lapses in attention. . . . This finding hints at the possibility that active-learning methods may have dual benefits: engaging student attention during the segments when faculty use these methods and ‘refreshing’ attention immediately afterward.”).

60. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

61. Jeremy Telman, *Limerick of the Week: The Punctilio*, CONTRACTSPROF BLOG (July 22, 2008), http://lawprofessors.typepad.com/contractsprof_blog/limericks/page/5. My favorite example of this genre plays off of the case of *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968), which challenged the decision of the company that owned the Chicago Cubs baseball team not to install lights for night baseball at Wrigley Field:

My own form of light-heartedness comes in emphasizing an important concept or case by singing to the class, using a recognizable tune but changing the words.⁶² Here are several examples: after discussing the same famous *Meinhard v. Salmon* case, I say that I will summarize the court's resolution,⁶³ from Salmon's perspective, in this way, to the tune of "As Long As He Needs Me"⁶⁴ from the musical *Oliver*:

As long as Meinhard needs me, then partners we will be,
 Cardozo made it clear to me, as long as Meinhard needs me.
 As long as our lease is long, we're partners right or wrong,
 And somehow he belongs, as long as Meinhard needs me.
 When you are partners, then you must know,
 It's utmost loyalty you have to show.
 I won't betray his trust, though Gerry says I must,
 I'll hold the lease in trust, as long as Meinhard needs me.

Perhaps the biggest change in the law of business organizations over the past fifty or more years is the rise of the limited liability company as the vehicle of choice for the new business venture.⁶⁵ The limited liability company, or LLC as it is usually referred to, combines the limited liability of the corporate form with the flow-through or conduit tax treatment of the partnership.⁶⁶ Because of its watershed effect on the law of business organizations, students need an anchor to remember its importance. This I supply by singing the tune of the Beatles' "Let It Be"⁶⁷ with these words:

Shlensky v. Wrigley

As Wrigley explained to the court,
 Pro ball is a daytime sport.
 Night ball you can see
 Down at Comiskey
 Where the teams out for profit cavort.

Jeremy Telman, *Business Associations Limerick of the Week: Shlensky v. Wrigley*, CONTRACTSPROF BLOG (Sept. 9, 2008), http://www.lawprofessors.typepad.com/contractsprof_blog/limericks/page/4.

62. No discernible musical talent is required to do this—the students love that you have taken the time to have fun with the class. The reader should feel free to hum along as you read the words to any of the following musical interludes.

63. *Meinhard*, 164 N.E. at 552.

64. GEORGIA BROWN, *As Long As He Needs Me (Reprise)*, on OLIVER! (THE ORIGINAL BROADWAY CAST RECORDING) (BMG Entertainment 1989).

65. See Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 35 (2004).

66. *Id.* at 40, 48.

67. THE BEATLES, *Let It Be*, on LET IT BE (EMI Records 1970).

When you find a client's having trouble forming a business entity,
Remember these three letters, LLC.

And though it may be new to some folks, it is clear to see,

There is now an answer, LLC.

LLC, LLC, there is now an answer, LLC.

Maybe the most important corporate case of all time is *Smith v. Van Gorkom*,⁶⁸ in major part, because prominent, independent, non-employee directors of a Delaware corporation were held personally liable for failing to engage in a process of informed decision making when approving a merger.⁶⁹ I highlight the separate portion of the court's opinion addressing the argument by the outside directors,⁷⁰ saying that the court might have characterized its holding on this point in this musical manner, using the tune of "Don't Cry for Me, Argentina"⁷¹ from *Evita*:

This won't be easy; you'll think it strange, when I try to explain why we feel

That you still should be liable after all that you've done.

You won't believe it. All you will think is that "How can this be

When we're so important and smart and you're just some Delaware judges?"

Don't cry to me, outside directors, the truth is, you abdicated.

You cannot act on blind reliance. Just do your homework; it's not rocket science.

Finally, the federal regulation of insider trading under Section 10(b) of the Securities Exchange Act⁷² and Securities and Exchange Commission Rule 10b-5⁷³ is a very convoluted matter in the Business Associations course. Several cases involve serious violations of law in which the defendants, including a prominent corporate attorney, go to jail.⁷⁴ To summarize this area of law, the title tune from the musical *Camelot*⁷⁵ is employed:

68. 488 A.2d 858 (Del. 1985).

69. *Id.* at 863-64.

70. *Id.* at 888-89.

71. PATTI LUPONE, *Don't Cry for Me, Argentina*, on PATTI LUPONE AT LES MOUCHES (Sh-K-Boom Records 2008).

72. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2006).

73. 17 C.F.R. § 240.10b-5 (2006).

74. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 646, 647, 649 (1997) ("A jury convicted [an attorney] on all 57 counts, and he was sentenced to a 41-month term of imprisonment).

75. RICHARD BURTON, *Camelot*, on CAMELOT (ORIGINAL BROADWAY CAST RECORDING) (Sony BMG Entertainment 1960).

There was a law a distant moon ago here—to trade on inside info you shall not,
And press releases must fully disclose here, in Camelot.
You cannot trade on inside information. You cannot use the news while it is hot.
And once disclosed, there must be dissemination, in Camelot.
Camelot, Camelot you know that's how conditions are.
Because in Camelot, Camelot, you could end up behind bars.

CONCLUSION

The students who enroll in the Business Association class almost universally have low expectations of the course and of their success in it. The students come in with a fear of the unknown that is exacerbated by their perceived inadequacy in being interested or capable of mastering the subject. With that start, even a modest attempt to make the subject appealing should meet with significant success.

Yet, the real challenge to teaching Business Associations is to take the students on a transformational, exploratory journey. This journey shows them that business and business law are accessible. Moreover, they can be led to see a whole new perspective on law generally, that is, that transactional law allows the lawyer to be a creative force in achieving positive results for business clients. The end result is that the students are at least challenged to consider the litigation predilection inculcated in the first year of law school in favor of a different approach to the remainder of their studies and maybe even to their ultimate careers as practicing lawyers.