From the Editor-in-Chief . . .

This is the 4th volume of the Southern Journal of Business and Ethics, an official publication of the Southern Academy of Legal Studies in Business. The Journal is being published in hardcopy and electronically on the Southern Academy’s web page at http://www.salsb.org.

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

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

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

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, March, 2012. Congratulations to all our authors. I extend a hearty invitation to the 2013 meeting of the SALSB in San Antonio, Texas, March, 2013.

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

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

M.P. (Marty) Ludlum
Editor-in-Chief
Southern Journal of Business and Ethics
www.salsb.org
VOLUME 4 (2012)

SOUTHERN JOURNAL OF BUSINESS AND ETHICS

Title Page . . . 1
Editorial Policy . . . 3
Table of Contents . . . 5

Save the Firehouse: The David and Goliath battle over rights to the use of a common name: Firehouse Restaurant v. Scurmont LLC
Henry Lowenstein & Andy E. Hendrick . . . 7

Fighting Futility III: Dealing with Difficult People in Mediation
Charles Bultena, Charles Ramser, and Kristopher Tilker . . . 26

Margaret Langford . . . 47

Corporate Citizenship: An Integrated Operational Approach
Lila Carden & Raphael Boyd . . . 57

Innovation in Legal Studies Education:
An Integrated Case Study Approach
Alix Valenti & James Benson . . . 68

Who Are You?
Identifying Online Students for Assessment Purposes
David Ritter, John Shampton, & Lawrence Larson . . . 81

Workplace Bullying: It’s Not Just Lunch Money Anymore
Dan Davidson & K. Venard Harrington . . . 93

Assessment of Learning Outcomes Based on a Comparison of Active Learning and Traditional Lecture Pedagogical Styles in a Legal Environment Classroom
LeVon E. Wilson . . . 101

Can You Put a Price on Corruption?
The Future of Honest Services Fraud
Lara L. Kessler, Ryan J. Hunt, & William Mawer . . . 112

A Holistic Approach to Legal Environment of Business Course Assignment Design
Lee Usnick & Russell Usnick . . . 123

The United States: Land of Opportunity or Land of Deception?
Nichole Griffin & LeVon E. Wilson . . . 138

Notes for authors . . . 149
SAVE THE FIREHOUSE: THE DAVID AND GOLIATH BATTLE OVER RIGHTS TO THE USE OF A COMMON NAME: FIREHOUSE RESTAURANT V. SCURMONT LLC

Henry Lowenstein, Ph.D.*
and
Andy E. Hendrick, J.D.

INTRODUCTION

A key tool in the conduct of commerce by business has been the establishment and protection of a firm's distinctive marks known as trademark or servicemarks.¹ These distinctive marks of trade date back even in history to caves in Europe of 5,000 B.C.E.² In the United States; the Founding Fathers in establishment of the U.S. Constitution (and in an era of prolific intellectual property infringement in Europe) placed a high value on "intellectual property" providing Congress with enumerated powers for their protection.³ However, the key operative public policy constitutional intent of intellectual property protection was, as clearly stated, "To Promote the Progress of Science and useful Arts..."⁴ In our modern era, the statutory protections of trademark arise from the Lanham Act of 1946.⁵

The essence of the legal concept of trademark has been explained by the U.S. Fourth Circuit as:

A trademark puts the purchasing public on notice that all goods bearing the trademark: (1) originated from the same source; and (2) are of equal quality...Thus, a trademark not only "protects the goodwill represented by particular marks", "but also allows "consumers readily to recognize products and their source," preventing "consumer confusion between products and

*Henry Lowenstein, Ph.D. is Professor of Management and Law and Andy E. Hendrick, J.D. is Associate Professor of Management and Law at the E. Craig Wall College of Business, Coastal Carolina University, Conway, South Carolina.

¹ Trademarks: protected words, names, symbols, sounds, or colors that distinguish goods and services from those manufactured or sold by others and to indicate the source of the goods. Trademarks, unlike patents, can be renewed forever as long as they are being used in commerce. Servicemarks: word, name, symbol or device that is to indicate the source of the services and to distinguish them from the services of others. A service mark is the same as a trademark except that it identifies and distinguishes the source of a service rather than a product. The terms "trademark" and "mark" are often used to refer to both trademarks and service marks. Source: Glossary, U.S. PAT. & TRADEMARK OFFICE, U.S. Dept. of Commerce, http://www.uspto.gov/main/glossary/ (last visited December 1, 2011)
³ U.S. Const. Art. I, Sec. 8, Cl. 8 "To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."
⁴ Id.
between sources of products.  

**ANTI-COMPETITIVE USE OF TRADEMARK LITIGATION: A QUESTION OF COMMERCIAL ETHICS?**

The rise of technology since *Lanham* and aggressive (in many cases, unethical) commercial practices by businesses through all forms of marketing (physical and electronic) witnessed the growth of infringement of marks in what is generally referred to as *mark dilution*, i.e. unauthorized use of protected marks as part of unfair or deceptive acts in the marketplace. Congress addressed this issue with two major amendments to *Lanham*, the *Trademark Dilution Revision Acts of 1995 and 2006*.  

Since the 2006 trademark law amendments, the pendulum has swung toward aggressive actions by businesses in protecting their marks, not just from direct infringement, but to the point many believe used as litigious weapons of unfair trade practices; devices to obstruct otherwise legitimate competition. Hence, the original constitutional intent of intellectual property, i.e. "To Promote the Progress of Science and useful Arts," has given rise to cases of use and potential misuse of intellectual property protections as an anti-competitive, if not punitive tool in commerce.  

Intellectual property, be it trademarks, patents or trade dress have traditionally been viewed as complementary devices to advance trade, innovation and choices to consumers. Consequently, in most cases the courts, Justice Department and the Federal Trade Commission recognize intellectual property exclusivity, even when potential (but not realized) market power may exist from such legal grants.  

Nevertheless, courts have recognized that in instances where intellectual property rights are used in a manner that demonstrates scienter to restrain trade, obstruct competitors or create monopolies, U.S. anti-trust laws may come into play to arrest the process. This concept has evolved in business law regarding anti-competitive use of patents. While we acknowledge as does the intellectual property literature, a divergence between trademarks and patent law, some examples are useful to highlight the concept.  

In the matter of patents, for example, Congress and the Federal Trade Commission have intervened in the pharmaceutical industry where a patent was used commercially beyond the intent of Congress.  

Likewise, the courts have faced a lengthy history of addressing the use of patents and questionable patent infringement lawsuits as a weapon to impede or obstruct competitors in the marketplace. Indeed, the Court was faced with such growing legal tactics during the nation's rapid technological growth of the 1960's and 1970's carving out

---

7 Amending 15 U.S.C. § 1125(c)
8 Art. U.S. Const. Art. I, Sec. 8, Cl. 8, supra.
11 Christine S. Paine, "Brand Name Drug Manufacturers Risk Anti-Trust Violations by Slowing Generic Production Through Patent Layering," **SETON HALL L. REV.**, 33 (479) at 479-480,
a legal exception or "safe harbor" of anti-trust immunity known as Noer-Pennington Immunity.\textsuperscript{12}

\textbf{Noer-Pennington Exception Doctrine and Sham Lawsuits}

The Noer-Pennington anti-trust exception was established by the Supreme Court in 1965. Simply put, when a company or organization engages in legal activities to influence legislation that result in a competitive advantage over others, the action is immune from anti-trust prosecution. As the court stated, "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."\textsuperscript{13}

In the decade that followed the courts experienced continued conflict over the concept, particularly as to whether Noer-Pennington applied strictly to attempts to influence legislative bodies or also was inclusive to judicial processes. Often, businesses were using aggressive tactics of litigation over alleged patent infringements as a strategic tool to gain competitive advantages or impede competitors in the marketplace. The cost of litigation and diversion of management energy was often substantial, particularly to small competitors who would settle, thus insulating the larger organization's market power. The courts grappled with the question, was this a legitimate use of the judicial power covered by Noerr-Pennington or illegal anti-competitive behavior under U.S. anti-trust laws?

The Supreme Court answered this threshold question in 1972 in the case, \textit{California Motor Transport Co. v. Trucking Unlimited}.\textsuperscript{14} Here, the Court stated that the Noer-Pennington Doctrine applied to courts and administrative agencies, those exercising their rights under the judicial power of the government. However, the Court took note to establish a significant caveat. Cognizant of past abuses, the Supreme Court articulated no safe harbor would exist for "sham lawsuits." As the Court stated the exception would not apply to:

\begin{quote}
[litigation] that is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.\textsuperscript{15}
\end{quote}

Moreover, the Court admonished litigants using such a tactic would be considered to be engaging in, "illegal and reprehensible practice which may corrupt the administrative or judicial processes..."\textsuperscript{16} This said, the Court left undefined what constitutes "sham litigation." That definition did not come until over twenty years later.

The Supreme Court provided guidance for determining the Sham Litigation Exception to Noer-Pennington in \textit{Professional Real Estate Investors, Inc. v. Columbia Pictures} (1993).\textsuperscript{17} In this case, the Court provided a two part test to define whether the

\begin{itemize}
\item \textsuperscript{13} Pennington, \textit{supra.} at 670
\item \textsuperscript{14} 404 U.S. 508 (1972)
\item \textsuperscript{15} \textit{Id.} at 511
\item \textsuperscript{16} \textit{Id} at 513
\item \textsuperscript{17} 508 U.S. 49 (1993)
\end{itemize}
use of an intellectual property lawsuit was an anti-competitive sham. The exact holding of the court and its explanation state:

We now outline a two part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," Noerr, supra, at 144 (emphasis added), through the "use [of] the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon," Omni, 499 U. S., at ___ (slip op., at 14) (emphasis in original). This two tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability. Of course, even a plaintiff who defeats the defendant's claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim. 18 (emphasis added)

We hasten to note again that these controlling rulings have applied to issues involving intellectual property as applied to patents. And, as we have acknowledged, the literature differentiates patent protections from those of trademarks. The question, however, is whether these principles have or could be applied in trademark dilution or infringement cases.

The Post 2006 Trademark Dilution Act (TDRA) Era

The enactment of the Trademark Dilution Revision Act of 2006 (TDRA) significantly changed the landscape of trademark enforcement from an absolute standard to a relative one. Congress' primary intent in TDRA was to reverse the Supreme Court's famous 2003 holding in Moseley v. V Secret Catalogue, Inc. in which the Court held the burden of proof was upon a mark holder to show evidence of "actual dilution." The TDRA creates a cause of action for the owner of a famous mark against any person who uses a mark or trade name in commerce that is "likely to cause dilution" of the famous mark "regardless of the

18 Id. at 51-52.
20 Id.
presence or absence of actual or likely confusion of competition, or of actual economic injury.\textsuperscript{23}

Other provisions of TDRA provided clarification of what constitutes "acquired distinctiveness of a mark," provided new standards of the burden of proof for unregistered trade dress claims, and provided additional "fair use" exclusions and protections.\textsuperscript{24}

Consequently, evidence of actual harm has been replaced by a facial standard of dilution by blurring, and judgmental, implicitly subjective criteria of distinctiveness impairment, left to the judgment of juries and judges in each case.\textsuperscript{25}

Under the new standards established by TDRA, defendants and courts face a high bar, some might say a virtual impossible bar, in establishing that litigation invoked by a mark holder rises to the Sham Litigation Exception to Noer-Pennington as currently interpreted by the Court. Thus, anti-competitive though the effect or even intent of mark holders may be, other defenses to questionable dilution cases must be sought by defendants.

In the era after passage of the 2006 TDRA, businesses and the courts have witnessed a growing volume of litigation of an anti-competitive nature on the subject of trademark dilution. Lawsuits have been filed against businesses in attempts to restrain the competition or at least exact fee revenue from those with alleged similar or "substantially similar" names. The following \textit{Vuitton} case provides an object lesson if not humorous demonstration of these trends and litigation environment faced by businesses large and small.

\textbf{Trademark Dillution-Tarnishment Litigation: The \textit{Vuitton} Case Example}

In \textit{Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC (2007)}\textsuperscript{26} Haute Diggity Dog manufactured and sold a line of parody small imitation chewable dog toys with such names as "Chewy Vuiton" that mimic the French woman's high end fashion brand \textit{Louis Vuitton}, a registered mark and brand since 1896. \textit{Vuitton}'s handbag at issue (parodied by the dog chew toy) for example sell for $1,190 and others upward of $4,500 while the parody dog chew toy sold for less than $20. \textit{Vuitton} sued under TDRA alleging mark dilution and tarnishment.\textsuperscript{27}

The true motives of \textit{Vuitton} for going after a small pet toy company may never be known. Was it an attempt to use the judicial process to coerce a licensing fee, brand ego, or other factors one can only speculate? What was clear is that under TDRA a Noer Pennington exception by the defendant would be remote and a small business defending itself would need to depend on the judgment and good will of jurors and judges. Indeed, \textit{Vuitton} lost at the trial court level and appealed to the U.S. Fourth Circuit Court of Appeals.

\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} 507 F.3d 252 (4th Cir., 2007)
\textsuperscript{27} Id at 252-253.
The appellant court reviewing the case, applied the six part test enumerated in the statute.28

(i) The degree of similarity between the mark or trade name and the famous mark.
(ii) The degree of inherent or acquired distinctiveness of the famous mark
(iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
(iv) The degree of recognition of the famous mark
(v) Whether the user of the mark or trade name intended to create an association with the famous mark.
(vi) Any actual association between the mark or trade name and the famous mark.

The court further noted that not every one of these factors is relevant to every case or requires a detailed analysis of each factor. The threshold factor is that, "...a trial court must offer a sufficient indication of which factors it has found persuasive and explain why they are persuasive so that the court's decision can be reviewed."29 The Court's comment in reaching its decision is instructive:

[T]he juxtaposition of the similar and dissimilar — the irreverent representation and the idealized image of an LVM handbag — immediately conveys a joking and amusing parody. The furry little "Chewy Vuiton" imitation, as something to be chewed by a dog, pokes fun at the elegance and expensiveness of a LOUIS VUITTON handbag, which must not be chewed by a dog. The LVM handbag is provided for the most elegant and well-to-do celebrity, to proudly display to the public and the press, whereas the imitation "Chewy Vuiton" "handbag" is designed to mock the celebrity and be used by a dog. The dog toy irreverently presents haute couture as an object for casual canine destruction. The satire is unmistakable. The dog toy is a comment on the rich and famous, on the LOUIS VUITTON name and related marks, and on conspicuous consumption in general. This parody is enhanced by the fact that "Chewy Vuiton" dog toys are sold with similar parodies of other famous and expensive brands — "Chewnel No. 5" targeting "Chanel No. 5"; "Dog Perignonn" targeting "Dom Perignon"; and "Sniffany & Co." targeting "Tiffany & Co."

After review, the Court found that no reasonable person would mistake or be fooled into confusion that a "$10 dog toy made in China was of 'inferior quality' to the $1,190 LOUIS VUITTON handbag."31

Vuitton is not an outlier case, but representative of a line of similar cases. Many recent versions have focused on mark use on the internet. In Hasbro v. Clue Computing

---

29 Id.
30 Id.
31 Id. at
the game manufacturer Hasbro attempted to stop Clue Computing Company's use of the common word "clue" on the grounds it was a trademark name of a Hasbro board game. Here there was no nexus between the game product and Clue's business and the court found:

I join those courts finding that, while use of a trademark as a domain name to extort money from the markholder or to prevent that markholder from using the domain name may be per se dilution, a legitimate competing use of the domain name is not. Holders of a famous mark are not automatically entitled to use that mark as their domain name; trademark law does not support such a monopoly. If another Internet user has an innocent and legitimate reason for using the famous mark as a domain name and is the first to register it, that user should be able to use the domain name, provided that it has not otherwise infringed upon or diluted the trademark. I reject Hasbro's request for a per se dilution rule and instead turn to whether Clue Computing has diluted Hasbro's CLUE (R) mark under existing dilution standards.

As to one final example, in the case Toys "R" Us, Inc. v. Feinberg and Gun are We (1998). In brief, Guns are We, a small local gun shop with a web site targeting gun dealers was sued by Toys "R" Us, (TRU) a large national retail toy store chain alleging dilution of its mark. Indeed, TRU asserted a claim to virtually any name that contained the word "are" as dilutive with their moniker "R." The court refused such assertion noting that the letter "R" and the common word "are" differ viz. trademark identification. Moreover, no reasonable person would be confused by a domain name of "gunsareus.com" with TRU's mark.

Moreover, aggressive actions are manifest in attempting to reserve common use words or names, thus testing the limits of intent and application of trademark laws. Such was the situation in the recent Federal case in South Carolina of Firehouse Restaurant Group, Inc. v. Scurmont LLC which we detail shortly in this paper.

NOER-PENNINGTON USE AND TRENDS IN TRADEMARK LITIGATION

Id. (Note: lower court decision upheld on appeal 232 F. 3d 1 (1st Cir., 2000)
For examples See: Starbucks Corp. v. Wolfe's Borough Coffee, Inc. 588 F3d. 97 (2d. Cir. 2010);
{Authors' Note: The case also raised issues under South Carolina's Unfair Trade Practices Act , SC Code of Laws §39-5-10 et. seq. We did not address these factors in the article as the court subsumed them under the larger trademark issue and such allegations were ultimately dismissed as part of the larger judgment in the case.}
Use of the *Noer-Pennington Doctrine* does not appear to have fundamentally migrated to the use and defense of intellectual property cases dealing in trademark. This makes intuitive sense in that a trademark rarely conveys market power or monopoly power as would be the case of a patent which grants a legal monopoly to a particular device or process. For example, Coca-Cola does not have a legal monopoly on the production of cola based soft drinks. Anyone may enter that market as long as they do not use the Coca-Cola (aka Coke) name, its unique bottle shape, color patterns and the like that are protected by Coca-Cola's trademarks.37

Nevertheless, the Court has signaled that the doctrine can be applied to circumstances where litigation is being used to obstruct or impede various free flows of commerce. For example, the principles were applied in labor relations in *Bill Johnson's Restaurants, Inc. v. NLRB* (1983)38 and *BE & K Construction v. NLRB* (2002).39 Yet, a search of the trademark case records shows few references to its application in trademark infringement or dilution cases.

In *Scooter Store Inc. v. Spinlife.com, LLC* (2011)40 The Scooter Store (TSS) held trademarks for phrases such as "the scooter store" related to insurance claims, repairs and delivery of electronic scooters and wheelchairs. Defendant, Spinlife, had purchased rights to the phrase from Google Adwords, TSS alleged, to create consumer confusion. Spinlife countered that TSS lawsuit was baseless and a deliberate attempt to use litigation to drive them out of a competitive business, a charge that would invoke the sham litigation doctrine. The U.S. District Court ruled:

Noerr-Pennington doctrine normally would entitle the owner of a trademark to file a trademark infringement case without exposing itself to antitrust liability. However, the court also noted the sham litigation exception, wherein immunity does not apply when the case was brought as a mere sham to cover illegal conduct. The court applied a two-part test to determine whether the sham litigation exception applied to TSS. The first prong required that a party’s claim be objectively baseless. The court found that TSS’s trademark claim was objectively baseless because TSS knew that its mark would be limited, invalid, and unenforceable as to SpinLife because TSS’s marks were limited to insurance claims processing and SpinLife’s business was directed toward retail sales.

The second prong required that a party be using the process of litigation to interfere with a competitor’s business. The court found that TSS was using the litigation to increase SpinLife’s expenses and to drive SpinLife from the motor scooter retail market. The court held, therefore, that TSS was not entitled to Noerr-Pennington immunity from SpinLife’s antitrust counterclaim and TSS’s motion to dismiss this counterclaim was denied.41

Invoking *Noer-Pennington*-Sham Litigation motions to dismiss alleged trademark claims has recently appeared in disputes on internet trademark cases. Lower courts have

---

37 see:  *The Coca-Cola Co. v. Koke of America*, 254 U.S. 143 (1920)
38 461 U.S. 731 (1983)
41 *Id.*
dismissed cases where defending parties could show that the plaintiffs holding alleged
cybermarks not for legitimate purposes but as merely a device to make money from
litigation rather than true business purposes. These cases have yet to appear in
appellate review.

Consequently, we found that the overwhelming majority of parties and courts of
appeal deal with the growing litigation over alleged trademark dilution and infringement
on their merits, using guidelines and judicial tests established by the various U.S. Circuit
Courts of Appeals and the Supreme Court.

The tide is turning against absurd or otherwise questionable intellectual property
lawsuits. A recent Bloomberg BusinessWeek article details the once popular approach of
patent litigants to file their cases in the U.S. District Court for the Eastern District of
Texas, a venue previously favorable to intellectual property holders and responsible for
twenty-five percent of the 2011 total patent cases filed in federal courts. Yet, a number
of plaintiff losses and less sympathetic juries have witnessed a change of filings
elsewhere.

The U.S. Supreme Court recently signaled a higher level of scrutiny on
intellectual property claims, again in this case, regarding the issue of patents. In Mayo
Collaborative Services v. Prometheus Laboratories (2012) the Court refused to enforce
a patent based on an obvious natural phenomenon. Reaching back to the original
constitutional intent of intellectual property protection, the Court stated:

This court has repeatedly emphasized a concern that parent law not
inhibit future discovery by improperly tying up the use of laws of nature
and the like...Rewarding with patents those who discover laws of nature
might encourage their discovery. But because those laws and principles
are "the basic tools of scientific and technological work"...there is a danger
that granting patents that tie up their use will inhibit future innovation, a
danger that becomes acute with a patented process is no more than a
general instruction to "apply the nature law" or otherwise forecloses more
future innovation than the underlying discovery could reasonably justify.
(internal cites omitted)

One can infer this principle to other areas of intellectual property law in the
stream of commerce, in the case to be presented, trademark, as well. Here, the
overreach of a plaintiff attempting to use common use words within a trademark to
obstruct competition, extract questionable fees, or otherwise obstruct interstate commerce
raises like issues of the propriety of trademark protection in a like manner to the holding
of the court in Mayo regarding patents.

dismiss), 213 F. Supp. 2d 612 (E.D. Va, 2002)(motion for summary judgment), and, Frayne v. Chicago
44 Id.
46 Id., at 16-19.
An object example and lesson on the perils and pitfalls to a larger firm in engaging in aggressive trademark litigation of an anti-competitive nature is presented in this paper in the case, Firehouse Subs. It is a case of a small restaurant owner, Heath Scurfield, unwilling to be threatened by questionable litigation over his single store restaurant name by a large national chain alleging trademark dilution. This "David and Goliath" legal battle resulted in significant negative consequences to the plaintiff far beyond its initial expectations.

CALI BAKER'S FIREHOUSE RESTAURANT MEETS FIREHOUSE SUBS

In Firehouse Subs, the national restaurant chain known as "Firehouse Subs" attempted to quash all use of the word FIREHOUSE in any establishment (food or otherwise) regardless of its differentiation from Firehouse Sub's particular line of business. The case not only demonstrates the perils to business of overreaching a mark as an anti-competitive strategy, but the unintended consequences to the mark owner, itself. In this case, the Federal District Court found, in fact, that the original mark registration by Firehouse Subs had been promulgated fraudulently and voided it, nationally.47

In brief, the case involved Heath Scurfield, a Captain in the Horry County, South Carolina Fire Department who established Scurmont LLC, subsequently purchasing a local, single store restaurant, Cali Baker's Roadhouse Bar and Grill, in Socastee, South Carolina (near Myrtle Beach, SC). Cali Baker's is a single store, full service, sit-down lunch and dinner establishment serving the full array of food items in a narrowly defined local market. Upon purchasing the restaurant, Scurfield remodeled the restaurant into a fire department theme and rebranded the name Cali Baker's Firehouse Bar and Grill. Subsequently, Firehouse Restaurant Group, seeing the word "Firehouse" in the restaurant's name, sought to enforce its mark against Scurfield, claiming that the word, FIREHOUSE, is an exclusively protected mark of its corporation.48

Firehouse Subs is a fast-food restaurant franchise based in Florida operating 375 restaurants in 21 states. Nationwide, by 2009 it reported in excess of $100 million in sales, doubling shortly thereafter. While operating 35 stores in South Carolina, it had only two stores in the Greater Myrtle Beach area, both of which subsequently closed at the time of the case.49

IS "FIREHOUSE" A WORD SUBJECT TO TRADEMARK?

Displayed in this section are the actual trademark registrations filed by Firehouse Subs with the U.S. Patent and Trademark Office (USPTO) 1995 to 2008 and presented in court documents. In all cases the company marks were clearly distinctive pairings of the common word "Firehouse" with "Subs" along with its unique trade design and dress.

47 Firehouse, supra., Judgment in A Civil Action and Order, at 1.
48 The short summary is derived from case documents including the Pre-Trial Motions, "Statement of Undisputed Facts," Firehouse, supra., at 1-51, (Order, Harwell, July 8, 2011)
49 Id.
Such pairing of a common use work to create a distinctive or fanciful mark is what allows a common use term to be incorporated into a protective mark under the Lanham Act.\textsuperscript{50}

However, common use terms face great scrutiny as to their ability to be protected by trademark unless they acquire a secondary meaning. A classic example of this concept is the term "London" and "Fog:" "London" being a geographic name, "Fog" a natural phenomenon, neither of which individually may be trademarked, but together acquire a distinctive meaning to its long recognized coat manufacturer.\textsuperscript{51}

In \textit{Firehouse Subs}, the banding of "Firehouse" to "Subs" as a distinctive mark was never an issue. Firehouse Subs registered and protected thirty-three distinct marks as "Firehouse Subs" and one distinct mark as "Firehouse with a Dalmatian Dog." Rather the case at bar involved the attempt to enforce Registration No. 23,173,030 of November 21, 2006, that being the generic name "Firehouse" for the class use of "restaurant services."\textsuperscript{52}

Firehouse posits that it has exclusive protection of the use of "Firehouse" in any food-restaurant service or establishment (and by inference, any other line of consumer product). Such an overly broad assertion would ultimately rest on its ability to show the use of "Firehouse" was such that it established a unique product brand in the mind of consumers, not used previously by other similar businesses among other factors.


\textsuperscript{52} Firehouse Subs, \textit{supra}. at 3-5. Chart of marks that follow are reprinted from the actual court order of same page reference.
<table>
<thead>
<tr>
<th>Sub Category</th>
<th>Quantity</th>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,012,834</td>
<td>November 8, 2005</td>
<td>Restaurant Franchising</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,012,835</td>
<td>November 8, 2005</td>
<td>Restaurant Services</td>
</tr>
<tr>
<td>FIREHOUSE STEAK SUB</td>
<td>3,014,796</td>
<td>November 15, 2005</td>
<td>Restaurant Franchising</td>
</tr>
<tr>
<td>FIREHOUSE &quot;HERO&quot; SUB</td>
<td>3,017,189</td>
<td>November 22, 2005</td>
<td>sandwiches</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,017,190</td>
<td>November 22, 2005</td>
<td>sandwiches</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,027,225</td>
<td>December 13, 2005</td>
<td>Cereal based snack foods, namely cookies or brownies</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,027,226</td>
<td>December 13, 2005</td>
<td>Cereal based snack foods, namely cookies or brownies</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,031,377</td>
<td>December 20, 2005</td>
<td>Pastries and desert items, namely cookies or brownies</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,031,378</td>
<td>December 20, 2005</td>
<td>Pastries and desert items, namely cookies or brownies</td>
</tr>
<tr>
<td>FIREHOUSE PARTY PLATTERS</td>
<td>3,034,141</td>
<td>December 27, 2005</td>
<td>Catering services or restaurant services</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,063,736</td>
<td>February 28, 2006</td>
<td>Stickers</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,063,737</td>
<td>February 28, 2006</td>
<td>Stickers</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,065,955</td>
<td>March 7, 2006</td>
<td>Bags, namely paper bags</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,070,837</td>
<td>March 21, 2006</td>
<td>Hats; toy vehicles</td>
</tr>
<tr>
<td>FIREHOUSE SUBS</td>
<td>3,070,838</td>
<td>March 21, 2006</td>
<td>Hats; toy vehicles</td>
</tr>
</tbody>
</table>
Confronted with these questions, the U.S. District Court following a lengthy jury trial explained in detailed opinion the test for mark validity to be used. Here, the Court relied upon the eight-step mark test established in two U.S. Fourth Circuit cases, *Pizzeria Uno Corp. v. Temple* (1984)\(^{53}\) and *CareFirst of Md., Inc. v. FirstCare P.C.* (2006).\(^{54}\) Applying the multi-step test to the case, the Court found Firehouse Subs failed to meet its burden of proof of mark infringement, dilution or harm to its mark.

**TESTING THE VALIDITY OF MARK AND INFRINGEMENT:**

*Pizzeria Uno* and *CareFirst* Tests

The opening definition from *OBX-Stock*, points to the key element of the Firehouse Subs and other like cases, i.e. (1) does the use originate from the same source? and, (2) does the use of the word (in this case *Firehouse*) convey equal quality of product or service?

To determine the first issue, that being *Are Consumers Confused?*, the court followed the nine part test from *Pizzeria Uno*. The:

1. strength or distinctiveness of the plaintiff's mark as actually used in

\(^{53}\) Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir., 1984)

\(^{54}\) CareFirst of Md., Inc. v. FirstCare P.C., 434 F3d 263m 267 (4th Cir., 2006)
In its lengthy analysis the court found that Firehouse Subs failed on each test element. We briefly summarize those findings herein:

1. Strength or Distinctiveness: Using guidance from CareFirst, the court looked to the "linguistic or graphical 'peculiarity of the mark,' and its frequency of prior use." Here so many other restaurants and other businesses use the term firehouse within their names and marketing that in essence consumers can and do readily distinguish even minute differences. Consequently, the court found no evidence that consumers in the Myrtle Beach area when hearing the word "Firehouse" associated it specifically with the specific Firehouse Subs brand.

2. Similarity of Marks to Consumers: In this case while "Firehouse" was the preeminent word in Firehouse Sub's mark, the word "Firehouse" was an internal word within the restaurant name "CALLI BAKER'S FIREHOUSE BAR AND GRILL." Thus the prime, dominant recognition to local consumers was of the long used "CALLI BAKER'S" with the use of "Firehouse" was merely an additional descriptive modifier. Here, too, Calli Baker's signage neither used the same type font, color scheme or patterns found in Firehouse Subs. Hence, the use of "Firehouse" by Scurmont well passed the test of avoiding "textual similarity between marks."

3. Similarity of Goods and Services: On this factor the court found that both businesses serve the same general purpose in that they offer prepared food to consumers. While both could weigh in favor of confusion, it was also clear that there were substantial, material differences between a single store sit-down service restaurant in Cali Baker's with its diverse menu, and, a large, national multi- store chain of fast food, sub-sandwich shops characterized as non-table service restaurants in Firehouse Subs.

4. Similarity of Facilities: Here, the court continued to note that Calli Baker's was a clearly differentiated from Firehouse Subs, being a different stand-alone building with:

   full service, sit-down restaurant: customers are seated by host or hostess and orders are taken at the customer's table with food and

---

55 Firehouse Subs, supra. at 31.
56 CareFirst, supra. at 269.
57 Firehouse Subs, supra, at 34, quoting reference from Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 11:88.
58 Id. at 36.
59 Carefirst, supra, at 271.
60 Pizzeria Uno, supra. at 1522.
drinks delivered to the table by the wait staff.

In contrast, the FIREHOUSE SUBS establishments at issue in this case are located in strip malls anchored by either a Wal-Mart or a Bi-Lo store. Unlike CALI BAKERS, FIREHOUSE SUBS facilities do not allow for customers to sit and order at a bar, order from wait staff, or be seated in an outdoor patio. 61

5. Similarity of Advertising: The court found in this test strong differentiation. Cali Baker's advertised primarily by word of mouth and minimal local advertising. Firehouse Subs in contrast uses major nationwide marketing firms and multi-media, among others, television, radio, billboards, flyers, newspapers and internet to the tune of well over $10 million over the decade preceding this case. 62

6. Intent to Infringe: At trial Firehouse Subs could not provide any credible evidence of an intent by Cali Baker's to infringe on Firehouse Subs mark or name. 63

7. Actual Confusion of the Consumer: As part of discovery, surveys were conducted and expert witnesses consulted to determine whether the consumers in the relevant market were confused by the use of "Firehouse" among both parties. Firehouse Subs could not provide any credible evidence demonstrating consumer confusion in the local market. 64

8. Quality of Defendant's Product, and,

9. Sophistication of Consuming Public

Under the heading "Remaining Factors" both the court and parties agreed these factors had no particular relevance to the particular issues of the case at bar. 65

Weighing the evidence and the aforementioned tests, the Federal jury found for Scurmont and against Firehouse Subs allegation of trademark infringement. Scurmont LLC won his right to use FIREHOUSE in his name. As is the case in litigation, Scufield battle came at a substantial cost in legal fees for which he petitioned the court for award of $490,217.90 66 The court upon review ordered Firehouse Subs to pay Scufield legal fees in excess of $241,888 and $9,060 in legal costs (total $250,948). 67

Normally this would be the end of a garden-variety trademark infringement case albeit a "David vs. Goliath" one. But an interesting twist in the tale befell Firehouse Subs.

FIREHOUSE SUBS AND THE TRADEMARK FRAUD ISSUE

A decision by a business to litigate always raises the age old specter of the Chinese saying, "Be careful what you wish for, you may get it." So, too, was the unanticipated risk to which Firehouse Subs exposed itself by pushing a heavy handed litigation against a small local restaurant. In opening the legal Pandora's Box, the

61 Firehouse Subs, supra, at 40. [Note Bi-Lo is a major regional grocery store chain in South Carolina]
62 Id.
63 Id. at 41
64 Id. at 41-42.
65 Id. at 42.
67 David Wren, Eatery won't get new trial, THE SUN NEWS, October 22, 2011 at C1.
company also exposed itself to judicial scrutiny as to its process for registering the word "FIREHOUSE" as a mark in the first place.

On this point, the Court found strong evidence that Firehouse Subs had actually committed civil fraud in its application to the USPTO for mark status submitting under oath (pursuant to 18 U.S.C. § 1001). Specifically, Firehouse had sworn that no other firms (in this case, restaurants) had used or had trade rights to FIREHOUSE in its name prior to the application. Specifically, Firehouse Subs affirmed under penalty of perjury as to the mark FIREHOUSE:

    submitted its oath....that to the best of its knowledge and belief no other person, firm, corporation or association has the right to use the mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely when used on or in commerce with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive...  

These facts raised a "judicial eyebrow" and caused the court to conduct a detailed analysis leading to the invalidation of Firehouse's trademark registration. Key factors to be determined by the court regarding Firehouse Subs alleged improper trademark registration behavior were: (1) Intent to Deceive, and, (2) Materiality of the Misrepresentation

Intent to Deceive: On the first point of the analysis, the court found strong, irrefutable evidence at trial that well over one hundred restaurants throughout the United States had long standing operations in commerce using the word "Firehouse" in their names PRIOR to Firehouse Sub's mark registration and even predating the founding of the company, itself. One of these establishments, Firehouse Grill and Pub, was located in Tampa, Florida, home of Firehouse Subs' corporate headquarters and had been using its trade name a full sixteen (16) years prior to the Firehouse Sub's registration with USPTO! The court found Firehouse Subs actively engaged in negotiations with active users of "Firehouse" at the time they filed their registration petition. The court concluded:

    Based on the foregoing, a reasonable jury could have found, by clear and convincing evidence, that FRG [Firehouse Subs Group] intended to deceive the USPTO when it filed its application for the FIREHOUSE word mark, to which it knew it was not entitled.... (emphasis added)  

Materiality of the Misrepresentation: To the second point of analysis Federal Judge Harwell noted the standard of fraud relating to trademark application citing again, McCarthy on Trademarks and Unfair Competition, the test being:

    ...but for the misrepresentation, the federal registration either would not or should not have been issued.  

68 Firehouse Subs, Judgment, supra. at 6. (internal references omitted, emphasis added)
69 Id. at 10.
70 McCarthy, supra. at §31:67 (West, 2010), see, Firehouse Subs Judgment, supra. at 11,
The court stated the materiality principle as follows:

*If an applicant is prevented from signing the [USPTO] declaration required to register a mark in good faith because it both knows of a senior user with superior rights and believes there is likelihood of confusion, but signs the declaration stating otherwise, anyway in order to get the registration, then it has made a "material" misrepresentation. In such a situation "but for" the misrepresentation....in the applicant's declaration, the registration "would not have been issued." The misrepresentation, therefore, is a "material" misrepresentation by definition.*

In conclusion, the Court and in Judge Harwell's more detailed Order found Firehouse Subs had procured the FIREHOUSE mark through fraud and invalidated its trademark Firehouse Subs has accepted the court's decision that Cali Baker's Firehouse Bar and Grill does not represent a trademark infringement. However, the company appealed the finding of civil fraud in their mark registration and its invalidation to the U.S. 4th Circuit Court of Appeals. As of the writing of this paper, the appellate court's decision is still pending.

**SUMMARY AND CONCLUSIONS**

The *Firehouse Subs* case provides an object lesson for businesses as well as business students on the perils and pitfalls of trademark use and enforcement, particularly those that diverge far afield from the constitutional intent to "advance the useful arts" and in this context, advance commerce and fair competition. Where businesses use the heavy hand of the judiciary to attempt to eliminate all competition and even small local competition of a relative *de minimus* nature, it runs the practical and legal risk of raising the ire of jurors and unconscionably in the eyes of the court.

A second lesson suggests in enforcing a mark, the mark holder must be clearly cognizant of the *Unclean Hands Doctrine*. A mark holder who has promulgated the mark by improper, questionable or otherwise illegal means will find its mark not only subject to invalidation but its improper conduct subject to judicial penalty. In the extreme the validity of the mark holder's enterprise itself could come into public or even legal question.

Third, the Firehouse Subs case reminds all businesses of their duty of due diligence. Had *Firehouse Subs* conducted a reasonable search, it would have discovered (as it actually did) that the FIREHOUSE name was in common use with superior, preceding claimants and not attempted to register it among its 33 other legitimate marks. Moreover, it is an important reminder that *federal declarations under oath* mean something as does enforcement of the Federal perjury statutes. In an era of increasing government tax and regulatory filings, the signing of such statements without proper due diligence and verification is a serious matter with serious consequences to firms and ultimately its management. Verification must be a practice *de rigueur* in all business processes.

Finally, this case demonstrates that despite the challenges, costs, complexities, time and machinations of the legal system, a small business David, can successfully challenge a large corporation Goliath in United States Courts. Justice can be achieved with facts and tenacity.

The enforcement of trademarks or any other protected intellectual property is a lengthy complex and expensive proposition. Businesses who chose, however, to overreach in aggressive mark enforcement should give careful consideration to their actions not solely from the legal standpoint but from that of a rule of reason in business decision making context taking into account perceptions of society (potential jurors, consumers), judges, and attendant unintended consequences that could arise,

As Supreme Court Justice Felix Frankfurter famously stated, "Litigation is the pursuit of practical ends, not a game of chess."72

***

ABOUT THE AUTHORS

Henry Lowenstein, Ph.D. is Professor of Management and Law and former Dean in the E. Craig Wall College of Business at Coastal Carolina University, Conway, South Carolina. Dr. Lowenstein received his Ph.D. in Labor and Industrial Relations from University of Illinois Urbana-Champaign, M.B.A. from The George Washington University, and B.S. from Virginia Commonwealth University. He is a consultant with research focus in public policy/regulation toward business and employment law issues.

Andy E. Hendrick, J.D. is Associate Professor of Business Law in the E. Craig Wall College of Business at Coastal Carolina University, Conway, South Carolina. Professor Hendrick is also Municipal Judge for the City of Conway, South Carolina and attorney with *Turner Padget Graham & Laney, PA, Myrtle Beach, South Carolina. He received his J.D. and B.A. from University of South Carolina. [*Professor Hendrick's law firm represented Scurmont LLC in the case, though he was not a participatnt in the case.]

72 Indianapolis v. Chase Nation Bank, 314 U.S. 63, 69 (1941)
FIGHTING FUTILITY III: DEALING WITH DIFFICULT PEOPLE IN MEDIATION

CHARLES BULTENA*
CHARLES RAMSER**
KRISTOPHER TILKER ***

I. INTRODUCTION

Mediation offers an alternative to the rigors of formal litigation in a courtroom. It has become a successful conflict resolution tool because it provides an opportunity to resolve virtually any issue in “a cost effective and timely manner.”\(^1\) Moreover, according to Gene Valentini, director of the Texas Dispute Resolution System, one can speak freely in mediation “about anything you feel will get you to a point of resolution because nobody’s recording or saying it’s out of order, whereas in the courtroom you may not be able to address those things.”\(^2\) Businesses of all sizes need to be more aware of the dynamics of mediation in order to understand how this process either can be successful or an exercise in futility. Only when business leaders have some understanding about those dynamics can they both prepare for and manage a successful mediation.

This paper is the third in a trilogy designed to offer insights into how to prepare for and conduct mediation so that the time and energy expended will not be wasted. This paper builds on earlier work applying models from the field of group dynamics to improve mediation, this time focusing on interpersonal problems—a common cause of mediation failure. The models are the Mediation Personality Matrix, the Typology of Difficult People, and the Dispositional Difficulty Matrix. The extent to which business leaders apply these models to address interpersonal problems can determine whether mediation succeeds or fails. Before considering how these skills can be developed using the models, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

II. THE MEANING OF MEDIATION

What are the characteristics of mediation? Texas statutory law defines mediation this way:

(a) Mediation is the forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.

---

* Ph.D., Associate Professor of Management, Dillard College of Business Administration, Midwestern State University.
** Ph.D., Professor of Management, Dillard College of Business Administration, Midwestern State University.
*** J.D., Professor of Legal Studies, Dillard College of Business Administration, Midwestern State University.
\(^2\) Ibid.
(b) A mediator may not impose his own judgment on the issues or that of the parties.  

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

Proactive use of mediation can help businesses keep conflict out of costly litigation and can even help settle conflicts already in litigation. For this to happen, business leaders must know what should happen in mediation and how to prepare for it.

III. THE USE OF MEDIATION

Over the past two decades, the use of mediation has exploded. Business leaders have discovered it to be a valuable, cost-effective alternative to litigation in the traditional adversarial system. In Texas and Oklahoma, the number of mediation cases is staggering. As shown in Table 1, mediation cases have exploded in Texas in recent years. The cases received by Texas alternative dispute resolution centers in the most recent three-year period for which records were kept total an average of almost 20,000 cases annually, with a total of more than 58,000 cases from 2003 to 2005. The same type of growth holds true in Oklahoma. As shown in Table 2, on average, more than 6,000 cases have been referred annually in that state to the alternative dispute resolution system, with 51,000 cases referred through the most recent eight-year period available. Equally impressive is Oklahoma’s settlement rate, which averages 65 percent over the most recent eight-year period available. Settlement rate data are not available for Texas, but as Table 2 shows, in Oklahoma, almost two-thirds of all mediation cases were settled. Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established.

---

5 Annual Report of the Texas Judiciary, Office of Court Administration, 2005 (last year reported).
7 Ibid.
Table 1: Texas Alternative Resolution Centers – Cases Received

<table>
<thead>
<tr>
<th>Date</th>
<th>Cases</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>20,356</td>
<td>11 of 14 Centers Reporting</td>
</tr>
<tr>
<td>2004</td>
<td>19,845</td>
<td>12 of 14 Centers Reporting</td>
</tr>
<tr>
<td>2005</td>
<td>18,280</td>
<td>11 of 17 Centers Reporting</td>
</tr>
<tr>
<td>2006</td>
<td>N/A</td>
<td>Office of Court Administration ceased</td>
</tr>
<tr>
<td>Total</td>
<td>58,481</td>
<td>Source: Annual Report of the Texas Judiciary, Office of Court Administration</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Date</th>
<th>Cases</th>
<th>Settlement Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>6,800</td>
<td>64%</td>
</tr>
<tr>
<td>2004</td>
<td>6,353</td>
<td>64%</td>
</tr>
<tr>
<td>2005</td>
<td>6,328</td>
<td>68%</td>
</tr>
<tr>
<td>2006</td>
<td>7,968</td>
<td>62%</td>
</tr>
<tr>
<td>2007</td>
<td>5,139</td>
<td>64%</td>
</tr>
<tr>
<td>2008</td>
<td>5,766</td>
<td>64%</td>
</tr>
<tr>
<td>2009</td>
<td>6,275</td>
<td>71%</td>
</tr>
<tr>
<td>2010</td>
<td>6,375</td>
<td>63%</td>
</tr>
<tr>
<td>Total</td>
<td>51,004</td>
<td>65%</td>
</tr>
</tbody>
</table>

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

IV. PURPOSE

Mediation can become a waste of time and effort for any business that is not aware of its dynamics. Mediation is collaborative communication that both cultivates and then depends upon a high degree of mutual trust among participants. Only when business leaders have some insight into those dynamics can they prepare for and manage a successful mediation. Mediation depends as much on the participants understanding one another as it does understanding the issues at hand. Despite differences in perspective, personality, and behavior, mediation participants must understand each other and believe that each has integrity, character, and capability. Without that interpersonal connection, the option of persuasion upon which mediation is founded cannot operate. In mediation dynamics, perceptions are as important as reality. If interpersonal barriers cause people to perceive a situation as being closed, then that becomes their “truth,” and the motivation to communicate with the opposing party will not exist. Frustration then builds from feelings of being misunderstood. The ultimate result is a barrier to any collaborative activity and even a loss of desire to communicate with others who share a common stake in a resolution.

---

This is the third paper in a trilogy offering skills for success in mediation. The first offered tools to prepare for mediation\textsuperscript{9}, and the second addressed communication in mediation\textsuperscript{10}. Now more tools for mediation success are offered, this time focusing on a common cause of mediation failure — interpersonal problems. Specifically, this paper offers three new models or tools to address interpersonal problems in mediation. The first model, the Mediation Personality Matrix, addresses the role of personality in the mediation process. Drawing on personality research, it applies the four temperaments (personalities) to mediation and offers direction on how to avoid personality clashes as well as the roles each type should play in the mediation process. The second model, the Typology of Difficult People, explores difficult behavior and the difficult people who often derail the mediation process. It provides a useful framework to analyze Bramson’s Difficult People and summarizes his strategies for coping with them\textsuperscript{11}. Finally, the Dispositional Difficulty Matrix integrates the discussion of personality and difficult behavior by highlighting tendencies for difficult behavior among various personality types. These tools offer unique insight into the dynamics of personality and difficult behavior in mediation. Recommendations and coping strategies outlined in this paper provide useful direction for avoiding interpersonal mistakes that can cause mediation to become a futile process.

V. THREE TOOLS FOR DEALING WITH INTERPERSONAL ISSUES IN MEDIATION

A. THE MEDIATION PERSONALITY MATRIX

The notion of temperament can be traced as far back as ancient Egypt and Mesopotamia, but a Greek physician named Hippocrates was the first to advance an actual theory of temperament in 400 BC. He believed certain moods, emotions, and behaviors were caused by the prevalence of four distinct fluids in the body. Galen (AD 131-200) refined the work of Hippocrates to develop the modern typology of four temperaments (sanguine, choleric, melancholy, and phlegmatic) widely used today\textsuperscript{12}. Meaningful research in this field continued in Europe but did not reach American shores until the 1960’s, when Tim Lahaye built on this research and pioneered in the United States the study of the four temperaments. Lahaye believed a person’s temperament was “the unseen force underlying human action.”\textsuperscript{13} According to Lahaye:

There is nothing more fascinating about man than his temperament! It is temperament that provides each human being with the distinguishing qualities of uniqueness that make him as individually different from his fellowmen as the differing designs God has given to snowflakes. It is the unseen force underlying human action, a force that can destroy a normal and productive human being unless it is disciplined and directed\textsuperscript{14}.

\textsuperscript{14} Ibid.
Inspired by Lahaye, Florence Littauer developed a comprehensive personality system based on the four temperaments in her book, *Personality Plus*[^15], which she applied to the workplace in her second volume, *Personality Puzzle*.[^16] In this paper, the four temperaments, or personality types, are applied to mediation.

Those who sit across the table from one another in mediation have one thing in common — a unique personality type that shapes their emotions, attitudes, and behavior. Each participant brings his own singular style to the mediation process, with profound implications for mediation strategy, team composition, and dynamics. Knowledge of who one is with regard to personality type as well as knowledge of the temperament proclivities of others involved in interactions provide distinct advantages in mediation. Such knowledge enhances communication by enabling one to tailor his message to the unique needs of mediation participants. Additionally, it enables one to offer solutions that are more compatible with one’s his needs and motives as well as allowing one to avoid derailing personality clashes. Failure to account for these unique tendencies can have a profound effect on mediation participants and mediation effectiveness.

Figure 1 summarizes the four basic personality types detailed in Littauer’s *Personality Puzzle*. Trent and Smalley’s (1990) personality animals[^17] are added for ease of reference and to make it easier to visualize the personality types one might encounter in mediation. Littauer’s *Wired that Way* survey provides a simple tool for determining one’s type in the *Personality Puzzle*.[^18]

### The Mediation Personality Matrix

Figure 1 is an adaptation of Littauer’s *Personality Puzzle*[^19] and Trent and Smalley’s *Personality Animals*[^20] to a mediation environment. What follows is a synthesis of personality theory and mediation reality. First, one must note the position of the personality types in the matrix. The top quadrants are the leading types (Lions and Otters). These are outgoing, extroverted leaders, often heard before being seen and easily spotted from a distance, Otters by what they wear (bright colors and, among women, lots of bling) and Lions by their behavior (fast-moving, confident, and assertive). The lower quadrants of the matrix are reserved for the analytical types (Beavers and Retrievers). They are quieter, more analytical people who are harder to spot. Beavers stand out because of their tidiness. There is a place for everything, and everything is in its place. Personal and work spaces are neat and tidy at all times. Retrievers are the hardest of the four types to identify because they are laid-back and go with the flow, rarely standing out in a crowd. They have many friends because they offend no one.[^21]

---

Figure 1: The Mediation Personality Matrix - Four Temperaments in Mediation

<table>
<thead>
<tr>
<th>MERRY MEDIATOR</th>
<th>MANIPULATIVE MEDIATOR</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Playful Otter - Sanguine</strong></td>
<td><strong>Roaring Lion - Choleric</strong></td>
</tr>
<tr>
<td><strong>“Are we having fun yet?”</strong></td>
<td><strong>“Do it My Way, NOW!”</strong></td>
</tr>
<tr>
<td><strong>Need:</strong> Fun - attention, affection, approval, and acceptance. “Fun and Adventure!”</td>
<td><strong>Need:</strong> Control – loyalty, appreciation, accomplishment. “Action and Excitement!”</td>
</tr>
<tr>
<td><strong>Controls by:</strong> Charm - draws people in</td>
<td><strong>Controls by:</strong> Threat of Anger – will confront</td>
</tr>
<tr>
<td><strong>Role in Mediation:</strong> Social Networker – Breaks down social barriers with charm, humor, ideas.</td>
<td><strong>Role in Mediation:</strong> Take-Charge Leader – Directs the process, sets goals, controls agenda.</td>
</tr>
<tr>
<td><strong>Mediation Strengths:</strong> Initial contact with parties (breaking the ice). Meeting, greeting, and persuading people. Colorful, enthusiastic communicator with lots of creative ideas.</td>
<td><strong>Mediation Strengths:</strong> Born leader, confident, decisive, hardworking, strong-willed, goal-oriented. Tough negotiator, aggressive, willing to confront, excel under pressure, play to win.</td>
</tr>
<tr>
<td><strong>Mediation Weaknesses:</strong> Talk too much, exaggerate, interrupt, don’t listen well, poor memory (names), easily distracted, disorganized. More interested in making a friend than a deal.</td>
<td><strong>Mediation Weaknesses:</strong> Bossy, impatient, aggressive, argumentative, and intimidating. Imposes his agenda on others. More concerned about being right than making it right with others.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>MELLOW MEDIATOR</th>
<th>METICULOUS MEDIATOR</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Golden Retriever - Phlegmatic</strong></td>
<td><strong>Orderly Beaver - Melancholy</strong></td>
</tr>
<tr>
<td><strong>“Does it really matter that much?”</strong></td>
<td><strong>“If its worth doing, its worth doing right!”</strong></td>
</tr>
<tr>
<td><strong>Need:</strong> Peace – stability, harmony, lack of stress, feeling of worth. “Peace and Harmony!”</td>
<td><strong>Need:</strong> Perfection – organization, planning, and efficiency. “Order and Understanding!”</td>
</tr>
<tr>
<td><strong>Controls by:</strong> Procrastination I’ll make you do it!</td>
<td><strong>Controls by:</strong> Threat of Moods – mood torture</td>
</tr>
<tr>
<td><strong>Role in Mediation:</strong> Support Person – builds relationships, mediates conflict among parties.</td>
<td><strong>Role in Mediation:</strong> Technical Expert – deep, thoughtful analysis, planning, Devil’s Advocate.</td>
</tr>
<tr>
<td><strong>Mediation Weaknesses:</strong> Indecisive and undisciplined. Unwilling to take an unpopular stand. Values harmony over victory. Not easily motivated, may not communicate feelings well.</td>
<td><strong>Mediation Weaknesses:</strong> Easily depressed, unreasonable demands self/others, procrastinate for perfection. Moody and cynical if pressed for time. Needs space. Use moods to punish others.</td>
</tr>
</tbody>
</table>

Despite the importance of vertical location on the matrix, lateral (left/right) position is also noteworthy. Personality types on the left side of the matrix (Otters and Retrievers) are the more playful types. They are people-oriented and more likely to take time to relax and have fun. On the right side of the matrix are the working types (Lions and Beavers). They are more concerned with working, planning, organizing, and controlling, oriented toward completing tasks.\(^{22}\)

Personality impacts mediation at two important levels: the individual one (knowing who one is) and the group one (how people interact). On the individual plane, it is imperative to know one’s own nature and tendencies as well as the role being undertaken. Most people are a mixture of a dominant and secondary personality type. Natural combinations occur in adjacent quadrants. These include the playful Otter/Retriever combination, the hard-working Lion/Beaver combination, the highly active Lion/Otter combination, and the more peaceful, analytical Beaver/Retriever combination.\(^ {23}\) Unnatural combinations occur on the diagonals of the matrix. The Playful Otter and Orderly Beaver are not likely to coexist, nor are the Roaring Lion and Golden Retriever. These contradictory combinations are “diametrically opposed to each other and are not natural birth personality combinations.”\(^{24}\) For most people, the dominant personality type shapes their behavior. The Mediation Personality Matrix defines four distinct “Mediation Personas” who may be involved in disputations.

The Merry Mediator – Playful Otter

Otters are **Merry Mediators** because they are charming, witty, and entertaining, and crave attention. They are the “Social Networkers” of the mediation process, breaking down barriers among mediation participants and using their charm and good humor to draw others into their network. They are colorful, enthusiastic, persuasive, and creative. Merry Mediators are essential for breaking the ice initially and then fostering friendly relationships among participants in the early stages of mediation. They are persuasive communicators who have a knack for generating and selling mediation solutions to other participants. Unfortunately, they have some weaknesses that may restrict their usefulness to that of a supporting role on a mediation team. They often talk too much, interrupt, do not listen well, and have poor memory for names and details. Additionally, they are easily distracted, disorganized, and more interested in making a friend than in making a deal.\(^ {25}\) Merry Mediators are better suited to playing a supporting role than to leading a team or serving as a mediator.

The Meticulous Mediator – Orderly Beaver

The polar opposites among Mediation Personas are the Beavers, or **Meticulous Mediators**. Unlike Merry Mediators, they are consummate perfectionists. They are highly analytical and efficient, capable of crafting detailed plans that may keep a team one step ahead of its mediation counterparts.\(^ {26}\) Meticulous Mediators are often the technical experts whose knowledge is vital to

\(^{22}\) Ibid.

\(^{23}\) Ibid, p. 142-145.


\(^{26}\) Ibid, p. 43-56.
keep the team from being blindsided by an overlooked detail. They make excellent devil’s advocates to test the legitimacy of all ideas presented. Meticulous Mediators are essential to the mediation process; at least one member of a team should have Beaver as at least a secondary trait. Meticulous Mediators, however, may not be best suited to leading a team because they tend to procrastinate, waiting to achieve perfection. They can become easily depressed and cynical because few can meet their lofty standards, including themselves. They tend to be moody and may use silence as a form of mood torture to punish those who offend them.\(^{27}\) They are best suited to playing supporting roles as planners, strategists, and technical experts in face-to-face deliberations and behind the scenes.

The Manipulative Mediator – Roaring Lion

Perhaps most compatible for leading mediation are Lions, or \textit{Manipulative Mediators}. They act well as both mediators and mediation participants, particularly in controversial mediations requiring tough negotiation. Manipulative Mediators are born leaders who have a strong need for control. It is in their DNA to lead, and they do it well. They are strong, confident, and goal-oriented, aggressive negotiators who thrive under pressure and are willing to confront others to win.\(^{28}\) Unfortunately, they are often viewed as being bossy, intimidating, and argumentative by other mediation participants, who are afraid to kindle a Lion’s wrath. The heavy-handed style of Manipulative Mediators may stifle communication among mediation participants and can lead to heated conflict when opposing Manipulative Mediators face off. This effect may be tempered by pairing a Manipulative Mediator with the more charming Merry Mediator or the more peaceful Mellow Mediator discussed next.

The Mellow Mediator – Golden Retriever

Finally, Golden Retrievers, or \textit{Mellow Mediators}, are by definition designed for mediation. They are peacemakers who abhor conflict and who seek peace at any cost, excelling at resolving disagreements between parties and finding middle ground. They are notable listeners who build relationships and rarely offend anyone. The flip side of that personality trait is that they are extremely indecisive, seldom having a strong preference for a particular course of action. Thus, they tend to remain impartial in conflict, unwilling to take unpopular stands.\(^{29}\) Their motto is, “Does it really matter that much?” Given this ability to resolve conflict without taking sides, they are well-suited to acting as mediators (with no direct stake in the dispute) but not to leading a team representing one of the parties in a dispute. Mellow Mediators are cast best as supporting members of a team, particularly serving as a countervailing force for Manipulative Mediators.

As this analysis of personality types indicates, successful mediation may depend on a team being balanced with regard to temperament characteristics and an awareness of the composition of the conflicting team. Incompatible or suboptimal combinations of personality types are a common cause of mediation failure. While personality clashes that erupt into conflict have an obvious impact on mediation success, less obvious personality mismatches that may go

\(^{27}\) Ibid, p. 104-115.
\(^{28}\) Ibid, p. 61-71.
\(^{29}\) Ibid, p. 131-140.
unnoticed can act as a silent killer that stifles mediation and robs it of the synergy it was
designed to create. Mediation participants who discover their own personality type, recognize
the types of other parties in mediation, and apply the model in forming mediation teams and in
conducting mediation can prevent the process from being ineffective.

B. The Typology of Difficult People – Dealing with Difficult People in Mediation

So far, this discussion has been limited to natural differences in personality among mediation
participants. While these differences can be challenging, they are relatively stable and impact
mediation in predictable ways. Unfortunately, mediation is often impacted by intractable people
whose behavior is far less predictable and far more challenging. This is the realm of Difficult
Behavior and Difficult People. While their numbers are relatively small, difficult people create a
great deal of stress in the workplace and can have a devastating effect on mediation. Richard
Bramson’s classic book, Coping with Difficult People, was written more than three decades ago
and is still the authoritative work on difficult people. From fourteen years of research and
consulting experience, Bramson identified ten categories of such people and offered strategies
for coping with their behavior. He cautions against being too quick to label someone as a
“Difficult Person.” In order to qualify, the behavior must not be transient or sporadic. The
difficult person “is one who acts chronically in a difficult manner.” Such a person is difficult
all the time, under varied circumstances and with virtually everyone. The label would not apply
to situations in which a specific stimuli triggers troublesome behavior or if the response only
happens under certain circumstances or with certain people.

No framework exists for categorizing these ten behaviors into a useful typology that can be
applied to mediation, but an adaptation of Kelly’s Model of Follower Types can be used to
build a Typology of Difficult People. Kelly’s Model classifies follower behavior in terms of two
dimensions that are relevant to mediation: active involvement and independent critical thinking.
Active involvement refers to those who are visible participants initiating action and interaction
with coworkers at many different levels. Passive involvement is the opposite, referring to people
who are barely noticeable, who avoid responsibility, and who have limited engagement in the
organization. Critical thinkers examine, analyze, and evaluate matters that are significant to the
organization. They are independent thinkers who question assumptions, follow their convictions,
and are willing to offer criticism. Noncritical thinkers are their counterpart, not analytical and
willing to accept things as they are. These two dimensions were used to define four quadrants (Drivers, Distracters, Cynics, and Indecisives) and a central position (Conformers) in this model.
The term “Assertive” has been substituted for “Active” because it fits the model better.

---

30 Bramson, p. 159-160
31 Ibid.
34 Ibid.
Table 3: Analysis of Difficult People in the Workplace

<table>
<thead>
<tr>
<th>Difficult Person</th>
<th>Defining Behavior</th>
<th>Assertive/Passive</th>
<th>Critical/Noncritical Thinking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drivers</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sherman Tanks</td>
<td>Overwhelming direct attack</td>
<td>Assertive</td>
<td>Critical</td>
</tr>
<tr>
<td>Snipers</td>
<td>Clever pot shots from cover</td>
<td>Assertive</td>
<td>Critical</td>
</tr>
<tr>
<td>Complainers</td>
<td>Find fault with everything</td>
<td>Assertive</td>
<td>Critical</td>
</tr>
<tr>
<td>Bulldozers</td>
<td>Pompous experts - run over you</td>
<td>Assertive</td>
<td>Critical</td>
</tr>
<tr>
<td>Distracters</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Exploders</td>
<td>Raging adult tantrum</td>
<td>Assertive</td>
<td>Noncritical</td>
</tr>
<tr>
<td>Balloons</td>
<td>Phony experts - try to impress you</td>
<td>Assertive</td>
<td>Noncritical</td>
</tr>
<tr>
<td>Conformers</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Super-Agreeables</td>
<td>Agree to your face, but never deliver</td>
<td>Both</td>
<td>Both</td>
</tr>
<tr>
<td>Cynics</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negativists</td>
<td>Wet Blanket – It won’t Work!</td>
<td>Passive</td>
<td>Critical</td>
</tr>
<tr>
<td>Indecisives</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stallers</td>
<td>Indecisive, avoid decisions</td>
<td>Passive</td>
<td>Noncritical</td>
</tr>
<tr>
<td>Clams</td>
<td>Yep, nope, grunt, or no response</td>
<td>Passive</td>
<td>Noncritical</td>
</tr>
</tbody>
</table>


Table 3 summarizes this analysis and classification of Bramson’s ten types of difficult people on both dimensions. The Typology of Difficult People, shown in Figure 2, is the result of this analysis. It offers a useful framework for understanding the behavior of Bramson’s difficult people and how that behavior impacts mediation dynamics. Next, a discussion of the difficult people in each quadrant of Figure 2 begins with Drivers.

Drivers

As shown in Figure 2, Drivers are assertive, critical thinkers. Bramson’s Sherman Tanks, Snipers, Complainers, and Bulldozers operate in this challenging mediation battle zone. They are the most assertive, analytical, and strong-willed independent thinkers of all difficult people and, because they are willing to challenge and criticize others, they are also the most confident, capable, and forceful. They are a formidable challenge in mediation, usually in attack mode and often abusive, abrupt, and intimidating. Yet, each has his own unique battle plan. Sherman Tanks are aggressive and intimidating, preferring direct assault and willing to plow over anyone who stands in the way of their position or agenda. They will attack not only an idea or project...
Figure 2: Typology of Difficult People

Sources: An adaptation of Kelley’s Model of Follower Types\textsuperscript{35} to classify Bramson’s Difficult People.\textsuperscript{36} Diagram, quadrant titles, and classification of behaviors by the authors.

but also someone obstructing them personally in front of others.\textsuperscript{37} \textit{Bulldozers} are similar, but their attacks are driven by their superior knowledge and the belief that they are always right. They overrun people with their condescending, blustery style and insist that their way is the only way in which to proceed.\textsuperscript{38} \textit{Complainers} are also confrontational but less intense, wearing people down with a never-ending barrage of complaints while not offering solutions.\textsuperscript{39} \textit{Snipers} are the most transparent of the Drivers but no less aggressive. They avoid direct frontal assault,
preferring instead to take relentless potshots at people from safe cover. They use innuendos, under-the-breath remarks, sharp digs, and nonplayful teasing to constantly undermine others. Drivers in all these variations are common in mediation. They have a seemingly endless arsenal of tactics for controlling the direction and tempo of the process. Coping with these most difficult of difficult people requires great skill and is vital to mediation success. Bramson’s strategies for coping with each of the Drivers are summarized in Table 4.

**Distracters**

The next quadrant in our Typology of Difficult People (see Figure 2) is reserved for Distracters, who are also assertive, but not critical thinkers. Bramson’s Exploders and Balloons are found here. Both Exploders and Balloons disrupt and distract, but in completely different ways. *Exploders* throw raging adult tantrums, without notice. These tantrums immediately shift control to the Exploder, leaving the witnesses “surprised and bewildered at the abrupt and horrifying change in the situation.” Considerable time can be lost tending to an Exploder’s needs and waiting for him to cool down. Meanwhile, the Exploder’s behavior is reinforced by the attention received. Exploders can instantly derail mediation, disrupt group harmony, and cause considerable delays in mediation as the team strives to recover from the explosion. *Balloons*, like Bulldozers, seek respect and admiration from others for their expertise, but they are phony experts. They are a major distraction in mediation because they lead unsuspecting victims down dead-end roads that waste time and resources until they are finally exposed. Mediators must be prepared to deal with these distractions. Bramson’s strategies for coping with Exploders and Balloons are also summarized in Table 4.

**Conformers**

The central position of the Typology of Difficult People (See Figure 2) is home to Conformists, who are moderately assertive and middle-of-the-road when it comes to critical thinking. This is the realm of Bramson’s *Super-Agreeables*, who just want to be liked by everyone. To achieve this, they strive to be outgoing, personable, funny and agreeable, always saying what they think someone wants to hear. According to Bramson, “They are difficult people precisely because they leave you believing they are in agreement with your plans, only to let you down.” It can be frustrating for a team to believe it has reached agreement in some aspect of mediation only to find that a Super-Agreeable was encountered who really did not agree in the first place and had no intention of following through. Mediators must be able to recognize Super-Agreeables and insist that agreements and commitments be put in writing. Coping strategies for Super-Agreeables are outlined in Table 4.

---

41 Ibid, p. 35.
43 Ibid, p. 86
Table 4: Coping with Difficult People in Mediation

<table>
<thead>
<tr>
<th>Difficult Person</th>
<th>Coping Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drivers</td>
<td></td>
</tr>
<tr>
<td>Sherman Tanks</td>
<td>Stand up for yourself. Give them time to run down. Use assertive language. Get them to sit down. Avoid direct confrontation.</td>
</tr>
<tr>
<td>Snipers</td>
<td>Force them out into the open. Question the intent of their comments. Don’t agree, ask for group confirmation. Deal with underlying problems. Prevent sniping by setting up regular problem-solving meetings.</td>
</tr>
<tr>
<td>bulldozers</td>
<td>Prepare yourself. Listen and paraphrase their main points. Ask specific questions, but don’t confront in meetings. Avoid being a Counter-Expert.</td>
</tr>
<tr>
<td>Distracters</td>
<td></td>
</tr>
<tr>
<td>Exploders</td>
<td>Give them time to run down and regain self-control. If it persists, use assertive words, call their name, or stand to end it. If this fails, take a break, leave, or invite them to discuss the matter privately.</td>
</tr>
<tr>
<td>Balloons</td>
<td>Set them straight with correct facts (expose them). Give them a way to save face. Don’t pop the Balloon in public, confront them privately.</td>
</tr>
<tr>
<td>Conformers</td>
<td></td>
</tr>
<tr>
<td>Super-Agreeables</td>
<td>Help them feel safe enough to disagree. Gently try to find out why they don’t act. Let them know you value them as a person. Don’t let them make unrealistic commitments. Listen for meaning behind their humor.</td>
</tr>
<tr>
<td>Cynics</td>
<td></td>
</tr>
<tr>
<td>Negativists</td>
<td>Don’t get sucked into their despair or try to talk them out of it. Offer your solutions after problem discussed. Be ready to take action without them. Don’t create negativism by asking them to act before they feel ready.</td>
</tr>
<tr>
<td>Indecisives</td>
<td></td>
</tr>
<tr>
<td>Stallers</td>
<td>Find out why they are hesitant. If you are the problem, ask for help. Help them limit the number of alternatives and rank them. Keep the action steps in your own hands. Possibly remove the staller from the situation.</td>
</tr>
<tr>
<td>Clams</td>
<td>Flush them out with open-ended questions. Wait patiently for a response using a friendly, silent stare. If no response comes, tell them what you plan to do if there is no discussion on the matter.</td>
</tr>
</tbody>
</table>

Source: Based on Robert M. Bramson, *Coping with Difficult People*, New York, Doubleday, 1981. Classification scheme and category titles added by the authors.
Cynics

Moving down in the Typology of Difficult People (see Figure 2), Cynics can be found. They are passive, critical thinkers. Bramson’s Negativists fit well in this quadrant. They are capable critical thinkers who thrive on evaluation and analysis but who are alienated and who have lost all trust in the system and their ability to influence outcomes. They are dispirited and defeated, and their pessimism is contagious. They have become “Wet Blankets” who believe anything not in their hands will not work. Negotiation is doomed when Negativists find their way into mediation. They discredit every proposal, and their pessimism soon infects the entire mediation process. Negativists have little to offer mediation but may be of some benefit in a limited role as a devil’s advocate. Mediators must be careful not to create Negativists in the mediation process. This occurs, according to Bramson, when methodical people are pushed for a decision before they have had adequate time for analysis. Other coping strategies for Negativists can be found in Table 4.

Indecisives

The final quadrant of the Typology of Difficult People (see Figure 2) is reserved for Indecisives, passive, noncritical thinkers who struggle to make decisions or take action. Bramson’s Stallers and Clams are well-suited to this quadrant. Stallers are helpful people who avoid making major decisions because they may hurt, upset, or disappoint someone. Stallers try to delay making decisions in the hopes that the need will go away. Stallers can paralyze mediation with their indecision and may have to be removed from the situation. Clams are silent and unresponsive when asked questions. They react to conflict by closing up (like their namesakes) and refusing to discuss problems. The biggest problem with Clams is that one does not know what the silence means, so open-ended questions have to be used to open them up. Clams are the antithesis of effective communication and negotiation. It is hard to imagine making any progress with a Clam in mediation. Coping strategies for Indecisives are presented in Table 4.

In summary, most mediators have encountered difficult people in mediation and have witnessed their devastating impact on the process. In the Typology of Difficult People, the greatest challenges are posed by Drivers, who, given their aggressive, often hostile nature, leave a wide path of destruction in their wake. However, Distracters, Conformists, Cynics, and Indecisives can also be destructive. In addition, few people are prepared for the ultimate mediation nightmare that unfolds when more than one difficult person enters mediation, or worse, when a coordinated attack is made by difficult people working in concert. The only viable defense is to identify difficult people, anticipate their behavior, and use Bramson’s coping strategies, summarized in Table 4, to address their behavior before mediation becomes an exercise in futility.

44 Ibid, p. 100-105.
46 Ibid, p. 70.
C. DISPOSITIONAL DIFFICULTY MATRIX-TENDENCIES TOWARD DIFFICULT BEHAVIOR IN MEDIATION

Finally, it must be recognized in an analysis of temperament and difficult people that each personality type, or disposition, is uniquely susceptible to certain forms of difficult behavior. Using the personality types from the Mediation Personality Matrix in Figure 1, the Dispositional Difficulty Matrix in Figure 3 was developed to identify dispositional tendencies to engage in difficult behaviors. According to the model, each personality type has a unique predisposition to engage in certain difficult behaviors. Awareness of these potential dispositions can help mediation participants avoid their own tendencies to engage in difficult behavior and can help them deflect triggers that may spark difficult behavior in others. The unique needs and behaviors of each personality type are examined to determine which has the greatest motivation or tendency to engage in the various difficult behaviors identified by Bramson.\(^47\)

Difficult Behavior among Otters

With their need for attention, approval, and acceptance and their incessant talking, self-centeredness, storytelling ability, and tendency to exaggerate,\(^48\) Otters are the most likely type to become Balloons. It is not hard to imagine an Otter embellishing the truth and becoming a phony expert to impress others. Their needs would also drive them to agree with others to gain approval and acceptance, putting them at risk of becoming a Super-Agreeable. Otters, however, are not the only ones vulnerable to this behavior. The bracket on the left side of Figure 3 is designed to indicate that both Otters and Retrievers are given to Super-Agreeable behavior. Retrievers, with their indecisiveness, need for peace and conflict avoidance, and their tendency to procrastinate,\(^49\) may be the Number One candidate for Super-Agreeable behavior. They are unlikely to have a strong position, hate to say “No!”, and often agree with parties on both sides of the issue. Agreement comes easily to them. And, because they are habitual procrastinators, they are unlikely to deliver on promises.

Difficult Behavior Among Retrievers

While both Retrievers and Beavers tend to sit on their feelings, Retrievers are more likely to engage in Clam behavior and to become Clams because they are so flexible, laid back, and indecisive.\(^50\) Because they do not have strong preferences, they are the most likely among the types to respond with a “yep,” “nope,” a grunt, or no response. This is also consistent with Super-Agreeable behavior because agreement when one has no intention of following through is tantamount to a “yep.”

Due to their indecisiveness and habitual procrastination, Retrievers are also the most likely among the types to resort to Stalling behavior. They don’t feel strongly about any of the options

---

49 Ibid, p. 131-140.
51 Ibid, p. 131-140.
Figure 3: Dispositional Difficulty Matrix - Tendencies for Difficult Behavior

Source: C.D. Bultena based upon a synthesis of Littauer’s Personality Puzzle\textsuperscript{51}, Trent and Smalley’s Personality Animals\textsuperscript{52}, and Bramson’s Difficult People.\textsuperscript{53}

and delay the decision out of fear they will make a mistake. Ultimately, the decision is made for them by others or by default (failing to act in time).

Difficult Behavior among Lions

Aggressive by nature, Lions are by far the most likely of the types to engage in Hostile-Aggressive behavior. Their aggressiveness, coupled with their need for control and willingness to confront others,\textsuperscript{54} puts them at risk for becoming Sherman Tanks and Exploders. Because they prefer a frontal assault, they have little need for Sniper tactics. Of the four personality types, Lions are the most likely to become Sherman Tanks, driving head on over anyone who dares to challenge them. They are well-suited for warfare, as they thrive on opposition and excel in a crisis. Like a tank, they are swift, decisive, and powerful. They have thick armor in that they are confident, non-emotional, and more concerned with work than friends.\textsuperscript{55} Because Lions

\textsuperscript{54} Ibid, p. 116-130.
\textsuperscript{55} Ibid.
use the threat of anger to control, an occasional explosion may keep the threat alive. When these explosions become more commonplace and escalate to “fearsome attacks filled with rage” (adult tantrums), an Exploder is born.56

Lions also share a tendency found in Beavers to become Bulldozers (see the bracket on the right side of Figure 3). Both seek knowledge but for different reasons. Beavers seek knowledge because they are driven by deep, thoughtful analysis, a laser focus on projects, and high standards.57 It is in their DNA to be experts. Lions seek knowledge as a means to an end, namely, to accomplish a goal or complete a project. Thus, both may become Bulldozers who attain expert status and use it in a confident, condescending manner, leaving “little room for anyone else’s judgment, creativity, or resourcefulness.”58

**Difficult Behaviors among Beavers**

Beyond their tendency to become Bulldozers, Beavers have a tendency to become Snipers. Because they are more sensitive and lack the aggression, power, and confidence of the Lion, they avoid frontal assaults and resort to guerrilla tactics, taking verbal potshots at people from cover. Their precision, deep analysis, and tendency to look for hidden meaning59 provide a steady supply of verbal ammunition (innuendos, veiled insults, and clever digs) to fire at their adversaries. These traits, coupled with their moodiness and willingness to use mood torture to punish others,60 are a recipe for the perfect Sniper.

Beavers also tend to have negative inclinations. Because no one, including themselves, can meet their high standards of perfection, they are often disappointed and easily depressed, and can have low self-image.61 These negative inclinations put them at risk of becoming Complainers and Negativists. Beavers have all three of Bramson’s ingredients to be a Complainer, in that they feel powerless because many others are weary of their unreasonable demands and no longer listen to them; prescriptive in that they have a clear view of how things ought to be; and perfect because bringing shortcomings to someone’s attention relieves them of responsibility.62 It is interesting to note that Littauer uses the latter term in labeling the Beaver as “Perfect Melancholy” in her personality system.63 So, Beavers are a perfect match for the kinds of people Bramson labels as Complainers.

Beavers are equally suited to Bramson’s description of Negativists or Wet Blankets. They throw a wet blanket on any suggestion or plan they did not initiate. Again, no one can meet their high standards of perfection. So, of course, “It’s not going to work!” Bramson’s description of Negativists as truly feeling “dispirited and defeated”64 is consistent with Littauer’s description of

---

61 Ibid.
Beavers as “negative, gloomy, and easily depressed.” Bramson even warns that pushing high-powered analysts with methodical minds (a perfect description of Beavers) to act before they have had time to fully understand the project will drive them to negativist behavior and may produce a Negativist if the practice continues over time.

In summary, understanding these dispositional tendencies helps one to manage one’s own behavior so that becoming a difficult person can be avoided. Such understanding also alerts one to the potential of others to engage in difficult behaviors. Thus, one can discover our own and others’ tendencies for difficult behavior and avoid triggers that may spark difficult behavior in others. Knowing one’s own personality type and being able to recognize that of others is essential to applying the model. Littauer’s “Wired that Way” survey provides a quick assessment of one’s personality and useful information for recognizing the personality types of others.

VI. SUMMARY

In summary, being aware of and managing the effects of personality and difficult behavior are essential to mediation success. This paper offers three useful tools derived from the field of group dynamics to understand and address interpersonal issues in mediation. The Mediation Personality Matrix draws upon personality research to identify four distinct Mediation Personas that may be encountered in mediation. It provides a simple tool for recognizing each type — their needs, mediation strengths and weaknesses, and the role they are best suited for in mediation. Mediators may use the Mediation Personality Matrix to discover their own type, recognize the types of others, and provide guidance in selecting a mediator, forming a mediation team, and avoiding personality clashes in mediation.

Once personality differences have been addressed, mediators must deal with difficult behavior in the mediation process. The Typology of Difficult People provides a visual tool that categorizes difficult people into five distinct types based on their level of assertiveness and critical thinking skills. Tables are provided to identify difficult people and to offer useful strategies for coping with their behavior. These tools make it easier to spot difficult behavior and address it before it derails the mediation process.

A final tool, the Dispositional Difficulty Matrix, integrates this analysis of personality and difficult behavior by recognizing that people of each personality type have a natural bent toward specific forms of difficult behavior and must manage their behavior to avoid becoming a difficult person. Overall, this paper suggests the following recommendations for mediation participants:

1. Discover their personality type (take a survey);
2. Recognize and respond effectively to personality differences in others;
3. Consider personality differences in forming mediation teams and conducting mediation;
4. Recognize the various types of difficult people and their behavior;

5. Consider tendencies toward difficult behavior in themselves and others; and
6. Practice the coping strategies outlined in this paper to address difficult behavior before it becomes chronic and produces difficult people who derail the mediation process.

Collectively, these models offer a useful tool kit for assessing, understanding, and managing interpersonal problems that impact mediation. The Mediation Personality Matrix provides a simple means for recognizing personality types and their roles in mediation, while the Typology of Difficult People provides a visual tool to identify and cope with difficult people. The Dispositional Difficulty Matrix ties it all together by offering strategies to avoid the tendencies of each personality type to produce difficult people. Mediation is a more dynamic process than can be wholly reflected through two-dimensional grids such those presented in this paper, but these tools, used together, can help mediation participants recognize and deal more effectively with personality differences and difficult people.

VII. SUCCESSFUL MEDIATION IN BUSINESS

While there is room to improve mediation through application of the interpersonal tools presented in this paper, there is no doubt that mediation has become a highly effective mechanism for conflict resolution. The large number of cases and the impressive settlement rates seen in just one state — Oklahoma — demonstrate the significance of mediation to individuals and managers of both small and large organizations. Beyond the numbers, however, mediation’s success is also evident in the wide variety of cases settled, not to mention the many cases that do not reach full settlement yet narrow the differences to be subsequently resolved through arbitration or litigation.67 As shown in Table 5, successful mediation has occurred in various conflict situations ranging from construction, telecommunications, and energy to cases involving estate settlement, franchising, textiles, and retirement. The variety of disputes that have been mediated is striking.

VIII. CONCLUSION

The success of mediation and its application across a wide spectrum of conflict situations have been noted, and three tools for addressing interpersonal problems to ensure success in mediation have been supported. Business leaders can use these three tools to remove interpersonal barriers among mediation participants leading to greater harmony and more success in the process. Mediation need not be an exercise in futility. It is most likely to succeed in a positive environment in which interpersonal barriers are removed, individual differences are understood, and the gradual progression to mutual trust and open communication is engaged.

The volume, variety, and impressive settlement rates of mediation cases suggest a bright future for this form of conflict resolution. With the use of mediation on the rise, it is more

important than ever for business leaders to master skills necessary to take full advantage of the opportunities this process offers. Mediation is an effective tool when business leaders prepare for and navigate the process with a clear understanding of how to remove interpersonal barriers leading to understanding, mutual respect, and open communication.

Table 5: Examples of Successful Mediation in Business

Cases Mediated by Bruce Meyerson

- A dispute over the termination of a franchise agreement.
- A dispute involving the Retirement Income Security Act over denial of benefits.
- A construction dispute between contractors over delay-related damages.
- Claims between partners over assets in three dissolved businesses.
- A claim against a surety for failure to make performance bond payments.
- A personal injury action on behalf of a minor over electrical shock burn injuries.
- A class-action dispute over school desegregation from Native American families.
- A probate dispute between siblings over the assets of an estate.

Cases Mediated by World Intellectual Property Organization

- A U.S. based software developer reached a licensing agreement with a European telecommunications service provider.
- A U.S. based manufacturer of automotive parts concluded a settlement agreement in the form of a patent license with one of its European competitors.

EUCON Case Examples

- A dispute over delays by an IT consultancy firm in delivery of contract services to a textile factory. The parties succeeded in finding a solution that was satisfactory to both sides.
- A contract dispute between a power station operator and an energy user. The parties succeeded in reaching long-term contract agreements on the tightest possible schedule.

---


DANCING WITH GINA: WHAT SHOULD EMPLOYERS KNOW ABOUT THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008?

Margaret Langford

In 2008, the Genetic Information Nondiscrimination Act (GINA) was passed. Title II of GINA, prohibiting the use of such information in employment, took effect on November 21, 2009. The first lawsuit under GINA was filed in April of 2010. The EEOC issued its Final Rule regarding GINA in November 2010. The purpose of this paper is to review GINA and the Final Rule concerning it and to discuss GINA-related workplace scenarios that illustrate the application of the law.

In July of 2001, a respected rail industry company found itself the subject of a national news story and not in a good way: splashed in the pages of People Magazine (Charles, 2001). The story was about Gary Avary, one of several employees of Burlington Northern Santa Fe (BNSF) ordered months earlier to provide blood samples or face disciplinary action. A 27-year employee of BNSF, Avary refused to do so after being told the samples were for genetic testing, whereupon BNSF stated he would be investigated for non-compliance. In its first case involving possible discrimination based upon genetic information, the EEOC filed suit against BNSF, relying upon privacy rights of the Americans with Disabilities Act (ADA). BNSF claimed it was trying to determine whether workplace or genetic factors were linked to carpal tunnel syndrome, a growing health insurance cost. Nearly three months before the story in People, BNSF agreed with the EEOC to end genetic testing and begin negotiating settlements with the affected employees. Six years earlier, the U.S. 9th Circuit Court of Appeals had ordered Lawrence Berkeley Laboratory to stop testing its black employees for sickle-cell traits and female employees for pregnancy (Prost, 2010), but what made the BNSF case perhaps more compelling was the nearly coincident news regarding the decoding of the human genome. This knowledge raised hopes for diagnosing and treating diseases but also the specter of misuse of genetic information. In 2008, the Genetic Information Nondiscrimination Act (GINA) was passed. Title II of GINA, prohibiting the use of such information in employment, took effect on November 21, 2009 (“Genetic Information Discrimination”). The first lawsuit under GINA was filed in April of 2010 (Brown, 2011; Prost 2010). The EEOC issued its Final Rule regarding GINA in November 2010 (“Regulations”). The purpose of this paper is to review GINA and the Final Rule concerning it and to discuss GINA-related workplace scenarios.

GINA has two parts: Title I, which prohibits health insurers from requesting or requiring an individual to take a genetic test, and Title II, which prohibits employers from using an individual’s genetic information in any employment decisions. The subject of this paper is Title II, and we begin with the basics.

GINA and Title II

The Equal Employment Opportunity Commission (EEOC) is the federal agency that enforces Title II of GINA, which applies to private and government employers with 15 or more

1 St. Mary’s University, Bill Greehey School of Business, San Antonio, TX 78228-8607
employees, to employment agencies, and to labor unions (“Background Information”). The notion of “genetic information” includes information specific not only to the person but also to family members. It includes an individual’s requests for or receipt of genetic services or participation in clinical research by the person or by a family member. An employer can use no genetic information regarding any part of the employment relationship (e.g., hiring, firing, compensation and benefits, job assignments, career progression, training, etc.). That is, “an employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual’s current ability to work” (“Genetic Information Discrimination”). Further, it is illegal to harass a person because of his or her genetic information or retaliate against a person for filing a charge of genetic discrimination, participating in a discrimination lawsuit or investigation, or opposing genetic discrimination. It is also generally illegal for an employer to disclose genetic information about employees or applicants. In addition, the employer must keep genetic information it might have in a separate medical file. Therefore, in most situations, it is illegal for an employer to obtain genetic information. However, six exceptions to this edict exist, which were the subject of detailed discussion by the EEOC after the 2008 passage of GINA and clarified in its Final Rule.

Six Exceptions

The first exception involves “inadvertent acquisition of genetic information.” What does “inadvertent” mean? In its Final Rule (“Regulations,” 68919-68922), the EEOC discussed the “water-cooler problem” in which information is simply overheard and interpreted this also to mean disclosures that might follow conversational questions like “How are you?” or “Is your child okay?” These instances would not violate GINA. But the EEOC warned that intentionally eavesdropping or asking probing follow-up questions (e.g., “Have you been tested for that condition?”) would fall outside of the exception. The EEOC elaborated that inadvertent acquisition might also occur by a person looking at a social media platform to which he or she is given permission and medical information happens to be on it. Further, the EEOC stated that an employer would create a “safe harbor” for itself if, in requesting other kinds of medical information (e.g., for ADA purposes), it clearly warns a person not to provide genetic information as the EEOC “knows of no reason why a covered entity would need to request genetic information to determine an individual’s current physical or mental limitations and whether those limitations need to be accommodated” (“Regulations,” 68921).

The second exception involves health or genetic services (“Regulations,” 68922-68924). That is, an employer might offer such services as part of a wellness program. If it does, the employer must ensure that the provision of genetic information by an individual is completely voluntary. Also, if a genetic-services provider furnishes aggregate information which nevertheless makes identification of the participant possible, the employer has not violated GINA as long as it does not use the individual information. Further, while an employer might offer an inducement for a person to participate in a wellness program and even to complete a health risk assessment, the employer may not condition the inducement on the person’s providing genetic information.

Much of the information in this review is available from the EEOC website in summarized form (www.eeoc.gov).
The third exception pertains to the Family and Medical Leave Act (FMLA) or similar state or local law, which might require the disclosure of family medical information on a certification form (“Regulations,” 68924). An employer would not violate GINA under these circumstances. The EEOC added in its Final Rule that this exception would also apply to smaller firms that are not affected by the FMLA or similar state or local law but do have a policy allowing for the use of leave to care for an ill family member (about whom medical information must be provided in order to obtain the leave).

The fourth exception involves commercially and publicly available information (“Regulations,” 68924-68925). Such sources include but are not limited to newspapers, magazines, books, television, movies, and the internet, but do not include court records or medical and research databases. As with the “inadvertent acquisition” possibility discussed earlier, an employer would not violate GINA if it accessed such sources and happened to discover that an employee was featured in a story about genetically transmitted conditions, for instance. However, the EEOC warns that if access to the source is limited to a particular group, then it would not be considered publicly available and therefore not an exception. Also, the EEOC added that an employer who actively seeks out employee genetic information from a publicly available source would not be protected by this GINA exception. In addition, if an employer purposefully accesses a publicly available source in which the chance of discovering genetic information is high, then the employer would not be protected by the GINA exception.

The fifth exception regards genetic monitoring (“Regulations,” 68925-68926). Some workplaces might involve the use of toxic substances. Under GINA, an employer can monitor the effects of such substances, including possible genetic effects. However, unless a law exists mandating this monitoring, an employer must obtain a worker’s voluntary authorization to monitor the worker. The authorization form must be easily understandable and must describe the uses of the genetic information. In its Final Rule, the EEOC stated that if a worker refuses to participate in monitoring that is not mandated by law, the employer may not retaliate or any way discriminate against the worker. However, the employer may emphasize the possible health hazards that could result if toxic effects go unidentified.

The sixth exception regards DNA testing for law enforcement purposes and for the identification of human remains (“Regulations,” 68926). Forensics labs or similar entities may gather genetic information from employees as a means of quality control to ensure lab samples are not contaminated. The EEOC saw this as a very limited exception and declined to rule that such samples would have to be destroyed.

Additional EEOC Interpretations

Elsewhere in its Final Rule (“Regulations,” 68926-68939), the EEOC clarified other aspects of GINA in addition to the six exceptions. One of these concerned the role of healthcare providers operating on behalf of the employer. An employer must tell the provider not to collect genetic information as part of a medical examination used to determine fitness to perform a job. However, for treatment not related to employment (and therefore it is not disclosed to the employer), a healthcare provider may gather such information. The EEOC declined to create an additional exception regarding the use of genetic testing of individuals with an already manifested condition. Once a condition is manifested, it is this that could then factor into
employment decisions (e.g., is the person physically able to work?). Neither the EEOC nor consulted medical professionals could envision a scenario that genetic testing could add anything to the determination of someone’s ability to do the job.

The EEOC also reviewed GINA requirements regarding confidentiality and limited disclosure of information. The EEOC stated that it believed the likelihood of a charge being filed to be very low in the case of an employer “allowing” co-workers to gossip about another worker’s genetically based disease. However, the EEOC recommended that employers create a policy that such discussions by workers are not permitted. Regarding allowable but limited disclosures of genetic information, the EEOC reiterated that informed consent is still required in the case of medical research and an employer may disclose information it might have in compliance with a court order that states such information specifically. Also, an employer may disclose information when acting in compliance with other law, such as the FMLA or HIPAA (Health Insurance Portability and Accountability Act).

The EEOC then discussed the intentional existence of a “firewall” (“Regulations,” 68930) that exists between Title I (regarding use of genetic information by insurers) and Title II of GINA. The EEOC gave examples of instances in which it would be the enforcing agency although an insurer might be involved. For instance, an employer would violate GINA’s Title II if it contracted with an insurer to request genetic information and the insurer might have violated Title I. Also, if an employer directed its employees to undergo genetic testing in order to be eligible for health insurance, it would violate Title II. Lastly, if an employer or labor union changes its health plan to require a person to undergo genetic testing, it would violate Title II.

Besides discussing remedies (e.g., pecuniary damages) and regulatory procedures (e.g., paperwork reduction), the EEOC clarified the language regarding medical information that is not genetic information. That is, “GINA prohibits discrimination based on genetic information and not (emphasis added) on the basis of a manifested condition, while the ADA prohibits discrimination on manifested conditions that meet the definition of disability” (“Regulations,” 68931).

With the basics of GINA and the EEOC’s Final Rule regarding it in mind, we look now at some possible workplace scenarios.

Six Scenarios

Scenario One

An employer requires that workers who have already received treatment for carpal tunnel syndrome also to undergo genetic testing to determine whether they are pre-disposed genetically to the syndrome. If no genetic link can be found, the employer would look into workplace factors.

This scenario is based upon the Burlington Northern Santa Fe case. If it occurred today, would the employer be in violation of GINA? Answer: If the employer acted only upon the manifestation of carpal tunnel syndrome to re-assign workers to other jobs, it would not violate GINA (although it might be in violation of the ADA or the ADA Amendment Act). However, by requiring workers to undergo genetic testing, the employer has violated GINA. The employer may not use genetic information to try to determine work performance.

³ The author of this paper is not an attorney; the answers suggested to the scenarios are therefore respectfully offered as likely interpretations of the law.
Scenario Two

A woman undergoes a preventative double mastectomy because her two sisters had developed breast cancer although she does not have breast cancer. Previous to that, all sisters had undergone genetic testing and discovered that they each had the BRCA2 gene that predisposes someone to breast cancer. The woman had told her bosses about the testing and the surgery, after which she took time off to recover. Upon her return to work, her previously good reviews become negative ones and she is eventually terminated for poor performance. The woman sues her employer alleging genetic discrimination. Does she have a case?

This scenario is based upon the first GINA-related charge brought to the EEOC (in 2010; see Brown, 2011 and Prost, 2010). The woman, Pamela Fink, believed that the action against her was taken based upon genetic information and not disability. Answer: Fink is unlikely to prevail. While she did not have a manifested condition, she did have a double mastectomy which statistically reduced her risk to five percent to contract the BRCA2-related breast cancer. The company would likely argue that the genetic information was inadvertently acquired and the double mastectomy acted as a preventative measure, almost nullifying the potential for acquiring the disease. That is, the reason for dismissal was performance related and not based on a fear that Fink would contract breast cancer in the future. However, although Fink’s attorneys said she was not fired due to disability, the ADA might have been the better route to have pursued, if they could argue that she was perceived as disabled and therefore fired.

Scenario Three

On his own, an employee purchases a direct-to-consumer (DTC) test to see if he has a genetic pre-disposition to diabetes and tests positive. Distressed, he discusses his results with a co-worker whom he knows has diabetes. During a lengthy conversation, she provides him with sources to consult. A supervisor overhears the discussion and cautions them about using company time to talk about personal matters. Has the supervisor violated GINA by using medical information to make an employment decision? Answer: No. The supervisor is concerned about the use of company time. The supervisor’s inadvertent acquisition and knowledge of the genetic information was not used to change the circumstances of employment. However, going forward, the supervisor may not probe for additional details, discuss this information, or use it any way.

Scenario Four

As part of a wellness program, an employee has voluntarily provided medical information about his manifested disease that has a genetic link in order to receive further counseling. This employee’s first cousin once removed (i.e., a child of a first cousin) works for the same employer. Two questions arise. First, is a first cousin once removed considered “family” for purposes of GINA’s definition of family medical history? Answer: Yes. The EEOC reiterated that GINA’s prohibition against gathering genetic information of family members extends to family members of the “fourth degree,” which includes great-great grandparents and first cousins once removed. The EEOC declined to extend the family member designation beyond the fourth degree, stating knowledge beyond that had little predictive value regarding an individual’s potential for genetically related health problems (“Regulations,” 68915-68916). Second, has the employer violated GINA in relation to the cousin because it has family medical history of the cousin? Answer: No. While the cousin did not volunteer the
information, the company is not violating GINA (as long as the company does nothing with the information in relation to the cousin).

Scenario Five
An employee’s medical file contains cholesterol information. Her employer, believing her high numbers are linked to bad health and likely more sick days, decides to fire her. Has the employer violated GINA? Answer: No. The EEOC reiterated that cholesterol tests, AIDS tests, liver-function tests, complete blood counts (CBCs), and tests for communicable diseases (that might be transmitted through food handling) are not genetic tests and therefore not subject to GINA. However, the EEOC reminded employers that acting upon such information might be in violation of the ADA and the ADAAA (“Regulations,” 68916-68917).

Scenario Six
To indicate her commitment to service, a candidate for a university deanship mentions her volunteerism with a national foundation dedicated to finding a cure for early-onset Alzheimer’s disease. Concerned by this information, a selection committee member accesses the public website of the foundation and discovers the candidate was recognized as Volunteer of the Year. The accompanying story explains that the candidate became involved because her older sister is a victim of early-onset Alzheimer’s, known to have a genetic link. The committee member shares this information with the rest of the committee, which decides not to include the candidate in the final cut. Has the committee opened up the possibility of a GINA-related lawsuit? Answer: Yes. While the website might be publicly available, the committee member deliberately accessed it. The EEOC clearly states an employer who actively conducts such a search will not be protected by the “publicly available resources” exception (“Regulations,” 68925). The candidate could argue successfully that the purpose of the search was to discover whether genetic information about the candidate was available and not to confirm volunteer activity.

Additional examples and recommendations can be found in the Final Rule and summary information regarding it on the EEOC website (see “Regulations,” “Background Information,” and “Questions and Answers”).

Conclusion
A seemingly straightforward law at first sight, GINA has many dimensions. The sheer volume of the Final Rule (twenty densely packed pages of information) indicates the layers of complexity. However, a question is, how worried should employers really be? According to Prost (2010), citing the president of the Council for Responsible Genetics, most of the cases filed so far with the EEOC are related to breaches of confidentiality and the improper acquisition of genetic information. It is unlikely that employers will deliberately violate the law by demanding genetic tests. However, the more subtle acquisition of genetic information might prove to be a problem. Was the acquisition truly inadvertent? How was it handled?

Currently, it is still too early to tell the impact of the law. The EEOC’s own charge receipt statistics (see Appendix for a breakdown of the disposition of those charges) indicate that GINA charge filings in both 2010 and 2011 amounted to only one-fifth of one-percent of all charges filed with the EEOC (“Charge Statistics”). Nevertheless, human resource professionals recommend the following to employers (Brown, 2011; Langevin and Seiler, 2010):
• Revise nondiscrimination policies to include genetic information.
• Use “safe harbor” language in forms requesting business related health information (such as for ADA purposes). That is, tell employees not to disclose genetic information and health care providers not to obtain genetic information for employment related health assessments.
• Ask for no genetic information or family medical history information on applications.
• Review health and wellness plans and programs for compliance.

With these admonitions and the EEOC’s clarifications in mind, an employer can successfully “dance with GINA.”
Appendix
GINA Charge Receipts Filed and Resolved at the EEOC

<table>
<thead>
<tr>
<th></th>
<th>FY 2010</th>
<th>FY 2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Receipts</td>
<td>201</td>
<td>245</td>
</tr>
<tr>
<td>Resolutions</td>
<td>56</td>
<td>211</td>
</tr>
<tr>
<td>Resolutions by Type</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Administrative Closures</td>
<td>11</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>19.6%</td>
<td>15.2%</td>
</tr>
<tr>
<td>Merit Resolutions</td>
<td>7</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>12.5%</td>
<td>17.1%</td>
</tr>
<tr>
<td>Settlements</td>
<td>3</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>5.4%</td>
<td>8.5%</td>
</tr>
<tr>
<td>Withdrawals with Benefits</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>3.6%</td>
<td>3.3%</td>
</tr>
<tr>
<td>Reasonable Cause</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>3.6%</td>
<td>5.2%</td>
</tr>
<tr>
<td>Successful Conciliations</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>1.8%</td>
<td>1.9%</td>
</tr>
<tr>
<td>Unsuccessful Conciliations</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>1.8%</td>
<td>3.3%</td>
</tr>
<tr>
<td>No Reasonable Cause</td>
<td>38</td>
<td>143</td>
</tr>
<tr>
<td></td>
<td>67.9%</td>
<td>67.8%</td>
</tr>
<tr>
<td>Monetary Benefits (Millions)</td>
<td>$0.08</td>
<td>$0.50</td>
</tr>
</tbody>
</table>

The data in this appendix are from the EEOC website (www.eeoc.gov/eeoc/statistics/enforcement/genetic.cfm). To assist the reader’s understanding, certain data were re-arranged, but retain their percentages correctly.
References


Regulations under the Genetic Information Nondiscrimination Act of 2008 (November 9, 2010). *Federal Register*, 75(216), 68912-68939.
CORPORATE CITIZENSHIP: AN INTEGRATED OPERATIONAL APPROACH

Lila Carden*
Raphael O’Hara Boyd**

Abstract

Corporations are embracing the idea that corporate citizenship activities, policies, processes and procedures are noteworthy and should be executed for the benefit of not only corporations’ reputations and profits; but also, for the benefit of employees, customers, various entities, and communities. Thus, organizations are developing corporate citizenship programs that include strategies for executing operational activities. This paper presents and discusses an integrative approach to corporate citizenship using Boeing as a case example to discuss the integrated model.

I. INTRODUCTION

Corporations are embracing the idea that corporate citizenship activities, policies, processes and procedures are noteworthy and should be executed for the benefit of not only corporations’ reputations and profits; but also, for the benefit of employees, customers, various entities, and communities. Corporate citizenship “refers to a company’s obligation to be accountable to all of its stakeholders in all its operations and activities. It encompasses a multidimensional and global set of issues with strategic implications for business and policymakers, such as health, safety, diversity, gender equity, human resource policies, human rights, supply chain, the environment, and sustainable development” (“Social Performance Map,” n.d., p. 12).

Corporate citizenship “humanizes the company in ways that other facets of the job cannot; it depicts the company as a contributor to society rather than as an entity concerned solely with maximizing profits” (Bhattacharya, Sen & Korschun, 2008, p. 37). For example, “Boeing’s overall corporate citizenship strategy is based on the idea that Boeing has a responsibility to its stakeholders to lead by example and make good decisions rooted in being a corporate citizen” (“Corporate Citizen 2010 Report,” n.d.). More specifically, corporate citizenship as defined by Boeing “is the means by which companies truly engage with, and contribute toward, the development of the communities within which they operate, on which they ultimately depend” (“Corporate Citizenship 2010 Report” n.d., p. 6 ). This paper presents and discusses an integrative approach to corporate citizenship using Boeing as a case example to discuss the integrated model. Section I of the paper discusses the introduction, section II discusses the reasons for executing corporate citizenship programs, section III presents the corporate citizenship example framework, and section IV concludes with suggestions about how to implement the integrative approach in the daily operations of an organization.

* Ph.D., Instructional Associate Professor, University of Houston – Main Campus
** J.D., Associate Professor and Chair, Management and Marketing Departments, School of Business, Clark Atlanta University
II. REASONS FOR CORPORATE CITIZENSHIP PROGRAMS

Fernando J. Fuentes-Garcia, Julia M. Nunez-Tabales, and Ricardo Veroz-Herradon (2008) reported that there are two reasons why companies have established corporate citizenship programs including: (1) the idea of social awareness recognized globally; and (2) the focus of companies using the corporate citizenship activities for consumer purchasing decisions. Additionally, the aforementioned authors also reported that companies are engaging in corporate citizenship programs by (1) establishing a code of ethics; (2) capturing social reporting data; and (3) executing ethical management standards (Fuentes-Garcis, Nunez-Tabales & Veroz-Herradon, 2008). For example, some companies are not only presenting financial reports; but also, social reports that detail their working practices and activities related to employment, company/worker relationships, health and safety, education and training, diversity, human rights, and child labor practices (“Social Performance Map,” n.d., p. 12). Corporate citizenship has been aligned with the triple bottom line. The triple bottom line is focused on integrating the social, environmental and economic business activities and performance (“Social Performance Map,” n.d., p. 12). The triple bottom line is included by John Elkington: (1) people that execute practices that are unbiased and beneficial per the community and the region of operations; (2) planet that includes the environment; and (3) profit which includes the internal and external economic impacts to the organization as well as to society (Glade, 2008).

Corporate citizenship proponents believe “that corporations should actively promote goals that society deems worthwhile and take positive steps toward solving social problems. Because so much of the wealth and power of this country is controlled by business, business in turn has a responsibility to society to use that wealth and power in socially beneficial ways” (Clarkson, Miller, Jentz & Cross, 2006, P. 117). Corporate citizenship also includes judging corporations on the contributions and practices in the areas of employee and human rights and “employment discrimination, human rights, environmental concerns, and so on” (Clarkson, et al., 2006, p. 117). For example, “in 2008, Boeing joined the Foundation for Corporate Responsibility to get involved in promoting ethics in business and environmental responsibility” (“Influence of Legal Issues, Ethics, and Corporate Social Responsibility on Boeing Management,” n.d.).

“Companies have responded to the new social demands of their interest groups by implementing corporate citizenship actions, which includes all their environmental and safety, and social activities that go beyond mere economic interests and break away from the traditional image of a company that focuses solely on generating value for its shareholders” (Fuentes-Garcia, Nunez-Tablaes & Veroz-Herradon, 2008, p. 27). Boeing’s philosophy is rooted in the idea that the company wants to lead the aerospace industry into the next generation. Thus, their philosophy is grounded in three elements: (1) products/services; (2) business practices; and (3) community (“Global Corporate Citizenship,” n.d.). Additionally, Boeing reports that the organization uses a holistic approach to citizenship that constantly promotes the use of resources to greater impact society. The holistic approach includes human capital that partners with Global Diversity, Environment, Health and Safety, Ethics, Government Operations and Human Resources (“Global Corporate Citizenship,” n.d.).

Integrating corporate citizenship with an overarching framework enables organizations to “conscientiously evaluate options and assess whether actions or decisions relating to current
operation may have an adverse long-term impact on the firm, the planet, and key stakeholders. In other words, viewing sustainability though a holistic framework serves as a means of integrating theories of applied ethical decision-making and corporate citizenship” (Benson, Gupta & Mateti, 2010, p. 11). Human capital, operational management, tools, and technology provide a strategic, holistic approach to consistently apply corporate citizenship activities that are a contrast to the financial-related tools that have reinforced unethical decisions in the past (Benson, Gupta & Mateti, 2010).

III. CORPORATE CITIZENSHIP EXAMPLE FRAMEWORK

Figure 1: Corporate citizenship Framework– Boeing Example

In order to implement a corporate citizenship framework, there should be three areas of consideration. These areas include corporate citizenship strategy, corporate citizenship activities, and corporate citizenship outcomes. The aspects of these areas are discussed below.

A. Corporate Citizenship Strategy

According to Kellie McElhaney (2009), there are activities that organizations need to engage in prior to developing a corporate citizenship strategy. The activities include: (1) communicating that the organization will be committed to executing corporate citizenship; (2) developing a corporate citizenship strategy that is aligned with the top three business objectives; and (3) integrating corporate citizenship culture into the organization via governance, policies, processes, and procedures. For example, Boeing has developed an ethics and business program to:

- “communicate the Boeing Values and standards of ethical business conduct to employees”;
- “inform employees of company policies and procedures regarding ethical business conduct”;
- “establish companywide processes to assist employees in obtaining guidance and resolving questions regarding compliance with the company’s conduct and the Boeing values”;
- “establishing companywide criteria for ethics education and awareness programs” (“Ethics,” n.d.).

The ethics program as defined herein is used by Boeing as a basis to develop and execute the corporate citizenship program. More specifically, Boeing’s approach to corporate citizenship is integrative, enterprise-wide and includes products, services, processes and impacts to partners and customers. The corporate citizen program includes: (1) developing innovative products and services; (2) conducting business in a profitably and ethical manner with an emphasis on customer service, safety, quality and integrity; and (3) partnerships with entities to improve education, health and human services, arts and culture, the environment and civic awareness (“Corporate Citizenship Report 2010,” n.d.).

In this paper, Boeing’s corporate citizenship activities include a focus on safety and environmental issues. Boeing’s safety strategy includes “making flying safer” and Boeing’s environmental strategy includes moving towards a future of carbon-free energy (“Corporate Citizenship Report 2010,” n.d.).

B. Corporate Citizenship Activities

In the corporate citizenship example framework, the human capital and organizational management activities include governance, policies, processes, and procedures for safety and the environment. A management structure at the department and functional levels ensures the corporate citizenship framework is iterative, integrative, and cyclical. The framework includes safety and environmental activities that are used to provide examples of human capital, organizational management, planning and technology. In 2010, Boeing spent a total of $160
million to help improve lives and communities. More specifically, the charitable grants by focus area totaled $57 million, with 23% of the $57 million spent on health and human services, 9% spent on the environment and the remaining percentages were spent on civic, arts and culture, and education (“Corporate Citizenship Report 2010,” n.d.).

1. Human Capital and Organizational Management

Human capital and organizational management activities include the management and functional employees who implement processes and operational procedures with a slant on the policies and governance practices as outlined in the ethics program reported herein (Purtell, 2007). The human capital and organizational management activities at Boeing involve internal and external human capital (“Corporate Citizenship Report 2010,” n.d.). For example, Boeing assisted in developing the Aircraft Fleet Recycling Association which has representation from eleven companies and includes internal human capital from Boeing and external human capital from other companies. The purpose of the group is to assist in recycling commercial and military aircraft. To date, the group has recycled more than 7,000 commercial and military aircraft (“Corporate Citizenship Report 2010,” n.d.). The operational management activities enable the organization to execute the iterative, enterprise-wide framework focusing on the operational activities to promote the overall strategic plan for safety and environmental practices (Purtell, 2007). For example, safety is one of Boeing’s primary areas for executing the corporate citizenship strategy by allocating an immense amount of time and effort to ensure aircrafts safely serve passengers daily (“Working Together to Make Sure Flying Is As Safe As Aviation Safety,” n.d.). Thus, Boeing has developed a strategic plan to ensure aviation safety including: (1) using processes to develop safe products; (2) providing monitoring and feedback of the fleet performance; (3) using new technology to support safety activities; (4) conducting accident investigations; and (5) partnering with departments and other entities to ensure flying is safe (“Making Flying Safer – How Boeing Helps to Advance Safety,” n.d.).

Boeing integrates commercial airplanes with operational management practices that are environmentally-focused. More specifically, Boeing’s fleet is “70 percent more fuel efficient than early commercial jet airplanes, consuming about 3.5 liters per passenger per km” (“Boeing, 2010 Environment Report,” n.d.). Additionally, Boeing developed an innovative air traffic management concept that decreases fuel burn, emissions and noise by operationally modifying arrivals (“Boeing 2010 Environment Report,” n.d.).

2. Planning and Technology

Planning and technology support the design, capture, and reporting of corporate citizenship data. The aforementioned business requirements require automated systems that will not only capture but manipulate data in order to be able to effectively manage the workflow of data and ensure the integrity and accuracy of the corporate citizenship information (Purtell, 2007). For example, planning the corporate citizenship responses at Boeing for safety includes noting that aviation safety is responsive to the following questions: (1) how do organizations comply with regulatory guidelines; (2) how are airplanes developed and produced; (3) how employees operate and maintain the tools and technology that reinforce safety; and (4) how the air traffic and airport
support facilities promote aviation safety (Working Together to Make Sure Flying Is As Safe As Possible, n.d.).

Boeing is responding to the commercial airlines and the environment by using innovative technology to create two new Boeing jetliners that are in the testing phase. Boeing has also tested enhanced air traffic control systems in Australia, Europe, and North America to help reduce emissions by mission of tons (“Corporate Citizenship Report 2010,” n.d.). Boeing further reported that “advanced technologies for generating and harnessing energy are reducing the need to produce electricity from non-renewable resources. Boeing is also developing applications within key energy harvesting technologies, including electrodynamic, thermoelectric, piezoelectric, hydrogen fuel cells and solar cells” (“Commercial Airplanes and the Environment,” n.d.).

Monitoring and reporting include assessing compliance and assuring that established policies, processes, and procedures are functioning effectively and efficiently (Testa, 2008). The aforementioned guidelines and standards are used to provide management and employees with trends for corporate citizenship, control, and compliance issues. The data are important in that they provide organizations with support to justify the value of the corporate citizenship program and to verify that the processes and procedures have been complied with accordingly. Thus, it is important for organizations to develop systems which include tools to design, implement, and measure corporate citizenship outcomes (Testa, 2008). For example, Boeing has developed internal environmental targets starting in year 2002 for reducing the consumption of CO2 emissions, energy, hazardous-waste generation, and water consumption (“Corporate Citizenship Report 2010,” n.d.). More specifically, during the years between 2002 and 2009, Boeing reported that they reduced “CO2 emissions by 31 percent, energy consumption by 32 percent and hazardous-waste generation by 38 percent on a revenue-adjusted basis (Corporate Citizenship Report 2010,” n.d). Additionally, Boeing reported they “reduced water consumption by 43 percent on a revenue-adjusted basis, and earlier this year set a challenging target to continue this progress” (“Corporate Citizenship Report 2010,” n.d.).

C. Corporate Citizenship Outcomes

Safety and environmental performances are not only executed via Boeing internally, but also, with external entities to ensure commercial aviation safety. The financial outcomes consider “whether the company is competitive and investors are confident that their investments will continue to reap returns” (Testa, 2008, p. 3). The safety and environmental outcomes are important in that they align the financial and economical goals with the needs of the internal and external stakeholders. As organizations identify their corporate citizenship strategies, they also need to consider the impacts of the strategies on their reputations including attracting and maintaining customer loyalty, recruiting and retaining human capital, and creating an advantage in competitive markets (Testa, 2008).

Boeing collaborates with other entities to review performance to promote commercial aviation safety. For example, Boeing collaborates with the Commercial Aviation Safety Team (CAST) (Working Together to Make Sure Flying Is As Safe As Possible, n.d.). CAST was established in 1997 and its common goal is to help reduce safety infractions. This team includes representatives
from airlines, manufacturing companies, labor and governmental personnel. Some of the procedures of CAST include using investigative data from past accidents to prevent future accidents by reviewing aviation operational information on an ongoing basis to note trends and conditions prior to accidents (Working Together to Make Sure Flying Is As Safe As Possible, n.d.). Additionally, in 2010, “Boeing employees led more than 400 workshops educating suppliers about ways to reduce emissions and cut back on the amount of materials sent to landfills” (“Corporate Citizenship Report 2010,” n.d., p. 40) in order to improve the supply chain’s environmental performance.

Boeing is also involved with organizations and governmental agencies to assist with creating a roadmap for improving safety standards (Working Together to Make Sure Flying Is As Safe As Possible, n.d.). The outcome of collaboration includes sharing of knowledge across and within entities, monitoring and controlling of the fleet, and designing and testing to promote ongoing safety practices. An additional outcome of the collaborative efforts of Boeing is that Boeing’s safety record is better now than in the past “with fatal accidents occurring less than once every 2 million flights” (“Making Flying Safer – How Boeing Helps To Advance Safety,” n.d.). This is a notable improvement since the 1950s and 1960s in which “fatal accidents occurred once every 200,000 flights” (“Making Flying Safer – How Boeing Helps To Advance Safety,” n.d.).

Boeing has received environmental awards and recognitions nationally and internationally. The awards and recognitions range from the Carbon Disclosure Project to green awards to energy. (“Boeing 2010 Environment Report,” n.d.). More specifically, “Boeing was named the best performing industrial company in the 2009 Carbon Disclosure Project and named to the 2009 Carbon Disclosure Leadership Index, which ranks corporations for transparency around reporting climate-change risks and actions to improve environmental performance” (Boeing 201 Environment Report, n.d., p. 36). Boeing excelled in the green area including being named the Utah Green Business achievement award and Green Business of the Year award from Kent, Washington. Additionally, Boeing received the U.S. Department of Energy/EPA ENERGY Star designation for Houston, Texas and Long Beach, California buildings and the Southern California Edison award for energy efficiency excellence (“Boeing 2010 Environment Report,” n.d.).

IV. CONCLUSION

Corporate citizenship trend analysis reports that “reputable campaigns are those that are innovative and substantiated by the company’s authentic commitment and ability to demonstrate tangible results toward it CSR goals” (McElhaney, 2009, p. 35). McElhaney (2009) also suggests that organizations need to develop corporate citizenship strategies and that partnerships are critical pathways to the execution of the corporate citizenship strategies. The authors suggest a strategic approach to corporate citizenship implementation including human capital and organizational management as areas of concentration due to the research findings that suggest that “development, implementation and management as top-down processes” (Bhattacharya, Sen & Korschun, 2008, p. 41) that need to be sanctioned by executive teams. Additionally, the authors suggest that organizations need to provide leadership and resources so employees can effectively execute their corporate social responsibilities plan as noted herein as the Corporate Citizenship Example Framework. Bhattacharya, Sen and Korschun (2008) further suggest that organizations need to go “beyond merely allowing corporate citizenship involvement on
company time to working, ideally, with employee groups to help them fully integrate their CSE efforts into coherent and compelling job-products” (p. 44).

The employees of the organization need to plan and use technology to implement the corporate citizenship responses and to monitor and report the implementation activities. More specifically, “management should regularly monitor the corporate reputation and the risks from its activity-whether centralized or decentralized at business lines, support functions, affiliates or business partners – to ensure the vitality of the system and achieving the desired results predicted” (Testa, 2008, p. 7). Lastly, with the implementation of a Corporate Citizenship Framework, business organizations should experience very good benefits and outcomes that support the overall image of the entities.

Figure 2: Boeing’s Responses to Safety and the Environment

<table>
<thead>
<tr>
<th>Corporate citizenship Activity</th>
<th>Strategy</th>
<th>Human Capital</th>
<th>Organizational Management</th>
<th>Tools and Technology</th>
<th>Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boeing Responses (as defined per this paper)</td>
<td>Safety and Environment</td>
<td>• Commercial Aviation Safety Team</td>
<td>• Using processes to develop safe products</td>
<td>• Innovative technology to create two new Boeing jetliners to reduce emissions</td>
<td>Safety record</td>
</tr>
<tr>
<td></td>
<td>Boeing Responses</td>
<td>• Aircraft Fleet Recycling Association</td>
<td>• Providing monitoring and feedback of the fleet performance</td>
<td>• Educating suppliers to reduce emissions</td>
<td>Educating suppliers to reduce emissions</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Using new technology to support safety activities</td>
<td>• Environmental awards</td>
<td>Environmental awards</td>
</tr>
</tbody>
</table>

Source: Summary data included in the paper
REFERENCES


INNOVATION IN LEGAL STUDIES EDUCATION:
AN INTEGRATED CASE STUDY APPROACH

Alix Valenti*
James Benson**

Abstract

Using case studies to enhance students’ understanding of theoretical concepts is a well-accepted and widely used method in business and management courses. In legal studies, the case method has a much different meaning and purpose; students read judicial decisions and, through inductive reasoning, determine the judicial precedents that establish our common law. More recently, legal scholars have suggested that using case studies in a manner similar to that of business school classes can be a valuable tool to enhance subjects taught in a law curriculum. This paper supports this view and suggests that an integrated case study can be used in two or more courses. We discuss the benefits as well as the problems of using a case study in three undergraduate legal studies courses, Legal Research, the American System of Trial by Jury, and Mock Trial.

I. Introduction

When legal scholars refer to the case method of legal instruction, the traditional Landgellian approach of studying cases combined with Socratic questioning comes to mind. Despite its popularity, however, the case method has been assailed as inadequately training students for the practice of law. Among its limitations, the case method approach places excessive emphasis on court decisions and ignores the way that most people resolve disputes. In its place, many legal scholars argue that using case studies, similar to those used in business and economics courses, are better tools for teaching law students to make rational and informed decisions.

*Associate Professor of Legal Studies and Management, University of Houston-Clear Lake.
**Associate Professor of Legal Studies, University of Houston-Clear Lake.

1 Christopher Columbus Langdell developed the Langdellian method at Harvard Law School during the late 1800s. He proposed that law be taught as a process of thinking as well as a doctrine of thought by having law students read cases and then engage in a question and answer dialogue regarding those cases. Ruta K. Stropus, Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century, 27 LOY. U. CHI. L.J. 449 (1996). Using the question and answer methodology, Langdell believed that students would learn how courts reasoned and analyzed, and thus be able to apply like reasoning and analysis to various fact patterns. Arthur D. Austin, Is the Casebook Method Obsolete? 6 WM. & MARY L. REV. 157, 161-62 (1965).


business decisions. Moreover, it has been suggested that a single case study may be used in more than one course. This paper discusses the use of case studies in business schools and their more recent application in legal studies courses. It then describes the integrated use of a case study in three courses in an undergraduate legal studies program.

II. USING CASE STUDIES IN BUSINESS PROGRAMS

With their introduction by the Harvard Business School in 1925, case studies have been widely used in business schools to provide students with a context in which to apply basic business principles learned in class. Almost 100 years ago Harvard Business School Dean Edwin Gay encouraged business school faculty to integrate real-world concepts and experiences in what and how they taught. Case studies are particularly effective because they involve real-life, often well known, scenarios or stories where the players face issues that require resolution, thus providing students with a chance to test their book learning and to make decisions. In a more recent discourse on the value of case studies in business education, Professor David A. Garvin notes that the case study provides a classroom substitute for experience; it is "the vehicle by which a chunk of reality is brought into the classroom to be worked over by the class and the instructor." Thus, using case studies redefines the “traditional educational dynamic in which the professor dispenses knowledge and students passively receive.” A case study allows students to learn by not only simply absorbing facts and theories, but also by exercising the skills of leadership and team work to solve real problems.

Generally, case studies used in business schools are written by professors at major case study teaching universities, such as Harvard, INSEAD, and the Ivey School of Business at the University of Western Ontario. Cases typically focus on a focal firm and contain both primary sources of data, such as interviews with managers, and secondary sources, such as press releases and annual report data. They also cover a chronology of significant events and information

---

5 Applegate, supra note 3, at 226.
9 Garvin, supra note 6, at 60 (quoting PAUL R. LAWRENCE, THE PREPARATION OF CASE MATERIAL, IN THE CASE METHOD OF TEACHING HUMAN RELATIONS AND ADMINISTRATION 213 (Kenneth R. Andrews ed., 1953)).
10 Hammond, supra note 8, at 13.
about the company’s industry and competitors\textsuperscript{13} which provide the basis for the issues that the students are expected to analyze and discuss.\textsuperscript{14}

Since their introduction almost 100 years ago, the advantages and disadvantages of using case studies have been debated. Undoubtedly the case study approach has become an indispensable tool in business education courses as they incorporate experiential learning which allows students to reflect the real world environment,\textsuperscript{15} especially in management courses where teaching students “things” about management is not teaching them how to manage.\textsuperscript{16} Moreover, students prefer to learn through analogy and their own deductive reasoning, and case studies enable this in a more hands-on environment.\textsuperscript{17} From the individual problems discussed in the case study, students are then expected to generalize and apply the learning to other situations they may encounter as managers. Further, if done properly, case studies can provide an enjoyable and engaging experience where both students and the professor gain new knowledge and insights into a realistic organizational problem.\textsuperscript{18} By bringing realism into instructional settings, it is expected that the case study will gain the student’s emotional and intellectual involvement and thus assist in long-term retention and understanding.\textsuperscript{19}

Despite their popularity, case studies are not without their detractors. From a developmental point of view, case studies are often poorly researched and written with insufficient checking of facts; this puts a burden on business schools using a case study to insure that it accurately depicts the events and issues facing the organization.\textsuperscript{20} For example, according to one study, the use of quotations in case studies can be 86 percent attributable to managers and senior managers which distort the case study as a representation of the real world; case studies require exhaustive research and inquiry.\textsuperscript{21}

Another problem identified with case studies is that students tend to dwell on the specific facts of the case; this can be counterproductive because students limit themselves to the particular situation and simply answer the question: what could have been done differently or what was done that was so unusual?\textsuperscript{22} As a result, although learning may take place, the question become whether that learning is transferable.\textsuperscript{23} Thus, it is argued that the case method should be


\textsuperscript{14} David Jennings, \textit{Strategic Management and the Case Method}, 15(9) J. MGT. DEV. 4 (1996). Professor Jennings has identified a number of learning objectives associated with using case studies including: (1) gaining an illustration of particular points, issues or managerial principles; (2) confronting the complexities of specific situations; (3) developing analysis and synthesis; (4) relating theory to practice; (5) transferring knowledge and techniques from the classroom to the manager’s organization; (6) developing communication and interpersonal skills; (7) developing self analysis, confidence and responsibility; and (8) developing judgment and wisdom. \textit{Id}. at 5.


\textsuperscript{16} Adrien Payette, \textit{To Teach Experience!}, 17 J. MGT. EDUC. 440, 452 (1993).

\textsuperscript{17} Madansky, \textit{ supra} note 11, at 556-57.


\textsuperscript{21} \textit{Id}. at 582-83.


used and taught not as a study tool but as a thinking tool. Rather than studying and memorizing what one did in a certain situation case studies should advance learning by taking the conclusions of the case study and applying it in different situations.\textsuperscript{24} Similarly, Professor Madansky argues that case studies often lack the support by the business community because they encourage students to focus on quantitative analysis at the expense of the social sciences.\textsuperscript{25} Case studies should not focus on the limited teachings of the facts but rather should encompass broad organizational theories such as resource dependence, transaction costs or population ecology.\textsuperscript{26}

Case studies have experienced a great deal of criticism regarding their use in executive MBA programs.\textsuperscript{27} Generally, an executive MBA student is one who is already in a professional setting and is choosing or being required to get some further education. These students differ from traditional MBA students with respect to their study habits, class participation, interest, and, most importantly, their understanding of the material.\textsuperscript{28} Executives are able to take a set of facts and quickly develop and use them based on their own analysis of the facts or situations.\textsuperscript{29} As a result many executives react to case studies as a waste of their valuable time; for example, they do not need to actually “crunch” the numbers, but only what to do with them once they are provided.\textsuperscript{30}

One suggestion to improve the current curriculum in business schools is to incorporate “multidisciplinary integration coupled with experiential learning methods are said to better reflect the real-world business environment . . . \textsuperscript{31} Business schools are contemplating moving away from the fragmented approach of a curriculum based on functional areas to programs that emphasize coordination on key competencies needed in business.\textsuperscript{32} Using a case study across more than one course is one way to achieve this. In fact, a multidisciplinary case study has been identified as one of the most effective approaches to a integrated curriculum.\textsuperscript{33} When used correctly, case studies provide a sound conceptual basis for building students' cross-disciplinary understanding.\textsuperscript{34} For example, by using a single company as the basis of the study students get familiar with its products, manufacturing processes, and its industry and have the opportunity to examine the company from different functional perspectives, while remaining cognizant of the organization as a whole.\textsuperscript{35} However, integration of a case study is difficult because of “a lack of support by the business community, a lingering uneasiness between the arts and sciences

\textsuperscript{24} De Dea, \textit{supra} note 22, at 165-66.
\textsuperscript{25} Madansky, \textit{supra} note 11, at 556.
\textsuperscript{26} Id. 558.
\textsuperscript{27} Argyris, \textit{supra} note 23. Argyris criticized the tendency of faculty to control the direction of case study discussions, \textit{id.} at 292, and their failure to connect the classroom learning with the executives’ behavior on the job, \textit{id.} at 295.
\textsuperscript{29} Bettina Buchel & Don Antunes, \textit{Executive Education in “TOIL”}, 6 \textit{ACAD. MGT. LEARNING & EDUC.} 305, 308 (2007).
\textsuperscript{30} Garvin2, \textit{supra} note 28 at 364.
\textsuperscript{31} Navarro, \textit{supra} note 15, at 114.
\textsuperscript{33} Larry K. Michaelsen, \textit{Integrating the Core Business Curriculum: An Experience-Based Solution}, 15(2) \textit{SELECTION} 9 (1999).
\textsuperscript{34} Id.
faculties, or a movement toward quantitative analysis at the expense of the social sciences.”

Therefore, in order to bring about the change that is necessary for students to succeed case study integration must be a unified group effort. Professor Rusinko suggests two ways to integrate a case study program. One is to develop one class where a case study is the focus. As the author points out this method does not require a substantial amount of cooperation from multiple sources and few resources. However, the ability to expose students and faculty to this new kind of teaching would be very limited. An alternative is to create a much deeper transformation through creating a new discipline or an overhaul of the educational system already in place. An advantage to this approach is school-wide exposure clearly communicating the effectiveness of the case study method in businesses education. However, the major disadvantage is that significant amount of resources, collaboration, and time would be required to get this method to work successfully.

III. USING CASE STUDIES IN LEGAL COURSES

Professor Menkel-Meadow was one of the first legal scholars to advocate the use of case studies in law courses. She suggested that law professors should make better use of real cases, rather than the “dried up and finished” cases reported in casebooks as legal narratives “put flesh on the bones of the eviscerated appellate case reports.” Just as the use of case studies allows students in management and engineering schools learn to recognize and overcome personal empirical biases in decision-making, similar cognitive learning can potentially be beneficial in teaching legal courses. A growing trend in law schools includes focusing on real life or fictional stories rather than “distilled” appellate decisions. By analyzing fact patterns for each side of the argument students not only learn legal standards, critical thinking, and lawyering skills but can also “develop empathy or sympathetic understanding for 'others' outside of [their] own experience.” Additionally, case studies allow students to better recognize inconsistencies between expected and actual behavior. Through case studies, students can identify doctrinal flaws or predict the implications of theory and custom to future fact patterns. This may help in avoiding ethical problems and irrational decisions in the future. For example, Professor Langevoort used a case study to illustrate how attorneys can become embroiled in their clients’ illegal activities and fail to recognize the warning signs that they have become complicit in the misconduct.
In the study of legal ethics, case studies have become the preferred teaching method because stories provide better examples of philosophical and moral lessons. It also provides students with a heightened sense of realism. One researcher suggests that using real on-going cases as case studies allows law students to better analyze the facts from the point of view of every participant, including “lawyers, clients, parties, judges, clerks, victims, law enforcers and those affected by the law.”48 As opposed to appellate opinions, case study narratives show the “psychological and moral realms” of the actors as they were before and after certain events.49 This way, students can comprehend the true consequences of legal decisions.

In addition to legal ethics courses, case studies are also used in substantive legal classes. Professor Douglas Leslie, for example, has developed an entire program for first-year law students through case studies (called "case files") rather than judicial decisions.50 He uses the case study as a means to put students in the position of lawyers needing to evaluate a potential legal claim and analyze legal arguments "favoring and disfavoring the position of a hypothetical client."51 First year law professors suggest that a case study such as Damages by Barry Werth52 can also successfully applied in teaching many legal courses, such as legal ethics, torts, civil procedure, and alternate dispute resolution.53 First, students are given an opportunity to practice real world legal problems and to “think like lawyers.” Second, using a real life case added “a level of genuineness” and provided a fact pattern that was much better than anything they could have created themselves. Third, through stories like these students can deliberate on topics of social, ethical, and lawyering issues. Students learn to construct a case from the very beginning, including developing case theories, finding the best witnesses, addressing ethical issues, and dealing with problems stemming from differences in economic and cultural backgrounds of their clients.54

The “Damages” case study was also adopted as the basis of a stand-alone law school course that allowed students to examine to examine a wide variety of discrete legal issues including client counseling, negotiation, mediation, litigation, insurance law, medical malpractice, and professional responsibility.55 According to the adopters, “Damages” was particularly useful because it allowed students to see the human costs caused by the negligence as well as the inner workings of a law firm in developing the case strategy and negotiation positions and other activities normally protected by confidentiality requirements.56 On the defense side, students observed the complicated relationships among attorneys hired by the defendants whose interests were not always the same, including the doctor, the hospital, and their insurance companies.

48 Id. at 789.
49 Id. at 788.
51 Id. at 1299.
52 Barry Werth, Damages: One Family's Legal Struggles in the World of Medicine (1988). This case study provides an in-depth account of a medical malpractice case from the perspectives of the injured family, the defendant physician, the lawyers, and the three mediators.
53 Jeanne Kaiser & Myra Orlen, Using a Literary Case Study to Teach Lawyering Skills: How We Used Damages by Barry Werth in the First-Year Legal Writing Curriculum, 12 LEGAL WRITING 59 (2006).
54 Id. at 62-63. See e.g., Tom Baker, Teaching Real Torts: Using Barry Werth's Damages in the Law School Classroom, 2 NEV. L.J. 386 (2002); Kevin M. Clermont, Teaching Civil Procedure through Its Top Ten Cases, Plus or Minus Two, 47 ST. LOUIS. UNIV. L.J. 111 (2003).
55 Daily, supra note 3, at 3.
56 Id. at 4-5.
Another author suggests that students should be taught substantive business law and transactional skills through a real case study. She refers to the American Bar Association's MacCrate Report that emphasizes the importance of teaching law students real professional skills needed in the practice law instead of focusing on analysis of arguments and application of law in appellate opinions. Similarly, the Carnegie Foundation for the Advancement of Teaching advocates for "context-based education." For example in business law, a case study approach teaches students not only legal concepts applicable to various areas of business operation but also the purpose of business transactions. This transactional approach allows students to learn real lawyering and legal judgment skills necessary to successfully represent their future clients. For this purpose, several law professors have already developed instructional texts in real estate law. The traditional casebook has been replaced by real-life fact patterns that simulate deals and documents actually used in practice.

A recent example of using a case study involves the litigation surrounding the bequest to Anna Nicole Smith and her last will and testament. Even before her death, Ms. Smith’s situation became a case study for law students and was included in at least one textbook on wills, trusts and estates. Both the widely publicized dispute with her husband’s family and the poorly drafted will leaving questions regarding her bequest to her daughter born after the will was executed create the basis for in-class discussions regarding issues typically covered in trust and estate classes. In some courses, professors have distributed copies of her will.

A novel adaption of the case study approach is used in a public interest law course at the New College of California School of Law which incorporates both case studies and the experiential learning approach, using role-plays. Consistent with the purpose of the course to integrate both theory and practice, classes examine the attorney-client relationship including case intake, framing a case, and ongoing transactions between an attorney and client. Other classes focus on courtroom procedures and formal hearings. Students are provided with a short description of an actual event and are asked to act out the parts of the various participants. The focus of the role-play is on the "lawyer" character. After the role-play is concluded, the class discusses the meaning of the case study and how successfully the lawyer represented the client’s interests. Students later reported that the course’s approach had a significant effect on their practice by emphasizing the importance of empowering clients by explaining the legal process they are about to go through. Another student said the class enabled him to invent approaches that challenged traditional methods of practicing law.

57 Hammond, supra note 8, at 9.
60 Hammond, supra note 8, at 10.
63 Id. at 367.
64 Id. at 379.
The role-play approach to case studies was also used in a course developed for the Families and the Law Clinic at the Columbus School of Law, Catholic University of America to teach students how to handle domestic violence cases. With one of the students playing the role of an abused young woman, students not only delved into the legal issues facing domestic violence victims, but also the psychological issues including the theory of power and control, the cycle of violence, and denial by the victim. Through the role-play, students are expected to reflect on their relationship with their client and develop a "client-centered" model. Students also gain the practical experience of interviewing clients and preparing the proper legal documents.

IV. USING AN INTEGRATED CASE STUDY IN THREE LEGAL STUDIES COURSES

The Legal Studies pre-law program at the University of Houston-Clear Lake was created to provide students with an opportunity to study a variety of areas of law and the operation of the American legal system as a foundation for entry into law school or as a path to become a paralegal professional. The curriculum requires students to take an introductory law course that provides them with a foundation for the more advanced study of the seven substantive and procedural areas of law constituting the core curriculum. This course also provides an overview of each of the stages in the development of a civil and criminal case and a cursory review of the process of trial by jury. While the more advanced courses on civil litigation and criminal law provide greater detail on the development of civil and criminal cases, nowhere in the body of the core curriculum was additional time devoted to educating students on the intricacies of the process of trial by jury. To address this weakness, a course titled the American System of Trial by Jury was added to the core curriculum as a required course. The learning objectives for this course focused on the students acquiring a more in-depth understanding of the trial by jury from voire dire to closing argument, the mechanics of trial advocacy involved in each phase of the process, a greater appreciation for the founding fathers’ struggle to preserve this fundamental liberty, and the evolution of the jury process through the common law.

Lacking a textbook suitable to achieving these three somewhat diverse learning objectives, lecture outlines were developed based on a variety of continuing education materials, that provided a more comprehensive explanation and analysis of the trial by jury process from voire dire to closing argument and the advocacy involved with each stage. These lecture outlines were augmented with reading assignments intended to give the students an appreciation for and understanding of why the colonists included a grievance in the Declaration of Independence accusing King George III of “...depriving us in many cases of the benefits of trial by jury.” In addition, the traditional case method was employed. Students were assigned

66 Id. at 259-60.
67 Id. at 263.
68 The Legal Studies program is a Bachelor of Science degree. Substantive and procedural courses in the core curriculum include family law, wills and probate, torts, criminal law, real property, dispute resolution, civil litigation as well as legal research and writing.
70 For example, selected materials were drawn from the University of Houston Law Foundation’s continuing education program titled “The Jury Trial 2009.”
precedent setting court cases to read and analyze that established the common law governing various phases in the process of trial by jury. These cases primarily centered on issues involving the Fifth, Sixth, Seventh, and Eighth Amendments.\(^\text{72}\)

While the use of the case method coupled with the reading of historical materials and selected continuing education articles provided a deeper understanding of the trial by jury process, this blended approach to instruction did not introduce students to the issues that must be addressed and resolved through critical thinking at each step of the process of trial by jury because the students were not required to analyze fact patterns and apply legal standards. For example, as instructive as it was for the students to read and analyze cases such as *Batson v. Kentucky*\(^\text{73}\) and *Georgia v. McCollum*\(^\text{74}\) which prohibit the purposeful discrimination of a juror based on race through the use of peremptory challenges, the case method of instruction did not force the students to face the reality of the decision-making that goes into the actual planning and use of peremptory challenges in a potentially racially charged case, say for example a case involving a white police officer shooting an unarmed black man. Nor did the case method instill in students the all-important fact that the trial process is not a collection of individual stages, but a highly integrated process that is built around a case theory and one or more related themes that are advanced through every phase of trial from voir dire to closing argument.

Faced with these shortcomings of the case method, it was abandoned in favor of the use of case studies that raised issues the students were required to resolve using the information they learned from the lecture outlines, such as how to plan and execute a voir dire. Case studies suitable for this new approach were found to be available for purchase from The American Mock Trial Association (AMTA).\(^\text{75}\) A typical AMTA problem, whether civil or criminal in nature, includes pleadings, real and demonstrative evidence, witness affidavits, deposition excerpts, diagrams and photographs as well as expert reports that raise numerous factual and legal issues that require resolution. AMTA case problems include brief summaries of the controlling case law and statutes relative to the legal theories applicable to the case study. While at first it seemed that the use of an AMTA case study was the ideal instructional tool to support a case study approach, in fact the complexity of the AMTA problem bogged down students in memorizing factual details rather than focusing on the issues to be resolved, the mechanics of trial advocacy and the application of critical thinking to each phase of the trial process. This single case study approach simply overwhelmed students who were being introduced to the complexity of the trial by jury process for the first time. Succinctly stated, this single case study approach was a hindrance to achieving the learning objective of the American System of Trial by Jury course. This approach was abandoned in favor of the use of multiple small case problems involving less complicated fact patterns that raised issues relative to each phase of the trial by jury process. A good source for smaller case problems was found to be the National Institute of Trial Advocacy (NITA).\(^\text{76}\)

---

\(^{72}\) For example, cases such as *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment), *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment), *Colgrove v. Battin*, 413 U.S. 149 (1973) (Seventh Amendment), and *Furman v. Georgia*, 408 U.S. 238 (1972) (Eighth Amendment), were assigned.

\(^{73}\) 476 U.S. 79 (1986).

\(^{74}\) 505 U.S. 42 (1992).

\(^{75}\) Past AMTA cases may be purchased for one year of internal use for $150. For additional purchasing information go to the AMTA website at www.collegemocktrial.org.

\(^{76}\) The National Institute of Trial Advocacy is the largest provider of trial advocacy materials for law schools in the nation. Publications can be purchased by going to www.nita.org.
This organization publishes a wide variety of books containing short case problems such as Anthony J. Bocchino and Donald H. Beskind’s “Problems in Trial Advocacy,” 2007 edition. Although Bocchino and Beskind’s case problems are short, in some cases as little as 5 pages in length, each case problem is supported with a combination of exhibits, deposition excerpts, diagrams and photographic evidence that make the case problem sufficiently difficult to challenge students’ best critical thinking skills. As a result of shifting to the use of smaller case problems, fact memorization ceased to be an issue and the frequent change of case problems reduced boredom associated with using the same fact pattern to teach advocacy skills week after week. For those phases of the trial process not addressed with case problems by Bocchino and Beskind, such as relative to voire dire and opening statements, existing case problems were easily modified to facilitate their use in study of other phases.

In order to provide students with the substantive instruction needed to address Bocchino and Beskind’s case problems, an additional text was adopted for the course, titled *Winning at Trial* (2007) by D. Shane Reed, a 2007 publication of the National Institute of Trial Advocacy. Although written as a middle level textbook to teach trial advocacy skills to lawyers, the author’s approach to teaching trial advocacy against the backdrop of actual trials such as the O.J. Simpson case made the text ideally suited for teaching the same concepts to undergraduate students in the American System of Trial by Jury class. As chapters in *Winning at Trial* were assigned starting with the first chapter on voire dire, students were called upon to demonstrate in front of their classmates their knowledge and understanding of that phase of the trial process and the advocacy skills needed to resolve the assigned case problem from the “Problems in Trial Advocacy” text.

Although this learning by doing approach facilitated a step by step analysis of each phase in a jury trial, what this approach was unable to instill in the students, given the weekly change in the case problem fact patterns, was that the process of trial by jury is a highly integrated process developed around a single case theory supported by one or more themes that carry the case forward to conclusion. As reverting back to the use of one single case problem from the American Mock Trial Association was not an option based on past experience, the decision was made to continue using the small case problems format in the American System of Trial by Jury class to introduce students to the trial process and advocacy skills and to address the issue of the integrated nature of the process through a course sequel that would employ a single case problem. This course sequel was titled Mock Trial and the course prerequisite was the American System of Trial by Jury class. These two courses were sequenced so that the American System of Trial by Jury is taught during fall semester followed by a spring offering of the Mock Trial class.

The single case problem chosen for the Mock Trial course was the case file of *Scruggs v. Snyder* (2nd edition) published by NITA. The selection of this particular case file was in part based on the fact that the author of *Winning at Trial*, D. Shane Reed, used the facts of this case file in his textbook to explain and demonstrate various aspects of the trial process. While the Scruggs case file contained pleadings, real and demonstrative evidence, witness affidavits, deposition excerpts, diagrams and photographs, what was missing was a research component containing case law summaries and related statutes that the students in the Mock Trial course could use as authority in support of their case theory, themes, and defense.

77 By way of example, case problems in this 2007 publication challenge students to resolve issues relative to the direct and cross examination of lay and expert witnesses and the introduction of different types of exhibits in the trial process.
This case deficiency was resolved by integrating the basic facts of the Scruggs v. Snyder problem into the core Legal Research class taught in the fall as the basis for the students’ first research project which could then be carried forward by the students into the spring Mock Trial class. The facts of the Scruggs v. Snyder case involve an automobile accident in which a six-year-old boy was hit by a car and suffered physical and mental injuries. Evidence in the case suggested that the driver may have been negligent in failing to observe the boy crossing the road. The facts also suggested that the boy may have contributed to the accident by failing to use the pedestrian tunnel to cross the road, and that his parents may have been negligent in failing to properly supervise their son. Thus, the issues of negligence and contributory negligence had to be researched by the students. Although the NITA case was supposed to take place in a fictitious jurisdiction, students were told to research the case applying Texas law. Under Texas law, plaintiffs may not recover damages for negligence if the court finds that the percentage of their responsibility is greater than 50 percent. Further, children who are under fourteen years of age are held less responsible for their decision-making. When considering the negligence of a child, the court will determine how a reasonable child of the same age would have behaved under similar circumstances. Thus, using deductive reasoning, students had to analyze whether the actions of the boy and those of his parents would have been sufficient to deny recovery for his injuries.

In addition to the facts under the NITA case, students were also asked to assume that the child had died in the accident. This inserted two additional issues involving application of the Texas Wrongful Death Act and the potential criminal charge of vehicular manslaughter. As fact patterns similar to Scruggs v. Snyder case had been used in the research course in the past, incorporating the Scruggs case was not difficult.

When those students who completed the Legal Research and American System of Trial by Jury courses in the fall enrolled in the spring Mock Trial class, they were prepared to address the Scruggs v. Snyder case armed with the case law and statutes supporting the parties’ theory of liability and defense and a basic set of trial advocacy skills. As the Scruggs case file contained a complaint and answer drafted according to federal pleading practice, the first assignment given to the students in the Mock Trial class was to replead the case according to the Texas rules of civil procedure using the knowledge they acquired through the required core course on Texas pre-trial civil procedure. Once this assignment was completed, the students were divided into plaintiff and defense teams by random assignments to meet at staggered times during the normal three hour course period. With a single case file to work with throughout the course, the goal of emphasizing that the process of trial by jury is a highly integrated process from voire dire to the closing argument began with tasking each team with the development of a case theory and related themes that they would carry through their case to conclusion. Thereafter every phase of the development of this mock trial case starting with voire dire centered on the further development and refinement of the students’ theory of the case and related themes through closing argument. The final exam for this course involved the students trying the Scruggs case to verdict before a judge as part of the University’s Annual Student Conference for Research and

82 Students had to discuss whether the accident would have constituted manslaughter under Tex. Penal Code Ann. § 19.04 (West 2011) which states that a “person commits an offense if he recklessly causes the death of an individual,” or criminally negligent homicide under Tex. Penal Code Ann. § 19.05 (West 2011).
Creative Arts. This exercise gave the students first hand feedback on the consequences of their legal decision-making.

Integrating case studies in the American System of Trial by Jury, the Legal Research, and the Mock Trial courses was a process of trial and error that resulted in several lessons and achieved several benefits for the courses and the students. As to the American System of Trial by Jury course, the lesson learned was that the use of one single case file to teach the process of trial by jury and related advocacy skills was simply overwhelming to students new to the process pushing them towards the safe practice of the memorization of facts rather than the mastery of advocacy skills. When the switch was made from the use of one large case study to smaller advocacy skill specific case problems supported by substantive instruction from Reed’s “Winning at Trial,” the learning objectives for the American System of Trial by Jury course were achieved, with the exception of instilling in the students an understanding of the highly integrated nature of the process of trial by jury. This issue was resolved through the creation of a course sequel, a Mock Trial course where one case study, the case of Scruggs v. Snyder, was the focus of the course. The benefit derived from sequencing these courses was that the former students enrolled in the American System of Trial by Jury class entered the Mock Trial course with a set of advocacy skills and with knowledge of the trial process. This facilitated placing emphasis on the integrated nature of the process beginning with the development of a case theory to be carried through to closing argument. What the Scruggs v. Snyder case file lacked, a research component, was addressed by integrating the Scruggs case file into the required Legal Research course as the principle research problem for the semester. By integrating the Scruggs case problem into the fall research course, the students were presented with legal issues in the case for which they had to research the legal precedents under Texas statutory and case law. When the students who completed the legal research enrolled in the mock trial course, they were able to appreciate the connection between the two courses and the value of the integrated case study approach. In future semesters, additional facts could be added to the case to spur research in other areas; for example, it could be suggested that the brakes on the defendant’s automobile were faulty, thus prompting research into the law regarding product liability and third party practice.

V. CONCLUSION

The advantages of using case studies in a variety of substantive and clinical legal courses in law school setting appear to be well established. Indeed, case studies have been used in research and writing courses in law school for many years as a means for students to “practice” their ability to find the law and construct a legal document such as the office legal memorandum or the appellate brief. When the use of case studies approach is extended to undergraduate courses in a legal studies program, equal success is achieved. By extending the use of the case study approach into several courses and by integrating these courses, professors are able to enhance undergraduate students’ understanding of the course material, the course learning objectives are more readily attainable, and the students acquire an appreciation for how the courses in the curriculum are interrelated.

84 Tex. R. Civ. P. 38.
WHO ARE YOU? IDENTIFYING ONLINE STUDENTS FOR ASSESSMENT PURPOSES

DAVID RITTER*
JOHN SHAMPTON**
LAWRENCE LARSON***

I. INTRODUCTION – “IDENTITY GIFT”

WHO ARE YOU?
WHO WHO WHO WHO?

PETER TOWNSEND (1978)1

The task of establishing someone’s identity not only surfaces regularly as a theme of the popular television show CSI: Crime Scene Investigation it also underlies one of the most vexing problems of online education, referred to herein as “identity gift” – standing in for another for the purpose of taking an exam.2 In a classroom, even in a large auditorium with hundreds of students, “identity gift” is not a serious problem – if nothing else, photo IDs can be required for the privilege of sitting for an examination. When, however, the student is in front of a computer monitor possibly thousands of miles away from the instructor, the question “who are you?” becomes crucial. A celebrated New Yorker cartoon from 1993 puts it well: a dog, seated at the keyboard of a computer, explains to a nearby canine friend “on the Internet, nobody knows you're a dog!” In the context of an online exam, unfortunately, the instructor does not have a way to readily know if the examinee is the student, a friend who has already taken the course or both.

II. RELEVANT CHARACTERISTICS OF ONLINE COURSES

Online classrooms have significant advantages and disadvantages for both the student and instructor. Time and distance management, cost effectiveness and overall efficiency are clear sources of attractiveness to both instructor and student. A major disadvantage,

* D.B.A., Associate Professor of Accounting, Texas A&M University Central Texas, Killeen, Texas.
** Ph.D., Adjunct Faculty, Texas A&M University Central Texas, Killeen, Texas.
*** Ph.D., Associate Professor of Computer Information Systems, Texas A&M University Central Texas, Killeen, Texas.

2 “Identity gift” is a much more applicable term than “identity theft,” since the deception is clearly consensual. As used herein, it includes obtaining third-party help as well as substituting a “ringer.” See, Luebben, Aimee, Identity Gift: The Opposite of Identity Theft? Distance Education, http://www.jsums.edu/jsuoaa/resources/Academic%20Integrity%20in%20Online%20Education.pdf
However, is the loss of the direct face-to-face feedback that allows the instructor to judge the progress of the student by visual clues (such as the legendary “deer-in-the-headlights” gape that signals non-comprehension). Since the beginnings of distance education via mail order correspondence courses, and up to and including today’s sophisticated online course delivery systems, however, one crucial problem remains unsolved: that of assuring the work of the student is not a product of collaboration with, or even complete substitution of the efforts of, another. Specifically, it is quite difficult to assure that the person taking an online exam is the person actually enrolled in the course.

There is no shortage of writing on the development and structuring of online courses, but these resources deal almost entirely with the dynamics of information transfer in online courses and the design of, and techniques for presenting, computer-based classes. Only one aspect of the problem at hand appears to be regularly treated in this literature, recommended techniques for the establishment of what might be called “credentialed anonymity” – methods for assuring that the person on the other end of the broadband connection has the credentials to take the exam, without being able to discern who is actually answering the questions. Passwords, “lockdown” browsers, features of the software packages being used and the like, discussed below, can assure that the work product is authorized but cannot assure that the effort is being made exclusively by the enrolled student. Human nature being what it is, the potential for improved grades as a result of such collaboration not only exists but is pursued regularly. People cheat.

Every two years since 1992, the Josephson Institute has conducted a national survey of the ethics of American youth. The 2008 survey indicated that 64% of respondents cheated on at least one test during the previous year. In addition, 93% of the respondents stated that “they were satisfied with their personal ethics and character…” In traditional face-to-face (FTF) classes, instructors have the opportunity to observe the actions of students when assessments are administered; as already noted, currently that opportunity does not

---


exist in online classes. The purpose of this discussion is to explore the problem generally and examine a few of the existing strategies for dealing with the issue.

III. ANALYTICAL FRAMEWORK
Analytically, the problem of identity gift can be examined from an economic perspective – one of cost-benefit analysis and the associated incentives that result in choices and behaviors. Since the parties involved, student and instructor, do not have complete information about the others’ perceived costs and benefits, traditional (“supply and demand”) analysis is inadequate. The relatively new (mid-20th century) economic concept of “game theory,” on the other hand, provides at least a basic framework for analyzing the issues in question.6

Essentially, game theory involves the analysis of decision-making under conditions of imperfect information and with multiple participants.7 Without going into detail, game theory holds that the choice among possible courses of action will depend not on the actual costs and benefits of that choice, but on the decision maker’s perceptions of them, together with the expectations of the acts or choices to be made by the other(s) involved, however uncertain those perceptions and expectations may be. In the traditional “prisoner's dilemma” problem,8 for example, game theory is used to predict an accused’s decision to cooperate with the police or not, knowing that his outcome will be affected by the choice made by his accomplice who is facing the same outcomes. Broadly applied to the matter at hand, the question of cheating by identity gift becomes one of analyzing payoffs9 given the actions that might be taken by the instructor. Consequently, any act by the instructor that would create the perception of a greater likelihood (or higher cost) of discovery would constitute a negative payoff and thus deter cheating. This conclusion applies, however, if and only if the student perceives that (1) the threat of punishment is credible given discovery; and, (2) the likelihood of discovery means the negative payoff is greater than the positive payoff from cheating.

As in traditional economic analysis, in game theory the probability of a negative payoff reduces the likelihood of observing that outcome. The main difference between traditional and game theory analysis lies in recognizing the element of uncertainty. In traditional analysis, probability is merely used as a discount factor in valuing the outcome for static comparisons; in game theory it helps reveal the likely choices of the opponent and thus guides the selection of a dynamic strategy. One clear point of useful information

---

6 It is said that the mathematician Johan von Neumann originally developed the concept of game theory while watching Princeton students cheating at poker. The ultimate result was the seminal work: von Neumann and Morgenstern, THEORY OF GAMES AND ECONOMIC BEHAVIOR, (1947) Princeton University Press.

7 The term “game” refers to the fact that the outcome to be achieved is initially unknown, and will depend on the actions of others, which are out of the control of the decision maker. A very extensive literature on game theory and its applicability to matters such as the instant exists, but is beyond the scope of this paper.

8 One brief discussion of this standard game theory example may be found in: Stanford Encyclopedia of Philosophy, Prisoner’s Dilemma, http://plato.stanford.edu/entries/prisoner-dilemma/

9 In game theoretical analysis, costs and benefits are usually “netted out” and referred to as “outcomes” or “payoffs” which can be positive or negative.
this approach brings us in this context is that punishment, or at least the threat of punishment, must be certain and must be credible.

Academic game theory, however, does not provide a clear practical solution. The lesson of game theory in this context is that less-than-ethical students will attempt to improve their outcomes by seeking testing strategies that either increase their score or reduce their effort. Identity gift is a strategy that can do both, so the student must be convinced that the payoff will not justify the effort. The instructor must communicate the perception of a negative payoff and at the same time increase the perceived probability of that outcome. The instructor's primary grading task, of course, is to assure that the test results actually reflect the knowledge of the student – the legitimate student, not a ringer. This, of course, is clearly not a surprise to anyone. Nor has the matter been ignored by educational authorities. The problem is that it has not been resolved.

IV. STRATEGIES FOR ASSURING A NEGATIVE PAYOFF
The identity gift predicament, as with most human activity, revolves around explicit costs as well as the implicit positives and negatives that go into measuring payoffs. Clearly, if dollar-amount cost is not a constraint, positive and certain verification of the examinee can be provided (at least as far as traditionally possible) by merely assigning a personal proctor to travel to the home of each student, check identification, and watch as the examination is completed. Unfortunately, explicit cost is in fact crucial to all parties. Moreover, concern must not only be had with the total of explicit costs but also with the visible allocation of these costs. If an explicit cost is to be borne by the educational institution (technically, this would be a “monitoring cost”) it will affect the educational mission of the institution, however slightly. On the other hand, if the cost is to be borne by the student (a “bonding cost”), it may deter a number of students from enrolling in the course – an outcome which also will impact the institution's educational mission. Ordinarily cost-balancing is a fairly routine task. In this case, however, the current state of technology as well as the allocation of cost becomes important and acts to significantly impact the potential choices.

The selection of strategies can be readily divided into technological and non-technological options. In the latter category, would be contractual solutions such as honor codes, while in the former we would find both techniques that assure the input comes from an authorized account and those that assure the input comes from an authorized person. It must be noted, of course, that the non-technological category is only more or less so since, after all, the problem of online cheating is a technological one to begin with.

10 The term “explicit cost” is used in this context to include not only dollar-amount costs, but also such burdens as travel, time and effort which may be experienced by the student or the instructor/institution. “Implicit costs” are used to refer to the consequences of cheating and thus will apply only to the student.  
11 In a tuition-driven institution, all costs, directly or indirectly, are paid by the student or by donors. In a tax-supported institution, the taxpayer is added to the mix. Perceptions of value, in the eyes of the student or other person paying the tuition, however, are formed by the visible allocation of costs – who gets handed the bill.
As suggested above, effective strategies must decrease the payoff to cheating either by increasing the benefits to honesty or by increasing the negatives of cheating. The non-technological approach of improving the payoff to honesty clearly presents fewer options and may, in fact, be limited to the establishment of effective honor codes. Technology may be called upon to increase the negatives of cheating by making it more difficult or more easily detected or by prescribing certain and costly punishment. In the case of either set of options, certain and costly punishment will serve to establish the negative outcome.

A number of writers propose a number of solutions to the problem of online cheating in general, but with only a few exceptions, do not dwell on the identity gift issue. A few of the recommended strategies do make it more difficult to substitute a third-party, but even those choices, unfortunately, do not effectively preclude third-party assistance. The following sections briefly discuss a few examples of these strategies. These various tips and recommendations can be collected and summarized in three categories: suggestions that rely on the integrity of the student (i.e. “bonding” cost solutions); those that involve choices made by the instructor (“monitoring” cost); and direct or indirect proctoring solutions, the cost of which could be born by either party or shared.

V. NON-TECHNOLOGICAL STRATEGIES

Requiring the student to demonstrate a level of integrity that would preclude identity gift is the primary goal of the small set of non-technological strategies discussed here. These options rely on ethical choices by, or integrity of, the student involved. The institution’s participation lies in the effective establishment of honor codes or other “contractual” undertakings by the student and, of course, providing deterrence by the credible threat of punishment for violators. Explicit costs are generally borne by the student in selecting an institution and taking steps to comply with the explicit agreement to abide by the honor requirements, although such costs are likely to be minor. The institution will be charged with promulgation and sanctioning of the codes of conduct or agreements. These strategies may include:

- Promulgation of a written honor code
- creation of an “atmosphere of honor”
- establishing and clearly stating penalties for misconduct
- promulgating clearly stated academic standards including plagiarism and cheating
- requiring the students to accept a “learning contract” for the particular class.


13 The University of Virginia, for example, is well known for the creation and enforcement of a strict honor code and system. The following statement is required on all examinations: “On my honor, I pledge that I have neither given nor received help on this assignment.” University of Virginia, A Short History, http://www.virginia.edu/uvatours/shorthistory/code.html. It is likely this solution requires for its effectiveness the existence of a well-established and respected ethical culture such as that of the U.Va.
Although clearly carrying the lowest level of explicit cost, the effectiveness of such ethics-based approaches is problematic in light of the significant amount of research concluding that, surprising as it may seem, some students cheat.\textsuperscript{14}

VI. TECHNOLOGICAL STRATEGIES – COURSE DESIGN

Selecting and employing appropriate course components or implementing certain options in the software platform used to deliver an online course can significantly increase the difficulty of cheating. Post-exam, grading practices and other analysis techniques may also increase the cost of cheating by increasing the likelihood of detection.\textsuperscript{15} These technological strategies can involve the use either of software, hardware or mixed approaches to achieve their ends.

Under course design-based techniques, we may find:

- Scheduling frequent exams or quizzes
- utilizing “pop” or unscheduled assessments
- primary reliance on essay exams
- frequent creation of new questions
- use of multiple assessment techniques
- greater reliance on threaded discussions
- posing follow up questions specifically referring to prior submissions by the student
- selecting specific (and difficult) concepts covered in a written assignment and requiring further explanation in the student's own words
- assignment of a series of “personal concept” papers that demonstrate the evolution of the students understanding
- requiring frequent posting of “lessons learned” and other interpretive statements
- posting of written assignments to a discussion board to be subjected to questions by other students.

Also in this category would be found grading-related (“post-exam”) strategies or techniques such as:

- Comparing student work to that from the same students other classes
- context analysis of student submissions
- requiring copies of all articles referred to
- requiring the preservation of metadata on all submissions.


\textsuperscript{15} These particular techniques, however, carry with them a heightened possibility of circumvention if the student is aware of the use of the approach. Thus, some care must be taken in determining just how far to reveal the application of these techniques.
Although some of these techniques may reduce the possibility of third-party assistance, they clearly do not directly affect the identity gift problem. Strategies such as “personal concept” papers and “lessons learned” essays, however could indirectly limit the viability of third-party assistance as would the timing of frequent assessments (by making it harder to schedule the presence of the “third party resource”). Many of these choices, of course, would negatively impact the flexibility of scheduling offered both the student and instructor in the online arena.

A second group of course design strategies would involve the selection of courseware preferences to assure only authorized respondents could participate. These would include:

- User IDs and passwords
- limiting access to authorized IP addresses
- use of “lockdown” browsers
- making use of plagiarism detection software such as turn it in
- challenge questions based on third-party data (e.g. “mother's maiden name.”)
- Presenting questions one at a time and preventing “retracing”
- time limits
- restricting access to a single attempt
- use of test banks for random selection of questions
- disabling the disclosure of the correct answers.

Again, however, the deployment of these options can assure “credentialed anonymity” but will not prevent identity gift.

VII. TECHNOLOGICAL STRATEGIES – REMOTE PROCTORING

Last, and of most interest to this discussion, would be the direct and indirect proctoring techniques that are aimed specifically at identity gift issues.\(^\text{16}\) To deal first with the obvious, there can be little doubt that the traditional method of requiring the student to be present on campus at the appropriate time, in the appropriate place and, where appropriate, clutching a photo ID is reasonably effective in ensuring both the identity of the test-taker and the restriction of access to prohibited materials.\(^\text{17}\) This is not to say there are no ways to avoid this scrutiny, such as false identification, but these are not new problems or issues unique to the online experience. The main difficulty with this approach is that many students, and even some instructors, are unable to be physically present. Work schedules, other commitments and, most notably, today's global character of online courses make physical presence a non-viable approach.\(^\text{18}\) Providing remote


\(^{17}\) As a practical matter, it might as well be acknowledged that online exams will be “open book” whereas those taken in testing centers can be restricted.

\(^{18}\) At the time of this writing, one of the authors is teaching an online course which began with students in Sydney, Australia (on vacation), Seoul, South Korea (civilian military contractor on assignment) and “somewhere in Afghanistan” (on deployment) as well as at various locations in the US.
testing centers might solve some of the problems inherent with the distributed nature of online courses, but the cost and difficulty of establishing such centers would also be high. Mutual assistance agreements among institutions providing access to their testing centers might be efficacious, but surely would be difficult to arrange. Moreover, students who are overseas, military students on deployment, and others with access problems would be unserved. For these students, alternate arrangements might be provided at some cost or with difficulty, but the logistics of this type of strategy would still make it unrealistic. This leaves indirect, or remote, proctoring solutions. Such techniques would involve the substitution of technology for physical presence at a testing center.¹⁹

The first, and easiest matter to resolve is verification of identity, at least to the level of “credentialed anonymity.” Besides the obvious requirement of username and ID inputs or the use of courseware preferences discussed above, there are hardware and software solutions that can satisfy or even outperform those techniques. Hardware-based biometric identification systems are common and include such devices as fingerprint readers and voice analyzers. These gadgets undoubtedly work but are unlikely to provide value exceeding their cost, therefore they will not be considered in any further detail. One interesting, and relatively inexpensive, software solution, however, is worthy of discussion as an example of the kind of technology being developed in this area.

Biometric Signature ID²⁰ offers BioSig-ID, a software program that records and profiles a mouse-driven signature to authenticate the user. Essentially an electronic form of handwriting analysis, the software has Blackboard, Pearson Learning System (eCollege) and Moodle add-ons as well as standalone software that reads a signature entered by mouse and compares it with an exemplar previously recorded. Although not in wide use, the software has been tested by the vendor in an academic context as a means of assuring the identity of the examinee. In that case, positive results were reported.²¹ Unfortunately, while using biometric means of verifying the identity of the exam taker assures the identity of at least one person at the keyboard, it still does not preclude the possibility of third-party assistance.

One hardware-based solution goes beyond the simple identification issue and allows the instructor to actually verify that no one else is around. This hardware/software suite, SecurExam Remote Proctor,²² produced by Software Secure, provides a set of electronic eyes on the examination venue by implementing a 360° visual check as well as audio input to ensure that the examinee is alone and not audibly communicating with another. The principal downside for this particular product, however, is the cost, reportedly as much as $200-$350 per student. Placing this cost on the student, especially if the device

²⁰ http://www.biosig-id.com/
²² http://www.softwaresecure.com/Main.aspx
would have no use after the course is completed, would not appear to be a suitable option. For the institution to acquire an inventory of devices would also be an unreasonable choice given the total expense and the costs and logistics of delivering the devices to the students and assuring their return after completion of the course.

A much less expensive alternative, and one which many students are already quite familiar with, exists in the popular (and free) Skype software which uses the student’s web cam and microphone inputs to provide a limited visual field plus audio input to assure, at least to a great extent, that the student is alone at the time of the exam. There is some cost in providing for multiple participants, but that relatively inexpensive fee (at the time of this writing, less than nine dollars per month) need only be paid by the instructor or institution. Given the low cost and potential for this particular product, it would be appropriate to go into further detail.

VIII. TECHNOLOGICAL STRATEGIES – SKYPE

Skype is a no-fee videoconferencing system which allows the participants to make use of a built-in or stand-alone web cam together with an audio input in the form of a simple microphone, to conduct real-time face-to-face online communications. The “Skype Premium” fee-paid service allows one participant (the instructor) to simultaneously conference with up to nine others at a relatively low monthly cost. Certain hardware and software requirements must be met by each participant, including a web cam, reasonably high bandwidth Internet connection (Skype recommends a minimum 1/2 Mb downlink or greater) and a computer with adequate processing power (minimum 1 GHz recommended). The instructor should have higher capacities both in the Internet connection and the computer as well as the Skype premium service and a paid group video calling subscription.

The benefits making use of the well-known Skype software include familiarity of most students with the system, the deterrent effect of being watched (even if there is not a 360° field of view) which greatly reduces the payoff for cheating, and, where appropriate, the enhanced communication between instructor and student made possible by visual feedback, restoring the communications channel lost – and most dearly missed – in online classes. The system, of course, is far from perfect. Identification of the students becomes problematic without some additional form of verification. The instructor (assuming only the instructor is required to have a video calling subscription) must provide an identification number for each student and individually invite them into the conference. Those familiar with Skype are also familiar with the picture and audio quality which, depending on the quality of the broadband connection, can be problematic. Classes larger than nine students, of course, would require multiple test times.


\[24\] Any of the techniques discussed above for establishing “credentialed anonymity,” of course, would easily resolve this problem, even the simple expedient (where video quality is adequate) of having the student hold a photo ID up to the camera.
The one factor that is most likely to be limiting for this, or any other remote proctoring scheme, however, is the problem of scheduling a mutual time. With students potentially on opposite sides of the globe, time zones could have a great impact.

IX. HIGHER EDUCATION ACT AMENDMENTS
Although seeking a solution to the problems discussed in this paper is important and justified by concerns for academic integrity, there is also a legislative issue that mandates awareness of the problem and will, undoubtedly require some future action to resolve it. In 2008 the Higher Education Opportunity Act (HEOA) provided a new requirement for higher education accreditation agencies. This small section, buried in a major piece of legislation, obligates accrediting authorities to require any institution offering distance education to verify student identities. The Act mandates that:

. . . the agency or association requires an institution that offers distance education or correspondence education to have processes through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the program and receives the academic credit.

In essence, an institution offering distance education must verify student identities or lose its accreditation. The simplest forms of verification, such as password and user ID, currently meet these requirements but accrediting associations insist on continual self-study and improvement and will, there is no doubt, require a much greater level of security in the future.

X. CONCLUSION
As online education continues to mature and expand, the already existing problem of accreditation of online programs will become more significant. Questions of academic rigor can be dealt with in traditional, well-understood ways. The area that will undoubtedly cause difficulty, it appears, is the simple fact that verification of the identity of the student who is taking the exams, submitting the assignments and is to receive the course credit cannot be assured given the current state of technology. The camel’s nose, however, may already be in the tent. The requirement of the HEOA for accrediting agencies to mandate the adoption of identity verification systems will surely be extended beyond passwords and IDs. Technology is already available to assure that the person at the keyboard has the right to take an exam or submit an assignment, but there still is no way to be certain that the work is the product of that registered student, and not of someone else or a collaborative effort. Among the available tools for preventing this form of cheating, identity gift, are teaching and course design techniques that make it difficult to improperly share or substitute work, biometric and other methods of remotely checking IDs, and some audio/visual tools, most notably Skype, that can assure the test-taker is working alone. Further development of, and experimentation with, these tools


26 20 USC Sec, 1099B (a)(4)(B)(ii)
and techniques is essential to assure the successful education of online students and to establish and maintain the credibility of their degrees.
WORKPLACE BULLYING: IT’S NOT JUST ABOUT LUNCH MONEY ANYMORE

Dan Davidson*
K. Vernard Harrington**

Bullying is not restricted to the “big kid” who takes a person’s lunch money every day. Nor is it only a matter of some “wise guy” knocking a person’s books out of his or her hands or knocking things off of someone’s desk. It is not even restricted to the uninvited and unwelcome “wedgie” administered to an unwilling victim. Bullying has moved from the province of the playgrounds and hallways to the workplace.

A number of experts have alleged that workplace bullying has become a serious problem today. There are also allegations that it has become more common over the course of the “Great Recession.” To further complicate matters, there are few, if any, laws that address the issue or provide the victim with any remedies or recourse. A recent survey in the United States reported that thirty-five percent of U.S. workers claimed to have been bullied at work, and that another fifteen percent claimed to have been adversely affected by the conduct.¹ A survey in England revealed similar results, with one-third of the workers surveyed reporting that they had been bullied at least once in the previous six months.² ACAS,³ the British conciliation service, reported that one in ten employees experience some sort of workplace bullying or harassment.⁴

Interestingly, there is no current legal definition of bullying. This implies that while bullying may be a social problem, it is not recognized as a legal problem in the U.S. Bullying is defined in Webster’s as “treating abusively, to affect by means of force or coercion, using browbeating language or behavior.”⁵ Washington State defines workplace bullying as “repeated unreasonable actions of individuals (or a group) directed towards an employee (or a group of

---

¹ “Being Bullied? Start Here,” Workplace Bullying Institute, found at http://www.workplacebullying.org/individuals/problem/being-bullied/
³ ACAS stands for Advisory, Conciliation and Arbitration Service, a United Kingdom organization dedicated to promoting employment relations and HR excellence. Found at the ACAS web site http://www.acas.org.uk/index.aspx?articleid=1461
⁴ Supra, note 2..
employees), which are intended to intimidate, degrade, humiliate, or undermine; or which create a risk to the health or safety of the employee(s).”

There are laws in the U.S. to protect workers from sexual, racial, and/or religious harassment. There are laws protecting workers against various types of discrimination, such as discrimination based on age or disability. There are laws to protect the victims of bullying in schools, at least in some states. But there are no laws specifically designed to provide protection to victims of bullying in the workplace. Perhaps it is time that such laws were enacted.

THE ISSUE

There is a strong link between bullying and suicide, as suggested by recent bullying-related suicides in the U.S. and other countries. According to the Centers for Disease Control, suicide is the third leading cause of death among young people. It is also reported that for every suicide among young people there are at least one hundred suicide attempts. Over fourteen percent of high school students have considered suicide, and almost seven percent have attempted suicide at least once. Bullying victims are between two and nine times more likely to consider suicide than non-victims, according to studies by Yale University. But bullying is not just a problem with young people, nor is it restricted to the school environment.

It is important to recognize that workplace bullying can have serious consequences, not only for the victim of the conduct, but also for the employer. The victim may have physical, psychological, mental or emotional injuries due to the conduct. He or she may have to seek medical attention, and may even be eligible for worker’s compensation in some cases. The employer may be forced to replace employees who have quit due to the stress and strain of working in what amounts to a hostile environment, even if that environment is not legally recognized as a hostile environment. Bullying also has a negative impact on productivity and creates an atmosphere of distrust among the employees.

Gary Namie, president of Work Doctor, Inc., co-founder of the Workplace Bullying Institute, and author of “The Bully-Free Workplace,” says that surveys show that as many as thirty-five percent of U.S. adults report being bullied at work. An additional fifteen percent witness bullying behavior and are affected vicariously by the conduct. Bullying in the workplace is more subtle than the conduct most people envision when they think of it. This subtlety is one of the things that make it difficult to provide a legal definition or legal protection to the victims.

Here are a few examples of conduct that can be considered as workplace bullying. An employee who believes he or she is being stalked in the halls at work may be the victim of a

6 “Workplace Bullying and Disruptive Behavior,” SHARP, Washington State Department of Labor and Industries (April 2011).
7 “Bullying and Suicide,” Bullying Statistics, found at http://www.bullyingstatistics.org/content/bullying-and-suicide.html
9 Workplace Bullying Institute.
bully, but the conduct may not be sufficient to establish assault or sexual harassment. An employee who is berated by a coworker or a supervisor in front of colleagues may be the victim of bullying. This is especially likely if the diatribe includes personal insults. Persistent criticism of an employee’s performance may, at some point, become a bullying tactic. So may yelling at coworkers or subordinates or repeated reminders of prior mistakes. Consistently excluding an employee from activities in which his or her colleagues participate can be viewed as a form of ostracism, a type of bullying. Persistent incivility or rudeness may be considered bullying behavior. None of these actions, with the possible exception of the stalking, would rise to the level of tortious conduct, nor would constitute a form of harassment for which remedies or recourse is available.

One of the most effective means of workplace bullying is also one of the most subtle. Triangulated conversations are often initiated by the bully as a method of creating suspicion, disrespect, and mistrust among coworkers. The initiator often manages to put himself or herself in the position of being each of his or her colleague’s only reliable friend or ally in the workplace. Such conduct creates stress and tension among the employees. It lowers morale, hurts productivity, and causes turmoil. It also frequently causes unhappy employees to leave, which then adds to the employer’s cost due to the need for replacing the departed worker and training the new employee.

To further complicate the issue, often the bully is in a supervisory position. He or she has used aggressive behavior and intimidation to successfully move ahead of colleagues. He or she has used rumors, lies, and innuendo to denigrate colleagues while inflating his or her achievements. Former managers or supervisors have avoided confronting the bully because to do so is often uncomfortable and it may lead to retaliatory conduct by the bully. Such conduct is frequently justified as being just part of the personality of the bully. Victims who complain are told that “it was nothing personal” or given the suggestion that perhaps the victim should just avoid the person in the future if they can’t get along.

LEGISLATIVE REMEDIES

There are no laws to date in the United States that prohibit workplace bullying. Perhaps the closest the courts have come to addressing the issue was an Indiana Supreme Court opinion. In 2008, the Indiana Supreme Court upheld a $325,000 verdict against a surgeon who was accused of being a workplace bully. However, the court’s opinion explicitly noted that there is no basis in the law for a claim of workplace bullying. Doescher was an operating room perfusionist. He was assisting on an open-heart surgery being performed by Dr. Daniel Raess, a cardiovascular surgeon. According to Doescher, Raess charged at him aggressively “with

11 A perfusionist is a certified medical technician responsible for extracorporeal oxygenation of the blood during open heart surgery and for maintaining the equipment used in the process. Found at Merriam Webster’s Collegiate Dictionary (on-line), http://www.merriam-webster.com/dictionary/perfusionist.
clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing at him.”

Doescher testified that he backed up to the wall, fearing the Raess was about to hit him. He sued for the torts of assault and intentional infliction of emotional harm, but the trial strategy was to present Raess as a classic “workplace bully.” The jury found for Raess on the claim of intentional infliction of emotional harm, but awarded Doescher $325,000 for the assault. Raess appealed, based in part on the trial court’s admission of “expert testimony” concerning workplace bullying presented by Dr. Gary Namie, as well as the fact that the court did not instruct the jury that workplace bullying is not a legal issue. The Indiana Supreme Court upheld the verdict for Doescher. It found that Raess’s attorneys failed to object to Dr. Namie’s testimony at trial, thus losing the right to raise the issue on appeal. The Court also ruled that the jury instruction requested by Raess was inconsistent with the law regarding jury instructions. (The trial court had permitted Raess’s attorneys to argue that workplace bullying was not an issue in the case and did not constitute a legally relevant issue.)

There is growing evidence that the issue of workplace bullying needs to be addressed by state legislatures. Researchers at the University of Manitoba reported that the emotional impact of workplace bullying is more severe than the emotional impact of sexual harassment. When research shows this degree of severity as a result of the conduct, and when a best-selling book points out the losses employers suffer due to absenteeism and employee turnover due to bullying conduct on the job, legislators begin to pay attention. The Healthy Workplace Bill (HWB) was created by the Workplace Bullying Institute. The HWB seeks, among other things, to forbid any “abusive work environment” that is harmful to one’s health. The bill was introduced for the first time in California in 2003. While the bill did not pass, it did generate a great deal of discussion, which led to the formation of the California Healthy Workplace Advocates group. New York, New Jersey, and Connecticut all introduced anti-bullying bills for consideration in 2008. By January 2012, twenty-one states have considered the Healthy Workplace Bill or similar legislation, although none have enacted it to date.

New Jersey recently passed an anti-bullying statute, the Anti-Bullying Bill of Rights, which applied to New Jersey schools. The statute was struck down when the Council of Local Mandates ruled that it was an unfunded mandate. Under the New Jersey Constitution, if the state institutes a mandate the state must provide funding for its implementation. An unfunded

---

13 Id.
17 The Healthy Workplace Bill web site, found at http://www.healthyworkplacebill.org/
mandate is in violation of the state Constitution. In fact, anti-bullying statutes that are applied to schools are common. A total of forty-five states have such anti-bullying statutes, but none of them address bullying in the workplace. Many of them do not go as far as the prior New Jersey statute (enacted in 2002) that made it a crime to bully or harass on the basis of race, sex, sexual and gender identity or disability.

There are laws in effect in the European Union that protect workers from workplace bullying. Council Directive 89/391 of the EU’s Law Code, which was enacted in 1989, requires all employers to provide and maintain “safe working conditions” for employees. The directive includes prohibitions against violence, sexual harassment, and bullying, and anti-violence provisions must be included in every collective bargaining agreement. The directive also defines bullying as “the deliberate and repetitive assault on one’s rights and dignity that leads to the breakdown of working conditions for the victim and that affects the employee’s physical and mental health.” Any worker who alleges that he or she has been the victim of bullying has the right to a fair hearing, and employers are required to take action against anyone or anything that threatens the health or well-being of the workers or the workplace. Victims are entitled to compensation, and may also treat their employment contracts as void. There are also sanctions imposed on anyone who falsely accuses a person of acts of workplace violence, sexual harassment, or bullying. Under the EU Law Code, most of the burden and most of the penalties are placed on the employer for failing to provide a safe workplace rather than on the perpetrator of the offense.

Workplace bullying legislation has recently been enacted in Canada, Australia, Sweden, France, Denmark, and Serbia. Other nations have chosen to adopt non-regulatory measures to address this issue. The German Ministry of Labor and Social Affairs states that “employers are obliged to protect their employees’ right of privacy and health. They must therefore prevent mobbing, act against employees who mob others and take all possible measures to prevent mobbing in their companies.” [Mobbing is defined as creating emotional abuse in the workplace; “ganging up” against one or more employees by coworkers (including both subordinates and supervisors), or malicious non-sexual or non-racial harassment.]

New Jersey is considering a bill, The Healthy Workplace Bill (S 233) sponsored by Senator Linda Greenstein, that would prohibit abusive behavior and bullying in the workplace,

---

20 Id.
22 Id.
23 Id.
25 Id.
whether public or private. If enacted, the statute would not automatically prohibit all rude behavior, nor would it impose any draconian measures against employers or co-workers for being demanding or for establishing high expectations or standards for the employees. It would only prohibit conduct that is severe and distressing. Victims will need to establish that some form of prohibited conduct occurred, and then show some measure of emotional or psychological distress supported by medical expert testimony before any remedies would be available.

CONCLUSION

Although a number of states are considering legislation to address the issue of workplace bullying, none have enacted a statute to date. This means that currently there is no clear-cut legal remedy for victims of workplace bullying in place in the United States. A victim may be able to argue that he or she has been the victim of illegal harassment, whether sexual, racial, or otherwise. But in order to so, he or she will need to show membership in a protected class and then connect the alleged harassment to that status and not just to the employment setting. The victim may also be able to claim intentional infliction of emotional distress, but would then have to establish the presence of all four elements of that tort: (1) the defendant must act intentionally or recklessly; (2) the defendant's conduct must be extreme and outrageous; and (3) the conduct must be the cause (4) of severe emotional distress.

The issue can also be addressed through the employment contract itself simply by having the employer insert a contract clause prohibiting such conduct and specifying the consequences of violating this prohibition. Similarly, it can be addressed in an employee handbook, an additional aspect of the employment expectations of the employer and of each employee. It is unclear how effective either would be, however, given the fact many of the allegations regarding workplace bullying point at bosses and other supervisors as the ones guilty of the conduct.

The Commission of Occupational Safety and Health of the Government of Western Australia has proposed a workplace bullying policy that might be adopted. This policy states:

*Company X* considers workplace bullying unacceptable and will not tolerate it under any circumstances.

Workplace bullying is behavior that harms, intimidates, offends, degrades or humiliates an employee, possibly in front of other employees, clients, or customers. Workplace bullying may cause the loss of trained and talented employees, reduce productivity and morale and create legal risks.

---

27 “New Jersey was the 10th state to introduce the healthy workplace bill,” *Current Legislation Status & News*, Healthy Workplace bill web site, found at http://www.healthyworkplacebill.org/states/nj/newjersey.php


30 See, e.g., Stephanie Pappas, “Your bullying boss may be slowly killing you,” Today Money, MSNBC (1/12/2012), found at http://today.msnbc.msn.com/id/45973010/ns/today-money/t/your-bullying-boss-may-be-slowly-killing-you/#.TyrVG8g_wkg
Company X believes all employees should be able to work in an environment free of bullying. Managers and supervisors must ensure employees are not bullied. Company X has grievance and investigation procedures to deal with workplace bullying. Any reports of workplace bullying will be treated seriously and investigated promptly, confidentially and impartially.

Company X encourages all employees to report workplace bullying. Managers and supervisors must ensure employees who make complaints, or witnesses, are not victimized.

Disciplinary action will be taken against anyone who bullies a co-employee. Discipline may involve a warning, transfer, counseling, demotion or dismissal, depending on the circumstances.

The contact person for bullying at this workplace is:

Name: _________________________________________________________

Phone Number: ________________________________________________

Until such time as legislation is enacted that provides recourse against workplace bullies, it is up to the employer to provide safeguards and to take steps to ensure that such conduct is not occurring in his or her environment. Protecting against workplace bullying is a type of insurance against a dysfunctional workplace. It may also increase employee satisfaction, leading to increased productivity and enhanced profits. In addition, it is the right thing to do for the employees.

Businesses need to recognize that addressing the issue of workplace bullying in a proactive manner is less expensive than the alternatives, it may increase employee satisfaction and productivity, it is effective, and it is the right thing to do. That should be reason enough to take action.
AN ASSESSMENT OF LEARNING OUTCOMES BASED ON A COMPARISON OF ACTIVE LEARNING AND TRADITIONAL LECTURE PEDAGOGICAL STYLES IN A LEGAL ENVIRONMENT CLASSROOM

LE VON E. WILSON

ABSTRACT

The purpose of this study is to determine whether an active learning classroom environment is more effective in helping university students learn legal environment of business concepts than the traditional lecture pedagogical style. To generate data to answer this question, 139 Legal Environment of Business students were instructed on the topic of employment discrimination by a lecture method of delivery and 255 Legal Environment of Business students were taught the same topic using an active learning method of delivery. The learning outcomes of the students were then assessed using a standardized test, which was designed to measure the levels of student learning under several categories of Bloom's Taxonomy. Student responses were analyzed using SPSS to determine whether there was any significant increase in learning for students who were taught by the active learning method of instruction versus students who were taught by a lecture method of instruction.

INTRODUCTION

Do college students learn best by the traditional lecture pedagogical style of delivery, or should university professors discard the traditional lecture and opt for an active learning environment? The search for the answers to these questions prompted the author to experiment with material delivery styles in the classroom to determine whether there was a significant difference in student learning as a result of the style of delivery. The purpose of this study is to determine whether an active learning classroom environment is more effective in helping university students learn legal environment of business concepts than the traditional lecture pedagogical style. To generate data to answer this question three classes of legal environment of business students were instructed on the topic of employment discrimination by a lecture method of delivery, and six classes of legal environment of business students were taught the same topic by an active learning method of delivery over a period of six semesters. The learning outcomes of the student groups were then assessed using a standardized test that was designed to measure the levels of student learning under several categories of Bloom’s Taxonomy.

This study was conducted on university students enrolled in Legal Environment of Business classes. The groups were not told that they were being evaluated on how they responded to different teaching methods. After the chapter material was delivered to the students and they were assessed on their knowledge by way of the standardized test, their responses were

* LeVon E. Wilson is a Professor of Legal Studies at Georgia Southern University, Statesboro, Georgia
1 The traditional lecture method is commonly viewed as when professors talk and students listen.
2 Active learning, sometimes referred to as collaborative learning or learning by discovery, may include a number of instructional techniques that are designed to actively involve students.
3 Data collection began during fall semester 2007.
evaluated to determine whether there was any significant increase in learning for students who were taught by the active learning method of instruction versus students who were taught by a lecture method of instruction.

**RESEARCH QUESTIONS**

(1) As measured by test score, to what extent is an active learning classroom environment more effective in helping university students learn concepts in a legal environment of business classroom than the traditional lecture pedagogical style?

(2) To what extent is the learning of legal environment of business concepts impacted by the style of instructional delivery, gender, class attendance, or class level?

**LITERATURE REVIEW**

The purpose of this study was to see if active learning does in fact produce a more successful learning outcome for the study of legal environment of business concepts. The author, through his own learning experiences, had a subjective belief that active learning presentations can lead to more successful learning opportunities, at least for adult learners. However, the author was aware of some controversy in the literature on the affects of active learning. For example, prior research by Brown and Pendleberry4 points out that because learners happen to be engaged in some kind of observable activity, this does not mean that they are necessarily the *subjects* of their own learning, rather than objective recipients of information, as active learning theories would have us believe. Further, other researchers think that there may be a problem in the aims of the active learning community. According to Kane,5 the process may be as important as the product and basically color the judgment of the learners. He states that it sometimes seems that active learning is simply seen as a more efficient method of transmitting prepackaged knowledge than traditional instruction. He further indicates that the method may look different from teaching as transmission of knowledge, but the ultimate aim and the underlying philosophy on which it is based are the same.

On the other hand, some researchers feel that an active learning environment is the best way to get information into the minds of students. According to Chickering and Ehrmann,6 a good learning environment requires opportunities for interaction and feedback. Cognitive theorists like Piaget7 and Festinger8 describe how learning takes place as students confront and discuss conflicting opinions with peers. Many learning theories support the view that student

---


learning is enhanced through opportunities to work collaboratively. Analysis of the research literature suggests that for students to be involved in active learning, they must read, write, discuss, or be engaged in solving problems. To be actively involved, according to Bonwell and Eison, students must engage in higher order thinking tasks and analysis, synthesis, and evaluation. In short, it is proposed that strategies promoting active learning be defined as instructional activities involving students in doing things other than simply listening and thinking about what they are doing. Bonwell and Eison report that discussion in class is one of the most common strategies promoting active learning. They suggest that if one of the objectives of a course is to promote long term retention of the information, to motivate students toward further learning, to allow them to apply information in new settings, or to develop their thinking skills, then discussion is preferred over lecturing. Bonwell and Eison cite several studies that have shown that students prefer strategies promoting active learning to traditional lectures. Other research studies evaluating students’ achievement, according to Bonwell and Eison, have demonstrated that many strategies promoting active learning are comparable to lectures in promoting the mastery of content, but superior to lectures in promoting the development of students’ skills in thinking and writing. Further, they report, some cognitive research has shown that a significant number of individuals have learning styles that are best served by pedagogical techniques other than lecturing.

In the traditional classroom, students are exposed mostly to verbal lectures given by their instructors. Students are passive listeners and note takers. According to McManus, “[s]tudents are assumed to enter the course with minds like empty vessels or sponges to be filled with knowledge.” Research consistently has shown that the traditional lecture method is still viewed as the dominate method of delivery in college and university classrooms. Nilson offers overwhelming evidence that at the college level, active learning methods ensure more effective, more enjoyable, and more memorable learning than do passive methods such as the lecture. Most people, according to Nilson, neither absorb nor retain material very well simply by reading or hearing it. The best methods permit learning by doing, by acting out, by experiencing first-hand, or by thinking through the realization. Citing studies by McKeachie et al. and Bligh, Nilson reports that the lecture is as effective as any other method in conveying factual knowledge. However, it is not as effective in the development of thinking and problem solving skills. The lecture, according to Nilson, also falls short when it comes to transfer of knowledge.

11 Id.
12 Id.
13 Id.
15 LINDA NILSON, TEACHING AT ITS BEST: A RESEARCH-BASED RESOURCE FOR COLLEGE INSTRUCTORS (2nd ed. 2003)
to new situations, student satisfaction with the course, motivation for further learning, and post-
course retention of knowledge.  

Based on these theoretical differences on the outcomes of active learning, the author of
this study sought to test on a comparison basis the effects of an active learning environment
versus curriculum delivery through lecture. The author was interested in discovering not only
whether there was a difference in learning outcomes between these two styles of instructional
delivery, but also whether there was a noticeable affect on higher order learning skills as defined
in Bloom’s taxonomy that was associated with presentation design.

**METHODOLOGY**

The population for this study consisted of 394 students who were enrolled in Legal
Environment of Business courses taught by the author over a period of six semesters beginning
fall 2007. All sections were taught primarily using the lecture method of instruction during the
semester. When there were approximately four weeks remaining in the semester, the author
deviated from his traditional lecture method and taught the topic of employment discrimination
to some of the sections using an active style of learning designed using the Cognitive Inquiry
Design of Instruction. He used a lecture method of delivery for other sections. For purposes of
consistency, he used the same PowerPoint slide presentation that was prepared by the publisher
of the textbook for the course. There was no use of PowerPoint slides or lecture for those
students exposed to active learning methods. Instead, students were given a series of problems
to solve, either individually or collaboratively, in order to “discover” content as opposed to being
told.

The classes taught by traditional lecture pedagogy using the PowerPoint slide
presentation prepared by the publishers of the textbook were instructor centered and solution
based. There was little dialogue between the instructor and the students or among the students
themselves during the lecture. The PowerPoint slides covered the same material as did the active

---

18 LINDA NILSON, TEACHING AT ITS BEST: A RESEARCH-BASED RESOURCE FOR COLLEGE INSTRUCTORS (2nd ed.
2003).
19 Instruction based on the cognitive inquiry theory is learner centered and problem based, as opposed to instructor
centered and solution based. See, P. Pallesen, Cognitive Inquiry. In MODELS AND STRATEGIES FOR
TRAINING DESIGN, 193-211 (Karen L. Medsker & Kristina M. Holdsworth eds., 2001).
20 During the initial period of data collection, students participated in a multi-activity in class assignment. In Activity
1, students were asked to work in pairs to make a list of all classes of persons that have been historically
discriminated against. Once the pairs had created these lists, the instructor compiled the responses on the board and
the students were able to group them into classes of persons with “immutable characteristics” (characteristics that
cannot be fundamentally changed) versus those with non-immutable characteristics. Next, Activity 2 required
students to work in different pairs to make a list of all types of employment decisions that are made in the regular
course of business that might provide opportunities for discrimination. Following this activity the instructor again
 compiled the responses on the board and asked students to identify which classes of persons were protected by
employment discrimination laws and what types of employment practices are prohibited.

During Activity 3, students worked individually on a worksheet that asked them to match the names of anti-
discrimination statutes or significant terms in or provisions of the statutes with their definitions. The instructor then
facilitated a class discussion in which the right answers were generated and discussed by the students. Activity 4, the
last activity, required students to identify impermissible employment decisions that were read to them by the
instructor from hypothetical cases. Again, the responses were discussed and debated by the class members. During
subsequent data collection efforts, students participated in a variety of active learning activities including debates,
the modified Socratic method, discussions centered around homework questions, and mock interviews.
learning sessions, but students were told what the law was, to whom it applied, and how it applied. The lecture was delivered during two ninety minute class periods. As an embedded part of the students’ final exam, students were given the same eighteen question multiple choice test on employment discrimination to assess their knowledge of the topic.\textsuperscript{21}

The 18-item multiple choice test that was used to assess student learning was created from a test bank that accompanied the course textbook. In selecting questions to be used from the test bank, the author attempted to choose questions that assessed students’ knowledge, comprehension, application, analysis, and evaluation skills. Given the introductory level of the course and the limited time for testing, the questions tended to fall in the lower level learning categories of knowledge, comprehension, and analysis. In all, the test contained four knowledge questions, two comprehension questions, seven application questions, one analysis question, one synthesis question, and two evaluation questions. Of the students who took the test, 139\textsuperscript{22} were instructed by the lecture method and 255\textsuperscript{23} were instructed by the active learning method.

**DATA ANALYSIS**

Once the tests were graded and case numbers assigned, responses were coded into an Excel spreadsheet and imported into the SPSS statistical software program. With the data integrated into SPSS, descriptive statistics for the sample as a whole, and descriptive statistics for the population of lecture students and the population of active learning students were run. Correlations were run to determine the relationship between demonstrated learning (correct test answers) and the style of instructional delivery. A t-test was performed to note the difference in means for each test question. Means of each group were computed. An ANOVA was conducted to determine if the two group means differ at the .05 level of significance. Pearson correlation coefficients were computed to obtain correlations between individual items and test score, as well as to determine if class attendance was positively linked to overall test score. Significance was sought at the .05 level. Results from data analyses are presented in Tables 1 through 7. Some demographic data were collected and analyses were performed to examine the relationship between demographic characteristics and test score for those data.

**FINDINGS**

Test scores for the entire population ranged from a high of 16 to a low of 4 with an overall mean score of 10.08 and a standard deviation of 2.27. Lecture scores spread from a high of 16 to a low of 6 with a mean score of 10.23 and a standard deviation of 2.24. Active Learning scores spread from a high of 16 to a low of 4 with a mean score of 10.00 and a standard deviation of 2.29. Table 1 presents raw scores, frequencies, percentages, cumulative percentages, means, and standard deviations for total test results.

Table 1

\textsuperscript{21}During some semesters of data collection, although the materials covered were the same, the number of days devoted to the topic and the number of minutes per class meeting varied. This occurred as a result of some classes being taught during a Monday/Wednesday/ Friday schedule, a Tuesday/Thursday schedule, or a daily 5-week summer session.

\textsuperscript{22}This represents 35 percent of the total population.

\textsuperscript{23}This represents 65 percent of the total population.
Total Scores – Frequencies, Percentages, Means, and Standard Deviations

<table>
<thead>
<tr>
<th>Score</th>
<th>Frequency</th>
<th>Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>2</td>
<td>0.5</td>
<td>0.5</td>
</tr>
<tr>
<td>5</td>
<td>4</td>
<td>1.0</td>
<td>1.5</td>
</tr>
<tr>
<td>6</td>
<td>15</td>
<td>3.8</td>
<td>5.3</td>
</tr>
<tr>
<td>7</td>
<td>32</td>
<td>8.1</td>
<td>13.5</td>
</tr>
<tr>
<td>8</td>
<td>50</td>
<td>12.7</td>
<td>26.1</td>
</tr>
<tr>
<td>9</td>
<td>55</td>
<td>14.0</td>
<td>40.1</td>
</tr>
<tr>
<td>10</td>
<td>64</td>
<td>16.2</td>
<td>56.3</td>
</tr>
<tr>
<td>11</td>
<td>66</td>
<td>16.8</td>
<td>73.1</td>
</tr>
<tr>
<td>12</td>
<td>46</td>
<td>11.7</td>
<td>84.8</td>
</tr>
<tr>
<td>13</td>
<td>34</td>
<td>8.6</td>
<td>93.4</td>
</tr>
<tr>
<td>14</td>
<td>17</td>
<td>4.3</td>
<td>97.7</td>
</tr>
<tr>
<td>15</td>
<td>7</td>
<td>1.8</td>
<td>99.5</td>
</tr>
<tr>
<td>16</td>
<td>2</td>
<td>0.5</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>169</td>
<td>100.0</td>
<td></td>
</tr>
</tbody>
</table>

Mean = 10.08  Standard Deviation = 2.27

Overall, more than 50% of the students gave correct answers for 10 of the 18 questions. Table 2 shows the question number, the question’s designation under Bloom’s category of learning, and the percentage of students who answered the question correctly, while Tables 3 and 4 show the question designation and percentage of correct answers by delivery style.

Table 2
Overall Percentage of Correct Answers

<table>
<thead>
<tr>
<th>Question Number</th>
<th>Question Type (Bloom’s)</th>
<th>Percentage Correct</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Application</td>
<td>72.8</td>
</tr>
<tr>
<td>2</td>
<td>Knowledge</td>
<td>23.6</td>
</tr>
<tr>
<td>3</td>
<td>Knowledge</td>
<td>84.5</td>
</tr>
<tr>
<td>4</td>
<td>Application</td>
<td>98.5</td>
</tr>
<tr>
<td>5</td>
<td>Synthesis</td>
<td>65.0</td>
</tr>
<tr>
<td>6</td>
<td>Application</td>
<td>78.7</td>
</tr>
<tr>
<td>7</td>
<td>Application</td>
<td>82.0</td>
</tr>
<tr>
<td>8</td>
<td>Analysis</td>
<td>23.6</td>
</tr>
<tr>
<td>9</td>
<td>Application</td>
<td>50.3</td>
</tr>
<tr>
<td>10</td>
<td>Evaluation</td>
<td>41.9</td>
</tr>
<tr>
<td>11</td>
<td>Knowledge</td>
<td>66.0</td>
</tr>
<tr>
<td>12</td>
<td>Knowledge</td>
<td>42.9</td>
</tr>
<tr>
<td>13</td>
<td>Evaluation</td>
<td>62.4</td>
</tr>
<tr>
<td>14</td>
<td>Application</td>
<td>69.3</td>
</tr>
<tr>
<td>15</td>
<td>Application</td>
<td>34.0</td>
</tr>
<tr>
<td>16</td>
<td>Application</td>
<td>31.0</td>
</tr>
<tr>
<td>17</td>
<td>Comprehension</td>
<td>37.1</td>
</tr>
<tr>
<td>18</td>
<td>Comprehension</td>
<td>45.9</td>
</tr>
</tbody>
</table>

The questions for which the students showed the greatest number of correct answers (more than 70% correct) were questions 1 (application), 3 (knowledge), and 4, 6 and 7 (application). The questions for which the students showed the least number of correct answers (less than 40%) were 2 (knowledge), 8 (analysis), 15 and 16 (application), and 17 (comprehension).
Question Designation and Percentage of Correct Answers (Greater than or equal to 50%) by Delivery Style

<table>
<thead>
<tr>
<th>Question Number</th>
<th>Bloom’s</th>
<th>Overall (%)</th>
<th>Lecture (%)</th>
<th>Active (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Application</td>
<td>73</td>
<td>73</td>
<td>73</td>
</tr>
<tr>
<td>3</td>
<td>Knowledge</td>
<td>85</td>
<td>83</td>
<td>85</td>
</tr>
<tr>
<td>4</td>
<td>Application</td>
<td>98</td>
<td>99</td>
<td>98</td>
</tr>
<tr>
<td>5</td>
<td>Synthesis</td>
<td>65</td>
<td>70</td>
<td>62</td>
</tr>
<tr>
<td>6</td>
<td>Application</td>
<td>79</td>
<td>76</td>
<td>80</td>
</tr>
<tr>
<td>7</td>
<td>Application</td>
<td>82</td>
<td>85</td>
<td>80</td>
</tr>
<tr>
<td>9*</td>
<td>Application</td>
<td>50</td>
<td>58</td>
<td>46</td>
</tr>
<tr>
<td>11</td>
<td>Knowledge</td>
<td>66</td>
<td>68</td>
<td>65</td>
</tr>
<tr>
<td>13</td>
<td>Evaluation</td>
<td>62</td>
<td>65</td>
<td>61</td>
</tr>
<tr>
<td>14</td>
<td>Application</td>
<td>69</td>
<td>68</td>
<td>70</td>
</tr>
</tbody>
</table>

* = point spread greater than five percentage points; significant at p < .05.

Table 4

| Question Designation and Percentage of Correct Answers (Less than 50%) by Delivery Style |
|-----------------------------------------------|----------|-------------|-------------|------------|
| Question Number | Bloom’s  | Overall (%) | Lecture (%) | Active (%) |
| 2               | Knowledge | 24          | 19          | 26         |
| 8*              | Analysis  | 24          | 12          | 30         |
| 10              | Evaluation | 42         | 39          | 44         |
| 12*             | Knowledge | 43          | 59          | 34         |
| 15              | Application | 34        | 36          | 33         |
| 16              | Application | 31        | 30          | 31         |
| 17              | Comprehension | 37      | 35          | 38         |
| 18              | Comprehension | 46      | 49          | 44         |

* = point spread greater than five percentage points; significant at p < .05.

Analyses were conducted based on class attendance. These analyses were designed to help determine if students who had better attendance also performed better on the test. Student attendance ranged from 0 to 2 days for both lecture and active learning sessions. The mean score for students who attended one or fewer days was 9.78, while the mean score for students who attended more than one day was 10.12. A Pearson r was run to determine if class attendance was positively linked to overall score. A correlation coefficient of .242 indicated no significance at the .05 level. Thus, we concluded that students who attended more classes were no more likely to perform better than those who attended fewer classes. Table 5 represents these results.

Table 5

<table>
<thead>
<tr>
<th>Correlation – Relationship of Class Attendance on Overall Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Correlation</td>
</tr>
<tr>
<td>ATTEND Pearson Correlation</td>
</tr>
<tr>
<td>Sig. (2 tailed)</td>
</tr>
<tr>
<td>N</td>
</tr>
<tr>
<td>SCORE Pearson Correlation</td>
</tr>
<tr>
<td>Sig. (2-tailed)</td>
</tr>
<tr>
<td>N</td>
</tr>
</tbody>
</table>

* Not significant at p < .05.

Though not significant, it was interesting to find that students who were exposed to the lecture method of delivery had a higher mean score than those who were exposed to the active
learning method. Other interesting findings include the fact that women had a slightly overall higher mean score than men, 10.15 and 10.04 respectively. Men who were exposed to the lecture method of delivery had a higher mean score than women at 10.32 compared to 10.00. Conversely, women who were exposed to the active learning delivery method had a mean score of 10.21, which was higher than the 9.86 mean score registered by men. The analysis revealed that women were more likely to attend class than men. Additionally, as evidenced by a Pearson r correlation coefficient of .012, there was a positive correlation between student classification and mean score. Graduate students performed better than undergraduate students; seniors outperformed juniors; juniors registered a higher mean score than sophomores, and sophomores scored better than freshmen. Table 6 provides a breakdown of those results.

Table 6
Student Classification and Overall Mean Scores

<table>
<thead>
<tr>
<th>CLASS</th>
<th>Mean</th>
<th>N</th>
<th>Std. Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freshman</td>
<td>9.60</td>
<td>35</td>
<td>2.10</td>
</tr>
<tr>
<td>Sophomore</td>
<td>10.02</td>
<td>271</td>
<td>2.27</td>
</tr>
<tr>
<td>Junior</td>
<td>10.28</td>
<td>67</td>
<td>2.28</td>
</tr>
<tr>
<td>Senior</td>
<td>10.50</td>
<td>12</td>
<td>2.02</td>
</tr>
<tr>
<td>Graduate</td>
<td>11.67</td>
<td>9</td>
<td>2.83</td>
</tr>
<tr>
<td>Total</td>
<td>10.08</td>
<td>394</td>
<td>2.27</td>
</tr>
</tbody>
</table>

RESULTS BASED ON INSTRUCTIONAL STYLE

A t-test revealed the difference in means for each question. The results revealed that students who were exposed to the lecture method scored higher on 9 out of 18 test items. The type of questions that the lecture students performed best on include four application questions, two knowledge questions, one comprehension, one evaluation, and one synthesis question. Students who were exposed to active learning methods outscored those exposed to the lecture method on 8 of the 18 test items. The type of questions that the active learning students performed best on included three application questions, one comprehension question, one analysis question, and one evaluation question. The groups were dead even on one test item. An ANOVA was conducted on the means of the two groups (lecture and active learning) to determine if their means differed significantly at the .05 level. The results indicated no significant difference in the mean scores of students exposed to the lecture method (10.23), and those exposed to the active learning method of instruction (10.00). Table 7 represents the ANOVA results.

Table 7
ANOVA – Method of Delivery with Overall Score

<table>
<thead>
<tr>
<th>Source</th>
<th>df</th>
<th>Mean Square</th>
<th>F</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Between Groups</td>
<td>1</td>
<td>4.768</td>
<td>.924</td>
<td>.337*</td>
</tr>
<tr>
<td>Within Groups</td>
<td>392</td>
<td>5.160</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>393</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Not significant at p < .05.

As evident, the results conform to no discernible pattern. If there was a significant difference in learning based on the method of curriculum delivery, the author would have
expected to find more consistency in the way the two groups scored on the questions. As it
stands, the groups were fairly evenly divided on their performance on comprehension and
application questions. Their differences in performance on most of the questions are too slight to
be able to draw any reasonable inferences. While not statistically significant, as indicated by the
p value of .337, the results invite further study.

LIMITATIONS OF THE STUDY

The author has identified several limitations of this study that may have an impact on the
results that were generated. First, students who were tested may or may not have attended all
lecture or active learning sessions. Students who may have been absent for one or more of the
lecture or active learning modules were permitted to take the test if they were in attendance when
the instrument was administered. Second, using different methodologies during the active
learning sessions could affect student understanding of the materials and, therefore, impact the
results. Further, no consideration was given to the number of students in each class and whether
or not it may have some bearing on the overall results of the study. Finally, no consideration
was given to whether or not students completed any assigned readings prior to being tested.

RECOMMENDATIONS FOR FURTHER STUDY

The author has also identified ways in which this study could be expanded to generate
more universal results and conclusions. First, it is suggested that the test instrument be refined to
reflect a balance of all of Bloom’s Taxonomy designations. Second, the study may contain less
risk of instructor manipulation if the same methodologies are used during each of the active
learning sessions. The author also recommends that the study be expanded to include a full
semester rather than a single topical area. Some consideration should also be given to
conducting a longitudinal study.

Further, this study presents no clear indication of all of the major variables that affect the
outcomes that have been identified. Limited demographic data were collected from students in
the current study; but, the instrument did not take into consideration the participants’ field of
study. This variable should be studied to determine the extent to which it contributes to overall
knowledge. Additional study is needed to validate the findings of this and previous studies. The
instrument could be expanded to a regional or national audience. The current study focused on
an introductory legal environment of business course. Students in other disciplines should be
surveyed as well.

Although numerous questions still remain as to the impact of an active learning
environment on student learning in the university setting, this study does suggest that successful
active learning is not achieved simply by the enjoyment of the activity alone. Students may
report a more favorable experience from an active learning class, but for learning to occur, the
active learning method requires more from both the instructor and the students than traditional
lecture style pedagogy.

CONCLUSION

One primary concern in this study was the general question relating to the extent to which
an active learning classroom environment helps students learn concepts. This issue was
addressed by the first research question, which asks, based on test scores, to what extent is an active learning classroom environment more effective in helping university students learn concepts in a legal environment classroom than the traditional lecture pedagogical style?

An interesting result of the findings from this study is that there are no indications that an active learning classroom environment is more effective in helping university students learn legal environment of business concepts than the traditional lecture pedagogical style. In our analysis, no difference in levels of student learning was observed at the .05 level of significance. Not only was there no significant increase in learning for students who were taught by the active learning method of instruction versus students who were taught by the traditional lecture method of instruction, overall, using mean score as a measure, students who were exposed to the lecture method of delivery performed better than those exposed to active learning methods. Students who were exposed to the lecture method scored higher on 9 out of 18 test items. Students who were exposed to active learning methods outscored those exposed to the lecture method on 8 of the 18 test items. The scores were identical on one test item. While this is not a significant enough result from which to be able to generalize, it is certainly an indication that further study is needed in the area. These findings appear to be consistent with the literature that suggests that active learning and lecture methodologies are comparable in promoting the mastery of content.

One might surmise that these results may be due to student attitude and expectation. Clearly, many students believe that their responsibility is to be passive learners. They believe that it is the responsibility of the instructor to tell them the “important” information, usually in the form of a traditional lecture. It is their responsibility simply to acquire the information that is delivered by the instructor rather than by means of active learning where they take on the role of instructor through their own discovery. Further, in order for active learning to be successful, students must actively participate in the learning process, which starts with doing the reading and being prepared for class. This is especially true relating to topics where students are likely to have little to no personal knowledge or experience on the subject to bring with them into the classroom.

Perhaps the results favoring the lecture method of delivery were due to the fact that the PowerPoint slides used for the lectures and the questions on the test were prepared by the publishers of the textbook from which the test questions were drawn. Thus, students were at least exposed to some of the materials that were included on the test instrument. Conceivably, active learning students, through their own discovery may not have stumbled onto the important materials, which would have better prepared them for the test.

The fact that some students performed better with one style as opposed to the other may also be reflected in their preferred learning style. These results do not overwhelmingly favor one particular style of delivery over another. They show a need to experiment with employing different curriculum delivery techniques depending on content and class rather than a single pedagogical style. Further, if instructors choose to use an active learning environment in the classroom, there should be some controls put in place to ensure that students are knowledgeable and prepared before their arrival in the classroom. It is not enough to assume that because the material has been assigned that students will read it.
I. Introduction

A concerned municipal employee of Anytown, U.S.A. noticed that the Mayor renewed the city landscaping contract of Evergreen Landscaping, even though another bidder submitted a bid to do the work for half the price. Suspecting corruption, the employee contacted the FBI. After a thorough investigation, the FBI confirmed four things: (1) the Mayor had renewed the contract every year, despite better offers from competitors; (2) the Mayor and the owner of Evergreen had been friends since grade school and played on the same football team; (3) the Mayor owned a lawnmower dealership; and (3) the Mayor was reported by his staff to be exceptionally lazy. The Mayor did not “bite,” however when offered a bribe by an undercover agent posing as a competing landscaper, and his bank records showed no unusual cash deposits consistent with bribes or kickbacks.

Could the mayor be prosecuted for fraud? The answer depends on in large part on whether the above hypothetical occurred before or after the Supreme Court’s recent decision in United States v. Skilling.1 Prior to Skilling, many federal prosecutors would have employed Title 18, United States Code, §1346, a statute that criminalizes “honest services fraud.” Underlying that statute is the notion that people have a right to expect honest services from elected officials, corporate officers, and other individuals in positions of responsibility – and that the deprivation of that right constitutes a fraud. In Skilling, however, the Supreme Court curtailed the doctrine and found no crime exists under § 1346 without the receipt of an actual bribe or kickback.2

Does this mean prosecutors have no tools to address “honest services” fraud? Not necessarily. As discussed in this paper, prosecutors (and Congress) may have several viable ways forward. First, even in the absence of bribes or kickbacks, creative prosecutors may approach these cases under traditional mail and wire fraud statutes.3 While these statutes require the fraud be committed for the purpose of obtaining money or property, the definition of those terms is more open to interpretation. In the above hypothetical, the Assistant U.S. Attorney might subpoena the records of the Mayor’s lawnmower dealership. If a substantial part of the Mayor’s revenue came from sales and service contracts with Evergreen, the Mayor could be charged with committing a traditional scheme to defraud for monetary gain, even without any intentional bribe or kickback coming from Evergreen.
Second, Congress could pass new legislation to abrogate the Skilling and allow “honest services” prosecutions to resume under § 1346. Two bills to that effect are currently pending in the Senate and House respectively. Unless Congress successfully updates the law, however, some cases may still arise in which people deprived of honest services are left without a remedy. If, for instance, the Mayor granted the expensive contract to Evergreen simply because of his warm feelings toward the owner, no currently available statute would criminalize the behavior. The same problem would exist if the Mayor renewed the contract because he was too lazy to read the competing bid proposals. In either event, the people could vote the Mayor out at the next election, but would have no criminal redress under current post-Skilling law.

II. History of Honest Services Fraud

Enacted in 1872, the mail fraud statute contained a general prohibition against using the mails to initiate correspondence in furtherance of “any scheme or artifice to defraud.” Legislative history shows that the main purpose of this statute was to “protect the people from schemes to deprive them of their money or property.” The elements of mail fraud are (1) that the defendant devised or participated in a scheme to defraud, (2) that the scheme included a material misrepresentation, (3) that the defendant had the intent to defraud, and (4) that the defendant used the mail in furtherance of the scheme. The mailing element is relatively easy to meet and not a current point of controversy. If a defendant could have “reasonably foreseen” that a mailing would occur, then this element is met. The other primary element, “a deceptive scheme to defraud”, has been expansively interpreted by the courts since the inception of the statute.

In 1896, in Durland v. United States, the Supreme Court interpreted the phrase “any scheme or artifice to defraud” broadly in so far as property rights are concerned and held that the mail fraud statute included “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.” In 1909, Congress codified the Court’s holding in Durland giving further indication that the purpose of the statute was to protect property rights. Congress amended the statute by adding the words “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” after the phrase “any scheme or artifice to defraud.”

Because the phrase “any scheme or artifice to defraud” was disjunctive from the phrase “for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” after the phrase “any scheme or artifice to defraud.”

---

6 Id.
7 Neder v. United States, 527 U.S. 1 (1999); McNally, supra.
10 McNally, 483 U.S. at 357.
promises,” lower courts have construed the phrases independently and held that schemes to defraud are not limited to those causing deprivation of money or property. In other words, a scheme can have as its object the deprivation of an intangible right. The Fifth Circuit is credited with first presenting this intangible rights theory in Shushan v. United States (1941). In Shushan, the court reviewed the prosecution of a public official who supposedly accepted bribes from businessmen in exchange for urging the city to take actions that benefit the bribe payers. Although the city actually saved money from some of the actions, the court found this irrelevant in deciding whether intent to defraud existed. The court held that “[a] scheme to get a public contract on more favorable terms than would likely be got otherwise would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public.” It further stated: “No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an [sic] one must in the federal law be considered a scheme to defraud.”

The opinion in Shushan inspired the creation of an “honest-services” doctrine which, unlike other types of fraud, did not require the victim to have actually lost money or property. Over the years an increasing number of courts followed suit. In fact, until 1987 the Courts of Appeals uniformly held that “schemes to defraud include those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly.” Essentially, the lower courts interpreted the law to mean that government employees owed a duty to citizens to provide them with “honest services.” If a government employee breached this duty by not performing his duties honestly, and it was coupled with a use of the mail, then the employee committed “honest services” mail fraud. While most of the cases relying on Shushan involved bribery of public officials, some courts also recognized private-sector honest services fraud. These courts held that even a recreant private employee “c[ould] be prosecuted under [the mail fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment.

In 1987, the Supreme Court put a stop to the expansion of the honest services fraud doctrine, opining that Congress never intended the statute to be so far-reaching. In McNally v.

---

12 Id. at 358.
13 Shushan v. United States, 117 F. 2d 110 (1941); See also Skilling v. United States, No. 08-1389; 130 S. Ct. 2896 (2010).
14 Id. at 115.
15 Id.
16 Id.
17 Skilling, 130 S. Ct. at 2926.
18 Id.
19 McNally, 483 U.S. at 357; see also United States v. Clapps, 732 F.2d 1148, 1152 (CA3 1984); United States v. States, 488 F.2d 761, 764 (CA8 1973).
20 Kobrin, supra at 781.
22 United States v. McNeive, 536 F.2d 1245, 1249 (CA8 1976).
The Court held the phrase “any scheme or artifice to defraud” was not disjunctive from the phrase “for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,” and that Congress simply intended the statute to apply to false promises and misrepresentations as well as other schemes or artifices to defraud that actually involve money or property. While emphasizing that the mail fraud statute is limited to the protection of money or property rights, the Court specifically held it does not protect any other rights, including any “intangible right of the citizenry to good government,” unless Congress states this desire more clearly. The Court effectively invalidated the honest services fraud theory.

In an almost immediate response to the ruling in McNally, Congress passed 18 U.S.C. §1346 as part of the Anti-Drug Abuse Act of 1988. Section 1346 reads as follows: “For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible rights of honest services.” In a report entered into the Congressional Record after the final passage of the statute, the Senate Judiciary Committee stated that §1346 overturns McNally and the intent is to reinstate all of the pre-McNally case law. The report further stated the mail (§1341) and wire fraud (§1343) statutes “will protect any person’s intangible right to the honest services of another, including the right of the public to the honest services of public officials.”

Since its passage in 1988, prosecutors have used §1346 to bring mail and wire fraud charges against public officials for participating in fraudulent schemes that involve a government office or process. The most common of these cases involve giving or accepting bribes, failing to disclose conflicts of interest, and soliciting or receiving gratuities. In particular, the intangible rights theory has been applied to public corruption schemes, including election fraud, government embezzlement, and kickbacks.

Although critics of §1346 have continuously argued that it is unconstitutionally vague, every circuit court of appeals to address the issue to date has found Congress intended to enact an intangible rights theory. Many have specifically addressed and upheld the law’s constitutionality. Even the Supreme Court stated: “There is no doubt that Congress intended §1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals’

23 McNally, 483 U.S. at 356-359.
24 Id. at 359-360.
27 134 Cong. Rec S17, 376 (daily ed. Nov. 10, 1988); But see United States v. Brumley, 116 F.3d 728, 742 (5th Cir. 1997) (en banc) (Jolly & DeMoss, JJ., dissenting) (discussing the absence of any legislative history).
29 Id. at FN15-17 (discussing the various types of cases prosecuted under §1346).
30 Id. at FN18-20 (discussing the various types of cases prosecuted under §1346’s intangible rights theory).
31 Id. at 1101 -1102.
32 Id.
decisions before McNally derailed the intangible-rights theory of fraud.” However, the Supreme Court was not as quick to dismiss the challenges to the constitutionality of the statute and recently granted certiorari in a Fifth Circuit case, Skilling v. United States, 130 S. Ct. 2896 (2010).

III. Skilling v. United States

In 2006, Jeffrey Skilling, the former chief executive officer of Enron Corporation, was convicted of conspiracy to commit honest-services fraud, along with several other crimes. The government charged Skilling with conspiring to defraud the corporation and its shareholders by misrepresenting the corporation’s finances, and thus depriving them of the intangible right of his honest services. The jury found Skilling participated in a wide range of schemes to deceive Enron’s shareholders, and the investing public, as to the actual financial health of Enron by manipulating public financial reports and making false and misleading misrepresentations about the corporation’s finances. The government argued Skilling had received a benefit for his conduct in the form of a generous salary, bonuses, and shares of Enron stock, but did not claim Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. Even without the allegation of a bribe or kickback, the jury convicted Skilling of violating 18 U.S.C. §1346, the honest services fraud statute, along with other criminal law statutes. Skilling appealed the decision to the Supreme Court and among the many contested issues was the constitutionality of §1346. Skilling argued the statute was unconstitutionally vague on its face.

To survive a void-for-vagueness doctrine, “a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Skilling argued that the phrase “intangible right of honest services” did not adequately define what conduct it actually banned, and therefore facilitated opportunistic and arbitrary prosecutions. Skilling urged the Supreme Court to completely invalidate §1346.

The Supreme Court acknowledged Skilling’s argument had some merit, but refused to invalidate the statute because of the “strong presumptive validity that attaches to an Act of Congress.” As other scholars have noted, the Supreme Court does not readily condemn

33 Skilling, 130 S. Ct. at 2928.
34 Id. at 2899.
35 Id.
36 Id. at 2908.
37 Id. at 2905.
38 Id. at 2899.
39 Id. at 2927.
41 Skilling, 130 S. Ct. at 2928.
42 Id.
Congress’s enacted laws. Instead, the Court opted to limit the scope of the act holding “that §1346 should be construed rather than invalidated”. In its opinion, the Supreme Court acknowledged that Congress clearly meant to reinstate the honest service doctrine developed in the pre-McNally cases and thus, those cases should be examined to determine what Congress intended by the phrase “the intangible right of honest services.” In the vast majority of those honest services fraud cases, the offender was in violation of a fiduciary duty by participating in bribery or kickback schemes. In fact, even McNally, the case which prompted Congress to enact §1346, involved a kickback fact pattern. Thus, the Supreme Court concluded that §1346 could be salvaged by limiting its scope to the predominant pre-McNally applications, prosecutions alleging bribery or kickbacks. The Court held that allowing §1346 to apply to a wider range of offenses, however, would raise the due process issues concerning vagueness.

The Court refused the urging of the government to encompass in §1346 behavior such as the “undisclosed self-dealing by a public official or private employee – i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.” In the end, the Court held “that §1346 criminalizes only the bribe-and-kickback core of the pre-McNally case law.” It reiterated its statement in McNally: “If Congress desires to go further, it must speak more clearly than it has.” As a result, because the government did not charge Skilling with taking a bribe or kickback from a third party, but rather profiting through salaries, bonuses and stock, the Court found that Skilling did not commit honest services fraud under the now more limited interpretation of §1346 and remanded the case to be reheard on different issues.

IV. The Impact of Skilling on Recent Cases

In addition to Skilling, the Supreme Court heard two other similar cases on the same day, Black v. United States and Weyhrauch v. United States. In Black, the defendants were leading executives of Hollinger International, a publicly held U.S. company. They were convicted of mail fraud based on the government's charges that they stole millions of dollars from the company by fraudulently paying themselves phony “noncompetition fees” without disclosing

45 Skilling, 130 S. Ct. at 2928.
46 Id. at 2928-2929.
47 Id. at 2930.
48 Id. at 2931; See also, McNally, 483 U.S. at 352-353, 360.
49 Id.
50 Id.
51 Id. at 2932.
52 Id. at 2923 (quoting McNally, 483 U.S., at 360).
53 Id. at 2934.
their receipt of those fees and by failing to disclose such fees, they deprived the company of their honest services.\textsuperscript{56}

In \textit{Weyhrauch}, the defendant's conviction arose out of his activities as a member of the Alaska House of Representatives in 2006.\textsuperscript{57} During this time, VECO Corp, an oil field services company, took significant interests in pending state legislation that would have altered the state’s oil production taxation laws.\textsuperscript{58} According to the indictment, defendant Weyhrauch solicited future legal work from VECO in exchange for voting as the company instructed and taking other favorable action for the company. The government did not allege Weyhrauch received any compensation or benefits from VECO but instead charged Weyhrauch with violating § 1346, alleging that his relationship with VECO deprived Alaska citizens of their intangible right to his honest services as a government official.\textsuperscript{59}

In both \textit{Black} and \textit{Weyhrauch}, the Supreme Court granted certiorari on the question of whether 18 U.S.C. §1346, the honest-services fraud statute, “applied when a private individual's scheme to defraud did not contemplate economic or other property harm to the person to whom honest services were owed.”\textsuperscript{60} In the end, the Supreme Court elected only to address the validity of §1346 in \textit{Skilling} and remanded the other cases to be decided in light of its ruling in \textit{Skilling}.\textsuperscript{61}

After \textit{Skilling}, numerous other cases have been remanded to lower courts for the same reason.\textsuperscript{62} Lower courts have generally upheld the honest services fraud convictions when a bribe or kickback was involved, but overturned them where the conviction was based solely on a theory of an undisclosed self-dealing.\textsuperscript{63} For instance, in 2011, in \textit{United States v. Siegelman}, the 11th Circuit Court of Appeals addressed a case that was remanded by the Supreme Court.\textsuperscript{64} In considering the case in light of \textit{Skilling}, the court reversed the conviction of the defendants on two counts of honest services fraud and affirmed the conviction on two other counts of honest services fraud.\textsuperscript{65} The court held that in two of the counts, a bribery scheme existed and therefore, the ruling in \textit{Skilling} was not violated; on the other two counts, bribery was not proven and to

\textsuperscript{56} \textit{Black}, 130 S. Ct. at 2964.
\textsuperscript{57} \textit{United States v. Weyhrauch}, 548 F.3d 1237, 1239 (2008).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Margaret Ryznar, \textit{The Honest-Services Doctrine in White-Collar Criminal Law}, 34 Hamline L. Rev. 83, 92 (2011); See also Petition for Writ of Certiorari, \textit{Black}, 130 S. Ct. 2963 (No. 08-876) and Petition for Writ of Certiorari, \textit{Weyhrauch}, 130 S. Ct. 2971 (No. 08- 1196).
\textsuperscript{61} \textit{Weyhrauch}, 130 S.Ct. at 2971; \textit{Black}, 130 S. Ct. at 2965.
\textsuperscript{63} See e.g., \textit{United States v. Davidson}, No. 09-13388, 2010 U.S. App. LEXIS 20966 (11th Cir. Oct. 8, 2010) (reversing conviction because conduct formation basis of the conviction was solely undisclosed conflict of interest).
\textsuperscript{64} \textit{United States v. Siegelman}, 640 F.3d 1159 (11th Cir. 2011).
\textsuperscript{65} Id. at 1173-1176.
uphold a conviction on these counts under a theory of undisclosed self-dealing did violate the holding in *Skilling*.66

V. What Does the Ruling in *Skilling* Mean for the Future?

Although the *Skilling* decision has caused several cases to be remanded, it remains to be seen whether it has truly “gutted and eviscerated one of federal prosecutors’ favorite weapons.”67 The convictions in several of the remanded cases were upheld for other reasons suggesting prosecutors still possess a large array of tools with which to address “honest services” type crimes.68 For example, in *Hargrove v. United States*, the government had charged, and the jury convicted, the defendant of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 in addition to §1346, honest services fraud statute.69 The Supreme Court remanded the case so the lower court could reconsider whether the defendant would still be found guilty under §1346 given the finding in *Skilling*.70 Upon remand, the 7th Circuit Court of Appeals reinstated the judgment finding that even thought the case did not involve a bribery or kickback scheme as required in *Skilling*, the error was harmless.71 The court found that given the facts of this particular case, the jury could not have found the defendant guilty of honest services fraud without also finding him guilty of “money fraud”; therefore, the outcome would have been the same even without the honest service fraud charge.72

As in *Hargrove*, honest services fraud is rarely charged in isolation. However, even where honest services fraud is the only charge, much of the self-dealing and undisclosed conflicts of interest formerly prosecuted before *Skilling* could be recharacterized as bribery or kickbacks still chargeable under §1346.73 More importantly, *Skilling* has no effect on the “ordinary” mail and wire fraud statutes, §§1341 and 1343, respectively, and much of the unsavory behavior charged under §1346 can still be prosecuted under these statutes.74 For example, if a defendant has a duty to disclose material facts, such as an undisclosed conflict of interest, failure to do so may be enough to satisfy the fraudulent conduct described under the mail or wire fraud statutes.75

66 Id.
68 See *United States v. Hargrove*, 412 Fed. Appx. 869 (7th Cir. 2011); *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011);
72 Id. at 870.
74 Id.
75 Id.
In some unusual cases, however, Skilling may entirely prevent the prosecutions that could have proceeded under section 1346 before Skilling. In addition to the example of the Mayor in the opening hypothetical, one might envision various scenarios involving political lobbying. While a junket to a golf resort in Hawaii might constitute a “bribe” or at least “money or property,” what about the intangible promise not to fund a primary challenger? Are the citizens of a crime-ridden city deprived of honest services if their representative changes his vote to oppose a gun control measure because he fears the advertising clout of a gun-rights organization? Is a mining town defrauded when their an environmental group holds out the promise of “independent” ads in his favor, and casts the crucial vote to ban coal production in his own district? Because the “gain” to the official is difficult to quantify in such situations, a viable theory of prosecution may be elusive.

VI. The Future of Honest Service Fraud

As discussed above, it is unlikely that Skilling will have a major impact on the prosecution of most individuals culpable of depriving citizenry of honest services. Nonetheless, the honest services fraud statute will most likely continue to be a source of debate in both the courts and in Congress. If left to the courts, §1346 will probably remain applicable only to bribery and kickback schemes as dictated by the Supreme Court in Skilling. One possible response by prosecutors might be to argue for an expanded interpretation of the terms “bribery,” “kickbacks” and “property” to include less traditional benefits like goodwill or electoral support.76 Another more likely scenario would be an increase in reliance on long standing mail and wire fraud theories.

On the other hand, Congress may respond once again to the Supreme Court’s proclamation that: “If Congress desires to go further, it must speak more clearly than it has.”77 In fact, Congress has already begun to “speak more clearly,” by drafting new legislation to amend §1346 to include undisclosed self-dealing.78 The proposed bill, The Honest Services Restoration Act, introduced by Senator Patrick Leahy on September 28, 2010, suggests a two pronged approach criminalizing undisclosed self-dealing in both the public sector and the private sector.79 Senator Leahy stated the aim of The Honest Services Restoration Act was to not only restore the law to what it was before the Skilling decision, but strengthen it to allow prosecutors to combat public corruption and corporate fraud.80 A similar bill was also introduced in the

76 34 Hamline L. Rev. 83, 95.
77 Skilling, 130 S. Ct. at 2923 (quoting McNally, 483 U.S., at 360).
78 51 S. Tex. L. Rev. at 1133.
79 Id. (referring to Senate Bill number 3854).
House of Representatives. Only time will tell if Congress will pass this law as swiftly as it passed §1346 in response to McNally.82

VII. Conclusion

*Skilling* may have taken away a long-used tool from the government’s toolbox, but creative prosecutors can find ways to charge most offenses under other existing statutes or by proving the existence of a bribe or kickback. Only the frauds that truly result in no compensation or monetary gain to the defendant are affected. What will happen to the prosecutions of these cases in the future is up to Congress . . . and perhaps again the Supreme Court.

---

82 See Thomas-Library of Congress (Aug. 8, 2011), http://thomas.loc.gov/cgi-bin/thomas (indicating that the House bill 6391 and Senate Bill 3854, both called “The Honest Services Restoration Act,” have not yet been passed and are still in committees).
A HOLISTIC APPROACH TO LEGAL ENVIRONMENT OF BUSINESS COURSE ASSIGNMENT DESIGN

LEE USNICK*
RUSSELL USNICK**

At one time, the creation of a course assignment in a legal environment of business course was a simple matter of identifying an activity which promised to improve student achievement on a course learning objective. The current environment demands a wider focus including matters such as assessments, active learning, rubrics, missions, goals, multiple accreditation standards, and numerous other program and institutional factors. This paper argues that in this environment, a holistic approach to course assignment design offers significant advantages. Using a case example of a compliance interview assignment, the paper explores how a holistic, integrative course assignment design process enhances overall course quality while also addressing wider program and institutional objectives.

I. INTRODUCTION

A. Every Instructor Continuously Creates New Assignments

Some assignments have very short lives, while others may be used for many years. Historically, the course assignment creation process was often heavily ad hoc, evolutionary over time, a patchwork, and heavily focused on communicating substantive knowledge on a specific topic of that day or week. This has been especially true in legal environment of business courses where the material does not demand the strict linearity of topics such as algebra, and assignments are routinely revised on the fly to address gaps in student understanding. Formalized discussions on the theory of assignment creation have been around for years, but are, in reality, not very compelling reading when competing for the instructor’s attentions against vastly more interesting cases in strange torts or convoluted fraud schemes.

The authors were confronted with the need to create a new assignment for an introductory legal environment of business course several years ago. For many years, the multi-section course had a common assignment requiring each student to visit a court and write a report on the case observed. Owing to growing security at area courthouses, a growing number of foreign students, who composed a sizable portion of enrolled students, were taking failing scores on the assignment rather than expose themselves to the heightened security at the courthouses. Additionally, after many years of this same assignment, some judges were still very receptive, regularly inviting students back to their chambers to answer questions, while other judges and bailiffs were growing more uncomfortable with the presence of note-taking students.

* JD, MA, MSSW, Associate Professor, University of Houston-Downtown.
** JD, Dr.Env.Des., MA, Adjunct, University of Houston, and Principal, Usnick and Associates.
B. Assignments, Assessment, and Accreditation

The need for an alternative assignment arose at a time when the authors were heavily engaged in accreditation and assessment processes, and they determined to engage in a course assignment process which addresses those issues in a holistic manner. That which follows is an explanation of that process and is presented solely to illustrate a conceptual framework. The authors do not intend to prescribe a step by step process, but instead, present a case study of one attempt at holistic course assignment development where a wide range of considerations are incorporated.

C. Assignments, Quality Management, and Continuous Improvement

A wide literature exists addressing recent changes in university planning, operation, and evaluation. The changes underway have much in common with long-standing Total Quality Management (TQM) principles. As applied to the modern university, this trend expresses itself as the need for continuous assessment of every aspect of university functions integrated into a continuous process of improvement and alignment with missions and goals. The trend toward this approach seems immutable.

As the assessment of every part of the university increases, and as the need for proof of continuous improvement and alignment reaches into every corner of the university, the need to consider the role of each assignment will grow.

D. Assignments and Alignment

The current trend envisions a time when every assignment includes a delineation of how it relates to the course as a whole. Also, the assignment should relate to and align with the degree programs to which the course is attached. Eventually each assignment will need to demonstrate its relationship to department, college, and university visions, plans, goals, and objectives. Already, specific assignments are being correlated to specific regional and professional accreditation commission standards.

Some universities find themselves at the very beginning of this process, while others have fully developed processes in place. Proactively embracing this trend as it applies to legal environment of business courses offers many advantages. This paper outlines a process for an individual instructor to create, from scratch, a holistic, integrative course assignment design process in a very short time. Obviously, the process outlined here would need to be adapted to the systems in place at a given department, college, and university.

II. HOLISTIC ASSIGNMENT DESIGN PROCESS

The following discussion outlines one approach for a quick, individually created, individually instituted, integrative, holistic assignment design process.

A. Identify Assignment Objectives

Every assignment always has learning objectives. Pressure is growing to formally document not only those learning objectives, but also the process by which they are converted into actual assignments. The first step in any informal or formal assignment design process is to establish the initial base skills, actions, and knowledge the student is to derive from the assignment. As these are assembled, they should start with the minimum requirements for the assignment, and then consider desirable, but not required, outcomes that could be beneficial. The list could be very short or extensive. The next step is to separate the identified outcomes list into desired skills, actions, and knowledge outcomes. Further, the desired outcomes should include utilization of established rubrics, informing students in advance of the basis for grading, providing for meaningful instructor feedback, and, to the extent possible, allowing for self-assessment by the student. Finally, these objectives need to be expressed in a terse, condensed, single-subject format that can easily be used in a matrix or spreadsheet.

To create the alternative assignment to the court visit and report, we compiled a short list of essential components which included preparing a law based report, interfacing with the regional business community regarding legal and regulatory issues, preparing a written document which could be evaluated utilizing a standard writing rubric, engaging in evaluative critical thinking which could be evaluated utilizing a critical thinking rubric, gaining an appreciation of the need to follow rules, and engaging in active learning.

B. Identify All Desired Outcomes

Every university articulates numerous desired outcomes, many of which are formalized into an array of statements and documents. Each course has course level desired outcomes. These can be found in course learning objectives, course syllabus, catalog course descriptions, and other supportive documentation. Usually there are program level desired outcomes. These are often expressed as statements of desired outcomes for majors, for minors, and for emphasis areas. Additionally, they can be found in supporting documentation for course requirements, degree requirements, and increasingly in activities such as course and degree mapping where the distribution of responsibility for desired outcomes is identified and assigned across the program curriculum.

Usually, there are identifiable department, college, and university outcomes which can include university-wide general education, or common core, desired outcomes as well as departmental, college, or university elaborations of desired outcomes. These can be found in documents such as strategic plans, mission statements, and visions statements at department, college, and university levels.

---

Finally, relevant accreditation standards and documents indicate desired outcomes. These can be found in regional accreditation standards and related university statements regarding regional accreditation, professional and specialty accreditation standards, and related program or college statements regarding professional accreditation.

At this point, the instructor should consider any additional desired outcome parameters that could be useful in the assignment design process.

When the inventory of all of the pertinent sources of potential desired outcome statements has been compiled, it is necessary to convert these into a usable format. Most sources of desirable outcomes are in the form of long, complex sentences that incorporate multiple ideas. The authors found it necessary to undertake what we termed deconstruction whereby these complex statements were separated into their individual components resulting in very brief phrases addressing only a single desired student learning outcome for a given assignment. For example, we deconstructed a lengthy university mission statement into four simple desired student outcomes that were relevant for our assignment decision process. A lengthy university mission statement, when deconstructed for our course assignment design process, became the following mission based criteria: M1: students engage with the community, M2: develop student talents, M3: prepare students for success, and M4: student success in a dynamic global society.

C. Develop and Refine Assignment In Light of Desired Outcomes

The next step is to consider how the desired outcomes relate to the assignment under design. Our first step was to enter the list of desired outcomes into a spreadsheet to simplify the design process. To keep track of the source of the desired outcomes, we assigned codes for the sources. Hence, M1 became the first desired outcome deconstructed from the university mission statement, COBM1 the first from the college mission statement, AACSBS the first from AACSB desired outcomes, BBA1 the first from the degree desired outcomes, CO1 the first from the stated course objectives, and ASSIGN1 the first from the stated assignment desired outcomes. The resulting spreadsheet lists over 100 discrete desired outcomes relevant to the assignment design process and is included as Appendix 1.

We next assigned a score to every desired outcome reflecting our quick judgment as to the potential for linkage between the desired outcome and the assignment under design. This can be viewed in the first numerical column in the spreadsheet in Appendix 1. The numbers represent the quality of the possible relationship. A "1" connotes a likely major linkage potential, a "2" indicates a likely minor linkage potential, a "3" indicates a potential or occasional major linkage potential, and a "4" indicates a potential or occasional minor linkage potential.

Once the potential scores were assigned, we undertook a review of the implications of the information at hand and created the outline of an assignment which seemed to optimally address the set of desired outcomes. This process included inquiring as to ways to include more desired outcomes, ways to address multiple outcomes with a single assignment task, and ways to make the assignment a more valuable student experience. This scoring activity created the opportunity to refine the assignment elements to address additional desired outcomes, and to focus the assignment elements to clearly achieve certain desired outcomes.

The result of this process was the decision to implement a "compliance interview" assignment which requires the student to undertake an interview with someone in business regarding the role that compliance plays in the interviewee's work.\textsuperscript{15}

\textit{D. Add Means of Communicating, Assessing, and Evaluating}

At this stage we were now ready to address how this assignment could be graded and how our evaluations could be communicated to the student. Some of the key desired outcomes called for the use of established rubrics for evaluating student writing skills and evaluative critical thinking skills. Elements of these documents became part of the assignment scoring rubric. The process served to encourage us to try to make clear to students what is expected of them, exactly how they would be evaluated, and exactly what outcomes we expected their work to competently demonstrate.

The act of creating the desired outcomes list reminded us of the importance of creating an evaluation and assessment trail within our assignment. The frustration that we encountered in constructing an assessment vehicle fortuitously resulted in adding a student self-assessment element to the assignment. This was initially included because of our inability to identify simple means of assessing the assignment's impact on student learning. Over time, the student self-assessment element has become one of the most valuable parts of the assignment for the student.

\textit{E. Establish Continuous Improvement of Learning}

Finally, acknowledging that the value of the quality management process necessitates continuous feedback, continuous assessment, and continuous improvement of the assignment, we regularly re-visit the assignment in light of changing desired outcomes, practical assignment glitches, and suggestions gleaned from student course evaluations. As a result of our most recent continuous improvement assessment of this assignment, we concluded that the assignment statement was far too lengthy. We have revised the assignment several times, significantly shortening it each time.

\section*{III. HOLISTIC ASSIGNMENT DESIGN PROCESS OUTCOMES}

\textit{A. Expected Outcomes}

Approaching the course assignment design process in this holistic manner has served nearly all of our original reasons for undertaking it. In this case, we undertook the process because we did not have a simple answer to the problem at hand. The process did give us an avenue for thinking creatively and integratively about alternative solutions. Certainly the resulting assignment is not radically innovative nor is it without problems. It is, however, integrated into and aligned with the full spectrum of stated desired outcomes within this university setting. Additionally, the resulting documentation of effects on desired outcomes has proven useful in a variety of ways ranging from relationship to other course assignments to documenting the extent of integration with desired outcomes at all levels of the university.

\textit{B. Unexpected Outcomes}

The most surprising outcome has been the numerous reports from students of job offers, promotions, and enhanced job standing. In some part this is due to the fact that some students embrace

\textsuperscript{15} See Appendix 2.
this assignment and use it as an excuse to meet and interview people in business that they would not otherwise have a reason for meeting. Additionally, the research component of the assignment where students gain some understanding of the regulatory environment of the industry of their interviewee, often results in students making a positive impression on the interviewee.

The second surprising outcome has been how much the instructor gains from reading and evaluating these reports. The "pulse of the street" value of some of these reports is very high. In addition, even mundane reports often contain unexpected insights. Each semester, reading the reports is a favorably anticipated activity.

The third surprise is the extent of learning that occurs regardless of the level of student investment in the assignment.16 Some students take the high path and manage to secure great interviews with high level executives in large organizations. Their take-away is often outstanding on many levels. The bulk of the students take the middle-of-the-road approach to the assignment and in doing so, gain a good sense of the nature of the day-to-day world where compliance issues are growing more important. Of course, some students try to find the easiest path and try to do the absolute minimum required. Often these students learn more from the assignment than anyone as they discover that a small, simple corner business, run by a friend of the family, is in fact swamped with an array of complex compliance issues confronting the owner daily.17

Finally, the use of the holistic assignment design process resulted in the students receiving a lengthy assignment sheet. Interestingly, after interviewing real world workers about compliance, fulfilling the complex requirements of the assignment has become itself a study of how compliance with regulations works, very similar to the kind of compliance issues their interviewees face in their regulated businesses.

IV. CONCLUSION

In a university setting that is quickly evolving into a continuous quality improvement operation at all levels, a little time is well spent designing assignments and documenting the design process, thereby giving the instructor an opportunity to have proof of both process and product. Much of what occurs here occurs in every assignment design process, but because of the absence of evidence and a record of a formal design process, the credibility of the assignment is often discounted and trivialized. Further, the process actually does result not only in better student learning, but more importantly, provides an ongoing framework for continuously evaluating and improving student learning.18

Simply, the use of this process resulted in students receiving a heightened experiential, active learning, hands-on introduction to the real world of rules and regulations. The total time required for an instructor to undertake this process for the first time starting with nothing is less than a day. Once the inventory of desired outcomes is in place, the required effort for the next assignment design or review process is often less than an hour.

<table>
<thead>
<tr>
<th>Appendix 1: Assignment Design Using Goals &amp; Objectives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goals and Objectives By Source</td>
</tr>
<tr>
<td><strong>University Mission Statement</strong></td>
</tr>
<tr>
<td>M1 engages with the community</td>
</tr>
<tr>
<td>M2 develop students' talents</td>
</tr>
<tr>
<td>M3 prepare them for success</td>
</tr>
<tr>
<td>M4 success in a dynamic global society</td>
</tr>
<tr>
<td><strong>Strategic Plan Mandates</strong></td>
</tr>
<tr>
<td>SP1 Challenging educational experiences</td>
</tr>
<tr>
<td><strong>College of Business Mission Statement</strong></td>
</tr>
<tr>
<td>COBM1 Reality-based business education</td>
</tr>
<tr>
<td>COBM2 Educate diverse population</td>
</tr>
<tr>
<td>COBM3 Educate Texas Gulf Coast Region</td>
</tr>
<tr>
<td>COBM4 Prepare students for business leadership</td>
</tr>
<tr>
<td>COBM5 Communicate effectively</td>
</tr>
<tr>
<td>COBM6 Think critically knowledge.</td>
</tr>
<tr>
<td>COBM7 Possess core business knowledge.</td>
</tr>
<tr>
<td><strong>AACSB Objectives and Standards</strong></td>
</tr>
<tr>
<td>AACSB1 global context for business</td>
</tr>
<tr>
<td>AACSB2 environmental context for business</td>
</tr>
<tr>
<td>AACSB3 political context for business</td>
</tr>
<tr>
<td>AACSB4 legal context for business</td>
</tr>
<tr>
<td>AACSB5 regulatory context for business</td>
</tr>
<tr>
<td>AACSB6 individual ethical behavior in orgs</td>
</tr>
<tr>
<td>AACSB7 individual ethical behavior in society</td>
</tr>
<tr>
<td>AACSB8 community responsibilities in orgs</td>
</tr>
<tr>
<td>AACSB9 Mgt responsive - ethnic diversity</td>
</tr>
<tr>
<td>AACSB10 Mgt responsive - cultural diversity</td>
</tr>
<tr>
<td>AACSB11 Mgt responsive - gender diversity</td>
</tr>
<tr>
<td>AACSB12 Statistical data analysis - decision-making</td>
</tr>
<tr>
<td>AACSB13 Mgt science -decision-making</td>
</tr>
<tr>
<td>AACSB14 Information acquisition for business</td>
</tr>
<tr>
<td>AACSB15 Information management for business</td>
</tr>
<tr>
<td>AACSB16 Information reporting for business</td>
</tr>
<tr>
<td>AACSB17 Information mgt/decision support - accounting</td>
</tr>
<tr>
<td>AACSB18 Information mgt/decision support - production</td>
</tr>
<tr>
<td>AACSB19 Information mgt/decision support - distribution</td>
</tr>
<tr>
<td>AACSB20 Information mgt/decision support - HR</td>
</tr>
<tr>
<td>AACSB21 Value - integrated production of goods</td>
</tr>
<tr>
<td>AACSB22 Value - integrated production of services</td>
</tr>
</tbody>
</table>

1=major direct potential, 2=minor direct potential
3=major indirect potential, 4=minor indirect potential
## Appendix 1:
### Assignment Design Using Goals & Objectives

(Continued, Page 2)

<table>
<thead>
<tr>
<th>Task:</th>
<th>Prepare</th>
<th>Research</th>
<th>Interview</th>
<th>Write</th>
<th>Assess</th>
<th>Feedback</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall Potential</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
</tr>
</tbody>
</table>

### Goals and Objectives By Source

| AACSB23 Value - integrated production of information | 4 |
| AACSB24 Value - integrated distribution of goods | 4 |
| AACSB25 Value - integrated distribution of services | 4 |
| AACSB26 Value - integrated distribution of information | 4 |
| AACSB27 Group dynamics in organizations | 3 3 3 3 3 4 |
| AACSB28 Individual dynamics in organizations | 3 |
| AACSB29 Human resource management | 3 3 3 3 3 4 |
| AACSB30 Human resource development | 4 |
| AACSB31 Finance theories | 4 |
| AACSB32 Finance methods | 4 |
| AACSB33 Financial reporting | 3 3 3 3 3 3 4 |
| AACSB34 Financial analysis | 4 |
| AACSB35 Financial markets | 4 |
| AACSB36 Strategic mgt - organizational environment | 1 |
| AACSB37 Decision-making - organizational environment | 2 2 2 2 1 |

### Degree Specific Objectives/Requirements

| BBA1 Effective Written Communication | 1 1 1 1 |
| BBA2 Effective Oral Communication | 1 1 1 |
| BBA3 Critical Thinking – Inductive Reasoning | 1 1 1 1 1 4 |
| BBA4 Critical Thinking – Deductive Reasoning | 4 |
| BBA5 Critical Thinking – Analysis | 1 1 1 1 |
| BBA6 Critical Thinking – Inference | 1 |
| BBA7 Critical Thinking – Evaluation | 1 1 1 1 1 1 |
| BBA8 Core Ethical/Social responsibilities | 3 3 3 3 3 3 |
| BBA9 Core legal in responsibilities | 1 1 1 1 1 1 |
| BBA10 Core legal environment | 2 2 2 2 2 1 |
| BBA11 Core regulatory environment | 1 1 1 1 1 1 |
| BBA12 Core bus. relationships, ethics and social resp. | 3 3 3 3 |

### Course Catalogue Description Specifications

| BA 3301-1 Introduce business law | 1 1 |
| BA 3301-2 Intro legal environment - domestic business | 1 |
| BA 3301-3 Intro legal environment - international business | 3 3 |
| BA 3301-4 Intro ethical environment - domestic business | 3 3 3 3 |
| BA 3301-5 Intro ethical environment - international business | 3 3 |
| BA 3301-6 Describe American legal system | 4 |
| BA 3301-7 Describe crimes | 4 |
| BA 3301-8 Describe torts | 4 |
| BA 3301-9 Describe contracts, | 4 |
| BA 3301-10 Describe agency and legal liability | 1 1 1 2 2 |

1=major direct potential, 2=minor direct potential
3=major indirect potential, 4=minor indirect potential
Appendix 1:
Assignment Design Using Goals & Objectives

(Continued, Page 3)

<table>
<thead>
<tr>
<th>Task:</th>
<th>Task:</th>
<th>Task:</th>
<th>Task:</th>
<th>Task:</th>
<th>Task:</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prepare</td>
<td>Research</td>
<td>Interview</td>
<td>Write</td>
<td>Assess</td>
<td>Feedback</td>
<td>Potential</td>
</tr>
</tbody>
</table>

Goals and Objectives By Source

BA 3301-11 Describe business organizations 4
BA 3301-12 Describe governmental regulations 1 1 1 1 1 1 1

Course Learning Objectives

| CO1 Knowledge - legal environment of business | 1 | 1 |
| CO2 Knowledge - U.S. Legal System | 1 |
| CO3 Knowledge - law origins | 4 |
| CO4 Knowledge - hierarchy of authority | 1 1 1 |
| CO5 Knowledge - legal principles | 1 |
| CO6 Knowledge - legal practices | 1 1 1 1 1 1 1 |
| CO7 Knowledge - regulatory environment of business | 1 1 1 1 1 1 |
| CO8 Knowledge - U.S. court system | 4 |
| CO9 Knowledge - court organization | 4 |
| CO10 Knowledge - court authority | 4 |
| CO11 Knowledge - court practices | 4 |
| CO12 Knowledge - local court system | 4 |
| CO13 Knowledge - local court practices | 4 |
| CO14 Critically apply legal principles | 1 1 1 1 1 |
| CO15 Critically apply legal theories | 1 1 1 1 1 |
| CO16 Critically analyze legal rights-business | 1 1 1 1 1 |
| CO17 Critically analyze legal rights-personal | 1 1 1 1 |
| CO18 Understand legal impact on business | 1 1 1 1 1 1 |
| CO19 Understand regulatory compliance impact | 1 1 1 1 1 1 |
| CO20 Understand non-compliance civil sanctions | 1 1 1 |
| CO21 Understand non-compliance criminal sanctions | 1 1 1 |
| CO22 Written communication skills | 1 1 1 |
| CO23 Ethical/moral standards | 3 3 3 |
| CO24 Responsibilities in organizations | 1 1 1 |
| CO25 Responsibilities in society | 3 3 3 |
| CO26 Law-Ethics relationship | 1 1 1 |
| CO27 New Technologies knowledge | 4 |
| CO28 New Technologies use | 4 |

Specific Assignment Learning Objectives

| Assign1 Prepare law based report | 1 |
| Assign2 Interface with community re law | 1 |
| Assign3 Utilize Writing rubric | 1 |
| Assign4 Utilize Critical Think-Eval rubric | 1 1 1 |
| Assign5 Appreciate need to follow rules | 1 1 1 1 1 |
| Assign6 Engage in active learning | 1 |

1=major direct potential, 2=minor direct potential
3=major indirect potential, 4=minor indirect potential
Appendix 2. Compliance Interview Assignment

Compliance Interview and Report Assignment

I. ASSIGNMENT OVERVIEW

Virtually all business activities conducted in the United States are highly regulated, not only by governmental entities, but by professional entities as well. Compliance with all federal, state, and local laws and regulations is a prerequisite to the long term health and survival of a business. Equally important is a business's compliance with standards issued by the professional and accrediting bodies responsible for licensing and certification. Certain industries are more regulated than others. For example, health care, financial services, and public utilities are all highly regulated with extensive licensing and operational standards. When a business fails to comply with all applicable regulations and standards, the business and the individuals who manage it can face a variety of sanctions, from loss of license and program certification, to civil and criminal sanctions that include monetary penalties and prison.

In this assignment, you will learn how someone in your selected industry meets the challenges of current compliance requirements. It is not necessary to address all aspects of compliance in this industry or selected company. Rather, you should educate yourself in broad terms about the kinds of governmental and industry standards covering your interviewee's business, then select a few key aspects to explore in depth with your research and your interviewee. As you learn about the current state of regulatory affairs in this industry, you should gain insight about the current and future compliance activities in that industry.

II. LEARNING OBJECTIVES

By completing this assignment, students will accomplish the following:

Increase awareness of the U.S. regulatory environment generally, and of compliance within a specific industry;

Demonstrate knowledge of current legal compliance issues in a select business function;

Experience directly the scope and significance of compliance through an interview with an industry profession responsible for compliance functions;

Articulate the interviewee's insider views of compliance in the selected industry as well as possible future requirements for compliance;

Demonstrate critical thinking (evaluation) skills by articulating the student's personal observations about, as well as reactions to, compliance as a component of professional business practice (as assessed by the College of Business' Critical Thinking-Evaluation Rubric, included in the course syllabus and incorporated into the Assignment Grade Form);

Demonstrate effective written communication skills (as assessed by the College of Business' Writing Rubric included in the Course Syllabus and incorporated into the Assignment Grade Form).

III. STEPS FOR COMPLETING THE INTERVIEW AND REPORT

A. Select a business/industry. Identify a business/industry in Houston that is of interest to you. Almost any business/industry is appropriate except for the following enterprises: nail salons, beauty and barber shops, convenience stores and gas stations, and law firms and CPA firms. If you are in doubt about your selection of interviewee and his/her industry, please ask before proceeding with the assignment.

B. Learn about Compliance. For background information on Compliance generally, read the items listed below. You do not need to read each one in detail, nor will you be required to include this material in your report. The purpose is to educate you about sources that serve as a portal to primary sources for future use. I find them all very interesting, and after looking at each, you will have a good overview of the increasing significance of compliance for U.S. businesses.
(1) Google Compliance. Select the first entry, "Compliance – Wikipedia." [NOTE: NEVER quote from or cite Wikipedia in any academic or professional paper; it is not a credible academic research source!]
(a) Select "Compliance (regulation)." Read the first paragraph.
(b) Select "2. Compliance in the U.S." and read this paragraph.
(c) Open the link for the "U.S. Sentencing Guidelines" and read the paragraph.
(d) Go back 1 page to "Compliance in the U.S." and open the link "Ch. 8 of the Federal Sentencing Guidelines." Under "Chapter 8 Guidelines" open the link "Effective Compliance and Ethics Program." Read this description of what constitutes an effective compliance program for a regulated business. The importance of having such a program is that it can help an out-of-compliance company avoid criminal prosecution, or, if prosecuted and found guilty of criminal conduct, it can reduce the number of months/years responsible parties must spend in prison. [NOTE: Do not quote from or cite Wikipedia in any academic or professional paper; it is not a credible academic research source! You will lose points if you do so.]

(2) An interesting federal government site is www.dol.gov/compliance, especially the "Compliance Assistance Resources" link on the left side of the page.

(3) Compliance is now a profession. For information on the compliance industry generally, check out
(a) www.compliancesearch.com/newsite/index_main.shtml
(b) www.careerbuilder.com. Type in the jobs box "compliance officer management." Type "Houston, TX" in the location box, then hit Search. Open up a few of the job postings to get an idea of what this industry is all about.
(c) Visit www.corporatecompliance.org to learn how to achieve professional certification in corporate compliance and ethics. This certification can be a stepping stone for career change and/or enhancement, regardless of the industry you work in.

(4) Some industries are more advanced in their compliance efforts than others. The health care industry is a perfect example. Check out the Health Care Compliance Association at http://www.hcca-info.org. On the left, select "About HCCA" and read. On the right of this page, select "Attain the CHC Certification" and check this out. You might find it interesting, especially if you already work in the health care industry. For the accounting majors, please see an interesting article relating to compliance and ethics certification in the accounting profession by Joshua H. Leet, “Have You Considered a Compliance and Ethics Career?” available at http://accounting.smartpros/com/x56154.xml.

(5) There are numerous associations whose sole focus is assisting businesses in compliance activities. For example, the Open Compliance and Ethics Group is a large non-profit engaged in compliance and ethics support activities. Visit the website at http://www.oceg.org.

C. Select your Interviewee. Contact a person working in your selected industry who has NOT been interviewed previously for this assignment. The person must be knowledgeable.

D. Learn about Compliance in Interviewee's Industry. Before the interview, explore compliance generally in your Interviewee's industry. For example, if you are interviewing someone in banking management, you should first read about the major laws and regulations (federal and state) governing the banking industry. (If you are unsure how to conduct this type of search, contact the Library's Research Librarian for guidance to industry data bases). You should read enough so as to sound knowledgeable when conversing with your Interviewee, demonstrating that you prepared for the interview by educating yourself on the big picture for that industry. Note that the majority of this assignment addresses government regulations (federal, state, local), not the standards of professional certifications or accreditation for a particular industry (such as ISO Standards). Though the later are interesting, they do not generally involve violations of law resulting in civil and/or criminal penalties. Remember, this course is about the legal environment of business, so focus on federal, state, and/or local regulations. You may include only one or two sentences about non-governmental professional standards as they relate to compliance with statutes, regulations, and ordinances in the selected industry. Do not focus on the industry generally, or on the history of the Interviewee's business. You are not writing an Industry Analysis as you would for your Management classes. Rather, focus on the compliance activities of your Interviewee.

E. Conduct the interview. After educating yourself about compliance generally, and about your Interviewee's industry specifically, conduct your interview by asking questions of a general nature, questions that the Interviewee can answer without disclosing or opining on confidential information. Once you review the report format, you will gain a sense of the kinds of questions to ask.
F. Format of the Report. Using the format below, complete your report by summarizing your findings from the interview, and recording your thoughts and opinions on compliance. Be sure to answer each question listed below.

NOTE: INTERVIEWEE CONSENT. You must obtain your Interviewee's written consent for disclosure of your report to me. That is, you must clearly explain to your Interviewee that the report will be submitted as a course assignment, with submission through the course website which is maintained on the University server. It will be reviewed by the course professor for the purpose of grading student work. It may also be reviewed internally or externally for assessment and accreditation purposes, or for evaluation of my teaching. No other use is intended. HOWEVER, THE STUDENT, THE PROFESSOR, AND THE UNIVERSITY MAKE NO GUARANTEE OF ANY KIND RELATED TO CONFIDENTIALITY. Clearly instruct your Interviewee to refrain from disclosing any confidential or proprietary information in the interview, even in an "off-the-record" context. If such material is inadvertently disclosed to you, DO NOT include it in your report, and do not repeat it to anyone.

IV. INTERVIEW GUIDELINES

Do not ask any questions about CONFIDENTIAL or PROPRIETARY information. Should it be disclosed, do not include it in your report, and do not disclose it. For example, do not ask, "Are you currently being prosecuted by the federal or state government for non-compliance?" Do not ask about past or present litigation of any kind. Your Interviewee must have some kind of compliance responsibilities within his/her organization that are conducted on a routine (daily, weekly, and/or monthly) basis. These responsibilities can be very specific or very broad and general. The Interviewee’s actual job title is not important; the job activities are. The organization can be a large corporation, a family-owned business, a sole proprietorship. In other words, almost any business enterprise is appropriate. Do not select nail salons/beauty/barber shops, convenience stores/gas stations, law firms/CPA firms. If you are unsure about the business, ask me. You should not schedule your interview until after you prepare by familiarizing yourself with your Interviewee's industry; otherwise, you may be unable to fully address your Interviewee's compliance responsibilities in a meaningful way. Details you should be familiar with include the names of federal and/or state and/or local agencies that regulate this business activity, a few specific laws and regulations your Interviewee’s activities relate to, and any other details your Interviewee thinks important (which you can explore after completing the interview). You do not need to explain these laws and regulations in great detail, but you should convey to your reader a general understanding of their requirements. In other words, you do not need a detailed explanation of every regulation your Interviewee works with, only a few of the most important. A general overview or description is sufficient. NOTE: Never ask about current or past lawsuits. Set an interview time and be punctual. Please dress in appropriate business attire. You represent the University and the College of Business, and you are a professional, so dress accordingly. You never know: this could be a potential employment opportunity, so look your best and do your homework on compliance prior to the interview!

V. REPORT GUIDELINES

Depending on your interviewee, you may or may not be able to address in depth each item in the list in Item VII. below. If this is the case, do not worry. Address as many as you can; if the item is not relevant, just say so. If you drop a topic area, add a new one. Feel free to add topics you or your Interviewee feel are relevant, or ask your Interviewee to comment on any area he/she thinks is important to the discussion.

VI. REPORT DETAILS

The report should be written and submitted in a manner consistent with the following specifications:

A. Complete Sentences
Use complete sentences, though listing of specific duties is permitted. See the Writing Rubric posted at the end of the course syllabus for guidance on writing mechanics to be assessed. Your Report grade will be scored according to the Grade Form linked on the website to this assignment. Take advantage of the writing tutors in the Writing Center of the Academic Skills Lab (920N). Call 713-221-8669 for an appointment. Online assistance is available for students unable to visit the Center in person. Contact the Virtual Writing Center at writingcenter@uhd.edu for details. Points will be deducted for errors in writing mechanics.

B. Mandatory Topics
See the topics you must address below in Item VII. You may include additional topics. If so, use a topic subheading in your report.

C. Format in Narrative, Not Question-Answer Format
This assignment asks you to demonstrate Critical Thinking-Evaluation skills by synthesizing your research and information from your Interviewee to form a comprehensive understanding of regulatory compliance in this industry. See the College of Business’ Critical Thinking-Evaluation Rubric in the course syllabus, and review its components on the Grade Form for this assignment. Use transitions to create a comprehensive report that flows from relevant topic to relevant topic. Your Report grade will be scored according to the Grade Form, and numerous errors on one or more of the rubric competencies will lower your score.

D. Report Length
The body of your report must be a minimum of 4 single-spaced pages (12 point Times Roman font, 1 inch margins for all margins). A separate page will serve as the title page and is described below. Do not count the title page as one of your 4 pages. You may exceed the minimum length if needed.

E. Cite Your Sources!
Use citations to correctly identify your sources of information. You must give credit to authors whose ideas, information, or quotes you include in your report. If you are unclear on proper citation style, see the University's Library homepage (linked from Student E-Services) on “Citing Sources.” NOTE: Be careful to avoid plagiarism. Plagiarism is a violation of University's Academic Honesty Policy and will result in a grade of ZERO and other possible administrative action such as receiving an F in the course and/or dismissal from the College of Business.

F. Additional Topics
Additional topics may be addressed. That is, you may include your own questions in addition to the minimum mandatory topics listed below. Questions should focus on the general legal environment of business, not on personal issues (such as how much a person earns) or sensitive issues (such as whether the company has been sued before, whether the Interviewee will go to jail if the company fails to comply). Please email your additional questions to me before using them in an interview.

VII. MANDATORY TOPICS to be addressed
Each topic will constitute a subheading in your report. If your Interviewee cannot address a topic, include the subheading, then state that the Interviewee is unable to address it. For each topic you do not address, you must add another one. Consequently, you will have the same minimum number of items substantially addressed in your completed report.

A. Brief Overview of the Industry
Describe generally the Interviewee's industry and the scope of regulation in this industry. Take care to distinguish between governmental regulation and voluntary industry quality-based (accreditation) standards. This report should concentrate on governmental regulation, not industry standards (though these can be mentioned in one or two paragraphs). Identify several federal, state, local agencies that write regulations for this industry, and key laws and administrative agency regulations impacting this industry. State the general purpose of each law you cite, and identify by name the administrative agency regulations you are discussing. You could then ask the Interviewee to describe how one or more of these laws and/or regulations affects his/her company. This topic should not exceed one-half to two-thirds of one page.

B. Interviewee's Job Title and Basic Responsibilities
State the Interviewee's job title and basic day-to-day responsibilities. If the Interviewee is willing to explain the percentage of time focused on compliance-related activities, please include this.

C. Interviewee’s Compliance Activities
Describe generally several of kinds of regulatory compliance activities performed by the Interviewee. To give your reader a better understanding of the regulatory environment of this business, you could select one or two laws or regulations to describe in detail, and then describe the Interviewee's job assignments related to these particular laws or regulations. Has the amount of time devoted to compliance activities changed much in the past 5 years? 10 years? In what areas have these changes occurred? What caused these changes to occur?

D. Keeping Current on Regulatory Changes
Ask the Interviewee to describe how he/she stays informed of changes in laws and regulations. Can he/she give you the name of industry publications that you could access? Does the company provide training? Is the Interviewee a member of a professional organization, and if so, does this organization provide regulatory guidance?

E. Compliance and Ethics Programs
Does the company have a formal Compliance Program? Does the company have a Code of Ethics? If so, can he/she share the Code with you? If the answer is no to both of the above, how would the Interviewee describe the ethical climate of the business? How does the Interviewee view the roles of law and ethics in this business? Are they the same or different? Does the Interviewee have professional certification as a Compliance Officer or Compliance Professional? If so, please ask the Interviewee to describe how he/she obtained this certification, from which organization?

F. Interviewee's View of the Future
What does the Interviewee see regarding regulations in the next couple of years? In the longer term such as 5-10 years? More regulation? Less regulation? In what area(s)? Why does he/she think this way?

G. Interviewee's Training and Advice to Student
Does the Interviewee have specialized training in his/her compliance activities? Certifications? What advice regarding compliance would the Interviewee give to the student? In the Interviewee's opinion, should the College of Business offer a course in Compliance? In his/her opinion, are changes needed for this industry? Why or why not?

H. Student's Opinion on Compliance Activities in Interviewee's Industry
(1) Based on your research prior to the interview, your Interviewee's responses, information learned from class and the textbook readings, and on your personal experience with regulatory compliance, describe your personal opinion on compliance activities in this industry. Be specific in explaining why you think the way you do about regulatory compliance in this industry. If you believe the regulatory environment should be different, please suggest changes and your reasons for them.
(2) Based on all of the above, describe your view on the regulatory environment of business in the U.S. Are you interested in someday becoming involved in compliance on the professional level, perhaps even obtaining certification as a Compliance Professional in your industry? Why or why not?

I. Most Important Lessons
(1) What is the one most important "lesson" you learned from this assignment with regard to the laws that govern this industry? Has your view about the overall regulatory environment of U.S. business changed as a result of this assignment? Why or why not?
(2) What are the most important lessons learned from this class? Do you think you would benefit from a second semester of business law? Why or why not?

J. Title Page
The Report's title page (a separate page from the 4 pages of the report) must contain the following information in the following format:
Student Name:
Course Name and CRN:
Interviewee's Name and Job Title:
Interview's Company Name and Street Address:
Interviewee's Phone Number/Email:
Interview Date:
Report Submission Date:
NOTE: Failure to include all Interviewee information (for randomly selected interview verification purposes) will result in a loss of 5 points.

VII. REPORT SUBMISSION REQUIREMENTS
A. Save your report as a Rich Text Format (rtf) file. Name the report (your last name)_(your first name)_(Report). Example: Smith_Bill_Report. Do not use ( ) around your names.
B. Submit your report as an attachment to the Assignment Drop Box in Blackboard. Submitting your report after the deadline to my university email will not count as a submission and I will not read it.
THE UNITED STATES: LAND OF OPPORTUNITY OR LAND OF DECEPTION?

NICHOLE GRIFFIN *
LEVON E. WILSON +

I. ABSTRACT

Human trafficking is a grave violation of human rights and human dignity. It causes harm to millions of persons around the world. Individuals are trafficked and exploited in numerous workers industries, ranging from the sex trade to a variety of labor settings, including manufacturing, construction, agriculture, mining and quarrying, fishing and domestic service. Your locale is not immune; human trafficking persists in our own communities. Attempts at combating this modern-day form of slavery require efforts from all segments of society, and attorneys are well-positioned to play an important role. This article provides an overview of the problem of human trafficking and associated money laundering issues. The authors briefly review current anti-trafficking laws and discuss ways that lawyers can contribute to efforts to curb the tide of human trafficking.

II. INTRODUCTION

Maria, a 15-year-old Honduran girl, and her two friends were approached by two well-dressed men claiming to be businessmen and offering to take them to the United States to work in a factory. After arriving in Houston, the girls were not sent to work in a factory but brothels disguised as bars instead. The girls were held captive, raped, and beaten daily if they did not make enough money. Men who came to the bar to have sex with the girls were able to pay for a mattress, paper towels, and spermicide. Maria was able to escape after six years, but her two friends are still missing. Maria is just one of the many victims of human trafficking each year. Human trafficking has become a “multibillion dollar form of modern-day slavery”.

Because human trafficking is such a lucrative business, traffickers commonly need to carry out money laundering schemes in order to hide their illegal profits. Many methods of money laundering are used to transfer illegal funds through financial systems and out of the

---

* Nichole Griffin, MAcc Candidate (2013), is a graduate student at Georgia Southern University, Statesboro, GA
+ LeVon E. Wilson, J.D., Ed.D., is a Professor of Legal Studies at Georgia Southern University, Statesboro, GA
2 Id.
4 Id. at 24.
5 Id.
6 Id.
7 Id.
country. With the developing technology of financial systems, money can move domestically and internationally with no effort. Although laws have been set in place to deter and prevent money laundering, traffickers are finding new ways to avoid the traditional financial systems and keeping their funds hidden.

Money laundering and human trafficking are global issues fueled by people’s desire for money. Because companies and individuals conduct business internationally, having money and humans crossing the borders each day seems to be a normal occurrence. Many individuals from other countries look to United States for jobs and other opportunities to have a successful life. Traffickers feed on this fact, and as long as the demand is high for sex and cheap labor, they will continue to supply the humans at any cost. As individuals continue to be trafficked domestically and internationally, the United States appears to be a land of deception rather than a land of opportunity.

III. DEFINING MONEY LAUNDERING AND ITS PREVALENCE

Money laundering is used to conceal the real nature and source of financial transactions and it occurs in three stages. The first stage is placement, which involves inserting the money into the financial system. In order to avoid problems with placement, launderers will typically structure the money by making a deposit for less than $10,000 and escape the reporting requirements for the Currency Transaction Report. The money is often converted to a less suspicious medium, such as money orders or cashier’s checks.9 Layering is the second stage and takes place when illegal funds are broken up in order to complicate the audit trail. Layering techniques include wire transfers to offshore banks or using the value of an offshore bank account that contains illegal funds as collateral for a bank loan in United States.10 The final stage is integration, which is the process of putting the money back into the economy and making it appear to be from a legitimate source. Although regulations are put in place to deter and prevent money laundering, many businesses are vulnerable to the transfer of illegal funds through their systems. Common businesses and systems that money launderers take advantage of include casinos, online payment systems, and money services businesses.11 Traffickers are also capable of using legitimate businesses as a means of laundering money, such as bars, nightclubs, and massage parlors.

Casinos have an enormous amount of money flowing through their systems and they offer more than just gambling activities. Financial services provided by casinos consist of “deposit and credit accounts, funds transfers, check cashing, and currency exchange services,”12 which put the casinos at risk for money laundering. Typically, money launderers will exchange illegal funds for casino chips and later cash them in for a check or have money wired elsewhere.13

---

10 Id. at 68-69.
13 Id. at 52.
Because of the growing demand for online purchases, online payment systems are becoming more prevalent. A digital currency system, which is a privately owned online payment system denominated in precious metals, is especially susceptible to money laundering. They are always available from anywhere with internet access, and most users can open an account anonymously. Since many digital currency systems are “incorporated in offshore and foreign jurisdictions,” money launderers do not encounter the restrictions of a traditional financial system.

Money Service Businesses (MSBs) are attractive to money launderers because they do not require opening an account like other formal banking systems. They operate through a system of agents and often without supervision. Common money service businesses include gas stations, convenience stores, and travel agencies. Although MSBs have reporting requirements to follow, they are vulnerable to money laundering because most of them do not have relationships with their customers.

Bars, nightclubs, and massage parlors are a hotspot for money laundering because they can use a legitimate business to carry on illegal activities. Many of these businesses receive cash as the normal form of payment. Bars and nightclubs markup their alcohol prices and charge for entertainment, while massage parlors have a set price and receive tips for their services. Matching the cost of alcohol, entertainment, and services to the cash received can be extremely difficult, which leads to the opportunity for laundering money.

IV. MONEY LAUNDERING AND THE LAW

Because human trafficking is an illegal and hidden industry, money laundering is always involved. The illegal proceeds from trafficking are converted into some form of legitimate money or property. Generally, traffickers are charged with money laundering in addition to other violations. For instance, Aleksandr Maksimenko smuggled Eastern European women into the United States to work as exotic dancers at Detroit area strip clubs. He and his business partners were able to lure the women into the country under the pretext of working for a legitimate business. Maksimenko, and others, pled guilty to involuntary servitude, alien smuggling conspiracy, and money laundering conspiracy. He was found guilty of money laundering under Title 18, U.S.C. §1956(h), which states “any person who conspires to commit

\[\text{References}\]

15 Id. at 2-3.
16 Id. at 1.
17 See MLTA, supra note 12, at 7.
18 Id.
19 See MLTA, supra note 12, at 7-8.
20 Id. at 8.
23 Id.
any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy. 25

The federal statute makes it illegal for anyone to knowingly be involved in a financial transaction representing proceeds from an unlawful activity, 26 with the intent to promote the unlawful activity, 27 and while knowing the transaction is being used to conceal the nature and source of the proceeds. 28 It also prohibits the transportation, transmission, or transfer of funds into or out of the United States if the person knows the funds are proceeds from an unlawful activity, 29 and the person intends to promote the unlawful activity. 30 Title 18, U.S.C. § 1957 provides that any person who “knowingly engages or attempts to engage in a monetary transaction with criminally derived property that is greater than $10,000 and that is derived from specified unlawful activity,” 31 has committed an offense. Maksimenko knowingly engaged in transactions involving unlawful activity with the intent to promote the unlawful activity, and thus was found guilty under the federal money laundering statutes.

V. THE EXISTENCE OF HUMAN TRAFFICKING

Human trafficking is one of the fastest growing industries in the world today. According to the International Labour Organization (ILO), human trafficking profits are approximately 32 billion dollars each year, 32 and these profits are the result of at least 2.45 million victims who are currently exploited. 33 Given the illicit nature of the activity, it is very difficult to determine the exact number of humans trafficking victims. According to Todres and Baumrind, recent estimates have suggested that there are more than two million human trafficking victims globally at any given time. 34 One reason human trafficking is so profitable is because “human beings are reusable resources.” 35 Unlike drugs, humans can be used over and over again for labor services or sex acts. The two most common types of human trafficking are labor trafficking and sex trafficking. Human trafficking results from the use of force, fraud, or coercion to induce and exploit individuals for profit. 36 Force, which can include beatings, rape, and confinement, is typically used at the beginning of enslavement to gain control over the victims. 37 Fraud occurs when traffickers make offers of employment to victims but do not fulfill these offers once the victims are in their presence. 38 Coercion includes “threats, debt bondage, and psychological manipulation.” 39

32 See FATF, supra note 11, at 16.
33 Id. at 16.
34 See Todres & Baumrind, supra note 1.
35 See Smith, infra note 41, at 767.
36 See TIP Report 2011, supra note 3, at 8.
38 Id.
39 Id.
Although victims are acquired domestically, they are commonly transported into the United States from foreign countries. The key areas trafficked victims originate from are Mexico, Brazil, Russia, China, Bulgaria, India, Ukraine, and Romania. Foreign victims can be brought into the United States legally, but they are also transported illegally. At times, human smugglers will work together with human traffickers, delivering smuggled aliens to them once they are across the border. Smuggled aliens are usually unaware that they are being brought into the United States only to become enslaved by human traffickers. They are more vulnerable to traffickers’ threats because they are in the United States without proper documentation. Traffickers normally confiscate foreign victims’ passports and threaten to have the authorities deport them. Confiscation and threats, along with the fact that many are unable to speak English and do not know American laws, gives traffickers an advantage for keeping the victims’ silence and maintaining control over them. Because many victims are non-U.S. citizens and they have come to the United States for better opportunities, they choose to remain under the control of their traffickers in fear of returning to their home country.

Traffickers use many different fraud techniques to lure the victims into the world of human trafficking. Common types of fraud include false promises of jobs, misrepresentation of working conditions and wages, and visa fraud. Visa fraud involves traffickers “allowing a legitimate visa to expire or failing to provide a promised visa.” Some traffickers fraudulently acquire visas for victims in order to get them across the border and exploit them. For example, under a B visa, which has more lenient documentation requirements, an alien can temporarily visit the United States for business or pleasure. This allows the traffickers to bring the victims into the United States with ease and once the visa expires they remain as overstays.

A. Labor Trafficking Defined

Labor trafficking is the “recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” In a special report on human trafficking from 2008 to 2010, the U.S. Department of Justice found that 11% of human trafficking victims were from labor trafficking. Victims of labor trafficking are often recruited from poor communities because these individuals are looking for jobs and a better life. Many victims are used in “agriculture, manufacturing, janitorial services, hotel services, construction,
health and elder care, hair and nail salons, and strip club dancing. Involuntary servitude and debt bondage are the two common forms of labor trafficking. Involuntary servitude occurs when victims are in a domestic environment, living in the same place where they work. Situations involving involuntary servants are often difficult to discover because they live on private property, which makes it more challenging for law enforcement to inspect. Debt bondage occurs when victims are forced to work until they pay off their debts to the trafficker, but the traffickers rarely make it possible to pay off these debts. Common ways traffickers prevent victims from paying off their debts include charging high rents and paying them low wages or nothing at all.

B. Sex Trafficking Defined

Sex trafficking is the recruitment, transportation, harboring, receiving or obtaining of a person, through the use of force, fraud, or coercion, for the purpose of a commercial sex act. According to the 2008 to 2010 special report by the U.S. Department of Justice, 82% of the human trafficking victims were from sex trafficking. Sex traffickers often victimize women and children, forcing them into prostitution or other forms of sexual exploitation. Other than street prostitution and underground brothel systems, common businesses that run sex trafficking operations include massage parlors, spas, and strip clubs. Traffickers may abduct victims or lure them in through false advertisements of promising work opportunities.

The internet is one source that traffickers have taken advantage of to recruit and exploit victims. More money can be generated with internet sexual exploitation because it only takes seconds for images to be broadcast anywhere in the world. The internet also makes it convenient for individuals to remain anonymous while they are viewing the sex images. In a documentary on sex trafficking, massage parlors controlled websites used to post descriptions of female workers. Potential clients viewed the girls’ descriptions to choose one before going to the massage parlor. Descriptions included breast size, whether the girl was willing to have sex without a condom, and many other things. Sex trafficking is considered severe when the person induced to perform sexual acts has not reached 18 years of age. Traffickers can easily deceive children by offering false promises of education and job opportunities. Some children run away from home and can be kidnapped or lured in by traffickers. An estimated 2.8 million children run away each year in the United States.

53 See Mundie, supra note 8, at 26.
55 Id. at 8.
56 See Smith, supra note 41, at 764.
57 See Smith, supra note 41, at 764.
58 Id.
60 See Banks & Kyckelhahn, supra note 52, at 1.
61 See Scotts & Ramey, supra note 37.
62 See Cao, supra note 9, at 65.
63 Ramona M. Moldovan, Human Trafficking in Cyberspace, 14 JURIDICAL CURRENT 86-92 (2011).
64 MSNBC Undercover: Sex Slaves in America (2007).
65 Id.
66 Id.
68 See Smith, supra note 41, at 766.
States and within 48 hours of being on the street, one-third are lured or recruited into the sex industry.69 Child victims are “easily brainwashed, coerced, and often become normalized to sexual harm leading them to believe that their sexuality is linked with violence, disrespect and sexual objectification.”70

VI. FEDERAL EFFORTS AGAINST HUMAN TRAFFICKING

In 2000, the Trafficking Victims Protection Act (TVPA) was passed as the first comprehensive law to deal with human trafficking. In the past decade, Congress has adopted several pieces of legislation to strengthen the United States response to human trafficking. The key statutes proscribing human trafficking are included under Title 18 of the U.S. Code and are often referred to as the Chapter 77 offenses. United States law separately criminalizes labor trafficking and sex trafficking and provides that any person who “knowingly recruits, harbors, transports, provides, or obtains by any means, any person for [forced] labor or services” shall be guilty of labor trafficking.71 Similarly, federal law proscribes sex trafficking as well.72 There are also forfeiture provisions in the federal statutes.73 Prior to enactment of labor trafficking laws, cases were filed under violation of the 13th Amendment, which prohibits slavery and involuntary servitude. The problem with filing a suit under the 13th Amendment is that conviction requires someone to use physical abuse to control a victim.74 In the Kozminski case, two brothers were verbally abused and psychologically coerced into performing labor services, but the 13th Amendment violation did not stand in court.75 In response to the case, Title 18 U.S.C. §1589 was passed, which makes it unlawful to obtain labor services by physical or mental threats and abuse.76 This statute is important because it broadens prior statutes related to labor trafficking by

70 See Moser, supra note 69, at 226.
72 18 U.S.C.A. § 1591(West 2012) provides that “whoever knowingly (1) in or affecting interstate commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, or obtains by any means a person; or (2) benefits, financially or by receiving anything of value, from participating in a venture which has engaged in an act described in violation of paragraph (1), knowing that force, fraud, or coercion described in section (c)(2) will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in section (b).” Punishments can include up to life in prison. It should be noted that under federal law, the movement of the victim from one locale to another is not required in order to establish the crime of human trafficking. Also, when the victim is a minor, force, fraud or coercion do not need to be proven if the victim is trafficked for sex (although force, fraud or coercion must still be established with a minor is trafficked for forced labor or other forms of exploitation). Additionally, United States citizens who commit human trafficking offenses abroad can be prosecuted here in the United States. See U.S.C.A. § 1596 (West 2012).
73 Federal law provides for forfeiture of any property used or intended to be used in committing acts of trafficking or derived from the commission of any such offense. See 18 U.S.C.A. §§ 1594(d)-(e) (West 2012). There is also a federal provision for mandatory restitution as well as a provision that enables survivors to bring civil actions against their traffickers for damages and reasonable attorney fees. See 18 U.S.C.A. §§ 1593, 1595 (West 2012).
75 Id.
76 The Act provides: “Whoever knowingly provides or obtains the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or be imprisoned not more than 20 years, or both. If death
prohibiting verbal threats. As part of the TVPA, Title 18 U.S.C. §1591 was passed to combat sex trafficking. Operation Supersonic, which took place in 2003, is one example of this criminal offense. Mexican men lured young girls to their hometowns to live with their mothers, and some of the girls had children with the men. Once the young girls turned 18, they were taken to New York and forced to become prostitutes. The men would physically abuse and threaten the girls if they didn’t engage in prostitution, which involved 25 to 30 sex acts each day. The defendants violated §1591 by forcing the girls to engage in a commercial sex act and threatening the girls if they did not cooperate. The defendants received the longest sentencing ever imposed for sex trafficking since the enactment of the TVPA.

The TVPA uses a 3P paradigm to measure a country’s efforts in combating human trafficking. The three Ps include prevention, prosecution, and protection. Under prevention, comprehensive policies must be established to prevent trafficking and adopt or strengthen measures to reduce demand that fosters exploitation. Prosecution requires that traffickers must be criminalized, and protection involves adopting specific measures to allow the victims to remain in the country’s territory in appropriate cases. Protection is a key element of the TVPA, considering that many victims are obtained illegally or their legal documentation is seized by the traffickers. If law enforcement deports victims because they are in the United States illegally, then the traffickers may never be discovered.

VII. GEORGIA EFFORTS AGAINST HUMAN TRAFFICKING AND THE ROLE OF AN ATTORNEY

Many states have enacted human trafficking laws, and Georgia has “passed one of the nation’s toughest laws.” Senator Renee Unterman brought tougher legislation to Georgia because Atlanta is a known hub for sex trade. The purpose of the law is to enforce harsher results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.” See also United States Department of Justice (DOJ). Involuntary Servitude, Forced Labor, and Sex Trafficking Statutes Enforced. http://www.justice.gov/crt/about/crm/1581fin.php.

77 Section1589 does not require physical force while prior statutes, sections1584 and 1581 do require physical force.
78 See Mundie, supra note 8, at 29.
79 For approximately 14 years, defendants operated a prostitution ring that smuggled Mexican women into the United States and forced them into prostitution. Defendants used violence, manipulation, and threats of physical harm and confinement to control their victims. Defendants often seduced the women, even some who were under the age of 18 years old. Many of the women were poor and uneducated. The victims were forced to prostitute themselves in brothels in Queens, Manhattan, and Brooklyn, New York just about every day of the week. Defendants made a profit from the prostitution activities; while the victims were not permitted to keep their earnings. It was only after a raid by Immigration and Custom Enforcement agents that the prostitution ring was busted and some of the victims were rescued. Just minutes before their trial was to begin, the defendants pled guilty to conspiracy to commit sex trafficking and other related crimes. See U.S. v. Carreto, 583 F.3d 152 (2009).
80 See Mundie, supra note 8, at 29.
81 Id. See also, U.S. v. Carreto, 583 F.3d 152(2009) where two of the defendants appealed their convictions after being sentenced to 50 years imprisonment each.
84 Id.
86 Id. Atlanta, Georgia is regarded as one of the top sex trafficking destinations in the United States and is one of the 14 cities in the United States with the highest incidents of child sex trafficking. See Sally Quillian Yates, U.S.
penalties on offenders and allow victims to have more treatment options. The law is steered at focusing on the trafficker and customers, instead of the child as a criminal.

O.C.G.A. §16-5-46 essentially covers the same criteria as the federal laws, but it combines labor and sex trafficking into one statute. Each violation of the code constitutes a separate offense and cannot be combined with other offenses. Interestingly, the code has a subsection that applies to corporations. A corporation may be prosecuted if an agent of the corporation conducts the crime while acting within the scope of his or her office or employment and on behalf of the corporation, and if the commission of the crime was authorized, requested, commanded, or performed on behalf of the corporation.

As efforts build to combat human trafficking in the United States, Georgia has taken a lead role. For a number of years, attorneys in Georgia have worked to assist the international victims of human trafficking in obtaining temporary visas. Todres and Baumrind indicate that while currently underutilized, civil remedies are available to victims, and lawyers play an obvious role. Lawyers can coordinate with victim services organizations or state and federal prosecutors to identify and assist human trafficking survivors who want to seek civil remedies. Opportunities for lawyers to make a difference, according to Todres and Baumrind, extend beyond litigation. The health care and education sectors provide opportunities for early intervention, and possibly even prevention of exploitation of children. Todres and Baumrind posit that attorneys working with corporate clients have opportunities to assist in the development of responses to the problem of human trafficking.


87 See Stanley, supra note 85.
88 Id.
89 O.C.G.A. §16-5-46.
90 Id.
91 For example, the Georgia Asylum and Immigration Network (GAIN) works with law firms around Atlanta to connect pro bono attorneys with human trafficking victims who need help applying for T visas. Similarly, the nonprofit organization, Tapestri, provides anti-trafficking training programs and materials including a guide to petitioning for U visas. See Todres & Baumrind, supra note 1, at 17.
92 For example, in 2011, The Atlanta, Georgia office of the law firm of King & Spalding, teamed with the international human rights organization, Equality Now, to file a landmark case under the TVPA seeking damages on behalf of four victims of human trafficking. The Southern Poverty Law Center has published a guide to civil litigation for human trafficking victims, which provides lawyers the opportunity to engage in such work. This is an area of growth for attorneys who want to contribute in this area. See Todres & Baumrind, supra note 1, at 17.
93 Todres and Baumrind suggest that when pimps and traffickers, from time to time, take victims to the emergency room for treatment, it often provides a window of opportunity for intervention. Legal counsel for health care and education institutional clients can help them develop new, or strengthen existing guidelines and procedures for identifying potential victims. A number of service organizations with expertise in this area are available, according to Todres and Baumrind, to help support these initiatives. Todres and Baumrind also report that attorneys working with corporate clients have opportunities to assist in the development of responses to the problem of human trafficking. See Todres & Baumrind, supra note 1, at 17.
94 Those authors cite California’s recent adoption of a new law, the California Transparency in Supply Chains Act of 2010, which might impact a number of businesses in other states as well. The California Act mandates that any manufacturer or retailer with worldwide annual gross receipts of at least $100 million that is doing business in the State of California disclose on its website its policies on, and measures undertaken to combat human trafficking and forced labor in its supply chain. It is anticipated that the new law will apply to approximately 3,200 global companies. See California Transparency in Supply Chain Act of 2010, codified at Cal. Civ. Code § 1714.43 (2012). See also Todres & Baumrind, supra note 1, at 17.
The above programs and opportunities are merely intended as examples of ways that attorneys working in various fields can play a role in combating human trafficking. It is by no means an exclusive list. The great breadth of practice areas in which lawyers and educators operate often places them in positions to contribute in a full range of ways.95

VIII. CONCLUSION

Many suggest that human trafficking is one of the great challenges of our generation. The notion that millions of people live in slave-like conditions in the 21st century in what is described as the greatest nation on Earth is disturbing, at best. It is hard to imagine that the United States, the land of opportunity, could be such a hotspot for human trafficking. Clearly, human trafficking is a profitable underground industry that is not shutting down anytime soon. As long as there is a demand for sex and cheap labor, traffickers will continue to supply that demand. People all around the world want to come to the United States for better opportunities,96 and this leaves foreign individuals vulnerable to false job and educational advertisements. Law enforcement and the government should put more effort forward to recognize human trafficking. Many times victims of prostitution are arrested without consideration from authorities that they could be victims of sex trade.97 When victims are treated as the criminals, traffickers go unnoticed and continue running their illegal activities. Fighting money laundering is an additional way to inhibit human trafficking. Since most traffickers are convicted of money laundering along with human trafficking, discovering money laundering first may be the key to preventing traffickers from carrying on their business. There is no single solution to the problem of human trafficking, but the United States must continue to aim at preventing trafficking, prosecuting offenders, and protecting victims.

95 Todres & Baumrind, supra note 1, at 18.
96 See Smith, supra note 41, at 766.
Notes for Authors:

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

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

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

The title should be in ALL CAPS. Authors’ names should be centered below the title. Paragraphs should be indented five spaces.

The maximum size for a paper is twenty pages, all inclusive, single spaced. Articles substantially longer will need to be edited.

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

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

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

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

Look for the call for 2012 papers at the Southern Academy’s website (www.salsb.org). If you would like to serve *SJBE* as a reviewer, your efforts would be appreciated. Many hands make light work.

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

Please submit all papers to:
   Marty Ludlum
   Editor in Chief, SJBE
   mludlum@uco.edu
Mark Your Calendars

March 7-8-9, 2013

Southern Academy of Legal Studies in Business

San Antonio, Texas

Find the details at:

www.SALSB.org