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From the Editor-in-Chief . . .

This is the 6th volume of the Southern Journal of Business and Ethics, an official publication of the Southern Academy of Legal Studies in Business. The Journal is being published in hardcopy and electronically on the Southern Academy’s web page at http://www.salsb.org.

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

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

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

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, April, 2014. Congratulations to all our authors. I extend a hearty invitation to the 2015 meeting of the SALSB in San Antonio, Texas, April, 2015.

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
Notes for Authors:

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

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

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

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

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

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

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

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

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

Look for the call for papers at the Southern Academy’s website (www.salsb.org). 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 26-27-28, 2015

Southern Academy of Legal Studies in Business

San Antonio, Texas

Find the details at:

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FIGHTING FUTILITY V: USE AND MISUSE OF INFLUENCE 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.”\(^2\) Business leaders can prepare for and manage a successful mediation only when they understand the dynamics of the process.

This paper is the fifth in a series designed to offer insights into how to prepare for and conduct mediation so that the time and energy expended will not be wasted. Building on earlier work applying models from the field of group dynamics to improve mediation, this paper focuses on the use and misuse of influence. Four tools are offered to help participants better manage the process of influencing others in the mediation process. These tools include Proactive Influence Tactics in Mediation, the Typology of Negative Influence Profiles, Coping Strategies for Dealing with Negative Influence in Mediation, and an Analysis of Carnegie’s 12 Principles for Influencing Others. The extent to which business leaders apply these tools as both initiators and as targets of influence can determine whether mediation succeeds. Before considering how skills can be developed using these tools, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

---

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2 Ibid.
II. THE MEANING OF MEDIATION

Texas statutory law defines mediation this way:

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

(b) A mediator may not impose his own judgment on the issues or that of the parties.3

Unfortunately, this statutory definition offers little insight into what mediation can and should be. When successful, mediation can be characterized as proactive, forward-looking, and problem-solving in nature. As a process, it is enlightening, flexible, confidential, and, typically, evokes less stress than does formal litigation. It is not a drastic action and does not involve the surrender of freedom that arbitration dictates, as the latter requires an impartial third party who breaks a deadlock by issuing a final binding ruling.4 Mediation basically involves negotiation through a disinterested third party, and it effectively can defuse emotional time bombs. One drawback mars this otherwise rosy picture: neither side is bound by anything in mediation. Arbitration binds; mediation intervenes benevolently. If the parties involved remain stubborn, intervention can sour, and mediation then becomes an exercise in futility.

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

III. THE USE OF MEDIATION

Over the past two decades, the use of mediation has exploded. Business leaders have discovered its value as a cost-effective alternative to litigation in the traditional adversarial system. The number of mediation cases in Texas, Oklahoma, and Nebraska (the state nearest the region to track statistics) is staggering. Cases received by Texas alternative dispute resolution centers in the most recent three-year period for which records were kept total an average of almost 20,000 annually, with a total of more than 58,000 from 2003 to 2005.5 The same type of situation holds true in Oklahoma. As shown in Table 1, on average, more than 6,000 cases have been referred annually to the alternative dispute resolution system, with 63,243 cases referred in just the past decade. Also, an impressive average settlement rate of 65 percent has been registered.6 Farther north, results in Nebraska (see Table 2) are even more impressive. The number of cases referred annually to their alternative dispute resolution system has almost doubled in five years, and the average settlement rate exceeds 82 percent.7 These impressive regional settlement rates are mirrored around the world. The World Intellectual Property Organization, which protects intellectual property (inventions, trademarks, and industrial

5 Annual Report of the Texas Judiciary, Office of Court Administration, 2005 (last year reported).
7 Annual Mediation Center Case Data Report, Nebraska Office of Dispute Resolution, 2008-2013.
Table 1: 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>2011</td>
<td>6,535</td>
<td>64%</td>
</tr>
<tr>
<td>2012</td>
<td>5,704</td>
<td>62%</td>
</tr>
<tr>
<td>Total</td>
<td>63,243</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

Table 2: Nebraska 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>2008</td>
<td>1,171</td>
<td>84%</td>
</tr>
<tr>
<td>2009</td>
<td>1,467</td>
<td>83%</td>
</tr>
<tr>
<td>2011</td>
<td>1,723</td>
<td>83%</td>
</tr>
<tr>
<td>2012</td>
<td>1,876</td>
<td>81%</td>
</tr>
<tr>
<td>2013</td>
<td>1,948</td>
<td>79%</td>
</tr>
<tr>
<td>Total</td>
<td>8,185</td>
<td>82%</td>
</tr>
</tbody>
</table>

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

designs) and copyright (literature, music, film, and software), reports an overall settlement rate of 69 percent in mediation cases across its 185 member nations. Moreover, these results were obtained in cases across a wide variety of industries, including the categories of Technology (33 percent), Industrial (16 percent), Medical (14 percent), Entertainment (10 percent), Luxury Goods (4 percent), Chemistry (1 percent), and Other (22 percent). Large, private dispute resolution firms, such as the Edwards Group Consultants and the Financial Industry Regulatory Authority (FINRA), report settlement rates in excess of 80 percent, rivaling Nebraska’s impressive numbers. Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established.

9 Ibid.
IV. PURPOSE

Mediation is a form of alternative dispute resolution that allows parties to avoid traditional litigation. Mediation parties agree to allow an impartial mediator to manage the process as they seek common ground and, hopefully, a win-win settlement. Because the parties are at odds initially, each attempts to influence the other in an effort to resolve the dispute. While the mediation parties are assumed to be of equal power and standing before an impartial mediator, this is not always the case. Increasingly, attorneys, former court officials, and successful business leaders are serving as mediators, as members of mediation teams, or as third-party experts called upon during the proceedings.\(^\text{12}\) This trend is shifting the balance of power and altering the nature of exchange and influence tactics employed during mediation. Although one would hope participants would rely upon collaborative, proactive or positive influence tactics, this is often not the case. Failure to recognize and respond to negative influence tactics can derail the entire process. Such tactics destroy the personal relationship, trust, and connection between parties that underlie the collaborative process upon which mediation is built.

Only when business leaders understand these dynamics can they prepare for and manage a successful mediation, which is a process of partnership and persuasion. Compelling persuasion is based on effective, ethical influence tactics that preserve a close personal relationship founded on trust, confidence, and integrity. Negative or unethical influence tactics, whether detected or not, compromise this supportive climate. Use of proactive, ethical influence tactics as well as early detection and redirection of those that are not so well-intentioned is vital to mediation success. This is a key concern not only for mediators, who are charged with managing the process, but also for involved parties who may initiate influence or be targets of influence by others.

This article is the fifth in a series offering tools for success in mediation. The first article offered tools to prepare for mediation\(^\text{13}\), the second addressed communication\(^\text{14}\), the third dealt with difficult people\(^\text{15}\), and the fourth examined mechanisms for dealing with defensiveness\(^\text{16}\). This article focuses on the use and misuse of influence in mediation. Four tools are described to help parties formulate effective influence strategies and respond appropriately when negative tactics threaten to derail mediation proceedings. This paper initially summarizes Proactive Influence Tactics in Mediation, which applies eight classic proactive influence tactics to the process. It then explores negative influence tactics through the Typology of Negative Influence Tactics in Mediation.
Profiles, which arranges thirty tactics found in the literature into nine distinct categories analogized as animals. A visual tool, the Integrative Model of Negative Influence, identifies the various profiles and tactics employed. Next, a chart outlining Coping Strategies for Dealing with Negative Influence Tactics in Mediation is presented. Finally, drawing on Dale Carnegie’s classic work, an Analysis of Carnegie’s 12 Principles for Influencing Others is presented. These tools draw on current as well as classic research in social psychology and group dynamics to help mediation parties formulate effective influence strategies and avoid and redirect negative ones when encountered. Effective use of these tools is vital to mediation success.

V. FOUR TOOLS FOR DEALING WITH INFLUENCE IN MEDIATION

A. PROACTIVE INFLUENCE TACTICS IN MEDIATION

At the heart of mediation are the needs for parties to communicate and to influence each other in a positive, proactive manner that leads to a mutually beneficial settlement. Thus, the process of influencing others is vital. Influence, “the process of affecting the thoughts, behavior, or feelings of another person,” may be applied in various directions in terms of the power and status of the target. One may attempt to influence a person of higher power and status (upward influence), a person of lower power and status (downward influence) or a peer (lateral influence). Ideally, because mediation involves two parties of equal standing and an impartial mediator, one would expect lateral influence to prevail. However, the balance of power in mediation is skewed by the influx of attorneys, former court officials, and business executives into the process, serving as mediators, mediation parties, and third-party experts. When power is not balanced, lateral influence tactics may not be appropriate. Moreover, in some instances, such imbalances may invite participants with greater power to resort to “hard tactics,” such as pressure. Further complicating the influence process is the finding that most people employ a combination of tactics, a “persuasion package” in attempting to influence others. This influence package tends to be consistent among individuals over time and even includes a preference order for fallback tactics when an influence attempt fails. Thus, the influence process in mediation is complex and dynamic.

Efforts to identify specific influence tactics began in earnest in a 1977 exploratory study in which Toni Falbo identified 346 strategies that she collapsed, using multidimensional scaling, into sixteen distinct tactics. A similar study in 1980 by Kipnis and his associates recognized

20 Ibid., p. 436.
370 influence tactics, which were grouped into fourteen categories.\textsuperscript{22} Yukl and Falbe (1990) replicated and extended Kipnis’ work in two extensive studies yielding what are widely viewed as the “Big 8 Influence Tactics,” shown in Table 3.\textsuperscript{23} Their survey instrument for measuring these tactics has been validated in hundreds of organizations and has become the standard for assessing influence tactics in a wide variety of organizations. While other tactics have been proposed by Yukl and his colleagues\textsuperscript{24}, the Big 8 remain the most widely cited in the literature.

This paper subdivides the Big 8 tactics in Table 3 into two categories (soft and hard) and includes a definition and a quotation to illustrate how each might be used in mediation. A mediation participant is more likely to be effective starting with softer tactics, such as Inspirational Appeals, Rational Persuasion, Exchange, Consultation, and Ingratiation. Drawing on the influencer’s personal power, these are more likely to succeed. If they fail, one might shift to harder tactics, such as Pressure, Upward Appeals, and Coalition, which entail more risk.\textsuperscript{25} Research has shown that Rational Persuasion, Consultation, and Inspirational Appeals are used most often and most effectively, while Pressure is used sparingly and is the least effective.\textsuperscript{26} It is likely that Exchange is of greater importance in the give-and-take realm of mediation.

The ability to recognize, apply, and respond to influence tactics is essential if parties are to effectively influence others ethically. Mediation fails when participants employ inappropriate or ineffective tactics and when they fail to recognize and respond appropriately to the influence strategies employed by others. Despite the usefulness of the proactive influence tactics in Table 3, they are not the only ones encountered in mediation. A greater variety of negative influence tactics often plagues mediation and human interaction in general. The realm of negative tactics is explored in the next section.


Table 3: Proactive Influence Tactics in Mediation

<table>
<thead>
<tr>
<th>Influence Tactic</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>“Soft” Tactics (Personal)</strong></td>
<td></td>
</tr>
<tr>
<td>Inspirational Appeals</td>
<td>Making an emotional request or proposal that arouses enthusiasm by appealing to your values and ideals or by helping you feel you can do it. “If we do this right, we can not only repair the kitchen, but we can make it big enough to feed twice as many homeless people!”</td>
</tr>
<tr>
<td>Rational Persuasion</td>
<td>Using logical arguments and factual evidence to persuade you that a proposal is viable and likely to meet objectives. “I’ve looked at medical claims over the past three years. I think the average cost is fair.”</td>
</tr>
<tr>
<td>Exchange</td>
<td>Promising rewards or tangible benefits if you comply with a request or support a proposal OR reminding you that you owe them a favor. “I can offer you a lot more if we don’t have to admit fault here!”</td>
</tr>
<tr>
<td>Consultation</td>
<td>Asking for your participation in making a decision or planning how to implement a proposed policy, strategy, or change. “I really need your help and expertise to put this proposal together!”</td>
</tr>
<tr>
<td>Ingratiation</td>
<td>Trying to get you in a good mood or to think favorably about them before making a request. “I was dreading this mediation, but I really have enjoyed working with you! You really know your stuff!”</td>
</tr>
<tr>
<td><strong>“Hard” Tactics (Formal)</strong></td>
<td></td>
</tr>
<tr>
<td>Pressure</td>
<td>Using demands, threats, or intimidation to convince you to comply with a request or to support a proposal. “This is our last proposal. If you reject it, we’re out!”</td>
</tr>
<tr>
<td>Upward Appeals</td>
<td>Trying to persuade you that the request or position is supported or sanctioned by higher authorities—resistance is futile! “My friends in the court think you don’t stand a chance if we don’t settle.”</td>
</tr>
<tr>
<td>Coalition</td>
<td>Seeking the aid or support of others to persuade you to do something or using the support of others to convince you to agree. “I met with the other restaurant owners down there and they all agree with me!”</td>
</tr>
</tbody>
</table>

**Source:** Based on Yukl, G. and Falbe, C. M., “Influence Tactics and Objectives in Upward, Downward, and Lateral Influence Attempts,” *Journal of Applied Psychology*, 75, 1990, 132-140. Classification scheme, category titles, and illustrative quotes added by the authors.
B. NEGATIVE INFLUENCE PROFILES IN MEDIATION

Early studies of influence yielded hundreds of distinct tactics, which were reduced to the eight universal tactics in Table 3. Left behind, because of infrequent use, lack of universality, and a generally negative connotation, was a sizable cache of largely negative tactics. Because mediation and business in general are still plagued by the use of such tactics, classic studies conducted by Falbo (1977)\textsuperscript{27} and Kipnis et al. (1980)\textsuperscript{28} were revisited in search of important negative influence tactics to avoid in mediation. Both studies relied on content analysis of essays written by students, managers, and professionals regarding how they influenced others. Falbo used multidimensional scaling (MDS) to collapse 346 tactics into sixteen that plotted on two dimensions: Rational/Emotional and Direct/Indirect.\textsuperscript{29} In this paper, five of these tactics (Reason, Compromise, Bargaining, Simple Statements, and Persuasion) were excluded because they are similar to the proactive tactics in Table 3. The eleven remaining tactics were added to our list of negative tactics. Kipnis et al. conducted a much larger study that yielded 370 influence tactics which were concentrated into fourteen categories. Unlike Falbo, Kipnis and his colleagues listed specific tactics that comprised each of those categories.\textsuperscript{30} From this list, thirteen negative influence tactics were retained. To the overall list of twenty-four tactics from this classic research we added the tactics of projecting weakness and projecting inequity from Shapira’s study of power in mediation\textsuperscript{31}, the tactic of propaganda from the Institute for Propaganda Analysis\textsuperscript{32}, and the three forms of cynicism we devised, to total thirty negative influence tactics.

Although many of these tactics were considered to be outliers at the time, Kipnis later acknowledged that influence tactics are rarely used in isolation. Rather, they occur in more powerful clusters, or “mixtures,” of tactics he called “influence profiles.”\textsuperscript{33} Nine clusters of related negative influence tactics (negative influence profiles) emerged from the analysis of thirty extracted from the literature. Each profile was analogized with an animal (e.g., Lion, Bear, Fox, Mole) that typifies characteristics of the profile. The Typology of Negative Influence Profiles in Table 4 includes a description for each profile and the negative influence tactics upon which it is based. Detailed footnotes are included to identify the origin of each negative influence tactic included in the model.

\textsuperscript{29} Falbo, p. 542
\textsuperscript{30} Kipnis et al., p. 442
\textsuperscript{31} Shapira, O., “Exploring the Concept of Power in Mediation: Mediator’s Sources of Power and Influence Tactics,” \textit{Ohio State Journal on Dispute Resolution}, 24, 3, 2009, pp. 17-18
\textsuperscript{33} Kipnis et al., “Patterns of Managerial Influence: Shotgun Managers, Tacticians, and Bystanders,” \textit{Organizational Dynamics}, 12, 3, 1984, pp. 59, 64-65.
The nine negative influence profiles in Table 4 were classified on the same two dimensions Falbo used to classify tactics in her classic study, whether they were Direct (visible and obvious) or Indirect (subtle and clandestine) as well as whether they were Rational (factual and reasonable) or Emotional (personal and manipulative). Combinations of these dimensions yielded four quadrants. A fifth was added to provide a middle-of-the-road position. The Integrative Model of Negative Influence in Figure 1 graphically depicts the location of the various animals (influence profiles) on Falbo’s multidimensional space. To our knowledge, this is the first comprehensive model of negative influence tactics.

In Figure 1, **Quadrant 1**, labeled **Dominate**, are the Lion and the Owl, who use a direct, forceful approach that is visible and obvious. Both are rational, relying on facts, reason, and practicality. **Lions (Dominator)**s are hard-charging and argumentative, striving to win in mediation at all costs. They cajole the target with relentless persuasion, argue continuously, make threats, and employ a tactic called Fait Accompli, which basically means, “I’ve moved on without you. Things are already decided, and you need to just get on board!” **Owls (Know-It-Alls)** enter mediation with an air of superiority that may be based on expertise or status derived from current or former employment. Attorneys, former judges, and business executives may become Owls. Unlike Lions, Owls tend to observe the proceedings from lofty perches high above the lesser-qualified prey in the valley below. They demand respect and swoop down at opportune times to chastise less qualified mediation participants or to proclaim a “point of order.” Theirs is more a form of “intermittent domination.”

Also in **Quadrant 2**, **Distract** is direct, forceful behavior that is both visible and obvious. However, in this case, the approach is emotional, personal, and manipulative. Both the Bear and the Otter, found here, are masters of distraction in mediation. They differ only in the way in which they distract. **Bears (Intimidators)** are usually imposing figures with a loud, bullying style who are easily angered. They often raise their booming voices or explode into raging tirades in mediation meetings, talking over everyone and verbally assaulting participants. These episodes completely derail mediation when they occur. **Otters (Charmers)** distract in a different way, acting as pleasers, friendly, funny, and hyperactive, the entertainer in mediation. Although they are often popular, they tend to be insincere, using their charm to fake emotions and concern while creating confusion with incessant talking and joking as a means to control or influence the proceedings. Little can be accomplished until the Otter is subdued.

The middle-of-the-road position is found in **Quadrant 3**, labeled **Disregard** because here there is little influence at all. **Turtles (Evaders)** are doing all they can to drop out, ignore others, and block progress. When Turtles retreat into the safety of their shells, they become obstructionists. As in nature, little can be done to get Turtles to move. After a period of silence, they will emerge from their shells, only to keep moving in their original direction. To avoid conflict, rather than debating or discussing differences, they tend to block action by threatening to walk out of mediation or by appealing to an outside agency or third party if they do not get their way.
<table>
<thead>
<tr>
<th>Influence Profile</th>
<th>Negative Influence Tactics</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Quadrant 1 - Direct/Rational - Dominate</strong></td>
<td></td>
</tr>
<tr>
<td>Dominator <em>(Lion)</em></td>
<td>Hard charging, argumentative, relentless drive to win at all costs</td>
</tr>
<tr>
<td>Cajoling Target²</td>
<td>relentless persuasion</td>
</tr>
<tr>
<td>Persistence¹</td>
<td>argues relentlessly</td>
</tr>
<tr>
<td>Fait Accompli¹,²</td>
<td>went ahead on my own, and it is already decided</td>
</tr>
<tr>
<td>Threats¹</td>
<td>stating negative consequences if my plan is not accepted</td>
</tr>
<tr>
<td>Know-It-All <em>(Owl)</em></td>
<td>Air of superiority based on expertise or status (former or current)</td>
</tr>
<tr>
<td>Superiority/Expertise³</td>
<td>claiming superior knowledge and skill</td>
</tr>
<tr>
<td>Chastising Target²</td>
<td>correcting or instructing the target</td>
</tr>
<tr>
<td><strong>Quadrant 2 - Direct/Emotional - Distract</strong></td>
<td></td>
</tr>
<tr>
<td>Intimidator <em>(Bear)</em></td>
<td>Verbally aggressive, easily angered, bullying style, and raging tirades</td>
</tr>
<tr>
<td>Verbal Aggression¹</td>
<td>overpowering, forceful, intimidating approach</td>
</tr>
<tr>
<td>Expressing Anger²</td>
<td>blowing up or exploding</td>
</tr>
<tr>
<td>Personal Confrontation²</td>
<td>personal verbal assault</td>
</tr>
<tr>
<td>Charmer <em>(Otter)</em></td>
<td>Hyperactive, friendly, funny, uses charm to dominate and control</td>
</tr>
<tr>
<td>Being a Nuisance²</td>
<td>create confusion, harassing until the target complies</td>
</tr>
<tr>
<td>Emotional Faking¹</td>
<td>altering your own expression</td>
</tr>
<tr>
<td>Faking Empathy²</td>
<td>projecting false concern for the target’s problem</td>
</tr>
<tr>
<td>Overuse of Humor²</td>
<td>keep joking and kidding until cooperation is gained</td>
</tr>
<tr>
<td><strong>Quadrant 3 - Neutral - Disregard</strong></td>
<td></td>
</tr>
<tr>
<td>Evader <em>(Turtle)</em></td>
<td>Checks out, ignores others, blocks progress, and goes his own way</td>
</tr>
<tr>
<td>Evasion¹</td>
<td>avoid those who disapprove of your position or plan</td>
</tr>
<tr>
<td>Ignore Target²</td>
<td>neutralizes target by ignoring them or being unfriendly</td>
</tr>
<tr>
<td>Blocking²</td>
<td>attempts to block the target from carrying out some action</td>
</tr>
<tr>
<td>Threat to Leave or Stop Cooperating</td>
<td>may just walk out of mediation</td>
</tr>
<tr>
<td>Threat to Notify Outside Agency</td>
<td>involve 3rd party, court, or agency</td>
</tr>
<tr>
<td><strong>Quadrant 4 - Indirect/Rational - Discredit</strong></td>
<td></td>
</tr>
<tr>
<td>Cynic <em>(Mole)</em></td>
<td>Overly critical with no solutions, extracting information for later use</td>
</tr>
<tr>
<td>Cynicism³</td>
<td>negativism, finding fault with every proposal</td>
</tr>
<tr>
<td>Intense Devil’s Advocacy⁵</td>
<td>all options discredited, no solutions offered</td>
</tr>
<tr>
<td>Spying⁵</td>
<td>overlistening, intelligence gathering with no effort to settle</td>
</tr>
</tbody>
</table>
Table 4: Typology of Negative Influence Profiles (Continued)

<table>
<thead>
<tr>
<th>Influence Profile</th>
<th>Negative Influence Tactics</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Quadrant 5 - Indirect/Emotional - Deceive</strong></td>
<td></td>
</tr>
<tr>
<td>Manipulator (Fox)</td>
<td>Crafty, deceptive, skilled manipulator, hard-core Machiavellian</td>
</tr>
<tr>
<td>Hinting(^1)</td>
<td>drops hints without openly stating what is wanted</td>
</tr>
<tr>
<td>Thought Manipulation(^1)</td>
<td>convincing target that the idea was his own</td>
</tr>
<tr>
<td>Emotional Manipulation(^1)</td>
<td>attempts to alter the emotions of the target</td>
</tr>
<tr>
<td>Manipulating Information(^2)</td>
<td>filtering, screening, or altering information</td>
</tr>
<tr>
<td>Propaganda(^4)</td>
<td>using biased or misleading information to promote a plan</td>
</tr>
<tr>
<td>Victim (Rabbit)</td>
<td>Projects weakness, uses perceived inequity and guilt to gain concessions</td>
</tr>
<tr>
<td>Showing Dependency(^2)</td>
<td>projecting powerlessness to gain concessions</td>
</tr>
<tr>
<td>Weakness Power(^3)</td>
<td>weaker party creates an obligation to assist them</td>
</tr>
<tr>
<td>Projecting Inequity(^3)</td>
<td>highlighting a weak position to produce guilt in the stronger party in hopes of creating an obligation to address the inequity</td>
</tr>
<tr>
<td>Liar (Rat)</td>
<td>Uses deceit, insincere flattery, and outright lies to gain concessions</td>
</tr>
<tr>
<td>Deceit(^1,2)</td>
<td>using biased or misleading information to promote a plan</td>
</tr>
<tr>
<td>Lying to Target(^2)</td>
<td>distorting or lying about the reasons to comply</td>
</tr>
</tbody>
</table>


In Quadrants 4 and 5, we enter the realm of indirect, clandestine influence tactics that are subtle and hard to recognize. In **Quadrant 4**, labeled **Discredit**, Moles (Cynics) are encountered. They live in the dark and maintain a low profile, preferring to lie low and play the role of a spy, asking many questions to gather intelligence for later use while offering little information about themselves. When forced to surface, they are the consummate cynic or devil’s advocate, finding fault with every proposal but seemingly incapable of offering their own solutions. Despite their clandestine activity, they are rational, factual, and practical.

Finally, **Quadrant 5, Deceive**, involves indirect, emotional tactics and includes the most clandestine, manipulative, and divisive influence ploys, most of which are unethical. It is home to Rabbits (Victims), Foxes (Manipulators), and Rats (Liars). Rabbits have mastered the power of weakness. They may project weakness or powerlessness deceptively or they may exploit actual weakness in their position in an imbalanced mediation. Regardless of the source of
weakness (real or imagined), Rabbits are skilled at playing the victim for personal gain. They project weakness, inequity, or unfairness in hopes of creating guilt and an obligation for the other mediation party to act in their favor.34

The Fox (Manipulator) is the most deceptive and manipulative of all the animal archetypes in the model. A hard-core Machiavellian, he has an arsenal of some of the most powerful unethical influence tactics known. He manipulates thoughts and emotions in others; filters, screens, and exploits information (“information engineering”); drops veiled hints; and acts as a skilled propagandist. He is a master of the seven common propaganda devices (Name-calling, Glittering Generalities, Transfer, Testimonial, Plain Folks, Card Stacking, and Bandwagon).35 As such, he may be the most dangerous of the animal archetypes and can be a major threat to the mediation process.

The last animal in Quadrant 5, the Rat (Liar), uses biased or misleading information; distorts or twists the truth; and outright lies to gain concessions in mediation. While his influence tactics are clearly unethical and potentially illegal, he may be less of a threat than the Fox because he has a much smaller arsenal upon which to draw, one based mainly on lies and deceit. Rats flourish in messy mediations, where facts are unclear, record-keeping is poor, and the mediation duration is relatively brief (too short a period for the Rat’s lies and distortions to be exposed).

Overall, this section highlights the potentially devastating impact that negative influence tactics and those who employ them can have on the mediation process, settlements and outcomes, and success as a whole. Beyond being aware of these effects, mediation parties must take action to counter the influencers described in this model. In the next section, guidance is offered for appropriate responses by mediators and involved parties.

C. STRATEGIES FOR COPING WITH NEGATIVE INFLUENCE TACTICS IN MEDIATION

When negative influence tactics are encountered, mediation participants must determine whether the tactic is a seldom-used outlier, a fallback tactic used only because the intended one failed, or part of a predictable pattern of negative influence — one that can be identified in the Typology of Negative Influence Profiles in Table 4. The first step to using the typology is to locate the tactic in Table 4 and note the influence profile (animal archetype) to which it belongs. For example, suppose a mediation participant refers to his plan as the “Christian thing” to do. One must determine whether it was a passing comment or a recurring theme used to sell the plan. If it recurs and does not clearly reflect the person’s character, it may well be a Glittering Generality, a propaganda tactic in which the influencer attempts to link his plan to a highly valued concept, hoping the target will focus on the concept rather than the merits of the plan.

Figure 1: Integrative Model of Negative Influence

4 **Discredit**
- Rational: Mole
- Emotional: Fox

3 **Disregard**
- Rational: Turtle

2 **Distract**
- Rational: Otter
- Emotional: Bear

1 **Dominate**
- Rational: Lion
- Emotional: Owl

**Indirect**
- Subtle, Veiled, Clandestine

**Direct**
- Forceful, Visible, Obvious

**Rational**
- Factual, Reasonable, Practical

**Emotional**
- Personal, Manipulative, Gamesmanship

**Source:** Developed by the authors to illustrate the nine profiles of negative influence described in the Typology of Negative Influence Profiles. Bold Rational/Emotional and Direct/Indirect labels are consistent with MDS labels in Falbo (1977).[^36]

In this case, the target of the influence tactic locates the tactic (propaganda) under the Fox (Manipulator) profile in Table 4. The target should begin watching for Fox tactics listed in the table (hinting and manipulation of thoughts, emotions and information). While the list is not exhaustive, one can quickly determine whether the tactics used fit the Fox (Manipulator) influence profile. Once it is determined that a mediation participant is employing a negative influence strategy, the target of the influence must try to arrest, neutralize, or appropriately counter the strategy. A tool for doing this is Strategies for Coping with Negative Influence Tactics in Mediation, summarized in Table 5.

The strategies summarized in Table 5 offer general guidance for responding to the various tactics that mediation participants are sure to encounter. By its very nature, mediation is a process of influence. Ideally, participants should employ appropriate influence tactics that are honest and ethical, and that promote openness, trust, and collaboration. They should avoid resorting to negative tactics that compromise those ideals and should be able to recognize and respond effectively to those who do. The tools offered in this paper promote proactive influence tactics and offer considerable insight into the nature of negative influence tactics and how to respond to them when they arise in mediation.

A word of caution, because the Model of Negative Influence we propose is new, additional research is needed to refine and measure the negative influence tactics identified. Mediators and mediation parties must be trained to recognize, avoid, and appropriately respond to such tactics, and federal, state, and local guidelines governing ethical practices in mediation must be reviewed to ensure adequate protection against unethical influence tactics. The Biblical admonition to “be wise as serpents and harmless as doves,” is apt in regard to influence tactics in mediation. Participants must be wise, keenly aware of the negative influence tactics presented, and harmless in that they do not engage in such tactics themselves.

Thus far, we have described effective influence in terms of more generalized proactive tactics from the literature. For guidance on specific approaches one should use in mediation, we turn to the man Fortune Magazine once labeled “The Best Salesman in Business,” Dale Carnegie. An analysis of Carnegie’s Twelve Ways to Win People to Your Way of Thinking is offered in the next section as a final tool to use in the mediation process.

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37 Ibid.
Table 5: Strategies for Coping with Negative Influence in Mediation

<table>
<thead>
<tr>
<th>Influence Profile</th>
<th>Mediation Coping Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Quadrant 1 - Dominate</strong></td>
<td></td>
</tr>
<tr>
<td>Dominator (Lion)</td>
<td>Be more assertive yourself. Don’t argue, but don’t bow to intimidation. Don’t respond to threats. Rely on the mediator to throttle the dominator.</td>
</tr>
<tr>
<td>Know-It-All (Owl)</td>
<td>Prepare for mediation. Educate yourself. Consider leveling the playing field by inviting a third-party of equal expertise to counter the Owl.</td>
</tr>
<tr>
<td><strong>Quadrant 2 - Distract</strong></td>
<td></td>
</tr>
<tr>
<td>Intimidator (Bear)</td>
<td>Don’t try to talk over them. Let them cool down. Take a break, leave, or invite them to discuss the matter privately. Don’t tolerate outbursts.</td>
</tr>
<tr>
<td>Charmer (Otter)</td>
<td>Be courteous, but ask questions to redirect attention back to the agenda. Insist on equal time for all. Set guidelines, provide structure and discipline.</td>
</tr>
<tr>
<td><strong>Quadrant 3 - Disregard</strong></td>
<td></td>
</tr>
<tr>
<td>Evader (Turtle)</td>
<td>Flush them out with open-ended questions. Wait for a response. If no response comes, tell them what you plan to do if there is no discussion.</td>
</tr>
<tr>
<td><strong>Quadrant 4 - Discredit</strong></td>
<td></td>
</tr>
<tr>
<td>Cynic (Mole)</td>
<td>Limit responses and ask counter questions to arrest spying. Press for a problem-solving orientation. Seek solutions, asking for their answer first.</td>
</tr>
<tr>
<td><strong>Quadrant 5 - Deceive</strong></td>
<td></td>
</tr>
<tr>
<td>Manipulator (Fox)</td>
<td>Document, check facts, verify records, and monitor proceedings. Adopt tighter standards and procedures. Be strategic, staying one step ahead.</td>
</tr>
<tr>
<td>Victim (Rabbit)</td>
<td>If inequity exists, offer appropriate compensation. Work with the mediator to address the perceived power deficit. Restore balanced collaboration.</td>
</tr>
</tbody>
</table>

Source: C. D. Bultena, C. D. Ramser, and K. R. Tilker
D. Carnegie’s Principles of Effective Influence

Perhaps more than anyone else, Dale Carnegie dedicated his life to making friends and influencing people. His training empire has franchises in eighty countries and boasts of eight million graduates. More than thirty million copies of his book, *How to Win Friends and Influence People*, have been sold, and sales are still brisk at 300,000 copies per year almost sixty years after his death. Carnegie’s twelve principles, summarized in Table 6, offer practical insight for influencing others in mediation. Dichotomies are offered in Table 6, contrasting Carnegie’s Approach and Tactics to Avoid for each of the twelve.

In Principles One and Two, Carnegie points out the folly of trying to win an argument or of telling someone he is wrong, the end result of which is that the parties become alienated and are even more convinced that they are right, with no progress toward resolution. Carnegie’s advice applied to mediation parties is to avoid argumentation and rigid defense of one’s viewpoint, choosing instead to be open-minded and to respect the other party by avoiding an unnecessary, unwinnable argument that may sour the mediation climate.

In Principle Three, Carnegie suggests being humble and admitting mistakes quickly and emphatically. He claims there is a certain degree of satisfaction in having the courage to admit one’s error. Besides clearing the air of guilt and defensiveness, it helps solve problems faster because the opponent is more willing to help. When humility is chosen over defensiveness in mediation, trust is built, the other party is at ease, and resolution is achieved more quickly.

Carnegie suggests in Principles Four and Five that one must start on the right foot when initiating interaction with someone. He emphasizes in Principle Four how important it is to be friendly at the outset. This creates a good first impression, breaks down barriers, and allows the parties to build a close relationship. Principle Five highlights the importance of setting a positive tone and creating a constructive climate by trying to get the other party to say “yes” as soon as possible. In mediation, it is the critical early moments that set the tone for the entire process. So, Carnegie would advise, begin the process with friendliness and affirmation and avoid the temptation to charge into mediation with an apprehensive, forceful, or skeptical tone.

Principles Six through Eight are related. The primary concern in all three is resisting the tendency for self-centeredness. In mediation, more will be accomplished when the focus is on the others, letting them talk, making suggestions instead of forcing ideas, and seeing things from the others’ perspective.

According to Carnegie’s Principle Nine, human beings crave sympathy and self-pity for their misfortunes in life. Therefore, Carnegie says, give it to them. Apologize and sympathize with their point of view, then see their hostility turn to friendliness. A great deal of the hostility in mediation could be diffused with a sincere apology and empathy for the other party’s situation.

Although many people think the worst of strangers, Carnegie, in Principle Ten, advocates appealing to nobler motives, to the best in people, by assuming sincerity, honesty, truthfulness,

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43 Ibid.
and responsibility. A great deal can be accomplished in mediation when trust is chosen over suspicion, particularly in the early days of the process.

In Principle Eleven, Carnegie encourages the dramatization of ideas, to make them vivid, interesting, and dramatic, and to use showmanship to make a point. He recounts the story of a rat poison manufacturer who gave dealers a window display with two live rats. Sales skyrocketed when the rodents were on display. Similarly, the way in which ideas and proposals are presented in mediation impacts acceptance by the other party. Parties can break mediation monotony and improve influence by using more dramatic ways to present and illustrate their ideas and proposals.

Finally, Carnegie’s Principle Twelve for winning people to one’s way of thinking is to throw down a challenge. Individuals want to express themselves, to excel, to win, and to feel important. Nothing stirs motivation like a good challenge. Mediators are in the best position to apply this tactic. When mediation stalls, the mediator may have to jump start the process by laying down a challenge.

Overall, Carnegie’s twelve principles apply remarkably well to mediation. This is not surprising because mediation is a process of influence. Almost eighty years since they were proposed, these principles offer a fresh perspective of influence in mediation that is practical and intuitive. While Carnegie’s work, which is anecdotal in nature, does not have the empirical foundation of the other models presented in this paper, it is nonetheless useful for practitioners in mediation.

VI. SUMMARY

This paper’s purpose was to provide tools to help participants better manage the process of influencing others in mediation. First explored were the classic Big Eight Proactive Influence Tactics\textsuperscript{44} in Table 3 that emerged from thirty-five years of empirical research. These proactive strategies have been measured with well-validated instruments across such a wide variety of organizational settings that they can be considered universal. They can be applied ethically and appropriately in mediation in varying degrees, depending on the situation.

Just understanding proactive influence tactics, however, is insufficient, because there are always participants in mediation who will stoop to negative influence tactics to gain advantage. Recognizing and responding to these individuals presents a far greater challenge. First, participants must learn how to identify and respond to negative influence tactics. Because little research concerning the use of negative influence tactics in mediation was found, two foundational studies were revisited. They included hundreds of influence tactics that had been abandoned in the literature. From these, we extracted thirty important negative influence tactics which we arranged into nine profiles of similar tactics, to produce a new model, the Typology of

Table 6: Analysis of Carnegie’s 12 Principles for Influencing Others

<table>
<thead>
<tr>
<th>Principle</th>
<th>Carnegie’s Approach</th>
<th>vs.</th>
<th>Tactic to Avoid</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Avoid arguments.</td>
<td>Respect</td>
<td>Argumentation</td>
<td></td>
</tr>
<tr>
<td>2. Show respect for other’s opinions.</td>
<td>Open-mindedness</td>
<td>Rigidity</td>
<td></td>
</tr>
<tr>
<td>Never say, “You're wrong.”</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. When wrong, admit it quickly and emphatically.</td>
<td>Humility</td>
<td>Defensiveness</td>
<td></td>
</tr>
<tr>
<td>4. Begin in a friendly way.</td>
<td>Friendliness</td>
<td>Forcefulness</td>
<td></td>
</tr>
<tr>
<td>5. Get the other person saying “yes, yes” immediately.</td>
<td>Affirmation</td>
<td>Skepticism</td>
<td></td>
</tr>
<tr>
<td>6. Let the other person do a great deal of the talking.</td>
<td>Attentiveness</td>
<td>Self-absorption</td>
<td></td>
</tr>
<tr>
<td>7. Allow the other person to claim idea ownership.</td>
<td>Suggestion</td>
<td>Compulsion</td>
<td></td>
</tr>
<tr>
<td>8. See things from the other person’s point of view.</td>
<td>Empathy</td>
<td>Self-centeredness</td>
<td></td>
</tr>
<tr>
<td>9. Be sympathetic with the other person’s ideas and desires.</td>
<td>Sympathy</td>
<td>Indifference</td>
<td></td>
</tr>
<tr>
<td>10. Appeal to the nobler motives.</td>
<td>Trust</td>
<td>Suspicion</td>
<td></td>
</tr>
<tr>
<td>See the best in others.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11. Dramatize ideas.</td>
<td>Exhilaration</td>
<td>Monotony</td>
<td></td>
</tr>
<tr>
<td>12. Throw down a challenge.</td>
<td>Inspiration</td>
<td>Apathy</td>
<td></td>
</tr>
</tbody>
</table>

Source: Dale Carnegie, How to Win Friends and Influence People, New York: Simon and Schuster, (1981), pp. 143-223. Dichotomies contrasting Carnegie’s Approach and Tactics to Avoid were added by the authors.
Negative Influence Profiles in Table 4. These nine profiles were labeled and analogized to animals for ease of reference. The nine profiles were graphically depicted in the Integrative Model of Negative Influence shown in Figure 1. This is the first model of its kind to allow mediation participants to identify negative influencers. After having discussed a diagnostic tool for identifying negative influencers, the Coping Strategies outlined in Table 5 were developed to help mediation participants counter these negative influence strategies. Then, practical advice from master influencer Dale Carnegie45 was presented. His twelve principles for influencing others are well suited to the mediation context.

Overall, both well-validated proactive influence tactics from the literature and practical, anecdotal principles from Carnegie were examined to help mediation participants formulate effective influence strategies. More importantly, an incursion was made into the realm of negative influence tactics that plague mediation to provide a diagnostic tool to identify the negative influencers, their profiles, and the tactics they employ. Finally, coping strategies were suggested to help mediation participants deal with the nine types of negative influencers and their tactics.

A great deal of work remains to be done in the area of negative influence tactics. The analysis of those tactics and the diagnostic tool developed in this paper are only the beginning. Researchers need to use exploratory methods to identify the full range of negative influence tactics and factor analysis to determine the unique constructs upon which these tactics load. These constructs could be similar to the negative influence profiles discussed in this paper. After these constructs are identified, instrumentation should be developed and validated to measure them. Then, a new stream of research into the use of negative influence tactics and strategies for coping with them might proceed. While it may seem counterproductive to develop models of deceptive or even unethical behavior, the use of such tactics will continue to arise in mediation and participants must be able recognize and respond appropriately if the dispute resolution process is to succeed.

Finally, the models discussed in this paper offer guidance for mediation practitioners. Mediators must be trained to recognize and manage these tactics. They must use knowledge gained from the models to prepare the parties for mediation—to educate them and to set ground rules. Mediation parties must be able to recognize negative influence tactics and confront them when they arise—Name It, Claim It! And, if mediation stalls, mediators may have to stage a caucus with one or both parties to confront and redirect negative influence tactics in order to jump start the process.

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 in Texas and Oklahoma, rapid growth in the number of cases in Nebraska, the impressive settlement rates seen in the region, and the global reach of mediation as exemplified by the World Intellectual Property Organization demonstrate the significance of the process to individuals and managers of both small and large organizations here and abroad. 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.\textsuperscript{46} As shown in Table 7, successful mediation has occurred in a broad range of conflict situations, varying greatly in both the size and nature of the dispute. Cases range from multimillion-dollar disputes involving thousands of employees, governmental agencies, and large corporations to smaller domestic disputes over a few hundred dollars in building materials. Table 7 also highlights the variety of issues involved in mediation, ranging from massive biotech suits, global airline ticketing platforms, and control over a Native America tribal council, to sexual assault, child abuse, divorce proceedings, and electric shock of a minor. Overall, the increasing volume, variety, and scope of mediation cases highlight its expanding role in business and society.

VIII. CONCLUSION

The success of mediation and its application across a wide spectrum of conflict situations have been noted, and four tools to help participants better manage the process of influencing others to ensure success in mediation have been supported. Business leaders can use these tools to address influence among mediation participants, thus leading to greater harmony and more success in the process. Mediation need not be an exercise in futility. It is most likely to succeed when participants employ proactive influence tactics and are able to recognize and respond appropriately to tactics used by other parties, including those that are negative.

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, thus ensuring more understanding, mutual respect, and open communication.

\textsuperscript{46} See statement from Financial Industry Regulatory Authority, Inc. (FINRA), accessed 3/26/2014; http://finra.org/arbitration_mediation/parties/overview/mediation_an_alternative_path.html
Table 7: Examples of Successful Mediation in Business

### Cases Mediated by Bruce Meyerson⁴⁷
- A dispute among factions seeking control of a Native American tribal council.
- A multi-million dollar property settlement dispute in a divorce proceeding.
- A claim alleging that a minor was coached to make allegations of child abuse.
- A claim by a union member against his union for breaching duty of fair representation.
- Disputes between a nephew and an uncle over the distribution of a trust.
- Action on behalf of a minor against a utility firm over burns caused by electrical shock.
- A claim of sexual assault by a restaurant customer.
- A claim alleging excessive force and false arrest.

### Cases Mediated by World Intellectual Property Organization (WIPO)⁴⁸
- A European airline and its problems stemming from an agreement with a U.S. software company concerning development of a world-wide platform for ticket sales management.
- A biotech dispute involving a French and German company and the treatment for a major disease was successfully settled.
- A research center and a European technology company signed an R&D pact to improve voice recognition software. The technology company violated the payment schedule. The parties reached a settlement after months of intense negotiation facilitated by a mediator.
- Legal areas in WIPO mediation and arbitration cases include: Patents (39%), IT Law (21%), Trademarks (15%), Copyright (8%) and other (17%). Industry areas include: Information and Communication Technology (33%), Mechanical (16%), Life Sciences (14%), Entertainment (10%), other (25%). Settlement rates for Mediation averaged 69%.

### Cases Mediated by SEEDS (Services that Encourage Effective Dialogue & Solutions)⁴⁹
- Residential housing disputes between buyers and sellers.
- Disputes between apartment owners and their property managers.
- A case that diffused a complex civil harassment issue.
- Cases involving disputes between neighbors over property repairs.
- A dispute over the discovery of major defects in home after it was purchased was settled and led to friendship among parties who were immigrant families from the same country.

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WHEN DOES COMPENSATION FOR “TIME SPENT UNDER THE EMPLOYER’S CONTROL” INCLUDE PRE AND POST SHIFT WAITING AND OTHER ACTIVITIES?

Hilary M. Goldberg1 and Nanci K. Carr2

In the face of continued economic uncertainly, employers are increasingly turning to temporary staffing to meet immediate workforce needs as a way of filling a current staffing gap without investing in a long-term commitment to an employee. The Fair Labor Standards Act of 1938 requires that employers pay employees, including temporary employees, for all “hours worked,” so the question is what constitutes hours worked for the temporary worker? The answer generally comes down to “time spent under the employer’s control” but what does that mean? Does the employer need to exercise control over the employees’ choices, or just their actions?

A. Introduction

In the face of continued economic uncertainly, employers are increasingly turning to temporary staffing to meet immediate workforce needs. Statistics maintained by the United States Department of Labor, Bureau of Labor Statistics, reveal that as of April 2014, there were over 2.86 million employees employed on a temporary basis nationwide, an all-time high.1 It is a way of filling a current staffing gap in an uncertain economy without investing in a long-term commitment to an employee.2 It also saves the cost of overhead which is often 40% more than

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4 “You can hire 10,000 people for 10-15 minutes. When they’re done, those 10,000 people just melt away.” Bob Bahramipour, CEO of Gigwalk, engaged by Frito-Lay, a division of PepsiCo, to provide temporary employees to check a seasonal in-store promotional product display. US Companies Increasingly Turning to Temporary Workers to Fill Positions, Fox News (July 8, 2013), http://www.foxnews.com/us/2013/07/08/us-companies-increasingly-turning-to-temporary-workers-to-fill-positions/.
base pay\(^5\) once paid time off, 401K plans, and insurance are included. Temporary employees are prescreened and often pretrained, a valuable benefit to employers, and employers do not have to spend time and resources recruiting them. Sectors that historically have not used temporary workers,\(^6\) particularly professional services like lawyers, doctors and nurses, have turned to temporary staffing as well,\(^7\) although often referring to them as “supplemental staff” rather than temporary employees in an effort to maintain good workforce relations and in an attempt to disguise the temporary nature of the engagement. In this same vein, Wal-Mart refers to its temporary workers as “flexible associates.”\(^8\) It is predicted that use of temporary doctors will grow ten percent in the next year.\(^9\) Currently, manufacturing engages about 33% of temporary workers and administrative temps account for about 20% of the temporary workforce.\(^10\)

According to Todd Miller, CEO of Gwabbit, a software company in Carmel Valley, California, workers are “willing to entertain employment possibilities that they would not have six or seven years ago.”\(^11\)

This growth in temporary staffing has far outpaced employer permanent hiring.\(^12\) Indeed, of the 57,000 jobs added to the professional and business services industry in March of 2014, 29,000 were temporary workers.\(^13\) The trend continued into April of 2014, wherein an additional 24,000 jobs were created in the temporary help services industry.\(^14\)

The Fair Labor Standards Act of 1938\(^15\) ("FLSA") establishes federal minimum wage and overtime pay requirements applicable to most, but not all, private and public sector workers.\(^16\) Congress has specifically allowed states to pass and enforce overtime laws more generous than the FLSA, thus where a state law sets a minimum wage or overtime requirement that is more favorable to the employee, the state law applies.\(^17\) The FLSA requires that employers pay employees, including temporary employees, for all “hours worked,”\(^18\) so the question is what constitutes hours worked for the temporary worker?

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\(^6\) There has also been a dramatic expansion in the online labor exchange industry, with employers spending $1 billion last year to engage freelancers from oDesk and Elance for short-term project work, a 67% increase over the prior year. See Note 2.

\(^7\) Id.

\(^8\) Id.

\(^9\) Id.

\(^10\) Id.

\(^11\) Id.


\(^16\) The FLSA, with some exceptions, applies to employees working in industries that engage in, or produce goods for, interstate commerce. 29 U.S.C. § 202(a) (2010).

\(^17\) 29 U.S.C. §218(a) (2010), see also Pacific Merchant Shipping Ass’n v. Aubry, 918 F.2d 1409, 1422 (C.D.Cal. 1990). A current fifty state survey listing of all state minimum wage and overtime requirements is attached hereto as Appendix A.

While the FLSA does not clearly define what types of activities qualify as "hours worked," the United States Supreme Court has decided several cases in which it elaborated on the types of activities that are compensable work under the FLSA. For example, in Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, the Supreme Court held that compensable work is "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

While temporary workers can be utilized in many work environments, many factories and warehouses now rely on temporary workers to fill gaps in varying workforce needs. In many such fact patterns, a large number of temporary employees may arrive at a facility for a specific shift start time. The temporary employees wait outside an employer’s facility to be hired for a particular shift, and they clock in only after being selected by employers to work a given day. The employees frequently are not paid from the clock in time, but rather from the later shift start time. Similarly, employees may be paid only to the shift end time, instead of the much later clock out time.)

New and evolving fact patterns, such as this, present novel questions for employers grappling with the question, “what constitutes hours worked in the temporary employment context?”

B. Whether Time Spent By A Temporary Employee “Waiting” Before The Scheduled Shift Start Time is Compensable Requires a Fact Intensive Inquiry; Employers Must Thoroughly Evaluate Their Pre and Post Shift Procedures.

As established by the United States Supreme Court in Skidmore v. Swift & Co., the key to determining whether time spent waiting for an assignment is compensable is whether “the employee was engaged to wait, or [] waited to be engaged.” However, the Skidmore court cautioned, “no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.”

Accordingly, whether or not waiting time is compensable requires a fact intensive analysis.

Employees are “engaged to wait,” or working, only if the stand by time is “primarily for the benefit” of the employer. If the employee is off-duty and able to use the time for her or his own personal purposes, the time is not compensable. Indeed, it is well established that the time a temporary worker spends seeking a job assignment is not compensable.

An emerging fact pattern recently appearing in courts throughout the country seeks a determination of when a temporary worker’s compensable time begins after being selected for employment. Employers have frequently prevailed in these scenarios, although the law continues to evolve as temporary staffing becomes increasingly predominant. For example, in Levias v. 19 321 U.S. 590, 598, 64 S.Ct. 698 (1944).

20 323 U.S. 134, 137 (1944).

21 Id.


Pacific Maritime Association, temporary employees seeking assignments were required to report to the union dispatch office to register for work, obtain the assignment and travel to the assignment. The court determined that the employees were not entitled to pay for any time prior to “the foreman’s safety speech to signal the beginning of the shift” because, the court reasoned, the employees were permitted to use their pre-shift time to “hang out, read the paper, get something to eat, drink coffee and/or talk with co-workers in the lunchroom while waiting for the day’s safety speech from the foreman.” Similarly, in Leverette v. Labor Works Inter’l, LLC, the court, in applying North Carolina’s wage and hour laws, determined that time temporary workers spent waiting at temporary employment agencies for transportation to job sites, riding in an staffing agency van to and from the job site, and taking a pre-shift breathalyzer test was not compensable as “hours worked.” The Leverette court reasoned that because the workers were not required to utilize the agencies’ transportation or equipment, and were provided with free time while waiting for transportation and pre-shift breathalyzer tests, such time did not constitute hours worked.

1. Employers Must Pay Their Employees For All Hours Worked, Which Includes All Time Spent Under An Employer’s Control.

California is widely recognized as one of the more employee friendly jurisdictions, and the California courts and California Labor Commissioner, also called the Division of Labor Standards Enforcement (“DLSE”), present a well-developed model within which to analyze compensable time issues. Under California law, it is the level of the employer’s control over its employees that is determinative, not whether the employee is “working.” In the seminal case on the issue, Morillion v. Royal Packing Co., the California Supreme Court affirmatively established that whenever an employee is under the control of her employer, regardless of whether that employee is actually working, the employee must be compensated for that time as “hours worked.” In Morillion, the California Supreme Court determined that employees must be paid for time they spend traveling to and from the fields on employer-provided buses pursuant to the California Industrial Welfare Commission wage order which defines “hours worked” as “the

26 Id. at 1043.
27 636 S.E.2d 258 (N.C. App. 2006).
28 When faced with issues concerning commute time, courts frequently rely on the Portal to Portal Act (PPA), which states that the following two elements must be considered in determining whether and employee’s time is compensable: (1) whether the time spent is predominantly to benefit the employer and integral to the job, and (2) whether the employee is able to use the time for his or her own personal activities. Portal–to–Portal Act of 1947, 29 U.S.C. §254.
29 The California Supreme Court requires that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. Murphy v. Kenneth Cole Productions, Inc., 40 Cal.4th 1094, 1103 (2007).
30 See Morillion v. Royal Packing Co., 22 Cal.4th 575, 578 (2000) (interpreting the DLSE’s “hours worked” definition and holding that employee can be under an employer’s control even when the employee is not “suffered or permitted to work”); Bono Enters., Inc. v. Bradshaw, 32 Cal.App.4th 968, 975 (1995) (determining that “[w]hen an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer’s control”), disapproved on other grounds by Tidewater Marine W., Inc. v. Bradshaw, 14 Cal.4th 557 (1996).
31 22 Cal. 4th 575, 582 (2000).
time during which an employee is subject to the control of an employer, … includ[ing] all the time the employee is suffered or permitted to work, whether or not required to do so.”

The Morillion court cited extensively to similar decisions to make the point that it doesn’t matter whether the employee is engaged in a productive task or not, only that they are subject to the employer’s control. Clearly, on the bus on the way to the field, employees were permitted to talk amongst themselves, use any smartphone or mobile device, read, nap, drink coffee and engage in any other available personal pursuits. A distinguishing factor between Morillion and Leverette, supra, is that in Morillion, employees were required to ride employer-provided transportation. Because riding the bus was a required condition of employment, the time spent by employees on the bus resting, on the phone or drinking coffee was compensable. In making the transportation arrangement optional, the Leverette employer escaped liability. Clearly, “an employee who is subject to an employer’s control does not have to be working during that time to be compensated.”

Underscoring the required versus optional distinction, citing Bono Enterprises, Inc. v. Bradshaw, the California Supreme Court explains, “[e]mployees who were required to remain on the work premises during their lunch hour had to be compensated for that time under the definition of “hours worked.” Further, “time an employer required personal attendant employees to spend at its premises, even when they were allowed to sleep, should be considered “hours worked.”

The California Labor Commissioner has recently cited a California warehouse company, Quetico, LLC, and fined it $1,300,000.00 in what the Labor Commissioner called “wage theft.” (Such action is referred to herein as “Quetico”). As the Labor Commissioner explained, employers are obligated to pay for the time spent by employees prior to the scheduled start time on the employer’s premises. In Quetico, employees were required to report to work prior to their scheduled start times to wait in long lines to punch time cards on very few time machines. This created a situation where employees were obliged to report to work earlier and earlier, time for which they were not compensated. When employees punched out for their meal period, they were also required to stand in long lines, which cut into their 30-minute lunch break and forced them to come back early to punch back in.

Quetico illustrates that time under the employer’s control, even pre-shift time, must be compensated. In Quetico, unlike the case of temporary staffing employees, the employees were regular employees who had control over when they arrived at work to stand in line for the time clock. A stronger case could be made for temporary staffing employees who frequently wait outside the employer’s facility for extended periods of time before knowing whether they would be chosen for a particular day’s work. Those employees, once chosen, may proceed to clock-in stations and then wait for their scheduled start time. The employer is in charge of when the

32 Cal. Code Regs., tit. 8, § 11140, subd. 2(G).
33 22 Cal. 4th 575, 582 (2000).
34 Morillion, 22 Cal. 4th at 582.
38 Id.
temporary employees are selected for the day’s work, when they are permitted to enter the
facility and clock-in, and whether this occurs significantly in advance of any scheduled shift start
time. Employers should be guided by the Labor Commissioner’s determination in Quetico and
make every effort to efficiently move employees through clock-in lines to ensure employees are
compensated for all time under the employer’s control.

California Labor Commissioner Julie Su is quoted as saying “Wage theft takes many
forms. My office will crack down on any employer who is taking hard-earned wages from
workers by falsifying time cards and systematically preventing employees from taking a full
meal break. We are also intent on eliminating the competitive advantage that labor law violators
gain over employers who play by the rules.” Employees should be cognizant of their rights
and employers attune to their obligations.

2. Pre and Post Shift Activities Designated as “Unpaid Grace Periods” May, Despite Their Title, Be Compensable.

Employers may try to argue that time spent before clocking in is not under the
employer’s control and therefore not compensable. In an effort to minimize paid pre-shift time,
many employers have instituted “unpaid grace period” policies which permit employees to clock
in and out significantly before and after scheduled shift times without, theoretically, triggering
the employer’s obligation to pay. The issue of the “unpaid grace period” was recently addressed
in See’s Candy Shops, Inc. v. Superior Court. Under this policy “employees whose schedules
have been programmed into the electronic time keeping system may voluntarily punch in up to
10 minutes before their scheduled start time and 10 minutes after their scheduled end
time.” However, “[b]ecause See’s Candy assumes the employees are not working during the
10–minute grace period, if an employee punches into the system during the grace period, the
employee is paid based on his or her scheduled start/stop time, rather than the punch
time.” Under the “grace period” policy the employer “assumed” that no work was being
performed and the issue was whether that assumption was accurate.

If the evidence later shows that the employees were working or
“under the control” of See’s Candy during the grace period and
they were not paid for this time, they may be entitled to recover
those amounts in the litigation and any applicable penalties.

In response to the “unpaid grace time,” employees will argue that clocking in necessarily
means that the employee is under the control of the employer. Once clocked in, an employee
cannot leave the premises or conduct personal activities, otherwise, employees will argue, being
“on the clock” has no purpose.

Temporary staffing cases may be distinguishable from See’s Candy, and other
conventional employment cases, because in the case of temporary labor, employees cannot
simply show up and clock in and begin working at their discretion. They must wait to be chosen
to work. Only after they are chosen to work are they permitted to enter the premises and clock
in. In See’s Candy, the employees were regular employees with free access to the facility. They
could choose when to enter and clock in. In the temporary context, employers control when to
select the day’s workers and permit entry into the workplace. This supports the employees’

39 Id.
41 Id.
42 Id. at 892-893, emphasis added.
position that the employer controls the clock-in time presenting new challenges to employers in the context of temporary workforce management.

Some argue that merely requiring the presence of the employee is sufficient control and constitutes “hours worked.” This is a timely and hotly debated issue. In Mediola v. CPS Security Solutions, Inc., currently pending review before the California Supreme Court, the court introduced a test for compensation, framing it in the context of whether the worker is sufficiently restricted from engaging in personal pursuits that he is deemed to be “subject to” the employer’s control. In Mediola, the court determined that security guards, who were required to be “on-call” to respond to emergencies at construction sites where they temporarily resided in trailer homes, were entitled to pay as hours worked.

[The guards] are required to live on the jobsite. They are expected to respond immediately, in uniform, when an alarm sounds or they hear suspicious noise or activity. During the relevant hours, they are geo-graphically limited to the trailer and/or the jobsite unless a reliever arrives; even then, they are required to take a pager or radio telephone so they may be called back; and they are required to remain within 30 minutes of the site unless other arrangements have been made. They may not easily trade their responsibilities, but can only call for a reliever and hope one will be found.

Most important, the trailer guards do not enjoy the normal freedoms of a typical off-duty worker, as they are forbidden to have children, pets or alcohol in the trailers and cannot entertain or visit with adult friends or family without special permission. On this record, we conclude the degree of control exercised by the employer compels the conclusion that the trailer guards’ on-call time falls under the definition of “hours worked” under California law.

The outcome of the California Supreme Court’s review of Mediola will have a determinative impact on the evolving definition of “hours worked.” In its everyday usage many employers improperly define “work” as some form of productive activity requiring mental or physical effort. But as the cases cited above illustrate, this common understanding bears little resemblance to the actual legal test for triggering compensation.

43 Aguilar v. Association for Retarded Citizens, 234 Cal. App. 3d 21, 30 (1991). (all hours employee is on premises, even while asleep, are hours worked.)
44 Mediola v. CPS Security Solutions, Inc., 159 Cal.Rptr.3d 159 (2013). The California Supreme Court has granted review on the following issue: Are the guards that defendants provide for construction site security entitled to compensation for all nighttime “on call” hours, or may defendants deduct sleep time depending on the structure of the guards' work shifts? As of the date of publication, the California Supreme Court has yet to issue an opinion.
45 Id.
3. Even Time An Employee Spends Sleeping May Be Compensable.

Clocking in serves as a confirmation that the intended employee is present and ready to work, so, it follows that an employee is generally entitled to compensation when required to be on the employer’s premises,\(^{46}\) without an analysis of what that employee is doing on the premises. He need not be engaged in productive work, and in fact, may be arguably “sleeping on the job.” According to the decision reached in Aguilar v. Association for Retarded Citizens,\(^{47}\) compensation is required even when the employee is asleep during the period he is required to remain on the employers’ premises.\(^{48}\) In the absence of any applicable exception, the Aguilar court found that the time fell under the broad definition of “hours worked” -- “the hours when an employee…is subject to the control of an employer” -- which “clearly includes time when an employee is required to be at the employer’s premises and subject to the employer’s control even though the employee was allowed to sleep.”\(^{49}\) Accordingly, the employees were “entitled to compensation for all the hours worked”; the employer was “not entitled to deduct those hours when it allow[ed] the employees to sleep.”\(^{49}\)


Another emergent area wherein parties challenge the compensability of pre-and post-shift activities concerns the donning and doffing of required protective gear. Employers find support in a recent Illinois case, Mitchell v. JCG Industries.\(^{50}\) In Mitchell, the employees were poultry processors covered by a collective bargaining agreement, which explicitly stated that the pre and post shift protective gear donning and doffing activities, of which the employees complained, were to be non-compensable. Instead, similar to the fact patterns described above, employees were paid based on the beginning and end of a shift, which were marked by bells. Because a collective bargaining agreement addressed the disputed issue, the court was inclined to defer to the pre-negotiated terms set forth by the parties.

Under the FLSA, an employer need not compensate an employee for the time spent “changing clothes” or donning and doffing protective gear where that activity is excluded from compensable time by a bona fide collective bargaining agreement.\(^{51}\) The issue of what constitutes “changing clothes” within the meaning of the FLSA was decided by the United States Supreme Court in Sandifer v. United States Steel Corporation.\(^{52}\) In Sandifer, the Supreme Court decided that time spent donning and doffing protective gear was, indeed, time spent “changing clothes” under the FLSA, thereby allowing parties to collectively bargain over compensability.\(^{53}\)

5. Employers Are Not Liable For De Minimis Time.


\(^{48}\) Id. at p. 30.

\(^{49}\) Id. at p. 31; accord, Bono Enterprises, Inc. v. Bradshaw, 32 Cal.App.4th 968, 975 (1995), disapproved on other grounds in Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal.4th at p. 574 (1996) (lunch period was compensable where employees were restricted from leaving work premises).

\(^{50}\) 929 F.Supp.2d 827 (N.D.Ill., 2013).


\(^{52}\) 134 S. Ct. 870, 881 (Jan. 27, 2014).

Employers may argue that they cannot pay for every second of an employee’s time. In other words, there must be some flexibility in calculating pay rates that allows for a degree of reason. The *de minimis* doctrine provides that, even if certain activities are otherwise compensable under the FLSA, these activities are noncompensable only if they involve an “insubstantial and insignificant” amount of time because the FLSA does not compensate “a few seconds or minutes of work beyond the scheduled working hours.”\(^{54}\) The Ninth Circuit has held that in determining whether an otherwise compensable time is *de minimis*, courts should consider “(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.”\(^{55}\) So, if after clocking out, an employer asks an employee to “close that door,” the practical administrative difficulty of adding that additional thirty seconds to an employee’s time for the week would not be required. However, if the employer is consistently asking for “just one more thing,” day after day, such activities may rise above *de minimis* and therefore be compensable.

C. Must Employers Compensate Time Spent On Pre-Hire Activities?
   1. Time Temporary Workers Spend Interviewing May Be Compensable; Staffing Companies May Be Held Liable For Payment.
   
   While one of the advantages of using a temporary staffing agency is that temporary workers have been prescreened and qualified for a position, a company engaging the services of an employee of a temporary agency may still want the opportunity to interview that candidate before accepting her services. That candidate is an employee of the temporary staffing agency, and is sent by the agency to the engaging company for an interview. Courts have held the temporary agency, as the employer, is liable for time temporary agency employees spend preparing for and attending job interviews with the engaging company. In *Sullivan v. Kelly Services, Inc.*\(^{56}\), the court determined that where the staffing agency, who maintained an ongoing employer-employee relationship with the temporary worker, exerted control over the interview scheduling as well as continued contact with the temporary employees during the interview process, the staffing agency as the employer was required to pay for interview time as “hours worked.”\(^{56}\) Employers who utilize the services of temporary staffing agencies should be aware that such costs may be passed along to them in the form of increased fees for staffing services.


   In some cases, employers will require certain types of training before hiring an employee. For example, some employers of virtual employees will require that the potential employee complete a training program on the virtual employer’s software to be sure that the potential employee has the requisite computer skills to be able to do the job. The U.S. Department of Labor’s Wage and Hour Division developed a six-part test\(^{57}\) based on United States Supreme Court’s decision in *Walling v. Portland Terminal Co.*\(^{58}\) to determine whether a trainee is an employee under the FLSA and therefore must be compensated for time spent in training. While

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each circumstance is different, and the facts must be carefully examined, if the following six factors are met, then the trainee is not an employee for purposes of the FLSA and therefore compensation will not be due:

1. The training is similar to training provided in a vocational school, even if it includes actual operation of the employer’s facilities. (This means that the training could be used by the trainee in a position with an employer other than the training employer.)
2. The training is for the benefit of the trainee.
3. The trainees do not displace regular employees, but work under close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer’s operations may be actually impeded.
5. The trainees are not necessarily entitled to a job with the training employer employment at the completion of the training period.
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

The U.S. Department of Labor (the “DOL”) also created a “safe harbor” list of criteria to determine if employee training time is compensable. In general, training programs do not count as working time for current employees if all four of the following criteria apply:

1. Attendance is outside of the employee’s regular working hours;
2. Attendance is in fact voluntary;
3. The training is not directly related to the employee’s job; and
4. The employee does not perform any productive work during such attendance;

Of course, each of these factors raises questions of interpretation. For example, with respect to the first factor, the focus is on the employee’s regular hours, not the employer’s regular business hours. So, if a hospital worker regularly works the night shift, a training session from 10am to 12pm would be outside of that employee’s regular working hours, even though the session would be during the employer’s regular hours. If the other three factors are met as well, the employee would not need to be compensated for that morning training session.

To determine whether the training was voluntary, consider whether the employee had a choice to participate in the training. The DOL determined that voluntary means that the employer does not require the training and that the employee does not attend the training because of a concern that his employment will be adversely affected without attendance.

What does “directly related to the employee’s job” mean? How does an employer determine whether that factor is met? If the training will make an employee more effective in the current position, then it is directly related. If, on the other hand, the training is in preparation for a new or more advanced position, it is not directly related, even if that training will have a positive impact on performance in the current position.

Employees will often argue that training related to obtaining or renewing a license or certification is directly related to that an employee’s job. However, while a licensed employee is a benefit to an employer, that same license would be useful in any other similar job, and the

61 29 CFR 785.27.
license training is probably offered by vocational schools or other training services. So, provided that the employer-provided training satisfies the requirements of the applicable local or state licensing division, an employee’s attendance at the employer-sponsored training program would not be compensable.

With respect to productive work, the DOL describes such work as that which benefits the employer, rather than the employee. As discussed above, that can mean providing a service or creating a product, but it can also mean remaining idle if that benefits the employer. So, in the case of training, while the employee can learn to do work during the training session that will ultimately benefit the employer, for example, learning how to assemble a product typically sold by the employer, any such products assembled during the training session cannot be used by the employer without compensation to the employee.

3. Pre-Employment Drug Testing Is Not Compensable; Employers May Want To Absorb Testing Related Expenses.

Many state and federal statutes require employers in certain industries to conduct drug tests and physical examinations on their employees. An example is the “periodic recurring testing of public transportation employees responsible for safety-sensitive functions” permitted by federal law. Private employers may voluntarily impose a drug testing program to obtain discounts on worker’s compensation premiums, prevent workplace accidents, deter drug and alcohol abuse among employees and to ensure that employees who use illegal drugs are not added to their workforce. At issue is whether employees must be compensated for the time spent completing required pre and post employment drug tests.

Employers may choose to make an offer of employment conditional upon the prospective employee’s ability to pass a drug test. In such case, the time spent by the prospective employee taking a drug test is not compensable. Further, no federal provision requires the employer to pay for the cost associated with such tests. Nonetheless, employers seeking to impose such costs on prospective employees should be wary of potential claims for discrimination if it can be shown that such costs discourage or prohibit minority applicants from applying or qualifying for employment. As a result, although the potential employee’s time is not compensable, most employers cover the actual cost of any required pre-employment drug testing.

Many employers choose to, or are required to, subject their employees to drug tests at various times after hire and throughout the employment relationship. The DOL has enunciated, as a general rule, that whenever an employer “impose[s] special tests, requirements or conditions that [an] employee must meet, time he or she spends traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements is probably hours worked.” The DOL clarifies that “[i]t does not matter whether these tests are scheduled during []employee’s normal working hours or during his or her non-working hours. Time spent in these activities is time during which the employee’s freedom of movement is restricted for the purpose of serving [the] business and during which he or she is subject to [the employer’s] discretion and control.”

63 29 CFR 778.223.
65 Pre-employment drug testing for alcohol use is prohibited by the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (2000).
The Substance Abuse and Mental Health Services Administration, the federal agency charged with establishing and maintaining procedures for drug testing federal employees, has promulgated “Mandatory Guidelines for Federal Workplace Drug Testing Programs.” Many employers outside the federal sector voluntarily comply with these established, widely recognized guidelines to avoid potential liability exposure generated by an employer’s own self-generated program.

D. Conclusion

Employers often seek temporary employees in an effort to reduce costs, however an employee’s right to fair compensation should not be compromised. While traditionally framed in the context of employer control, the issue of compensable time may also be analyzed in the context of the level of choice involved on the part of the employee, who, with increasing frequency, may be a temporary employee. If the temporary agency has instructed the temporary employee to prepare for and participate in an interview with an agency client, then that temporary employee is under the control of that agency employer. If that temporary employee accepts an assignment with an agency client company, and that company requires that the temporary employee clock in during a grace period, and has no choice to leave the company’s premises during that grace period, then that is likely compensable time. Employers, whether hiring direct employees or engaging temporary employees from an agency, should take care to be sure that all time spent under the employer’s control is properly compensated.

68 For example, Best Buy Co., Inc. has instituted a policy that mirrors the federal guidelines. (http://www.bestbuy-jobs.com/sites/bestbuy/pdf/Best-Buy-Pre-Employment-Drug-Testing-Policy.pdf, last visited April 22, 2014).
### Appendix A

#### 50 State Survey

**Minimum Wage Requirements By State**

<table>
<thead>
<tr>
<th>States with No Minimum Wage Requirement</th>
<th>States with Minimum Wage Less Than Federal Minimum Wage</th>
<th>Rate</th>
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</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Arkansas</td>
<td>$6.25</td>
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<tr>
<td>Louisiana</td>
<td>Georgia</td>
<td>$5.15</td>
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<td>Mississippi</td>
<td>Minnesota (small employer – annual receipts less than $500,000)</td>
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<td>South Carolina</td>
<td>Wyoming</td>
<td>$5.15</td>
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<table>
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<th>States with Minimum Wage Greater than Federal Minimum Wage</th>
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DIGITAL ASSETS: LAW AND TECHNOLOGY COLLIDE
– A DILEMMA NEEDING A SOLUTION

KYLE C. POST*
MARSHA L. BAYLESS**
J. KEATON GRUBBS***

ABSTRACT

This article explores some of the legal and practical issues related to the inheritance of and access to digital assets. As of today, technology has outpaced the law in this area as only five states have laws specifically addressing this issue. In the absence of direct legal authority, individuals and service providers are left trying to determine how, if at all, digital assets fit within existing laws. As a result, e-mail and social media service providers have developed their own policies regarding the issue and in many cases these policies vary widely. The inconsistency in these policies as well as the uncertainty regarding judicial interpretation and enforcement of the policies make it difficult to determine a service provider’s obligations and an account holder’s rights with respect to digital assets. In the end, despite recent legislative attempts to address the issue, many questions remain unanswered and create significant uncertainty and confusion regarding digital assets.

I. INTRODUCTION

A popular computer program, Second Life, allows players to create an electronic version of themselves and live life in a virtual 3D world. The website describes it as a space where “everyone you see is a real person and everything you see is built by people just like you.”¹ Many of us have not experienced our avatar in Second Life, but most, if not all, of us have created an electronic version of ourselves and live a significant portion of our lives in an electronic world. For example, Facebook reported that at the end of 2013 there were 1.2 billion

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active Facebook user accounts. Many people are involved with online banking and shopping and often have multiple email accounts as well as iTunes, Amazon, and other online accounts. In addition, photos, videos, artwork, and sometimes important business documents are stored electronically. While a significant amount of life activity happens online, we often are unaware of the legal issues that such activities create. Although there is no single, authoritative definition, these online assets and accounts have generally become known as “digital assets”. However, as noted below, the ability to accurately define the assets is a source of some of the legal uncertainties in the area. Traditional rules in laws involving property, contract, succession and inheritance, and privacy all collide in the high-tech arena of online accounts and information, and there are immense dilemmas for users, providers, families, estate administrators, businesses, legislatures, and the courts.

II. LEGAL ISSUES

A. OWNERSHIP RIGHTS IN DIGITAL ASSETS

The first issue is what, if any, property rights users have in the content of email and other electronic accounts such as iTunes, Kindle and Amazon. Is there even a transferrable asset or interest involved? If so, how can the asset or interest be transferred and to whom? There have been many discussions of this topic and commentators have tried to define “digital assets” and create a classification system for those assets. As noted by other scholars, digital assets can include (i) devices and data, (ii) e-mail, (iii) online service accounts, (iv) financial accounts, and (v) online businesses or stores. While it may be simple to identify the types of digital assets a person can acquire, it is more difficult to determine how the law treats those assets from a property law standpoint. For example, are email accounts intangible personal property or are they simply a license to use the services of the email provider? Determining what rights a person has with respect to digital assets requires an understanding of property law as well as the contracts with the service providers that facilitate the creation and management of digital assets.

In some cases, the digital assets we think we own are really non-transferrable licenses to use certain products and technology. For example, the Kindle Store terms of use provide that when you pay to “buy” an e-book or other material through the Kindle Store, the payment of the applicable fees “grants [an individual] a non-exclusive right to view, use, and display” the
material an unlimited number of times using Kindle-related devices. The user may not “sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights” to the material.

Similarly, Amazon.com’s user agreement provides that the user receives a license to the music or other content but does not receive any ownership rights. So, while the license is an asset, it may have no value to a person’s heirs because technically when the license holder dies the license terminates. The laws regarding inheritance of digital assets discussed below seem to acknowledge that fact and as such do not specifically address the use of or access to this type of content (i.e. content created by a third party, such as copyright protected music, movies, files, etc.). Instead, the laws deal only with email accounts or other digital assets with content created by the deceased person. Furthermore, the laws do not address actual ownership of digital assets; they simply allow a deceased person’s heirs to access email accounts to retrieve the data. Any attempt by an heir to continue use of a deceased’s Kindle, iTunes, or similar account or other copyrighted material would likely be met with hostility from the copyright owners and service providers and is clearly not supported by the laws discussed below.

Some email service providers also specifically provide that an email account is non-transferable. For example, Yahoo!’s terms of service state that a Yahoo! email account is “non-transferable and any rights to [the] Yahoo! ID or contents within your account terminate upon your death.” Every person who signs up for a Yahoo! account is required to agree to the terms of service, including the non-transferability provision. What effect does this agreement have on any legal rights a person has in the contents of an email account?

Some commentators and scholars have suggested that the author of an email should be regarded as the owner because he or she obtains copyright protection when the email is created. Generally, copyright protection is available to “original works of authorship fixed in any tangible medium of expression”. “Digital transmissions”, which would include an email message, are specifically covered by the Digital Performance Right in Sound Recordings Act of 1995 which amended the Copyright Act. Under the Copyright Act, copyright protection is automatic and does not require registration with the U.S. Copyright Office, although registration may provide additional legal rights and remedies that are not otherwise available.

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7 Id.
8 Amazon.com, Conditions of Use, HELP AND CUSTOMER SERVICE (last updated Dec. 5, 2012).
However, if the author of an email obtains copyright protection for the email, that may not mean he or she (or his or her heirs) retains control of any copies of the copyrighted material. It appears that if an author creates copyrighted material and sends the material to another party without retaining a copy of the material, he or she may not have any rights to get the material back.\textsuperscript{14} For example, if a person writes a letter and sends it to a friend, the author may have copyright protection in the content of the letter which prevents the friend from copying, publishing, or distributing the letter, but the author has no legal right to require the friend to return the letter to her.\textsuperscript{15} With emails, the author of an email may obtain copyright protection, but if he or she does not retain a copy (printed or in digital format) there may not be any means to secure a copy.\textsuperscript{16}

It has also been suggested that emails are similar to letters delivered by the post office.\textsuperscript{17} When a person leaves a package at the post office for delivery, the person transfers possession of the package but not ownership. That is, the post office keeps the package and delivers it according to the instructions but does not have any ownership rights with respect to the package. This agreement creates a bailment of the letter and some have suggested that sending an email creates a similar bailment between the service provider and the sender of the email.\textsuperscript{18} As a result, the service provider (bailee) has a duty to return the property to the sender (bailor) or at least maintain it according to the terms of the bailment. However, email accounts (and other digital assets) present some peculiar issues not found in traditional mail and other bailments. First, an email service provider grants the user access to its technology to prepare the email, store it, and deliver it to the recipient’s inbox. In addition, the service provider maintains a copy of the email and allows the sender to access it at any time by logging into the account. Furthermore, the user agreements often provide that the account terminates on the user’s death, which could be viewed as a term of the bailment agreement.

As a result of the foregoing, it is difficult to analyze the ownership of emails and other digital assets under the laws applicable to traditional mail or other services. There really is not any other area of law that fits squarely with email and other digital assets. Furthermore, many user agreements specifically provide that the accounts (and, therefore, access to the contents) are non-transferrable. So, when a person agrees to use email, he or she agrees that access to the account dies with him or her. This provides notice that the sender needs to make copies of the contents or make other arrangements to ensure the contents are not lost at death.

\section*{B. Inheritance of (or Access to) Digital Assets}

\textsuperscript{14} See Grigsby v. Breckenridge, 65 Ky. (2 Bush) 480, 486 (1867).
\textsuperscript{15} Id.
\textsuperscript{16} See Darrow,\textsuperscript{supra} note 10, at 300.
\textsuperscript{17} Id. at 304.
\textsuperscript{18} Id.
Another legal issue is what happens to our digital assets after we die. This issue was highlighted in 2005 when the family of Justin Ellsworth, a U.S. Marine killed in combat, tried to get access to their son’s Yahoo! email account after he was killed in Iraq. After Justin’s death, his family contacted Yahoo! and requested access to Justin’s email account but Yahoo! refused, citing the terms of the company’s privacy policy that Justin agreed to when he created his account. Although the request was initially denied, Yahoo! recognized the need for a solution to the problem facing the parties. Yahoo!’s spokeswoman stated that “[T]here are important reasons why we feel it is important to uphold the preferences that are part of the agreement we have with our users regarding their privacy. What all of us are looking for is a path that upholds individual privacy and also fully respects a family's request.” Several months later, a Michigan court required Yahoo! to grant access to the email account and Yahoo! complied. In fact, Yahoo!’s spokeswoman noted that Yahoo! was “pleased the court resolved [the] matter.” While the court ordered Yahoo! to release the account contents, it did not reach a broad conclusion regarding the rights of a deceased person’s heirs to the deceased’s digital assets. For the most part, that issue remains unresolved today.

The difficulty in determining the inheritance rights with respect to email is that unlike traditional mail, when an email is sent a digital copy of the email is automatically saved in the sender’s email account. Does this give a deceased person’s heirs the legal right to access the account to retrieve the copy? The answer to that question is unclear because by virtue of the terms of service of the email account the user may have agreed that upon his or her death all rights in the account and its content terminate. As discussed below, however, some states are enacting laws to grant such access to the deceased’s executor.

To date, five states have directly addressed this issue by enacting laws governing the rights of a deceased person’s estate to the contents of the deceased’s email account. Connecticut, Idaho, Indiana, Oklahoma, and Rhode Island have passed laws.

These laws can be separated into two general categories: (i) those that attempt to give an executor control over digital assets and allow the executor to continue to use the account and (ii) those that grant an executor only access to the contents of a decedent’s email accounts. Oklahoma and Idaho fall into the first category, while Connecticut, Indiana, and Rhode Island are in the second.

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19 See Jim Hu, Yahoo denies family access to dead marine’s e-mail, CNET NEWS (Dec. 21, 2004, 2:49 PM), http://news.cnet.com/Yahoo-denies-family-access-to-dead-marines-e-mail/2100-1038_3-5500057.html.
20 Id.
21 Id.
23 Id.
24 See CONN. GEN. STAT. ANN. § 45a-334a (West 2014); IDAHO CODE ANN. § 15-5-424(3)(z) (West 2014); IND. CODE ANN. § 29-1-13-1.1 (West 2014); OKLA. STAT. ANN. Tit. 58 § 269 (West 2012); R.I. GEN. LAWS ANN. §§ 33-27-2 to -3 (West 2014).
Connecticut, Indiana, and Rhode Island were the first states to address the treatment of email upon a person’s death, enacting laws between 2005 and 2007.\(^{25}\) These statutes provide that “electronic mail service providers” or “custodians” are required to provide to the personal representative of an estate access to or copies of the contents of the deceased’s email account or other documents stored by the provider or custodian.\(^{26}\) The email provider or custodian’s obligation to provide this information is not triggered until a written request has been received from the executor containing a copy of the death certificate and a certified copy of the court document appointing the executor as the administrator of the estate.\(^{27}\) Connecticut also allows the executor to submit an order from the probate court having jurisdiction of the estate as a means of triggering the electronic mail service provider’s duty to disclose.\(^{28}\) Rhode Island has an additional requirement that the executor submit an order from the probate court (i) designating the executor as an agent for the deceased for purposes of the Electronic Communications Privacy Act and (ii) ordering the estate to indemnify the email provider from all liability for complying with such order.\(^{29}\) Indiana’s law also provides that a custodian cannot dispose of electronically stored documents for two years after receiving a request from the executor of an estate.\(^{30}\)

Oklahoma passed a similar law in 2010 which addressed not only email accounts but also “social networking website[s], [and] any microblogging or short message service website.”\(^{31}\) This law provides that “an executor or administrator or an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person” with respect to any of the above-mentioned services.\(^{32}\) Application of this law may be very limited because of the “where otherwise authorized” limitation on an executor’s right to access the online accounts. As one commentator has noted, if the terms of service provide explicit limitations on the transferability of the account or the right to access the account after death, Oklahoma’s law does not grant the executor any rights.\(^{33}\) The Oklahoma law “does not, on its face, appear to grant executors any new powers not already conferred by the contract terms.” Idaho’s law provides a similar authorization to “take control of, conduct, continue or terminate” certain digital accounts, including email and blogs.\(^{34}\)

In some cases, granting access to an email account may be all that the heirs need and want. As in the case of email accounts, the ability to read, save, print, or otherwise manage the

\(^{25}\) See CONN. GEN. STAT. ANN. § 45a-334a (West 2014); R.I. GEN. LAWS. ANN. §§ 33-27-2 to -3 (West 2014); IND. CODE ANN. § 29-1-13-1.1 (West 2014).

\(^{26}\) CONN. GEN. STAT. ANN. § 45a-334a; R.I. GEN. LAWS. ANN. §§ 33-27-3; IND. CODE ANN. § 29-1-13-1.1.

\(^{27}\) CONN. GEN. STAT. ANN. § 45a-334a(b); R.I. GEN. LAWS. ANN. § 33-27-3; IND. CODE ANN. § 29-1-13-1.1(b).

\(^{28}\) CONN. GEN. STAT. ANN. § 45a-334a(b).

\(^{29}\) R.I. GEN. LAWS. ANN. §§ 33-27-3(2).

\(^{30}\) IND. CODE ANN. § 29-1-13-1.1(c).

\(^{31}\) OKLA. STAT. ANN. Tit. 58 § 269 (West 2012).

\(^{32}\) Id.

\(^{33}\) Roy, supra note 3, at 385 (“Although this law still awaits court interpretation, it does not, on its face, appear to grant executors any new powers not already conferred by the contract terms.”).

\(^{34}\) IDAHO CODE ANN. § 15-5-424(3)(z) (West 2014).
messages is likely the most important aspect to the heirs. However, with iTunes accounts or other services, the value of the account is not in having a list of what the account contains but in being able to use the contents as desired. Email providers have been slow to respond to the issue of allowing heirs to access a deceased person’s accounts and Apple, Amazon and other service providers who supply copyrighted material are sure to be even more hesitant about providing access to heirs and most likely will not grant such access in fear of violating the terms of the license with the copyright holders.

C. Privacy Concerns

What happens if the deceased wanted the account and its contents to remain private? Will the executor be required to disclose the contents to the potential beneficiaries? If the contents are valuable, then absent specific direction otherwise from the decedent the beneficiaries will have access to the private information. It has been suggested that there be an opt-out or opt-in mechanism to allow people to determine in advance whether they want their heirs to have access to the online accounts.\(^{35}\)

Allowing an opt-in option would surely simplify the procedure which could otherwise be accomplished by specifically providing in a will that the online accounts are to pass to a specified individual or not to be disclosed. Using a will to manage digital assets may be an important tool because some state laws, such as Indiana, Rhode Island and Connecticut, appear to make it mandatory that the contents of such email accounts be disclosed upon request from the executor. Thus, in those states, an executor would receive the contents and then be required to distribute them to the estate beneficiaries, without specific instructions to the contrary in a will. Even in those states, if the executor is instructed in the will to not disclose the contents to the beneficiaries (or a specific beneficiary) the executor could presumably keep the contents confidential (except when the executor is also the beneficiary). However, this situation creates additional questions such as: Can the executor destroy the contents, if instructed to do so? If not, who will maintain the records and for how long? Is an executor liable for destroying estate assets, even at the request of a decedent? What is the value of digital assets for estate distribution and tax purposes?

III. Email Service Providers’ Policies

Some email service providers have responded to the issue and will grant access to a deceased’s email account in certain situations. For example, Gmail allows family members to access a deceased person’s account through a two-step process. by submitting the following documentation: (i) the requesting family member’s name, mailing address, and email address, (ii) a copy of the death certificate, (iii) a photocopy of the family member’s government-issued

identification, (iv) a document answer specific verification questions, and (v) evidence of email correspondence between the family member and the Gmail account owner. After the required documentation has been submitted, Gmail will review the request to determine if it “will be able to move forward based on [Gmail’s] preliminary review.” At that point, someone from Gmail will send further instructions regarding step 2 of the process, which will require “additional legal documents, including an order from a U.S. court and/or additional materials.” After all this, Gmail’s policy acknowledges that “in rare cases” only will Gmail be able to provide the content of a Gmail account and that submitting the materials via the two-step process “does not guarantee that [Gmail] will be able to provide Gmail content” to the requesting party. It is unclear what factors Gmail considers in determining whether to allow access to the account, but the policy, while more than is offered by other email providers, clearly involves a level of uncertainty for family members trying to retrieve the contents of a deceased loved one’s email account.

Outlook.com (formerly Hotmail) has a similar process by which the “Next of Kin” can request copies of the contents of a deceased person’s account. If the request is approved, Outlook.com will mail a data DVD with the contents to the authorized recipient. Outlook.com’s policy also provides that such requests must be made within one year after the death of the account holder or the email account and contents may be permanently deleted. Once a request has been submitted to Outlook.com, an answer typically takes only a few days, with the contents often being mailed within that same time frame.

As of the date of this article, Yahoo! does not have an official, published policy regarding granting access to a deceased person’s email account. Instead, Yahoo!’s terms of service provide that “upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.” This is consistent with Yahoo!’s position discussed earlier which states that email accounts are nontransferable.

IV. SOCIAL MEDIA PROVIDERS’ POLICIES

36 Accessing a deceased person’s mail, GMAIL HELP, https://support.google.com/mail/answer/14300?hl=en (last visited April 22, 2014).
37 Id.
38 Id.
39 Id.
41 Id.
42 Id.
43 Id.
45 See supra note 9 and accompanying text.
Facebook has expanded its policies relating to sharing content from deceased user’s accounts. Previously, Facebook provided two options, permanently delete the account or memorialize the account.46 Generally, memorializing an account allows the deceased person’s “friends” to continue to view the content of the account and send private messages to the deceased person.47 Facebook’s policy now provides an additional application procedure for requesting content from the account of a deceased person.48 The application process states that “sending a request or filing the required documents does not guarantee that we will be able to provide you with the content of the deceased person’s account.”49

Facebook’s application process differs depending on the responses given to certain preliminary questions. For example, if the deceased person is a minor, Facebook requires a court order indicating that the individual requesting the content “has authority to provide lawful consent under the Stored Communications Act, 18 U.S.C. Sec. 2701, et. Seq., for the disclosure of stored content of” the deceased’s Facebook account.50 The order also must contain a statement that the executor or other authorized individual “shall not disclose or cause to be disclosed . . . any communications obtained through this Order to any third party unless otherwise directed by the Court.”51

Interestingly, MySpace, LinkedIn, and Twitter previously had policies allowing for the memorialization of a deceased user’s account52 (see articles as of 2011), but MySpace and LinkedIn apparently have since eliminated those policies as no such policies are discussed in the MySpace or LinkedIn terms of service or help areas. Twitter has gone a step further and its policy states that Twitter is “unable to provide account access to anyone regardless of his or her relationship to the deceased.”53 These policy changes will add to the uncertainty of what happens to a deceased person’s account and what rights the deceased’s relatives may have with respect to the account.

V. CONCLUSION

The existing uncertainty regarding the status of email accounts and other digital assets upon a person’s death can create significant problems for service providers, account holders and their estates, courts, and businesses. Service providers are uncertain of the effect of existing user

48 Id.
49 Id.
50 Id.
51 Id.
52 See Beyer and Griffin, supra note 46, at 5.
agreements, potential liability for closing and deleting accounts, and compliance with varying state laws. Account holders must deal with how to provide access to their heirs given the terms of the user agreements or how to keep accounts confidential in the face of state laws requiring disclosure. Courts must attempt to fit the digital assets round peg into the existing square hole of insufficiently analogous laws while balancing the interests of service providers, users, beneficiaries, and the public. Businesses may be affected when digital assets or accounts are tied up in controversy or litigation, leaving potentially time-sensitive material undiscovered for significant periods of time.

As a result of these issues, there is a glaring need for clarification and resolution. Ideally, the solution would come in the form of legislation, whether a uniform federal law or individual state laws, addressing the issues above. Some states have attempted to provide guidance, but as noted above, those laws do not adequately address all of the issues. Alternatively, a solution could result from a court decision on the issue. However, as illustrated by the case of Mr. Ellsworth and Yahoo!, court decisions may often not determine the issue of ownership of the digital assets but rather provide for access to the accounts. In most cases, the heirs likely don’t have an interest in litigating the issue of ownership when they can get a court to order the service provider to disclose the account contents. Until the right set of facts arises, most legal disputes will likely revolve around the issue of access to the content, not ownership of it.

Until legislation exists or a court decision is rendered, these issues may ultimately be decided by the terms of the various user agreements. As noted above, many service providers have responded to the issue by implementing specific policies to allow access to user accounts in some circumstances. However, other providers have taken the opposite approach and enacted policies prohibiting the disclosure of account contents. The reasoning behind the two policy extremes is understandable given the pressure placed on service providers from the heirs who want access and the users who want to ensure their privacy is respected.
AGE DISCRIMINATION AND THE WORKPLACE: 
EXAMINING A MODEL FOR PREVENTION

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Abstract

Many employers enact hidden agendas that include discriminating against workers over the age of 40. Fairness and respect are key behaviors for preventing age discrimination with a particular emphasis on “information”. Thus, the focus of the paper includes providing information related to the identification and discussion of age discrimination as well as strategies to impede the progression of age discrimination. Additionally, the authors present a model to support the idea that a holistic approach to addressing age discrimination is needed in order to create a culture that focuses on protecting intellectual capital, reducing legal issues, and promoting a productive work environment.

I. Introduction

According to the Bureau of Labor Statistics, the labor market has met an unprecedented statistic in that “the median age of working Americans—half the working population—is 40 or older” (“Workplace Ethics Advice,” 2013, p. 1). This is important for management in various entities because approximately one-half of the workers are now protected under the Age Discrimination in Employment Act of 1967. This unprecedented statistic will continue to increase over time because of the aging population in the United States (“Workplace Ethics Advice,” 2013). Therefore, employers may need to take heed that they may be losing experienced workers to the inexperienced skills and training of the younger generation due to inappropriate actions related to the various age groups of employees.

Age discrimination issues have been more prevalent due to the downturn in the economic fiber of various organizations (Grossman, 2013). It is difficult for an individual 40 years of age or over to prove age discrimination when the individual has been laid off (Grossman, 2013). The likely story from employers is that the individual was performing below average. Age discrimination can take on many forms including but not limited to:  (a) a younger more energetic person was hired and not a 45 year old; (b) a 45 year old received a negative performance review because the individual was not “flexible” in working on special projects; and (c) when layoffs occur most of the persons laid off are 40 or older (“Workplace Ethics Advice,” 2013).

Age discrimination focuses on age being the primary attribute in identifying skills and abilities and that older workers are less mentally and physically able to perform job functions when
compared to younger employees (Keene, 2007). However, many employers enact hidden agendas that include discriminating against workers over the age of 40. Anyone over the age of 40 is included as the “older worker” and typically includes the ages of discriminated workers. In the chart below, note the receipts (total number) of discrimination charges filed under the ADEA from fiscal year 2011 to fiscal year 2013.

<table>
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<th>FY 2011</th>
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<tr>
<td>Receipts</td>
<td>23,465</td>
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Source: U.S. Equal Employment Opportunity Commission

As noted by Peng and Kleiner (1999), “perhaps the greatest obstacle to fighting age discrimination is lack of information” (p. 2). This paper serves to continue to build on the information that can arm employers with the tools to fight age discrimination and support the decrease in the number of age discrimination charges reported by the U.S. Equal Employment Opportunity Commission. Additionally, this paper extends the research by presenting a holistic approach to impede the progression of age discrimination. Lastly, this paper includes an identification and discussion of age discrimination as it relates to legislation with an emphasis on implications for employers.

II. Background

Legislation to prevent age discrimination started around the 1960s (Neumark, 2003). Most notably in 1965, there were amendments to add age as a protected category under Title VII of the Civil Rights Act of 1964 (McCann, n.d; Neumark, 2003.). Title VII prohibits employment discrimination based on race, gender, religion and national origin. However during this 1965 period, legislation for age discrimination was rejected.

Note that as a result of the 1964 Civil Rights Act, Congress directed the Secretary of Labor at that time to conduct a study of the factors that might contribute to age discrimination (McCann, n.d.). The results of the study noted that “age discrimination in employment was a pervasive and debilitating problem, particularly insofar as hiring practices were concerned” (McCann, n.d., p. 4). As a result of this effort, the Age Discrimination in Employment Act (ADEA) was enacted on December 15, 1967 and became effective on June 12, 1968 (McCann, n.d.).

Age Discrimination in Employment Act (ADEA) of 1967 prohibited discrimination based on age including persons ages 40-65 (U.S Code, Section 621). The purpose of the act was “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment” (U.S. Code, Section 621). The ADEA applies to various entities that employ 20 or more employees including state and local governments, the federal government, employment agencies and labor unions (“Workplace Ethics Advice”, 2013).
There are five noteworthy federal legislations that are pertinent for the understanding and discussion of age discrimination herein as noted by Neumark in his publication dated 2003.

1. Age Discrimination in Employment Act (ADEA) (1967) – prohibited discrimination based on the following age range, 40 through 65
2. Age Discrimination Act (1975) – prohibited age discrimination in programs or activities receiving federal assistance
3. ADEA Amendments (1978) – extended the age range for the protected group to 40 through 70
4. ADEA Amendments (1986) – eliminated the upper age limit for the protect group, thus banning mandatory retirement
5. Older Workers Benefit Protection Act (1990) (OWBPA) – regulated financial incentives to retire

In addition to the federal laws, there are also state laws that prohibit discrimination in employment (McCann, n.d.). In fact, some states provide greater protection than ADEA and include relief for discrimination in the form of compensatory and punitive damages.

III. Business Ethics and the Age Discrimination Prevention Model

Prior to utilizing an Age Discrimination Prevention Model, it is important to gain an understanding of ethics as it is used to manage employees in the work environment. As a result, the values that lead to seasoned judgment will be included in the holistic model and will contain processes and procedures that can be used to prevent bias actions that lead to age discrimination.

A. Business Ethics

Ethics in the business environment includes knowing what is right and wrong in the workplace and what is right when engaging in business transactions as well as with internal and external relationships (McNamara, 1999; Institute, 2013). Business ethics is considered a management discipline and has been aligned with the social responsibility movement in the 1960’s (McNamara, 1999). Additionally, the social awareness movement called on upper and middle management “to use their massive financial and social influence to address social problems such as poverty, crime, environment protection, equal rights, public health and improving education” (McNamara, 1999, p. 13). Hence, age discrimination is considered in the context of abusing one’s civil rights (Neumark, 2003).

Duty-based ethics is rooted in the idea that ethical dilemmas should be driven by the idea of “to whom do I owe a duty and what duty do I owe them” (“Deciding What’s Right: Ethics for Daniels Scholars,” 2012). The main proponent of this framework was Immanuel Kant who believed that individuals were born with moral integrity which includes reasoning skills and the ability to conduct business rationally. Thus, a person’s thoughts and behaviors should be respected (Cross & Miller, 2009). The duty-based approach considers ethical dilemmas within
the context of moral vision and seasoned judgment (Dierksmeier, 2013). Fairness and respect are key behaviors for preventing age discrimination with a particular emphasis on “information”.

B. Age Discrimination Prevention Model

The Age Discrimination Prevention Model should begin with a framework that contains ethics management. Ethics management is focused on providing information related to management activities including recruiting and hiring, performance management and training. Ethics management is not only focused on goals and activities; but also, is focused on the organizational outcomes (Dierksmeier, 2013; Martin, 2003). These outcomes are geared towards assessing the actions related to the greatest benefits to all parties (Martin, 2003). The outcomes are direct extensions of the policies and procedures as noted by the employers such as recruiting and hiring, performance management and training. The outcomes related to preventing age discrimination include increasing intellectual property, reducing legal issues and promoting productive work environments.

Figure 1, included herein, includes the Age Discrimination Prevention Model that was developed by the authors to facilitate the discussion of age discrimination in the workplace. The framework includes ethics and the applicable policy, management activities and outcomes which are discussed in detail in the remaining sections of the paper.
Figure 1: Age Discrimination Prevention Model

FRAMEWORK

MANAGEMENT ACTIVITIES

OUTCOMES

Ethics Management and the Age Discrimination Policy

Recruiting and Hiring

Performance Management

Training

Increasing Intellectual Capital

Reducing Legal Issues

Promoting Productive Work Environments
IV. MANAGING ACTIVITIES OF THE AGE DISCRIMINATION PREVENTION MODEL

A. Ethics Management and the Age Discrimination Policy

Ethics management is rooted in determining to whom you owe the obligation and thereafter considering what is that obligation (“Deciding What’s Right: Ethics for Daniels Scholars,” 2012). The duty per the ADEA is to prohibited discrimination based on age including persons ages 40-65 (U.S Code, Section 621). This leads to abiding by the law and treating employees with fairness and respect to avoid bias behaviors against employees of a certain age range. Ethics management is rooted in the values of individuals by treating them with fairness and respect via processes and procedures that are geared toward reflective behaviors. For example, programs geared towards eliminating age discrimination need to include a culture of zero tolerance for age discrimination that may include processes and procedures that are executed over a period of time (Institute, 2013). These processes and procedures are related to human resource activities including hiring and recruiting, performance management and training. The goal of the activities include helping managers reinforce and introduce old and new employees to a culture and value system that are applicable for each activity.

Preventing age discrimination in the workplace lies in the hands of all levels of employees but first starts with senior management (Shah & Kleiner, 2005) Senior management needs to ensure a culture that respects and treats older workers with fairness and dignity. The respect and fairness starts with appreciating the benefits of older workers including reliability, level of experience, ethical work practices and timeliness (Shah & Kleiner, 2005). In order to create and maintain a culture of respect for older workers, senior management should mandate the development of a zero tolerance policy and the training of the policy related to the behaviors that are aligned with the prevention of age discrimination.

B. Recruitment and Hiring

In accordance with business ethics, “it is obvious that ethical managers should first follow the law in recruiting, hiring, promoting and treating employees or potential employees” (Demuijnck, 2009, p. 84). Recruiting and hiring pre-employment inquiries need to emphasize that “the ADEA does not specifically prohibit an employer from asking an applicant’s age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age” (U.S. Equal Employment Opportunity Commission Fact Sheet, 2013, p.2). The pre-employment inquiries need to be monitored and controlled to ensure the inquiries are purely based on a lawful purpose. If the demographic information is needed for a lawful purpose the training needs to indicate that the information can be obtained after employment.

Other items to consider for recruiting and hiring are related to apprenticeship programs and job communications. Per the ADEA of 1967, “it is generally unlawful for apprenticeship programs, including joint labor-management programs, to discriminate on the bases of an individual’s age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption” (U.S. Equal Employment Opportunity Commission Fact Sheet, 2013, p. 1). Additionally, per the ADEA of
1967, it is generally unlawful to include age preferences, limitations or specifications for job communications. However, a job communication may denote an age issue if age is not for a “bona fide occupational qualification (BFQO) reasonably necessary to the normal operation of the business” (U.S. Equal Employment Opportunity Commission Fact Sheet, 2013, p.1).

C. Performance Management

Managers and appraisal staff involved in assessing performance need to be aware of the provisions of the law including exemptions that are covered under Title VII of the Civil Rights Act of 1964. Accordingly, under the law there needs to be a valid reason for employment and performance decisions. For example “managers may reward employees differently, provided these differences are not predicated on the employees’ race, color, sex, religion, or national origin” (Bohlander & Snell, p. 106). Thus, the differences may be based on higher levels of education and superior skills and abilities. Other examples of valid reasons include budget issues, performance ratings and restructuring of the organization (Cavico & Mujtaba, 2011).

Performance evaluators need to not allow stereotypes about older workers interfere with their overall evaluation process including the ratings. More specifically, “research that examines the cognitive processes raters use to make rating decisions will point to the best ways to train raters and eliminate potential for bias” (Sterns & Miklos, 1995, p. 263). Additionally, as noted by Grossman (2013), “the falloff in performance in most jobs is minimal and that when some abilities declines, older workers compensate with counterbalancing ones that enable them to continue to perform” (p. 25).

D. Training

The training for age discrimination policy needs to include workshops that communicate the policy. For example, the policy needs to note information related to firing individuals so that employers will know the factors that can be used for terminating employees. For example, “an employer must produce credible and relevant evidence that the challenged policy or practice was based on reasonable factors other than age” (Cavico & Mujtaba, 2011, p. 23). Reasonable factors may include position, longevity and industry or company experience.

The training should also include detail activities related to recruiting and hiring and performance management. For example, when hiring for a firefighter position, it is fine for the hiring manager to not consider older workers who are not physically fit. This hiring consideration is legal because the job specification is necessary to perform the job. Conversely, filling a promotional position with a younger employee before an older employee is aware of the position may be not legal under ADEA (Shah & Kleiner, 2005).

V. Outcomes and Conclusion

As stated by Grossman (2013), “employees age 50 and older represent almost a third of the U.S. workforce. They’re your brain trust” (p. 20). Employees are intellectual capital and as capital the older employees produce “superior customer service and registered much lower turnover” (Grossman, 2013, p. 22). Thus as intellectual capital, research has noted that some employers revere older workers and some companies focus on the culture for older workers, the benefits, and advancement opportunities. “In fact, studies have suggested that older workers may give
better service, receive higher ratings on key job skills, have lower rates of absenteeism and stay in post longer than younger colleagues” (Peng & Kleiner, 1999, p. 72). As a result, older workers tend to provide foundational stability for their organizations.

The management activities, included herein, are focused on reducing the number of legal issues related to age discrimination. The activities are focused on preventing age discrimination practices from entering the workplace. The U.S. Equal Employment Opportunity Commission (EEOC) has reported a 30% increase in age discrimination claims (Grossman, 2013). The rewards related to EEOC claims of age discrimination have “averaged about $60 million from 2002 to 2006, then jumped to $87 million from 2008 to 2012 (Grossman, 2013, p. 23). Thus, noting the need for management practices to reduce legal claims.

Keene (2006) noted that beliefs about the costs of hiring and maintaining employment of older workers contribute to the actions that support workplace discrimination. More specifically, the beliefs are based on the idea that older workers generally are paid more and have more health issues. These beliefs encourage age discrimination and often limit older workers’ productivity and opportunities. Thus, the authors sought to provide employers information related to identification and discussion about age discrimination as well as strategies and tools that employers need to implement in order to impede the progression of age discrimination.

Ethics management, as previously noted, is focused on treating employees lawfully and with fairness and respect via management activities that are geared toward removing bias behaviors in the workplace. To assist organizations in implementing processes and procedures to support this initiative, the authors included a holistic approach to address the prevention of age discrimination. The model supports creating a culture that changes the behaviors that support age discrimination and focuses on the positive outcomes of older workers such as increasing intellectual capital by reducing turnover, supporting fewer lawsuits and promoting a productive work environment.
References


U.S. Code- Section 621: Congressional Statement of Findings and Purpose


MAKING THE LEAP: USING INFORMATION TECHNOLOGY TO DEVELOP AND ENHANCE STUDENT LEARNING IN LEGAL STUDIES COURSES

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Abstract  
This paper will examine migrating traditional Legal Studies courses to hybrid and online courses, the challenges, the differences inherent in the delivery of course content, steps taken to learn best practices in these new learning environments, the various technologies implemented, outcomes experienced, student attitudes toward technology integration, and lessons learned. Our conclusions are that students benefit from these learning environments; students experiment and practice their technology skills while honing critical thinking and communication skills necessary for success in today’s global social, legal and business environments. Instructors also benefit by increasing their technology skills and staying current with new course delivery methods. Recommendations, based upon our extensive experience teaching in traditional, hybrid and online environments, are made for Legal Studies instructors to enhance their own courses while making the leap from a traditional course delivery to a hybrid mode and then to a full online course.
I. INTRODUCTION

As educators adjust to Millennial Learners, it is more important than ever to examine whether or not, and how, technology can complement and enhance course instruction. Information technology and its applications to the business, personal, and educational worlds are ubiquitous and more powerful than ever. Online courses are

“…those in which at least 80% of the course content is delivered online. Face-to-face instruction includes courses in which zero to 29% of the content is delivered online; this category includes both traditional and web facilitated courses. The remaining alternative, blended (sometimes called hybrid) instruction has between 30% and 80% of the course content delivered online.”

Whereas internet access and usage throughout the world is growing, so is its use and application in the world of higher education. Institutions and instructors are utilizing technology in more frequent and innovative methods every year, resulting in rich, collaborative virtual learning environments. Where do students and instructors fit within this move to technology-enhanced instruction? It is important to recognize that student-users are more than ready to interact in technology-rich learning environments. Students born after 1994 have no experience in a world not connected by the internet. While they may operate at different levels of digital proficiency, it is clear that they absorb digital tools more quickly and efficiently than earlier generations. They are clearly digital natives, “native speakers” of the digital language of computers, video games and the Internet. Whereas digital immigrants are “Those of instructors who were not born into the digital world but have, at some later point in our lives, become fascinated by and adopted many or most aspects of the new technology…”

Students have access to the internet everywhere, at home, in public libraries, most businesses, on campus and in residence halls, via handheld devices and for some, in their vehicles. Our students are quite comfortable operating in digital environments since many applications emphasize sharing and collaboration at some level. Future business managers need to know not only how to use evolving collaborative tools, but must also need to understand conceptually how these tools can benefit not only their organizations, but also their own professional growth. Current and future educators need to analyze how technology can be used to enhance and complement course delivery, beyond posting a syllabus in the institution’s Learning Management System (LMS). Whether or not instructors are digital natives, modern course delivery systems and Web 2.0 tools must be examined for potential integration into course content and delivery. The ability to create virtual classrooms and create content collaboratively can lead to new approaches to teaching and learning that will significantly change our previous conceptions. In addition, instructors will enable students to be fully

4 Prensky, supra, note 1, at 2-3.
5 Id. See also Marc Prensky, Digital Natives, Digital Immigrants II, Do They Really Think Differently? Part II, 9 ON THE HORIZON, no. 6, l. 9 (2001).
6 We emphasize mobile devices because there is little difference in the ubiquity of phone or tablet since these students have had access to personal devices for years.
prepared for the business world where “Workgroup communities AND customer outreach provide daily updates on products and services.”

The use and application of technology to augment course content and delivery further enhances student’s general knowledge and skills in several areas, including those articulated by the AACSB in Standard #15: “Communication abilities, ethical understanding and reasoning abilities, analytic skills, use of information technology, dynamics of the global economy, multicultural and diversity understanding and reflective thinking skills.”

Instructors in traditional face-to-face Legal Studies courses can begin to enhance their courses with technology by first moving to a hybrid delivery and then to an online delivery. When deciding to investigate transitioning to hybrid and then online courses, the first question to be answered is - why? One approach, simply transferring a face-to-face environment to an online environment is neither effective, nor successful. Instructors who have taught hybrid/online courses know that recording a live lecture and posting to an online course alone, does not create an effective learning environment. Instructors must give a great deal of thought to the motives, foundations and learning goals upon which to create a hybrid/online-learning environment. This article will review the growth of hybrid and online delivery of courses, the rise in demand for such offerings and the resources available to support that process. We will recommend a step-by-step analysis for instructors to consider prior to making the transition to hybrid or online courses. Finally, we will discuss our experience with the transition from face-to-face to hybrid and online delivery of our courses, including an examination of digital platforms and possible assignments.

II. THE GROWTH OF HYBRID (BLENDED) AND ONLINE EDUCATION

The 2011 survey by Sloan Consortium and the Babson survey research group, a collaborative effort between the Babson Survey Research Group and the College Board, is the leading barometer of online learning in the United States. Based on responses from over 2,800 academic leaders, the 2011 survey reports that the number of students learning online exceeded 6 million in 2011. In fact, the number of students enrolled in at least one online course in 2002 was over 1.6 million; by 2011 it exceeded 6.7 million students. The 2014 Babson survey reveals that as of 2013 “There are 412,000 more students online students in Fall 2012 than in Fall 2011, for a new total of 7.1 million students taking at least one online course.” Even more telling is the increase in online enrollment as a percentage of the total enrollment. In 2002, it was less than 10% and by 2010 it exceeded 30% of total enrollment. According to the latest numbers, “The proportion of higher education students taking at least one online course now stands at 33.5%. For comparison, this rate was 32.0% last year, and slightly less than 10% in the first year of this study (Fall, 2003).”

The assessment of learning outcomes and the difference between the online and face-to-face experience is also important to understand. Interestingly, almost 14% of chief academic officers view online education as somewhat superior to face-to-face education while nearly 23%
of CAOs have an unfavorable view of online education. A bit more than 51% of those CAOs view the two delivery methodologies as the same.\(^{15}\) In addition, 44.6% of chief academic officers now report that it required more faculty time and effort to teach an online course.\(^{16}\) When beginning the process, one of the most important things that a faculty member must do is recognize the additional time commitment required to create a hybrid or online course. Armed with the above information, an instructor can begin to view the larger picture of trends in online higher education.

### III. WHERE DO STUDENTS FIT INTO THE PICTURE?

Instructors must take into account the impact of the development and delivery modes on the learners and the instructors. Contact with the professor and classmates may be less frequent, take different forms, and interaction may possibly be limited to text based delivery platforms. The introduction of multipoint videoconferencing can be useful in reducing the limitations of these platforms. The lack of a physical presence and the differences in form and function of assignments and feedback may, at least initially, prove to be very disruptive to both student and teacher. It is also important to note that most of our students have little or no experience with online education.\(^{17}\)

Experience also tells instructors that success in any hybrid or online environment requires a level of organization and motivation on the part of the student that may not be the same as in a face-to-face environment. Most of our students have never formally assessed their learning style to help guide them through the potential for success using different learning environments. It is important, therefore, that we alert newcomer students that hybrid or online learning environments that will require them to work in a different manner.\(^{18}\)

### V. DIGITAL PLATFORMS

The development of Web 2.0 platforms has transformed the potential to integrate digital platforms in our learning environments. As O’Reilly (2005) put it, users “add value” to the technologies\(^ {19}\) and in educational settings, it is student participation that adds value to the course. Web 2.0 tools allow the communication and collaboration of students at an unprecedented scale. In fact, Web 2.0 tools do not merely facilitate the participation of users but are actually inconceivable without it. The use of Web 2.0 tools such as blogs, wikis, RSS feeds, social bookmarking, etc. which require user participation led to the formation of new practices in the fields of communication, collaboration, business, and education.\(^ {20}\)

In recent years, we have switched to the use of online digital platforms for our assignments including blogs, journals and wikis. The use of these digital platforms by business customers is increasing.\(^ {21}\) So, like the use of non-LMS based collaborative tools mentioned

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\(^{15}\) ALLEN & SEAMAN, supra note 2, at 24.

\(^{16}\) Id. at 22.


above, providing students with experience in the use of digital platforms is an important part of their education. These digital platforms allow instructors to expand the scope of assignments to include multimedia objects such as audio and video files. It also allows students to understand the power of the hyperlink. A five hundred word writing assignment can be expanded to thousands of words with the appropriate and judicious use of hyperlinks and multimedia objects.

We work primarily with three different digital platforms: blogs, journals and wikis. These platforms are the successors to earlier interactive forums such as Usenet, Bulletin Boards and Newsgroups#. Digital Platforms can help students master substantive topics, teach students how to have civilized debates and how to share opinions and viewpoints. They are also an effective way to enhance writing and critical thinking/analytical skills.22

We chose to introduce digital platforms to our students because we seek to combine technological innovation with course content. Digital platforms in learning environments encourage active learning by students. Instructors can also increase collaborative learning (student to student), increase learning across the curriculum, help students learn to work as individuals or as team, increase research skills including better citation skills (reduce plagiarism), and can encourage the value of perseverance.23 The “…experience of collective knowledge generation can and should be applied to traditional educational environments.”24

A. Blogs

Blogs are “weblogs.”25 As a knowledge management tool, a blog provides relatively undifferentiated articles of information that can add value to a course as it aids students to generate “‘knowledge’ from mere ‘information’.”26 More importantly, “… as Wrede (2003) observes, ‘… if professors want students to become autonomous, creative, helpful and cooperative, educational institutions must actually allow students to practice exactly these skills … by designing curriculums and courses that really value these qualities.’”27

B. Journals

Journals28 are another digital platform that allow for a great deal of flexibility. Journal use can encourage students to reflect on how the course material relates to the real world of business. The use of journals also allows us to support one of our goals, i.e., the introduction and mastery of digital platforms for writing. The opportunity to provide guidance to our students over the course of a semester long writing assignment supports the development of better writers. The journal assignment that mimics the development of a more traditional writing assignment like a term paper can help students overcome their lack of familiarity with working in a new structure provided by a digital platform.

C. Wikis

What is a wiki? According to wiki.org, a “… wiki is a piece of server software that allows users to freely create and edit Web page content using any Web browser. A wiki supports

22 Oravec, supra at note 7.
23 Id.
26 Williams and Jacobs, supra at note 24.
27 Id.
hyperlinks and has simple text syntax for creating new pages and cross-links between internal pages on the fly.”29 Wikis are unusual among group communication mechanisms in that they allow open editing. Like many simple concepts, "open editing" has some profound and subtle effects on Wiki usage. Allowing everyday users to create and edit any page in a Web site is exciting in that it encourages democratic use of the Web and promotes content composition by nontechnical users.”30

As noted by Karasavvidis:
“Wikis are popular for a number of reasons. First, wiki systems enable the collaborative creation of associative hypertexts. The lack of hierarchical structure enables users to choose which links to follow. Second, to use a wiki the user does not need any specific operating system or applications software: a simple-web browser would suffice. Third, the entry-level skills required for the creation of a web page in a wiki system are very low: the availability of wiki mark-up and built-in WYSIWYG editors considerably simplifies the process of creating a web page. Last, a wiki system provides several other functions such as: tracking of edits, comparison between different versions of edits, rollbacks to earlier versions, threaded discussions per wiki page, fully customizable access, read, and edit rights, other types of media (e.g. images, sounds, video), and protected pages.”31

Remarkably, according to Daspit and D’Souza, “… the adoption of this technology in business schools has only just begun.”32 Notwithstanding this failure to broadly use wikis, the power and flexibility of a wiki make it a natural choice for assignments that require a digital platform.

Our experience is that a wiki is the remarkably versatile digital platform that the descriptions above suggest. It allows for any number of uses in technology infused learning environments. Wikis support individual or team-based assignments. Access to content can be limited to a single student, a group of students, or an entire class. Wikis are ideal platforms for either short-term assignments or those extending over the course of the semester.

VI. LET’S GET STARTED: TAKING LEGAL STUDIES COURSES TO HYBRID AND ONLINE MODES OF DELIVERY

Hybrid (blended) and online courses are structured differently from traditional face-to-face delivered courses. These differences are driven by the need to address the expectations of the students, accommodate the differences in available technology and allow for the stylistic differences demanded by the two approaches. In either case, the tried-and-true methods that serve a face-to-face experience are generally not applicable in a hybrid/online experience.

A. Step One: Ready to Make the Transition?
✓ Ready to transition to a hybrid course?
✓ Ready to transition to a full online course?

How comfortable is the instructor with technology? This critical question must be answered at the front end of the transition process. In order to determine what level of course delivery is best for the instructor, an honest answer is essential. It is not necessary to have a high level of technological proficiency. In fact, for the most part, instructors will work with software that is quite intuitive. That said, an instructor should plan to develop a reasonable comfort level

30 Id.
31 Karasavvidis, supra note 20, at 221.
with the technology planned to be used in a course because situations may occasionally arise where there is no one else available to fix a problem. Uncertainty transitioning from face-to-face environments to hybrid or online courses will ease as an instructor’s comfort level and technology expertise grow. It will be necessary for instructors to take their experience in a classroom environment and use it as the basis for developing new approaches that will be effective.

B. Step Two: Is This Feasible?

✓ Is the institution or school ready for the course to be delivered in hybrid or online mode?
✓ Are there resources available and will they be deployed to support the transition?
✓ What is the need for the course?
✓ Who are the student learners? Are they physically located near campus or are they remote learners?
✓ What is the quality of student’s Internet connection, high-speed broadband or dial-up?
✓ Can a first face-to-face meeting be required?

While it is important to know why an instructor wants to make the investment in this new approach to content development and delivery, it is equally important to understand the process that instructors will go through when “making the leap”. The instructor must answer the questions posed above, and doing so will help determine the optimal method of delivery for the course, i.e., hybrid or online. The instructor also needs to determine if the institution supports the chosen mode of delivery. We first took a course to a hybrid model and then, after several revisions, based upon our experiences and feedback from students, to the online mode.

In a hybrid course, the class may meet face-to-face one or two times a week or on alternating weeks and the remainder of the semester will be delivered online. In other words, a hybrid environment may be among the most flexible to design and deliver and a natural first step in the transition. Assignments can be designed to take advantage of either face-to-face time or extend the classroom beyond its four walls by requiring online interaction with the instructor and/or classmates. The content can be modular and include in-class group activities and exams. Case study assignments, for instance, can be geared either for individual or group work online. These assignments can then be reviewed in some detail during in-class discussions. If designed properly, all of the assignments can be completed either on an individual basis or as part of a group.

An online course may or may not require a face-to-face first meeting, dependent upon the institution and what the instructor is trying to accomplish in the course. We have found that initial meetings, when possible, give our students and ourselves the opportunity to transition from a more traditional environment to an exclusively virtual learning environment. In the alternative, an instructor might want to consider a required videoconference with all students present to ask questions and learn answers to common questions and concerns.

C. Step Three: Make Time to Create the Course

✓ Is this a time consuming process?
✓ Can a course be transitioned in a week or two?

Developing and delivering hybrid/online courses is a time-consuming process if done well. It is critically important that an instructor prepare well in advance of the start of the course. Experienced teachers know that making adjustments on the fly in a face-to-face setting, while occasionally challenging, is relatively doable and can be reasonably successful. However, it is very difficult to adjust in an ad hoc manner in a hybrid or online environment. While preparing a well-planned course does not guarantee success, it increases the potential for success. Leave plenty of time to analyze content and plan delivery. We do not recommend creating a hybrid or online course two weeks before a semester begins or creating a course and planning to populate
it with content and assignments as the semester proceeds. This type of poor planning can lead to confusion and disorganization. Students will sense and dislike a poorly designed learning experience.

**D. Step Four: Reach Out to Sources**

- Is there a potential colleague/mentor to support the transition?
- What are the Institution’s instructional design resources? Are they sufficiently robust to support an instructor during the transition process?
- Does the institution offer professional development session on developing hybrid or online courses and new technology for course content delivery?
- Where is the help desk?

These sources will be an invaluable guide as an instructor begins the actual process of developing the content and delivery of the course. Colleagues are some of the best resources for transitioning to hybrid and online courses and can provide feedback that should not be overlooked. We are fortunate in that we can brainstorm ideas and create innovative assignments with each other. We strongly suggest joining forces with a colleague to do the same. For those who are not technologically literate, it is always a good idea to identify a technology savvy colleague willing to serve as a mentor while working through the challenges related to this learning experience. We also recommend meeting with colleagues who have previously taught hybrid or online courses. These individuals can be a significant source of assistance with this new approach. Plan to schedule regular consultations with mentor(s). Ask a colleague to critique the course site. Regular interaction with a “technology support group” will provide invaluable feedback. Departments investigating adding several hybrid and online courses may also want to form a “collaborative space” for discussions, recommendations and helpful hints.

In addition, meet with the experts at the institution’s Teaching and Learning or Teaching, Learning and Technology Centers. They will be a key resource in your journey. The TLTC will provide access to instructional designers and digital media specialists, among other resources. Instructional designers will provide advice on the design of the content and delivery in either a hybrid or online environment. In addition, instructional designers may have prior experience in developing courses in a specific discipline with knowledge as to content sources, delivery methods and suggestions for tailoring the course to specific wants and needs. Instructors should also attend professional development opportunities related to hybrid and online learning.

When developing our legal studies courses, our instructional designers directed instructors to the Quality Matters Program which is a nationally recognized company dedicated “to promoting and improving the quality of online education and student learning…” Quality Matters uses an annotated rubric of eight general standards and forty-one specifically explained standards that can be used to evaluate the design of online and hybrid courses. These standards will help to focus and organize the development of the course. Lucas Loafman and Barbara W. Altman discuss using the Quality Matters rubric in the *Journal of Legal Studies Education* when building an online course.

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36 Note: The Quality Matters rubric cannot be used without the permission of MarylandOnline, Inc. and use is reserved to those institutions with a paid subscription.
To the extent that one feels that working with technology is essentially a high wire act, mentors, colleagues and instructional design professionals are the nets. An instructor may not be able to help students with the technical aspects of the information technology supporting their online course. The help desk is available for those reasons. An important caveat for all of instructors to remember is that assistance with technical support can be an enormously time-consuming experience. This is especially important if using materials supplied by publishing companies to support the course. Fortunately, much of the material from publishing companies will integrate directly into the learning management system, creating a relatively seamless experience for both professor and student. Unfortunately, on those occasions when it does not work, it becomes an issue for the publisher’s technical support to resolve. In either event, we have found that it is always better to defer to the appropriate tech support. All of the aforementioned resources can help an instructor cultivate that expertise or enhance developing skills.

**E. Step Five: Set Up A “Sandbox”**

- What is a “Sandbox”?
- Where do sandboxes come from?
- What does one do in a sandbox? What is kept in the sandbox?
- Who will see the sandbox?

Part of the discussion with an institution’s Teaching and Learning or Teaching, Learning and Technology Centers is how to set up a “sandbox” and what tools your institution can provide that will allow the instructor to “practice” before the course goes live. Remember that, as a child, playing in the sandbox was a wonderful time. It was a place to experiment, to try things, molding the sand or the toys in a way that brought a vision to life.

A digital sandbox performs the same function. It allows an instructor to “play” in a digital environment that is the same as the one that will ultimately support a hybrid or online course and, like a physical sandbox, permits one to work with little or no consequence. If a particular approach to an assignment is not effective then it is very easy to delete that work and start over. It may take time to get the content, assignments, evaluations, grade book, etc., to the instructor’s liking. A sandbox is also a place for to learn and test the functionality of the institution’s learning management system. Remember, no one but the instructor and the instructional designer will have access to and see experiments, including those that do not work.

Instructors can also use the sandbox to store templates of successful experiments. If a particular approach or approaches to presenting materials, creating assignments or the use of administrative functions “work” and are effective, they can be stored in the sandbox for future use. This experimentation will also help build confidence in the ability to develop and implement online courses. The more often the technology is used, the more an instructor will become comfortable with the idea that the problem that has arisen can be addressed. When creation of the course is complete in the sandbox, it is time to establish the real course in the institution’s Learning Management System.

**F. Step Six: Going Live**

- How is a live course managed?
- Should auto-reminders be added?
- Videoconferencing?

Now that the course has been successfully designed, students have enrolled and the semester is about to begin, it is time to “go live” with the implementation of the course. There are a few things that an instructor can do to make life easier while teaching a hybrid or online course.

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38 Remember Step Three and allow time to create a final product that will be enjoyable to work with.
course. Remember that the course is no longer meeting face-to-face with students on a regular basis. If teaching a hybrid course, instructors may be alternating live with online meetings and, in an online course; the instructor will be “on” twenty-four-seven, with no traditional face-to-face meetings. That means that regular face-to-face interaction with students as a group and the resulting opportunities for reminders about assignments and exams will decrease. In order to counter this, we recommend several ways to manage a live hybrid or online course.

First, take the course calendar and add it to the instructor’s personal calendar, adding reminders that will automatically email or send text messages as updates and reminders. The instructor should be sure to monitor email so as to be as responsive as possible within the parameters that established for the course. Next, when working with students individually or in small groups use a videoconferencing platform, like Skype, Google+ or the platform available in the LMS. We both use videoconferencing in our online courses and schedule these conferences in our syllabi so students know when to join.

Another suggestion is to schedule weekly virtual office hours by way of videoconference. Also, alert students to the parameters of the instructor’s availability during times outside those regularly scheduled hours. Online students can exercise the virtual equivalent of raising their hand for additional assistance. Videoconferencing will allow them to do so in a group setting and is also a great tool for post-exam review or for discussions on research projects. Students also like to use these tools for group projects.

Now that the instructor has designed an excellent course, created a set of deliverables for the students and clearly stated the expectations for student performance through the development and publication of grading rubrics for various assignments, it is important to set up auto reminders for assignments, quizzes and tests. Remember to also use the Learning Management System’s calendar and reminder tools so students are reminded both within and without the institution’s system. The auto reminders and videoconferencing will only help the students, and the instructor, stay on top of course deliverables.

**G. Step Seven: Be Flexible**

- Can an instructor remain/be flexible with students in a hybrid or online course?
- How much flexibility is needed?

It is very important to maintain a level of flexibility when responding to students in hybrid or online courses. That flexibility will be important when addressing situations involving a family emergency or unexpected employment demands. It goes without saying that a more significant disruption, such as a weather related event or other natural disaster, requires more of everything: more empathy, flexibility, responsiveness and creativity. Emergencies, for both students and instructors, may demand responses not anticipated in the initial course design. An instructor can be both creative and flexible when working in a hybrid/online environment. When transitioning to these new environments, ask students to also be flexible as you BOTH learn new tools. This gives students a sense of ownership and participation, while alleviating the fears of some of the digital immigrants.

Anticipating the need for flexibility suggests that an instructor prepare students for alternate communication platforms in case the institution’s system is unavailable for some reason or the student cannot access the system from a remote location. Collect their mobile numbers (for text messaging) and establish Skype and/or Google+ accounts. The introduction of Google+ hangouts\(^{39}\) allows for multipoint videoconferencing, screen sharing and the integration of documents, spreadsheets and presentations while working in a videoconference. We also suggest

that students locate, in advance, free Wi-Fi access points. That will allow students to be prepared in the event their Internet access at home, or at work, is disrupted. These kinds of preparations will help to minimize stress from unanticipated disruptions.

**H. Step Eight: Be Present**

✓ What is “presence” in a hybrid or online course?

✓ How can an instructor be present in a hybrid or online course?

✓ How can an instructor encourage students to be present in a hybrid or online course?

One of the key aspects of a well-designed hybrid or online course is the level of interaction among students in the course and between students and the instructor. Often this is described as “presence” in a hybrid or an online course. Presence, in an online course, can be defined as cognitive, social and teaching presences. Cognitive presence is “the extent to which the participants in any particular configuration of a community of inquiry are able to construct meaning through sustained communication.” Social presence is defined as “the ability of participants in the Community of Inquiry to project their personal characteristics into the community, thereby presenting themselves to the other participants as “real people”.

Teaching presence includes:

“…the design of the educational experience. This includes the selection, organization, and primary presentation of course content, as well as the design and development of learning activities and assessment. A teacher or instructor typically performs this function. The second function, facilitation, is a responsibility that may be shared among the teacher and some or all of the other participants or students. This sharing of the facilitation function is appropriate in higher education and common in computer conferencing. In either case, the element of teaching presence is a means to an end to support and enhance social and cognitive presence for the purpose of realizing educational outcomes.”

There are many opportunities for creating a vibrant instructor presence in a hybrid or online course and in particular, in a hybrid or online course. When we began to collaborate on the development of these new learning environments, we used tools like Google Docs, Skype, LMS platforms and email in order to keep in regular contact with our students. Over time, those tools have been enhanced and new tools have become available. Platforms like Google Docs and Google+ hangouts have become more sophisticated, easier to use and more intuitive.

It is also apparent that the effectiveness of cloud-based tools will only become more robust in the future. In addition, the use of these tools with colleagues to collaborate on projects also makes instructors more familiar with them and puts instructors in a much better position to introduce them to our students. While our learning management systems are both comprehensive

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41 Id. at 89.
42 Id. at 89.
and reasonably well integrated, our students will not be living in a world where a learning management system remains available to them. The use of mainstream tools enables instructors to expand their presence in either a hybrid or online course and to encourage interaction and active learning among the students.

I. Step Nine: Take Notes

✓ How can an instructor remember issues that arise as the course proceeds?
✓ Is there any way to track student questions and concerns?

As the course progresses, an instructor should take notes on how issues and items can be handled differently the next time the course is offered. Review student questions on assignments for ways to improve communication. Consider creating a frequently asked question (FAQ) section in future courses in which students can submit questions, answer each other and communicate with the instructor. Also, be aware of time issues, i.e., was the length of time for an assignment too short or too long? Was additional time needed for grading and responding to assignments and evaluations? Should the email response policy be adjusted? The instructor might want to informally keep track of who attends video conferences (if they are not mandatory). Are student questions about the content (the instructor’s area of expertise) or are they about the delivery or technology? Note when during the semester the student questions began to lessen as they became familiar with the content and the delivery methods. These notes will help an instructor tweak various aspects of the course so that it will run more efficiently the next time. An instructor can create a module in the LMS, not available to students, wherein comments and notes can be left for later review.

J. Step Ten: Evaluate the course: Self-Reflection

✓ How can the course be improved?

It is always important to reflect upon the successes and challenges faced upon the completion of a new endeavor. Students, of course, will evaluate the course at the end of the semester. In many ways, student evaluations are an indicator of the extent to which they appreciate an instructor’s teaching style. However, take the time to evaluate its success when the course is completed. We have used an evaluation rubric for online courses developed by the California State University at Chico. The Chico framework provides a sense of what aspects of the course to examine when conducting a self-evaluation. It is very useful to undertake this process in conjunction with a review of the student evaluations. For example, if many of the students sought clarification of an assignment or some other course requirement, the instructor was alerted to the need to further develop the explanatory materials introducing that particular requirement. In this instance, conducting a self-evaluation of the course and cross-referencing student evaluations is an effective way to assess the intersection of the two evaluations. A critical self-evaluation will help the instructor identify what was learned through the process and what can be done better as part of the inevitable redesign of the course. It will also create a checklist that will be particularly informative when identifying and evaluating new online tools that might be of interest in the future.

VII. Digital Assignments

Once an instructor has completed a self-evaluation of where digital platforms fit within the scope of the instructor’s capability, desire and learning goals of the course, the instructor can determine where to add the platforms. We do not recommend constructing an assignment simply to use any particular digital platform or Web 2.0 tool. Instead, we recommend that an instructor layer the tools and platforms into existing assignments, taking one step at a time. For instance, weekly writing assignments can be turned into a blog posting assignment. A research paper (or

“Term” paper) can be converted into a research journal or discussions relative to current events can be converted into a weekly current event journal. Students that would be assigned some type of slide presentation can now use a Wiki to present their material and provide classmates with audio, visual and hyper links to additional material.

When infusing technology into our courses, our main initiatives are for students to: hone their critical thinking skills, enhance learning and retention of course material, practice professional and civil discourse, improve writing skills, recognize the importance of current events and business trends in their chosen fields of study allowing them to identify future occupational challenges and opportunities. All of these are important for students to successfully transition to a changing business environment.

A. Blogs

Blogs allow instructors to craft assignments that encourage an active discussion between and among all of students related to the events of the day and the course material. Our blog assignment (See Appendix A) uses the course blog created specifically for use by our Legal Studies students to complement and enhance the learning goals of our courses. Although we are at two different universities, our graduate and undergraduate students share and contribute to this course blog.

We post multiple articles to the blog site during a typical week. Articles posted to the blog introduce business and global current events and are the basis for student comments. Students are required to make connections between the blog content and course material. Legal Studies courses incorporate blogs very easily as these courses utilize current events as examples of the impact of many laws and regulations on business and the broader environment. We both traditionally start our class meetings with a current events discussion; blogs are an effective way to efficiently share a broad range of current events sources in order to help students focus on course material, filter out extraneous information and make connections to real world events. Students also begin to make connections to materials covered in other courses.

In addition, blogs introduce students to new technologies that are used in business forums and help students understand proper “netiquette”. Reading a variety of blogs can help students learn to decipher a blog and how bloggers engage on a particular site or subject. As instructors, the use of blogs is a personal/professional challenge to stay current with new technologies that enhance the students’ educational experience. An instructor may also choose to participate actively in the course blog assignment rather than serving only as a moderator. This will help the instructor understand the student perspective of the assignment while continuing to encourage dialogue with students and furthering instructor presence in the course.

Before deciding to use a blog in a course, it is important to evaluate the course to determine where you want to use the blog. When designing an assignment, its purpose and desired learning outcome, “… it is essential to carefully review learning objectives and learner’s needs to determine how blogs can amplify learning opportunities.” The instructor must determine if an individual/group or public/private blog will be utilized. Instructions, expectations, criteria (number and frequency of posted comments, word count, links to other sites, whether to reply to other students’ comments, grading (grammar, style, spelling, quantity/quality of links, originality of insights) all must be clearly explained to the students in

48 http://____.net.
50 Deng and Yuen, *supra* at note 47, at 96.
the syllabus and in the learning management system. In addition, in the beginning of the course, we review the requirements and purpose of the assignment, and explain the mechanics of commenting on a blog post.

The requirements of our blog assignment vary depending upon the course delivery mode (traditional face-to-face, hybrid or online) and the length of the course (6, 8, 10 or 14 weeks). In general, students are required to add comments at least two to three times per week on individual blog posts.

1. The Blog Assignment

We have found over the years that very few of our students have ever posted to a blog. In order to clarify expectations, procedures and evaluation, students are introduced to the blog during the first week of class and are shown how to post comments to the site. Previous posts and comments are reviewed by students during this time and a “good” comment and a “poor” comment are identified and discussed. Deng and Yuen cite Xie and Sharma (2005) who “… noted that a structured and guided introduction to blogs might be conducive to a more fruitful blogging experience since most students initially feel somewhat lost and frustrated with regard to how to blog and what to blog about.” Comments are regularly reviewed to ensure students understand the mechanics and requirements of the assignment.

In order to help students understand the assignment, the requirements for comments and the basis for assessment of their work are specified in the course syllabus and in the learning management system (LMS) for student review prior to posting. “Brownstein and Klein (2006) suggested that structure should be provided for student blogging in the form of rubrics, guidelines or explicitly stated expectations.” (See Appendix A)

2. Assessment

Students are assessed on their comments based upon the quality of writing, depth of critical analysis, topic comprehension, initiative, respect for other participants, citation to outside sources, and current event references. Students are given the grading rubric to guide their work (Appendix E). Most students recognized the additional writing required with this assignment and found the articles complemented the topics covered in the course. In the end, students successfully interacted on the blog and across both campuses. Students maintained professional decorum and attitude while posting and informal feedback from students was that they felt their critical analysis and writing skills were improved. The majority of students were pleased to have learned a new technology that lets them communicate and they also discovered that many companies have their own blogs.

B. Journals

Journals can be used to support longer term, individually focused assignments and are more appropriate for reflective work. Journals provide significant opportunities for one-on-one interaction between instructor and student. An assignment using a digital journal will support four important goals: stages development of the assignment over time; provides a structure that allows students to be reasonably comfortable in a new delivery platform; allows flexibility and provides students latitude for experimentation; and instructors are able to provide timely feedback as the assignment progresses.

1. The Research Project Journal (See Appendix B)

The development and presentation of a research project structured over a period of weeks and reliant upon a digital platform allows students to incorporate digital materials, e.g., images, audio and video, while honing their research and writing skills. Such an assignment is effective

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51 Deng and Yuen, supra at note 47, at 96.
52 Id.
when the production of a weekly word count is a manageable size. This approach is an alternative to an assignment that requires students to produce a substantial research paper on a date certain toward the end of the course. Some students may decide to write such an assignment a short time before it is due. The use of a regular assignment that requires the incremental development and addition of material to a research project encourages students to develop a major writing assignment in a more appropriate way.

One approach to this assignment requires the identification of a current issue examining a topic at the intersection of law and business. Students submit a proposal that includes a description of the topic with information adequate to make a well-developed analysis with sources sufficient to support the proposal. All aspects of the assignment, instructor or student are posted to the journal (See Appendix F). Students submit content on a weekly basis. Each submission must: identify the relevance of the content to topic, contain multimedia (audio and/or video), be appropriately sourced and use MLA format and live hyperlinks to each source. All submissions, including the proposal and Executive Summary, must include both live in-text hyperlinks (in lieu of footnotes or endnotes) and a Works Cited list (using MLA format and live hyperlinks to each source). The final submission is an Executive Summary of their weekly content. Students are given guidelines for the Executive Summary (See Appendix D).

C. Wikis

A wiki platform provides for a wonderful level of flexibility. The collaborative nature of this particular platform allows for either individual or team-based projects. Students learn how to add visual and audio files to text material, in addition to hyperlinking to sources that expand the discussion beyond the four corners of the assignment by inviting readers to further investigate the hyperlinked sources. One version of such an assignment chose current events related to the course topics and analyzed the event’s relationship to the course and summarized why they thought their classmates would be or should be interested in the issues raised (See Appendix C). Instructors can choose whether or not to have classmates comment on other’s current events. In another assignment, the instructor required students to work on their individual wiki pages for the previously discussed Research Project journal. This use made it possible for the students to “see” their research project as it developed and facilitated the instructor’s review of each student’s progress.

We have also found that the flexibility of this platform is particularly effective for teams. An instructor can easily transition an assignment to one that is team based. For instance, in the assignment in Appendix C, teams could be assigned to particular topics and be responsible for updating their classmates on developments throughout the semester. Most wiki platforms provide a dashboard that allows instructors to evaluate user data, assessing individual contributions to the group work. This function helps alleviate student concern about team members who do not contribute. We have found that this information is very helpful when evaluating student performance.

VIII. RECOMMENDATIONS

The transition to more widespread use of hybrid (blended) and online learning environments is accelerating. The growth in demand for these alternative delivery methods is driven by students’ need to gain more flexibility in their access to higher education by time and location shifts. Significantly, increased demand for faculty who are willing to invest in learning these new platforms is one clear outcome. Early faculty adopters are generally the driving force behind technology innovations and become the facilitators of the broader adoption of a particular innovation. We expect that development of blended and online learning environments will follow a similar process.
While hybrid and online courses are different, both are challenging and rewarding. They provide an instructor with the opportunity to examine their approach to the development of course materials and the delivery of same. An instructor comfortable with face-to-face delivery might experience disruption when delving into hybrid or online delivery. Given current trends in higher education that embrace and infuse technology in the classroom, we recommend legal studies professors begin to investigate the use of these tools to enhance their course content and delivery.

Instructors who use their Learning Management Systems as repositories for syllabi and documents should consider how Web 2.0 tools can be integrated into their courses, for their own benefit and for the benefit of the students. Instructors should use institutional resources such as teaching, learning and technology centers. Additionally, professional resources such as conferences and continuing learning seminars can be leveraged to learn how others are adapting new technology and learning tools. Colleagues are instrumental in building a network of instructors who are engaged and willing to share their knowledge and experiences.

We also recommend instructors consider when a course will be offered, the format (hybrid or full online), the semester length and the size of the class. A good way to “test the waters” is to experiment with portions of a current face-to-face course. A writing assignment, such as a case analysis, can be turned into a wiki assignment. Journals can be used to follow student performance on research papers. Blogs can be introduced to encourage students to connect course material to real world events and trends. Departments can foster the growth of technology in the classroom with continuing discussions and perhaps even a department blog for ideas, comments and questions.

IX. CONCLUSIONS

New opportunities for collaboration and experimentation with different content and delivery alternatives will lead to teaching and learning innovation. The challenges and rewards foster professional growth for both the instructor and the students. Innovative approaches to enlarging students’ circle of learning encompasses an analysis of the benefits of technology in the classroom and collaborative teaching and learning, an idea that is appropriate for the age that we live in. Making the leap to either a hybrid or an online course can be equal parts challenging and rewarding with positive outcomes for instructor and student.
APPENDIX A
Sample Blog Assignments

Sample 1:

Course Blog: I maintain a blog for my courses. I post items of interest to http://www.sampleurl.net that are relevant to the material covered in my courses. The materials in the posts will be discussed over the course of the semester in class and on-line. All students will be responsible for keeping current on the posts to the blog and providing comments. I expect that students will post substantive comments on at least three (3) separate posts per week. You must complete your comments no later than on Fridays at 9p. My goal is to encourage an active discussion between and among all of my students related to the events of the day. And remember … http://www.sampleurl.net is a public blog … be certain that your comments comport with the etiquette requirements described above.

Course Blog Assessment: I will assess your blog comments as follows:
   a. Your blog comments should reflect a thoughtful, substantive and well-reasoned summary/response to the blog post you have chosen - approximately two (2) to four (4) paragraphs; and
   b. Evidence in your blog comments that you have read and are specifically and thoughtfully responding to the points raised by the author and/or another commenter, if also responding to someone’s prior blog comments.

Course Blog Grading: Your blog comments are valued at ten percent of your final grade. Failure to participate at all, or in a timely manner, will result in zero points and a grade of F. Students who only partially meet the requirements outlined above will earn a maximum grade of D. A student who meets the requirements above will be assessed subject to the Grade Ranges described below.

Sample 2:

Blog Posts: We will be utilizing a blog created by Professor _______ who teaches at _____ University, located at http://www.sampleurl.net. This is a blog maintained for use by several courses. Professor _______ posts items of interest that are relevant to our course material. The materials in the posts will be discussed over the course of the semester in class and on-line. All students will be responsible for keeping current on the posts to the blog and providing comments. I expect that students will post substantive comments on at least two (2) separate posts per week. My goal is to encourage an active discussion between and among all of my students related to the events of the day. Students will observe professional etiquette when posting, including being respectful of others opinions and utilizing proper spelling and grammar. Students are responsible for posts from (insert date) through (insert date) for a total of ___ separate posts.

Blog Post Etiquette: Respect is essential in our various forms of communication. Participants in the Blog are to respond to each other with enthusiasm, but always with proper decorum. Slang, cursing, texting-style acronyms are inappropriate for this forum. Proper grammar and spelling are to be used at all times. Please also use correct English in emails, and specify the subject matter in the subject line, e.g., “Blog Post ___” or “Smith vs. Jones”, NOT “Hey Bob”. For further information on the University’s code of conduct, please refer to the Student Handbook.

Blog Post Assessment: I will assess your total contributions to the Blog based upon three things:
   a. A thoughtful, substantive and well-reasoned summary/response of/to the article you have chosen –approximately two (2) to four (4) paragraphs;
b. Evidence in your posts in that you have read and are specifically and thoughtfully responding to the points raised by the author and one of your blog mates, if also responding to someone’s prior comments; and

c. The presence, in your posts, of relevant content, high quality, substantive material, initiative in discussions, respect for blog mates, citation to outside sources, and current event references.

Blog Post Grading: Total Blog posts are valued at ten percent/points of your final grade. Failure to participate in the Blog at all, or in a timely manner, will result in a lower grade or no grade at all. Students who only partially meet the requirements outlined above will earn a maximum of 2 points. A student who meets the requirements outlined above will be assessed as follows: 4 points: fair; 7 points: good; 10 points: excellent - note that late submissions, such as posting several posts in one day, or within minutes of each other, will affect your final grade for this component.

APPENDIX B
Sample Research Project Journal Assignment

Journal. Identify a current issue (topic) examining the intersection of law and business. Your proposal (a minimum of 500 words) should include a description of your topic with information adequate to make a well-developed argument in support of your topic. Your proposal should also include sources (a minimum of four) sufficient to support your argument.

You must post your proposed topic to your Journal no later than (insert date). Approval of your topic will be posted to your Journal.

On a weekly basis, you will post content appropriate to the approved topic. Each post will describe the relevance of the content to your topic (a minimum of 500 words per post) and contain multimedia (audio and/or video) content. Each post should be appropriately sourced with a minimum of four sources (not Wikipedia) using MLA format and live hyperlinks to each source supporting that post's content.

The final post in your journal will be an Executive Summary (a minimum of 1,000 words and multimedia content) summarizing your journal content. Your Executive Summary must be posted no later than (date) at 11:56p to your Journal.

Remember, all posts to your Journal, including your proposal and Executive Summary, must include both live in-text hyperlinks (in lieu of footnotes or endnotes) and a Works Cited list (using MLA format and live hyperlinks to each source).

Journal Assessment: My review of your journal posts will include the following:

a. The presence of content relevant to your topic, i.e., high quality, substantive material, supported by your sources, and

b. The extent to which you address the requirements of the assignment, i.e., you have met or exceeded the minimum word count, included multimedia content, live in-text hyperlinks (in lieu of footnotes or endnotes) and a Works Cited list (using MLA format and live hyperlinks to each source). Please remember that Wikipedia, and other non-primary sources, are not an acceptable.

Journal Grading: Your Weekly Journal is valued at twenty percent of your final grade. Failure to submit a journal post at all, or in a timely manner, will result in zero points and a grade of F. Students who only partially meet the requirements outlined above will earn a maximum grade of D. A student who meets the requirements outlined above will be assessed subject to the Grade Ranges below. You will find your grade
for each journal post in the Blackboard gradebook. Please note that late submissions will not be accepted for credit.

APPENDIX C
Sample Current Events Wiki Assignment

Current Events Wiki: In the LMS, each student will create a page in our course Current Events Wiki. Here, you are required to submit current event summaries of interest to you and related to our course material, to your current event page one times (1x) per week (date) for a total of 10 posts.

Wiki Etiquette: Wiki post etiquette will follow the guidelines posted above.

Wiki Assessment: I will assess your total contributions to the Current Event Journal based upon three things:
   a. A thoughtful, substantive and well-reasoned summary of the current event –approximately two (2) to four (4) paragraphs, and a link to your original source;
   b. Evidence in your response posts in a minimum of one (1) to two (2) paragraphs that you have read and are specifically and thoughtfully responding to the points raised by one of your classmates, and
   c. The presence, in your Current Events posts, of relevant content, high quality, substantive material, initiative in discussions, respect for classmates, citation to outside sources, and current event references.

Wiki Grading: Each Current Event Wiki is valued at ten percent/points of your final grade. Failure to participate in the current event wiki at all, or in a timely manner, will result in a lower grade or no grade at all. Students who only partially meet the requirements outlined above will earn a maximum of 2 points. A student who meets the requirements outlined above will be assessed as follows: 4 points: fair; 7 points: good; 10 points: excellent - note that late submissions will affect your final grade for this component.

APPENDIX D
Research Project Executive Summary

Date Due: April ?, 201? at 11:59pm
Submit: via digital platform
Length: 1,000 words (approx. 4 pages)
Audience: Your Professor, Employer or Client
Purpose: to summarize your research so your reader understands the materials you have developed

The Executive Summary will distill the entirety of your project into approximately four (4) pages. Approach this as if this were the only document your audience will review about your project. The reader should be able to understand the issue(s), research and analysis related to your project. Since you will be preparing and submitting your Executive Summary on your Digital Platform, you must include embedded live multimedia, with live in-text hyperlinks and live hyperlinks to your sources. This document provides to you an outline of the MINIMUM required components of the Executive Summary. Note that executive summaries vary depending on what you are trying to accomplish (fundraising, new business, attract investors...). For the purposes of this course, we are using the Executive Summary to work on our writing, communication and technology skills. Since we are using the Digital Platform, remember your Executive Summary MUST include multimedia.

Format: (it is up to you WHERE you include multimedia in your executive summary – but you MUST include incorporate relevant embedded multimedia, live hyperlinks and hyperlinked sources)

Title, Name and Date Prepared (You should have all three)
Overview (This section briefly and succinctly describes your research project. Here you can, if you choose, restate your thesis statement or your revised thesis statement)

Problem(s)/Issue(s) (This section can be either a short summary or a handful of bullet points that concisely identifies the problems – legal, ethical, social and business – that you uncovered in your research. Tell the reader who, what, where and why these are problems. Try to distill each problem/issue into a clearly stated sentence)

Analysis/Discussion/Findings (This section will analyze the problems you have identified within the context of prevailing law, social norms, ethical theories and/or business conditions/trends etc. Describe the problems/issues you discovered in further detail. Remember to cite your sources with live hyperlinks)

Conclusions (Here you need to state your conclusions. What were/are the impacts of the identified legal, ethical, social, and business problems/issues)

Recommendations (In this section you will make specific recommendations to resolve/solve the legal, ethical, social and business problems/issues you identified)

Bibliography (MLA format) You must list your sources with live hyperlinks in MLA – alphabetical order.
## APPENDIX E

### Blog Assignment Grading Rubric

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Poor</th>
<th>Fair</th>
<th>Good</th>
<th>Excellent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Length (2 - 4 pps)</strong></td>
<td>Length Is Less Than Required By A Substantial Amount</td>
<td>Length Is Close To The Required Amount</td>
<td>Met The Required Amount Of 2 to 4 pps</td>
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<td></td>
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<td></td>
<td></td>
<td>3 To 4</td>
<td>5 To 7</td>
<td>Exceeded The Required Amount In A Well Written Comment</td>
<td></td>
</tr>
<tr>
<td><strong>Weekly Submissions</strong></td>
<td>No Submissions</td>
<td>Submissions Were Late Or Did Not Meet Total</td>
<td>Submissions On Time And Met/Exceeded Total; Very Well Written</td>
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</tr>
<tr>
<td><strong>Writing Mechanics</strong></td>
<td>Numerous Mechanical Errors Severely Distract From Meaning Of Paper (Grammar, Usage, Spelling, Citations)</td>
<td>Some Mechanical Errors Distract The Reader At Various Points Throughout The Paper</td>
<td>A Few Mechanical Errors, But Does Not Distract The Reader Too Greatly</td>
<td>Grammar, Punctuation, Usage And Spelling Enhance Paper Quality; Well Written</td>
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</tr>
<tr>
<td></td>
<td></td>
<td>8 To 10</td>
<td>8 To 10</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Analysis</strong></td>
<td>Presentation Unclear And Disorganized Throughout</td>
<td>Some Arguments Tied To Central Idea; Presentation Sometimes Unorganized</td>
<td>Majority Of Comments Thoughtful, Substantive And Well Reasoned Responses To Main Concepts In Articles And Other Blog Comments; Organized In Logical Fashion</td>
<td>All Arguments Tied To Central Idea And Organized In Logical Fashion</td>
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</tr>
<tr>
<td><strong>Professional Etiquette</strong></td>
<td>Professional Etiquette Lacking In All Comments; Respect For Fellow Commenters Missing In All Comments</td>
<td>Professional Etiquette Lacking In Several Comments; Respect For Fellow Commenters Missing In Several Comments</td>
<td>Professional Etiquette Always Displayed In Most Comments; Exhibited Respect For Fellow Commenters</td>
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**Total** 50
## APPENDIX F

### Research Project Proposal Grading Rubric

<table>
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<tr>
<th>Criteria</th>
<th>Poor</th>
<th>Fair</th>
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<th>Total</th>
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<tbody>
<tr>
<td><strong>Length (Min 500 Words)</strong></td>
<td>Length Is Less Than Required By A Substantial Amount</td>
<td>Length Is Close To The Required Amount</td>
<td>Met The Required Amount Of 500 Words Minimum</td>
<td>Exceeded The Required Amount In A Well Developed Proposal</td>
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<tr>
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<td>Submission On Time</td>
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<tr>
<td><strong>Thesis Statement</strong></td>
<td>Thesis Statement Missing; Legal Issue(s) Not Identified</td>
<td>Thesis Statement Present But Unclear As To What Legal Issue(s)/Subject The Author Will Examine</td>
<td>Thesis Statement Present; Author Needs To Strengthen Issue(s)/Subject Identification For Reader To Follow Proposed Analysis</td>
<td>Strong Thesis Statement, Clearly Identifies The Legal Issue(s)/Subject And Analysis Proposed</td>
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</tr>
<tr>
<td><strong>Introduction</strong></td>
<td>Unclear, Vague Introduction; Reader Is Not Clear As To What This Paper Will Be About</td>
<td>Aim Of Paper Is Vague; Reader Is Unsure As To What Aspect Of The General Topic Will Be Covered Or What Specifics Of The Topic Will Be Analyzed And Discussed</td>
<td>Introduction Is Clear; Author Generally Identifies Topic But Partially Identifies Specifics To Be Analyzed And Discussed</td>
<td>Clearly Stated Introduction That Identifies The Specifics Of The Topic To Be Analyzed And Discussed</td>
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<tr>
<td><strong>Description</strong></td>
<td>Presentation Unclear And Disorganized Throughout</td>
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<td>Majority Of Arguments Tied To Central Idea And Organized In Logical Fashion</td>
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<td><strong>Writing Mechanics</strong></td>
<td>Numerous Mechanical Errors Severely Distract From Meaning Of Paper (Grammar, Usage, Spelling)</td>
<td>Some Mechanical Errors Distract The Reader At Various Points Throughout The Paper</td>
<td>A Few Mechanical Errors, But Does Not Distract The Reader Too Greatly</td>
<td>Grammar, Punctuation, Usage And Spelling Enhance Paper Quality; Well Written.</td>
<td>15</td>
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<tr>
<td><strong>Relevance</strong></td>
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<td>Identifies The Issues But Does Not Entirely Connect To Or Explain The Relevance To The Course Material</td>
<td>The Issue(s) Are Connected But Needs Additional Clarification As To Relevance To The Course Material</td>
<td>The Issue(s) Are Clearly Identified And Connected To The Course Material</td>
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<td><strong>Research Citations, In-Text Research Support And Format Of Bibliography</strong></td>
<td>References Improperly Cited And Formatted Incorrectly; Did Not Provide 4 Primary Sources Properly Formatted; Some Inappropriate Sources; Missing Hyperlinks</td>
<td>References Not Properly Cited In Text But Formatted Correctly; Some Inappropriate Sources; Provided 4 Or Less Primary Sources Correctly Formatted; Some Hyperlinks</td>
<td>Some References Missing In Text But Formatted Correctly; Provided 4 Primary Sources; Correctly Formatted All Appropriate Sources; Hyperlinks Live And Correct</td>
<td>All References Are Cited Properly, Support The Text And Are Formatted Correctly; All Appropriate Sources; Provided At Least 4 Primary Sources Correctly Formatted With Hyperlinks</td>
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**Total**                                          | **100**                                                             |                                                                      |                                                                      |                                                                      |       |
# APPENDIX G
Research Project Weekly Submission Grading Rubric

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Poor</th>
<th>Fair</th>
<th>Good</th>
<th>Excellent</th>
<th>Total</th>
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<tr>
<td><strong>Length (Min. 500 Words)</strong></td>
<td>Length Is Less Than Required By A Substantial Amount</td>
<td>Length Is Close To The Required Amount</td>
<td>Met The Required Amount Of 500 Words Minimum</td>
<td>Exceeded The Required Amount In A Well Developed Proposal</td>
<td>5</td>
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<tr>
<td><strong>Submission On Time?</strong></td>
<td>No Submission</td>
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<td>Submission On Time</td>
<td>Submission On Time</td>
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<td>Used Digital Platform But Did Not Include Sources And Or Weekly Summary</td>
<td>Digital Platform Used And Organized; Sources Included; Weekly Summary Identified And Included</td>
<td>Excellent Use Of Digital Platform For Organization; Weekly Summary; Sources And Media</td>
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<tr>
<td><strong>Analysis</strong></td>
<td>Presentation Unclear And Disorganized Throughout</td>
<td>Some Arguments Tied To Central Idea; Presentation Sometimes Unorganized</td>
<td>Majority Of Arguments Tied To Central Idea And Organized In Logical Fashion</td>
<td>All Arguments Tied To Central Idea And Organized In Logical Fashion</td>
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<td><strong>Multimedia (Pics/Graphs/Video/Audio)</strong></td>
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<td>Multimedia Embedded But Not Seamlessly Incorporated Into Weekly Summary; Included Sources For Multimedia</td>
<td>Multimedia Embedded And Seamlessly Incorporated Into Weekly Summary; Included Sources For Multimedia</td>
<td>15</td>
</tr>
<tr>
<td><strong>Writing Mechanics</strong></td>
<td>Numerous Mechanical Errors Severely Distract From Meaning Of Paper (Grammar, Usage, Spelling)</td>
<td>Some Mechanical Errors Distract The Reader At Various Points Throughout The Paper</td>
<td>A Few Mechanical Errors, But Does Not Distract The Reader Too Greatly</td>
<td>Grammar, Punctuation, Usage And Spelling Enhance Paper Quality; Well Written</td>
<td>15</td>
</tr>
<tr>
<td><strong>Relevance</strong></td>
<td>Does Not Identify The Relevance Of The Issues To The Course Material</td>
<td>Identifies The Issues But Does Not Entirely Connect To Or Explain The Relevance To The Course Material</td>
<td>The Issues Are Connected But Needs Additional Clarification As To Relevance To The Course Material</td>
<td>The Issues Are Clearly Identified And Connected To The Course Material</td>
<td>15</td>
</tr>
<tr>
<td><strong>Research Citations, In-Text Research Support And Format Of Bibliography</strong></td>
<td>References Improperly Cited And Formatted Incorrectly; Did Not Provide 4 Primary Sources Properly Formatted; Some Inappropriate Sources; Missing Hyperlinks</td>
<td>References Not Properly Cited In Text But Formatted Correctly; Some Inappropriate Sources; Provided 4 Or Less Primary Sources Correctly Formatted; Some Hyperlinks</td>
<td>Some References Missing In Text But Formatted Correctly; Provided 4 Primary Sources; Correctly Formatted All Appropriate Sources; Hyperlinks Live And Correct</td>
<td>All References Are Cited Properly, Support The Text And Are Formatted Correctly; All Appropriate Sources; Provided At Least 4 Primary Sources Correctly Formatted With Live Hyperlinks</td>
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Total 100
COMPLIANCE SCOPING: SYSTEMS THINKING AND REGULATORY COMPLEXITY

LEE USNICK*
RUSSELL USNICK**
SAMUEL USNICK***
WILLIAM USNICK****

Compliance scoping is a term that is increasingly appearing in discussions about business compliance. Scoping has a long history as a first stage planning tool in environmental regulatory settings. Derived in fair measure from systems thinking, it seeks to predefine the boundaries of a complex inquiry by stipulating in advance the limits (that is, the scope) of the analysis and actions which are to follow. As regulatory complexity grows, scoping becomes an ever more necessary tool. This paper addresses the accelerating emergence of scoping in contemporary regulatory compliance, the widening range of application, and some future implications.

I. INTRODUCTION

Planning is about change.1 As any planning for change begins, a filtering process naturally ensues which seeks to give the upcoming planning process dimension and boundaries. This early analysis can occur completely informally, often with no conscious recognition that it is underway. Alternatively, in compliance settings, the analysis is fast becoming a formal, structured, obvious process.

Scoping is one term for this pre-planning process. Whether formal and obvious, or informal and unconscious, everyone does scoping in some form in every planning situation.

II. SCOPING ROLE IN DECISION MAKING

All of planning and all scoping activities are directed at ultimately making decisions. The means by which quality decisions are made in a timely manner are not clearly established, much less agreed upon, but rather are widely varied and diffuse. Identifying a specific part of the planning and decision making process as an activity called scoping is not widespread, though the practice has an established history, especially in a regulatory compliance context.

A. Scoping as a Pre-Planning Activity

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****    M.S., Student, University of Houston Law Center.
Scoping is used to determine the focus of an upcoming planning process. It involves identifying the range of issues that are expected to arise in the subsequent planning activity. The scoping process serves to both highlight significant issues and to de-emphasize less significant ones. It acts as an early decision process where choices are made about the expected course of the ensuing planning activity and decision making process. The success of the overall project is often tied to the effectiveness of the scoping processes. The activities undertaken in a scoping process serve to shape the entire upcoming planning and decision processes.

It is helpful to think of scoping as the point in the life-cycle of a project where the project is defined and the objectives are aligned with the anticipated outcome of the task. It often results in decisions about the project which later become irreversible.

B. Scoping Objectives

Scoping plays many roles in any decision process. It constitutes an opportunity early in the project to identify potential problems. In the compliance context, it is vital as a part of overall risk management by identifying potential risks and exploring appropriate management responses. It can provide a forum for identifying the data available to the planning process. Often, it establishes a range of management options for the activity. Since most projects cannot proceed totally risk-free, scoping can identify potential risks along with the opportunity to consider contingency, mitigation and remediation options from the beginning of the project.

In compliance scoping, the determination of the dimension of the potential risks is a critical activity. The identification of risks that are relevant to making informed decisions is a key purpose of a scoping activity. Additionally, exploring and focusing on the array of technical and specialty information which can be applied to the potential risks create the framework for the future course of the project. It is specifically intended to identify risks that are relevant to inform decisions, especially decisions on risk and risk management.

3 Id.
5 Id.
7 Id. at 676.
9 Id.
Identification and inclusion of relevant stakeholders is key to the process. A clear purpose is to engage relevant stakeholders at the earliest possible point in the process. Stakeholders should be engaged in the scoping process at the goals level and also regarding the specific direction of the impending planning activity.

Finally, there are a number of other objectives, including the ability of the process to create a range of viable alternatives, to insure the cost-effective use of available resources, to seek flexible alternatives, and to resolve issues early in the process to encourage project buy-in and foreclose later dissension.

III. REGULATORY COMPLIANCE

Compliance becomes increasingly complex each year. Both the number of regulatory regimes and the range of the regulation are continually expanding. There is no sign of any change in these trends in the foreseeable future. Over time, many of the regulatory requirements are also increasingly vague and often outright confusing. These regulations affect an ever widening range of a company’s business processes.

Compliance is largely about insuring that business processes are correctly designed and appropriately executed. Establishing compliance with all applicable regulations, or even with a single regulation, is ever more difficult to ascertain to a comfortable degree of certainty. One evolving trend is that regulators are increasingly examining the quality of the overall compliance process and the data used to defend both compliance processes and actions. The only reasonable response is to adopt and pursue a programmatic approach to regulatory change and this is making scoping an ever increasingly critical part of business response to the evolving regulatory environment.

A. Regulation and Scoping

As compliance program responses expand, they inevitably become increasingly interactive with non-regulatory compliance issues which are also expanding. The result is a growing acknowledgment that explosive global change leaves no choice but to change or be relegated to irrelevance at best. The only viable response is a wise and regular use of compliance scoping as an integrated and ongoing...

19 Thomson, supra note 8, at 1160.
20 Id.
21 Id.
22 FED. AVIATION ADMIN., supra note 4.
23 FED. AVIATION ADMIN., supra note 4.
24 FED. AVIATION ADMIN., supra note 4.
26 Cannon, supra note 26.
27 Id.
28 Strinivasan, supra note 28.
Increasingly, the regulatory framework itself has a direct effect on the nature of a specific scoping process and on the resulting scoping outcome. The ability to bring to the scoping activity all of the relevant implications, including those unstated or tangential, is critical. Regulation related planning activities must be able to produce processes and action products that are clearly focused, cost-effective, functionally and legally defensible, open to future accountability, while they provide a rational framework for ongoing adjustment and calibration. More and more, this all begins with a compliance scoping process.

B. The EPA Scoping Process

In the regulatory arena, scoping evolved starting in the 1970s as an "early and open process for determining the scope of action to be addressed and for the identification of significant issues related to the proposed action". A specific step in a number of early environmental regulatory processes was the defining of the scope of an assessment. Some environmental regulations mandated a scoping process and also required that post-scoping actions and products be consistent with the parameters established in that scoping process. The scoping process was designed to supply decision makers with input from various stakeholders, agencies, and the public as to the considerations that should be a part of a given environmental review. In spite of years of scoping experience, there are few studies of scoping in the environmental setting. Much of the discussion which follows emanates from a single 2002 EPA internal study which specifically looked at the scoping process.

C. Scoping in Other Settings

Scoping as a specified activity can be found in a variety of settings. State and federal transportation planning activities often include scoping as a multidisciplinary effort looking at system needs and project alignment with policies and goals. There are numerous cases where the scoping process appears in a number of governmental functions in the United States as well as abroad, and across a wide array of topics. A typical example is where a major consulting firm advertised "definition of scope" as the first step in a Sarbanes-Oxley Internal Control Readiness Planning Module.

Scoping as a working term of art appears continually more frequently in non-governmental business settings. The information industry has long used the concept as an essential tool for product development in which the interaction of systems and components must be evaluated intensively in activities as diverse as writing software, establishing software architecture, managing data systems, and

36 Firestone, supra note 10, at vii.
37 Strinivasan, supra note 28.
38 Firestone, supra note 10, at 9.
39 Slotterback, supra note 6, at 663.
40 Firestone, supra note 10, at vii.
41 FED. AVIATION ADMIN. supra note 4.
43 Slotterback, supra note 6, at 664.
44 Firestone, supra note 10, at 1.
45 MICH. DEP’T OF TRANSP., supra note 23.
controlling network policies. Scoping is a common business practice in designing supply chain systems. In many settings, it has a role in the design process, including a growing use in academic research in many fields as a first tool to survey the existing literature so as to narrow the focus of subsequent studies. Despite the breadth of scoping activities, there are not a large number of actual studies on the nature and effectiveness of scoping.

D. Scoping and the Courts

Although scoping has a long history in a regulatory setting, there is little case law directly addressing the scoping process. When courts have addressed scoping, they look to the sufficiency of the scoping and to the relationship between the particular scoping activity and the regulations mandating the scoping process.

IV. SCOPING, SYSTEMS THINKING, AND REGULATORY COMPLEXITY

Formalization of scoping arose parallel with the rapid growth of what has come to be broadly described as systems thinking. Focused on improved ways to address complex issues, systems thinking serves as both the rationale for, and the operational approach to, early scoping activities. Acknowledging the relationship between scoping, systems thinking, and regulatory complexity simplifies the role of scoping on both a conceptual and an applied level.

A. Systems Thinking

Although there are numerous ways of defining systems, it is generally thought of as a group of interacting, interrelated, or interdependent components that form a complex and unified whole. Systems thinking is a framework for seeing relationships rather than things. There is no way to avoid contact with systems as they are everywhere. Each system is a part of a larger system and also contains subsets which are themselves systems. Over more than sixty years, systems thinking evolved

50 See, Slotterback, supra note 6.
52 Id. at 577.
53 VIRGINIA ANDERSON & LAUREN JOHNSON, SYSTEMS THINKING BASICS: FROM CONCEPTS TO CAUSAL LOOPS 2 (Pegasus Communications 1997).
56 C. WEST CHURCHMAN, THE SYSTEMS APPROACH 48 (Dell Pub'g 1968).
as a tool for considering patterns of change as opposed to static freeze-frame depictions.\textsuperscript{57} Systems thinking grew out of the need to be able to intelligently consider problems with an unruly number of variables.\textsuperscript{58}

At its core, systems thinking involves arbitrarily and temporarily defining certain elements as externalities for purposes of analysis. That is, because there are often so many variables, reasonable evaluation of any single issue is hampered. This problem is solved by arbitrarily declaring certain of these system variables to be temporarily fixed as externalities. In this context, an externality is still a variable, but it becomes for analysis purposes, a variable that the system is considered powerless to alter. The smaller number of remaining variables can now be better analyzed for their potential impact on the system. The strength of the systems approach lies in being able to again redefine the externalities allowing for a close analysis of a new limited set of variables. Hence, the same system can be repeatedly analyzed by multiple examinations of the same system dynamics from a different perspective each time. Arbitrarily and temporarily defining externalities limits the scope of consideration so that specific aspects of a system can now be considered with some measure of control.

Systems thinking has come to be thought of as a set of tools for seeing relationships rather than merely observing objects.\textsuperscript{59} Systems models can forewarn of the possibility that change in one part of the system could yield unforeseen outcomes, both good and bad, in other places in the system.\textsuperscript{60} The inherent implication of a systems view is that we can never do just one thing because every action radiates forward in time and outward in space, affecting everything everywhere.\textsuperscript{61} Systems thinking requires a sensibility to the subtle interconnectedness within and between systems.\textsuperscript{62} Planning, and as a result, scoping are integral activities of a system.\textsuperscript{63}

\textbf{B. Complexity}

Systems thinking becomes a critical tool in addressing complexity.\textsuperscript{64} In part this is inherent, because each additional layer of complexity results in entirely new systems which interact and must be addressed.\textsuperscript{65} Systems thinking is an antidote to the sense of hopelessness created by the ever expanding web of complexity.\textsuperscript{66} One role of systems thinking is to provide tools for talking about complex situations.\textsuperscript{67} Systems thinking is a discipline for seeing the structures that underlie complex situations.\textsuperscript{68}

\textsuperscript{57} SENG, \textit{supra} note 54.
\textsuperscript{58} CHURCH, \textit{supra} note 56, at 4.
\textsuperscript{59} SENG, \textit{supra} note 54.
\textsuperscript{62} SENG, \textit{supra} note 54, at 114.
\textsuperscript{63} CHURCH, \textit{supra} note 56, at 149.
\textsuperscript{64} SENG, \textit{supra} note 54, at 69.
\textsuperscript{66} SENG, \textit{supra} note 54, at 69.
\textsuperscript{67} ANDERSON, \textit{supra} note 53, at 20.
\textsuperscript{68} SENG, \textit{supra} note 54, at 68.
With each new level of complexity, entirely new system properties can appear, reordering everything.\textsuperscript{69} It should, however, be understood that complexity indicates that the system consists of parts which interact in ways that heavily influence the probabilities of later events.\textsuperscript{70} Growing complexity and the glut of information, most of which is irrelevant, have made it extremely difficult to obtain the information required for wise decisions.\textsuperscript{71}

Scoping improves assessments of risk even when the analysis is narrow or only qualitative, especially when dealing with controversial and complex situations.\textsuperscript{72} The role of scoping is to preliminarily define relationships in complex projects or in projects being implemented in complex settings. When the risks are complex, the context for exposure and risk management must be considered in planning and scoping steps.\textsuperscript{73}

\textit{C. Systems Thinking, Complexity, and the Law}

Our concept of the law as a stable, predictable, fixed entity belies the reality of a vast web of interacting systems which have many characteristics of self-organizing adaptive systems. The legal system and its legal environment now look much more like incomprehensible mazes than the more orderly, linear law of an earlier period. In a contemporary, complex setting, legal environment becomes a much more valuable and useful construct when taken out of the old meaning as a fixed, external, unalterable element in a decision process, and instead is dealt with in a flexible way using a systems approach. This approach conceptualizes the law as capable of being a fixed externality, or an interactive system variable, or both at the same time.

Legal thinking, practice, and education all find a comfortable framework in the linear world. Legal thinking embraces the idea that every question has an answer to be discovered, that systems have identifiable predictability, and that there are fixed realities within which to reach a “correct” answer. In the new regulatory environment, it is critical to understand that certain complex, seemingly chaotic systems, only achieve that sense of orderliness when viewed in the framework of a complex interaction of systems. Scoping is the first step in linking the law to the multiple complex systems such that a path to compliance of all systems with all applicable regulations can be uncovered.

\textbf{V. CONSIDERATIONS GOING FORWARD}

\textit{A. Participants}

Scoping should not be thought of as a single person activity, especially in a complex regulatory setting.\textsuperscript{74} Early participation and extensive participation by the ultimate decision maker is critical in

\textsuperscript{69} \textsc{Waldrop, supra} note 65, at 82.
\textsuperscript{70} \textsc{Robert Axelrod & Michael D. Cohen, Harnessing Complexity: Organizational Implications of a Scientific Frontier} 15 (Basic Books 2000).
\textsuperscript{71} \textsc{Cornish, supra} note 61, at 16.
\textsuperscript{72} \textsc{Firestone, supra} note 10, at 15.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textsc{Strinivasan, supra} note 28.
focusing the scoping process.\textsuperscript{75} An early action should be to identify all of the parties needed to successfully design and implement compliance with a regulation.\textsuperscript{76} The identification of the full range of stakeholders who should be involved in the process appears to be crucial to successful scoping outcomes.\textsuperscript{77} It has been argued that determining participation should grow out of first determining what decisions will need to be made, then tailoring the participation to match the range of decisions to be made.\textsuperscript{78} Early buy-in by the participants is directly related to their patience and fatigue factor as the scoping unfolds.\textsuperscript{79}

The fast pace of regulatory change makes it increasingly difficult for enterprises to keep abreast of the changes, and has resulted in rapid growth of the use of outside third parties to assist with compliance activities.\textsuperscript{80} The potential value of outside involvement often becomes apparent during the scoping activity.\textsuperscript{81} Computerized products which automate and often attempt to integrate internal compliance systems are on the market,\textsuperscript{82} and "compliance-as-a-service" products can help an enterprise both achieve and maintain compliance with applicable regulations.\textsuperscript{83}

\textbf{B. Bumps in the Road to Compliance}

As with any other process, compliance scoping has many small but troublesome tactical quirks. Representing to participants that the compliance scoping activity will be simple, fast and easy is inaccurate.\textsuperscript{84} The scoping process can alert the participants and the enterprise to possible complications that had not been anticipated.\textsuperscript{85} While knowledge of the complication can be valuable, it can turn the scoping process in entirely unforeseen directions. In the same vein, any scoping process will likely include unanticipated uncertainty which will need to be addressed by the scoping activity.\textsuperscript{86} Finally, the process participants should be continually on the lookout for both internal and external "scope creep", in which the process starts focused on a specific regulatory compliance, but then inappropriately broadens in a manner detrimental to the initial regulatory compliance purpose.\textsuperscript{87}

Setting and maintaining the strategic operation of a scoping process has a set of potential problems as well. As the scoping process unfolds, the policy issues identified that may need

\textsuperscript{75} Firestone, supra note 10, at viii.
\textsuperscript{77} Slotterback, supra note 6, at 664.
\textsuperscript{78} Charles H. Eccleston, The Decision-Identification Tree:A New NEPA Scoping Tool, 26 J. ENV. MGMT. 457 (Oct. 2000) available at EBSCO.
\textsuperscript{79} Firestone, supra note 10, at viii.
\textsuperscript{80} Jaclyn Jaegar, Choosing a Compliance-as-a-Service Vendor, COMPLIANCE WEEK, 47, 47 (Jan. 2012) available at Business Source Complete.
\textsuperscript{81} CONFLICT RESEARCH CONSORTIUM, supra note 76.
\textsuperscript{82} Strinivasan, supra note 28.
\textsuperscript{83} Jaegar, supra note 80.
\textsuperscript{84} Firestone, supra note 10, at viii.
\textsuperscript{85} Mich. Dep't of Transp., supra note 23.
\textsuperscript{86} Firestone, supra note 10, at C-7.
consideration can stretch beyond the bounds anticipated at the time the scoping was initiated. In other words, as the scoping process proceeds, it becomes apparent that the scope and the alternatives do not match the initial charge given the scoping undertaking. Likewise, the consideration of alternatives is a valuable scoping process, but can again lead to scope creep and perhaps result in having the participants at odds with the formulators of the scoping process. A scoping process can uncover information suggesting that the crisply focused task designed to address compliance on a single issue might, and perhaps should, be addressed on a larger, integrated "cumulative" basis. As regulatory schemes reach out to third parties, such as vendors or suppliers, the push to address regulatory issues on a cumulative basis will increase.

C. Flexibility

The early environmental scoping activities were intentionally non-rigid, allowing pursuit of topics germane to that particular scoping. Scoping is not a clearly developed set of tools and techniques. Since the context of each situation will vary, the scoping process should not be prescriptive. Hence, flexibility is a highly desirable aspect of compliance scoping. The order of proceeding should be flexible to change with the project needs.

D. Monitoring, Evaluating, and Continuous Scoping

As compliance scoping expands, enterprises will be drawn to compliance life cycle management systems. Covering the full range of the compliance activities, careful scoping will occur within the system as an activity, but will also evolve as an ongoing, over-arching activity which continuously scopes the entire compliance management system itself. As policies are more able to be tightly integrated with compliance needs, monitoring for compliance will become complicated as policy semantics and syntax are merged with regulations, some of which are extremely precise while others are frustratingly imprecise. The compliance regime will be a regular enterprise function whose hallmark is vigilance and constant monitoring where scoping takes on a potentially much wider function. Expect enterprise wide monitoring programs in an established and highly integrated framework. Unlike most present compliance operations, the compliance monitoring programs of the future will likely have clear

88 Eccleston, supra note 78, at 458.
89 Id.
90 Strinivasan, supra note 28.
91 Firestone, supra note 10, at vi.
92 Id.
93 Eccleston, supra note 78, at 458.
94 Firestone, supra note 10, at B-8.
95 FED. AVIATION ADMIN., supra note 4.
96 Firestone, supra note 10, at vii.
98 Jaegar, supra note 80, at 64.
99 Strinivasan, supra note 28.
responsibilities across the entire enterprise.  

E. Documentation

Documenting scoping activities enhances the quality of compliance thinking and enhances the credibility of the scoping process.  Careful scoping documentation provides a vehicle to justify both the scoping process and scoping decisions.  Openly using a full range of documentation tools such as conceptual modeling can clarify scoping for those within the process, for decision makers, and for stakeholders in general.  Over time, it will become critically important to document that which the scoping process also determined not to pursue.  The documentation should include assumptions, estimates, and gaps of information or knowledge that played a role in the scoping process.  The open use of case-based reasoning utilizing earlier deliberations as guides to address current issues will expand greatly.  Every scoping process becomes a potential template for subsequent scoping activity. Enterprises will be able to use the collection of documentation as a tool for protection when non-compliance is alleged, and the enterprise compliance scoping and planning library will be an integral part of ongoing compliance.

VI. CONCLUSION

Out of systems thinking, scoping evolved as a tool for government to improve the environmental planning process to insure that critical issues were not overlooked in the complex array of the systems that make up the environment.  Today, scoping is becoming an increasingly common, necessary, and sometimes mandatory tool for enterprises to assure themselves, the regulators, and the market that they are carefully integrating regulatory compliance into every corner of the enterprise.

100 Id.
101 Firestone, supra note 10, at C-8.
102 Mich. Dep't of Transp., supra note 23.
103 Firestone, supra note 10, at 15.
104 Nicholas C. Yost, Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping, Executive Office of the President, Council on Environmental Quality, ceq.hss.doe.gov/nepa/regs/scope/scoping.htm (last visited Apr. 1, 2014).
105 Firestone, supra note 10, at 2.
107 Strinivasan, supra note 28.
IDENTIFYING THE CONTEXTUAL ISSUES
THAT CAN LEAD TO ETHICAL PROBLEMS

John L. Keifer† and Mary Carter Keifer++

Abstract

Benjamin Franklin (circa 1791) once reportedly said, “...so convenient a thing it is to be a rational creature, since it enables one to find or make a reason for everything one has a mind to do.” His statement incisively captures the essence of the difficulty when it comes to making ethical behavior an outcome of pedagogy. This difficulty is further exacerbated by the split between concerns for consequences (the utilitarian approach) and principles (deontological approach). A justification can be found for nearly any act depending on how the issue is framed. For instance, the scandal at the IRS demonstrates how reliance on principled decision-making can put a democracy in jeopardy even when people involved feel justified ethically in what they are doing. Was it ethical for the IRS to target conservative groups? Unfortunately, the answer arguably is "yes," and it does not depend on a person’s choice of ethical theory necessarily. If a person is a utilitarian, s/he can feel justified on the basis of doing whatever benefits the most people. Given the pyramidal distribution of income and wealth in this country, a growing government bestowing more and more entitlements on lower income, lower wealth citizens by an imposition of an ever-increasing tax burden on the high-income earners clearly could be considered ethical (at least in the short run). But what if s/he is a deontologist? What would be the outcome if s/he felt compelled, as a deontologist, to only do what s/he felt should be done in all like instances in the future (i.e., to universalize the politicization of the IRS to the advantage of the party in power regardless of which party held power)? Well, have you ever heard the expression, “to the victor goes the spoils?” It certainly qualifies as a principle regardless of whether you agree with it or not. Thus, the authors argue that ethical instruction must be embedded in the larger context of business itself and not treated as a stand-alone consideration of theoretical constructs. In developing their thesis, the authors draw on the work of Mary C. Gentile, PhD, a Babson professor, and her acclaimed series “Giving Voice to Values,” and the earlier work of Barbara Toffler, PhD, author of “Tough Choices: Managers Talk Ethics.” In particular, the authors contend that ethical dilemmas can often and unnecessarily arise due to ill-conceived or poor management practices that erupt into ethical quandaries for the protagonists to resolve often at personal and professional risk. It is hoped that the authors work can enable law faculty to be able to enrich their classroom discussions through discourse beyond just the dilemmas themselves to the underlying contextual framework that led them to arise.

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Introduction

Instruction in business ethics has become a major focus of AACSB International beginning with the corporate scandals of the first decade of the new millennium. While well meaning academics have expressed faith in the benefits of such instruction from the standpoint of influencing the future behavior of their students, much skepticism abounds especially when it comes to reported stories concerning the financial services industry. In fact, a Google search of the question, “Is business ethics an oxymoron?” produced 85,800 responses in just .33 seconds. Also, doing a trends analysis provided by Google, you see an uptick in corporate bribery in 2010 for the United States that has persisted to the present (a rating of 91 out of 100 for the United States when it comes to insider trading putting us third behind Singapore and Hong Kong) and a rating of 100 on executive compensation putting the United States ahead of Canada, India, Australia and the United Kingdom (showing ratings of 66, 21, 15 and 14, respectively). The latter rating is particularly depressing because it strongly supports an ethos of self-interested behavior. It seems naïve to think that ethical instruction alone will suffice to curb undesirable behavior at any level, individual, functional, departmental, firm, industry or societal for that matter. This problem is further compounded by globalization and the somewhat disparate values, norms or mores extant across international borders.

The authors believe that a need exists to refine in realistic terms the extent to which society can rely on personal integrity when it comes to ethical behavior and to begin to view these issues in terms of flawed management practices. In making their case, the

3 Google Search of “is business ethics an oxymoron,” conducted March 29, 2014.
authors will rely heavily on the work of Mary C. Gentile, PhD, a Babson professor, and her acclaimed series “Giving Voice to Values,”7 and the earlier work of Barbara Toffler, PhD, author of Tough Choices: Managers Talk Ethics,8 two scholars that have contributed mightily to placing the issues of ethical behavior in the context of real life individuals. Before discussing their contribution and using their examples to show how these issues can often arise as a result of flawed management practices, the authors would first like to consider whether and the extent to which traditional, classical ethical instruction is a good fit with an economic system based on competition and its emphasis on the exploitation of economic advantage. 9

The Paradox of Our Mammalian Nature

Science shows that we, as the most advanced form of mammalian species, are programed (by design or evolution) to share certain common needs or characteristics. As stated by De Waal:

… If you ask anyone, "What is morality based on?" these are the two factors that always come out. One is reciprocity, and associated with it is a sense of justice and a sense of fairness. And the other one is empathy and compassion. And human morality is more than this, but if you would remove these two pillars, there would be not much remaining I think. And so they're absolutely essential.10

Thus, the very characteristics that define our humanity and upon which many religious and humanist principles are based, such as doing unto others and as you wish for others to do unto you, and which have found their way into our jurisprudence (for instance, the equality principle of the Fourteenth Amendment), underlay the metrics by which we measure our progress as a society. Even in the cases of oppression of minority populations such as in Crimea, it comes down to the way we view others not of our tribe, nationality or ethnicity; do we see them as our neighbors in the sense of the Story of the

7 Professor Gentile and the Aspen Institute that supported the development of the work of Professor Gentile have made their work available for classroom use. All the materials to which reference is made herein were retrieved from <http://www.babson.edu/Academics/teaching research/gvv/Pages/curriculum.aspx>
8 (Wiley, 1986).
9 It is somewhat ironic that a high level of trust among American businesses is the factor that Francis Fukuyama uses to explain the dynamism of the American economy relative to other cultures and their economies. It could well be that the word trust means something quite different when it comes to financial transactions as opposed to social transactions. See: Fukuyama, F. (1995). Trust: The Social Virtues and The Creation of Prosperity. (Free Press).
Good Samaritan or do we cross to the other side of the road as was done by the Priest and the Levite in that story?\textsuperscript{11} In such instances, what does it mean to be human anyway?

Behavioral economists have isolated the norms between what they have labeled as financial transactions contrasted with social transactions\textsuperscript{12}. Financial transactions are bargain-for exchanges or \textit{quid pro quos}. These are typical of what we consider the essence of a market economy. Social exchanges, on the other hand, are about social interactions where people voluntarily provide services to others without any expectation of payment; in fact, any offer of such would be seen as highly offensive. Thus, you hear stories and see television advertisements of corporate social responsibility efforts by companies enlisting the voluntary help of their staffs in community development efforts. Actually, research shows that such voluntary work on behalf of the needs of others actually lends itself to positive feelings of self worth and self-meaning for the participants, feelings that would be totally compromised if money were suddenly offered.\textsuperscript{13} Research further shows that people so engaged give of their time and talents freely and maximize their efforts on behalf of others. In order to get the same commitment if the transaction was structured as a financial transaction, a higher monetary award would be required to produce the same amount of effort.\textsuperscript{14}

This expectation of a financial reward in the case of financial transactions is what skews the dynamics of our interactions with others and can create cognitive dissonance when it comes to doing the right thing. This pressure is exacerbated in the context of gainful work because research shows that we do not transcend to the spiritual realm until our basic needs for security and safety have been met. Unless there is total congruence between our mammalian side (our emotional side) and our conscious thought, the choices we are likely to make hang in the balance. And this situation is further exacerbated by the nature of competition itself and its reliance on relative economic advantage. This is true because the exploitation of that advantage is the essence of strategic thinking when it comes to the sources and implications of competitive advantage.

\textbf{Understanding The Sources and Implications of Competitive Advantage}

The whole concept of competitive advantage assumes an uneven bargaining position


\textsuperscript{14} \textit{Id}.
between the one having the advantage and their counterparty. Free market enterprise is all about exploiting that advantage. Such advantage is based on either an asymmetry in information between the parties or the existence of a monopoly or monopsony position. In fact, the essence of business education today is based on instruction as to how firms can both create and exploit such anti-competitive asymmetries or positions. It is easy to see why society sees the topic of business ethics in oxymoronic terms. Why should big drug companies not price gauge when it comes to life saving drugs? In fact, are they violating their duties to their shareholders if they are otherwise inclined? Also, it makes one realize the importance of competition laws.

Milton Friedman may have had it right when he said that the only social responsibility owed by businesses to society is one of legal compliance. It is just too easy to find congruence between “doing the right thing” ethically and what lies within the firm’s economic interest through rationalizations of one sort or another. Prahalad recognized this fact in his book, The Bottom of the Pyramid, and its focus on social development that pays. Ethics really fits the best when considering topics of social justice because it finds its greatest congruence when it comes to our mammalian nature largely and its focus on social transactions (i.e., a feel good experience). In fact, the authors would contend that the very appeal of Rawl’s “veil of ignorance” concept within his “A Theory of Justice” for which he is famous is due to its requirement that decision makers should place themselves in the position of society’s least fortunate when addressing policy decisions. Such a concept, however, does not fit in the world of business unless, of course, money can be made (i.e., Prahalad’s exhortation). Then one can take pride in “killing two birds with one stone.” This also is the criticism of firms that “go green” simply because it serves to enhance their image and improve their stock price. Such motivations are hardly the stuff of morality.

We now turn to our proposition that firms would be better served to focus on the prevention of situations that cause ethical problems and to treat such problems as a failure of management. While this certainly is not true in all instances (i.e., there are times when you need to trust in the honesty and integrity of staff), it represents an approach to management that serves the longer-term interests of the firm and society.

**Characteristics of Ethical Issues and Ethical Dilemmas**


16 “There is one and only one social responsibility of business–to use it resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.” Milton Friedman, *New York Times Magazine*, September 1970.

Toffler sought through manager interviews and their self-identification of what they considered to be ethical questions arising in their day-to-day work to define the kind and scope of ethical concerns businesses face. She found that such self-identified concerns were dispersed over three primary areas: the managing human resource processes and personnel (moderated by the degree of commitment felt and their spatial proximity to the declarant); the managing external constituents (suppliers especially in connection with the termination of the relationship) and customers (especially in instances of familiarity and trust); and, the managing personal risk versus company loyalty. With respect to the first two domains, much of the reported disquiet felt by managers had to do predictably with the obligatory concealment of planned changes that would inevitably, adversely impact others around them.

Toffler differentiated between what she called ethical issues and ethical dilemmas. Ethical issues are ethical questions that society considers largely decontextualized. For instance, most would agree that polluting the environment or child labor is reprehensible. On the other hand, ethical dilemmas are considered in a context that requires ethical concerns to be considered where trade-offs exist. For instance, should you tell a supplier that they would be dropped at the end of the quarter so they can pursue what might be in their best interest when you need their supply of materials through the end of the quarter? The following table compares and contrasts how Toffler views the different characteristics of what she sees as issues versus dilemmas:

<table>
<thead>
<tr>
<th>An Issue</th>
<th>A Dilemma</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Is easy to name.</td>
<td>1. Is hard to name.</td>
</tr>
<tr>
<td>2. Is a-contextual: it stands outside a specific setting.</td>
<td>2. Is embedded in a specific context.</td>
</tr>
<tr>
<td>3. General agreement exists that the issue is ethical.</td>
<td>3. Disagreement as to whether or not the case in point is ethical.</td>
</tr>
<tr>
<td>4. Addresses the claim of a single stakeholder.</td>
<td>4. Addresses multiple, often competing, stakeholders.</td>
</tr>
<tr>
<td>5. Addresses the right and wrong of a single value.</td>
<td>5. Addresses multiple, often competing values.</td>
</tr>
<tr>
<td>6. Assumes that individuals are free to do the right thing.</td>
<td>6. Assumes that the individual can do the right thing but (a) may not know what it is or (b) may not have the capacity to do it.</td>
</tr>
</tbody>
</table>

For Toffler, any discussion of business ethics needs to be addressed in real terms in the lives of real managers. The problem with many texts dealing with ethics in the business context is that they distort the reality that managers face to the point where one is inexorably drawn to the “right solution.”

She reported that the prevalence of ethical questions across these domain areas was 66.1%, 16.9%, and 11.9% respectively. She listed a fourth category dubbed “other” but it accounted for just 5.1% of her observations.
“Giving Voice To Values: Brief Introduction”19

Mary C. Gentile, PhD, a Babson professor, has addressed the problem of decontextualized ethical issues by producing a wonderfully rich set of short scenarios that place the protagonists in conflicted situations with which they must contend. The idea is to use these instructional tools in advance of the student’s real life encounters to help them develop strategies for dealing with them. Gentile says:

Most of us want to bring our “whole selves” to work. Yet, experience and research demonstrate that many of us will encounter values conflicts in our careers, when the way we want to live and the things we want to accomplish seem in conflict with the expectations of our clients, our peers, our bosses and/or our organizations. The Giving Voice to Values curriculum is designed to help individuals learn to recognize, clarify, speak and act on their values when those conflicts arise.

The focus here is POST-decision making. It is not about deciding what the right thing is. Rather it is about how a manager raises these issues in an effective manner; what he/she needs to do and say in order to be heard; and how to try to correct an existing course of action when necessary.20

Gentile’s approach to instruction in situations of value conflict is contained in her Reasons and Rationalizations: An Exercise.21 It reads as follows:

After reading the scenario, please work through the following questions:

• What are the main arguments you are trying to counter? That is, what are the reasons and rationalizations you need to address?
• What is at stake for the key parties, including those who disagree with you?
• What levers can you use to influence those who disagree with you?
• What is your most powerful and persuasive response to the reasons and rationalizations you need to address? To whom should the argument be made? When and in what context?

The authors’ contribution to the Gentile’s work is to add the additional questions:

• Was the value conflict the result of poor firm management? In other words, should the possibility of such a conflict have been foreseen and what management changes should be recommended to avoid such a

19 This material is part of the Giving Voice to Values curriculum collection (www.GivingVoiceToValues.org). The Aspen Institute was founding partner, along with the Yale School of Management, and incubator for Giving Voice to Values (GVV). Now Funded by Babson College. © Mary C. Gentile, 2010
20 Id., at 1.
21 Id., at 2.
conflict in the future?

We now turn to several of Gentile’s scenarios to demonstrate the implementation of these additional questions into any discussion. While the questions may not lead to anything fruitful in every instance (such as when the practice itself is deceptive)\(^{22}\), the authors find that in many of the scenarios the value conflict could have been avoided through installing better management practices.

**Be Careful What You Wish For: From the Middle\(^{23}\)**

Sarah was delighted when she was promoted to Controller for the regional Sales unit of a leading chemical producer where she had been employed for the last 3 years. It was a big boost in responsibility and enabled her to participate in the incentive compensation program. Now that she was facing her first end-of-quarter crunch, however, she wondered what she had gotten herself into.

A major customer has placed a large order just one week before the end of quarter, but they don’t want delivery till the middle of the next quarter. The Sales Director of Sarah’s group wants to recognize the revenue now, thereby ensuring the maximum bonus for his group for the quarter. This means processing the order, shipping the product to a warehouse and bearing the carrying costs until shipment to the customer.

Sarah feels pressure on all sides. When she sat in the Accounting organization, she saw the costs of such revenue recognition problems – the cost of sending messages to all levels of the organization that it’s OK to game the system; the loss of information and distortions in expectations that jeopardized effective decision-making; the cost of records cleanup when the distortion eventually came to light; and so on. She still reports to her old team and she knows they are counting on her to make the right decisions on this kind of thing.

On the other hand, she wants the Sales Director and her new unit’s General Manager to consider her one of the team. She wants to earn their trust and respect.

What should she say, to whom, when and how?

\(^{22}\) In *Market Research Deception*, a university intern is asked to lie and say she is doing a school project when doing “some research on the competitor firms of one of the agency's major clients.” In *Billing Bind (A)*, accounting interns were ordered to show one-half hour of time spent on client matters when they were tasked to scan paper files into a computer as the firm moved from paper-based files to an electronic database.

\(^{23}\) This case was inspired by interviews and observations of actual experiences but names and other situational details have been changed for confidentiality and teaching purposes. This material is part of the Giving Voice to Values curriculum collection ([www.GivingVoiceToValues.org](http://www.GivingVoiceToValues.org)). The Aspen Institute was founding partner, along with the Yale School of Management, and incubator for Giving Voice to Values (GVV). Now Funded by Babson College. © Mary C. Gentile, 2010
This presents the dilemma, should or should not Sarah permit revenue recognition a quarter before the sale should actually be booked. Obviously not you might say. This scenario, when used in an executive development form involving Brazilian executive who manage local, domestic firms, failed to raise any red flags in their mind.  

Beyond exploring Gentile’s queries, a fruitful area of discussion could be the structure of the reporting relationships within Sarah’s firm. To whom is Sarah a direct report? Is it the Director of Sales? If not, does the Director of Sales have input into her annual evaluation? Another fruitful area might be the structure of Sarah’s compensation and incentive package. Should someone in Sarah’s position be incentivized by a bonus based on firm performance? If so, should her package include a claw back provision in instances where she incorrectly recognized quarterly revenue?

**The Client Who Fell Through the Cracks (A)**

Juan, the client portfolio manager and Susan’s boss, flashed a sardonic grin, shook his head and directed her out of his office with explicit instructions to revise the numbers. Susan was flabbergasted; all of the performance figures had come from the electronic systems scrupulously maintained by the company’s analysis team and were in line with the portfolio’s underlying investments. However, she quickly realized that the issue lay not with the figures and charts but rather with the investment decisions that had yielded such poor results. And that was one tale that her portfolio manager at Company XYZ did not want told.

Specifically, Susan was urged to find a “better” blended benchmark to replace the original, and to do so in time for the client meeting that afternoon. The original benchmark was based on the appropriate market indices that best reflected the portfolio’s asset mix, but which unfortunately outperformed the portfolio since inception. Consequently, Susan was not so subtly advised that accuracy was to be superseded by a desire to conceal this knowledge from the client.

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24 Ohio University College of Business for years have conducted seminars for executive students enrolled in educational programs offered by the Getulio Vargas Foundation. An author has taught in this program and has used this case study many times. His observation is that executive participants who work for western firms clearly see the impropriety of such behavior unlike their domestic firm counterparts.

25 These cases were prepared for the Giving Voice to Values program for Columbia Business School by Mary C. Gentile, Ph.D and Professor William Klepper, with the assistance of Sharon Sarosky, Columbia ’09 and Suprita Goyal, Columbia ’08, and with funding from the Sanford C. Bernstein & Co. Center for Leadership and Ethics. This case is also available through the Columbia CaseWorks collection and appears in that collection as #081801A. This material is part of the Giving Voice to Values curriculum collection (www.GivingVoiceToValues.org). The Aspen Institute was founding partner, along with the Yale School of Management, and incubator for Giving Voice to Values (GVV). Now Funded by Babson College. © Mary C. Gentile, 2010
The principal of this portfolio was one of the bank’s smallest clients in terms of net worth and had remained on their platform only as a personal favor to a senior banker. He had decided only two years ago to invest the bulk of his wealth with the bank. An eighty-five year old man who admitted that luck had been on his side, the client had acquired a small fortune by creating a franchise of clothing shops, specializing in low-priced fashion-forward clothing throughout Mexico. He was happily enjoying retirement and hoping to grow and eventually disperse his self-made wealth to his nine grandchildren.

It was not surprising that the portfolio's performance woes had gone unnoticed by both the portfolio manager and client. After all, the portfolio manager was new and there had been enormous turnover on Susan’s team in the past eighteen months and a subsequent focus on their largest accounts. Everyone had been operating in fire drill mode, trying to keep the existing base of clients and acquire new ones to replace the few clients that had left during the turmoil. A small portfolio not at risk for defection would have been at the bottom of the group’s priority list. For the client’s part, his lack of financial expertise was the reason he turned to this firm in the first place; he gathered his information almost exclusively from their scheduled meetings.

Susan was dismayed. Whether the client was worth billions or pennies, this fudging of data and exploitation of a client's ignorance in such matters did not sit well with her. Sent back to her desk and with the client meeting looming, Susan pondered how she could protect her firm’s (and the portfolio manager’s) reputation while still doing the right thing for the client. It made her sick to her stomach to think of deceiving an elderly man, one who would no doubt have put his full faith in XYZ based on their global brand. Still, as a new team member, she worried that she didn’t have the credibility or the relationships to raise the issue without personal cost, having only joined the team two months before.

Now she was faced with a difficult challenge and very little time to come up with a strategy.

Business firms need to be clear strategy-wise. Strategy is, as much about what the firm does not do as it is about what the firm does. Strategy is about making choices, making trade-offs. In this case, services were offered to an investor whose importance to the firm was social, not financial. As a result, he fell through the cracks quite literally.

A decision not to provide assistance to the gentleman was not the only choice the firm had at its disposal. For instance, it could be the policy of the firm to use such accounts as a training ground for younger staff on which to cut their teeth. While this would involve some oversight cost, the benefits to the firm could be great. What the firm can not do, however, is ignore their responsibility to their investors and not have in place mechanisms to insure that they receive the appropriate attention.

Is This My Place? …Speaking “UP” (A)26

26 This case was inspired by interviews and observations of actual experiences but names and other situational details have been changed for confidentiality and
Ben was pleased when he was hired out of college, with an accounting degree, to manage the internal and external reporting for a non-profit organization whose work he respected. The organization collected donations of medical supplies from U.S. producers and shipped them to developing countries where the need was great and where they had partnerships with service providers on the ground.

It was a small, thinly staffed office and that also appealed to Ben. He knew their small size was the reason he had the opportunity to take on so much responsibility so quickly, and he approved of the thin operating expenses. The more efficient their operations, the greater the services they could provide to the individuals who most needed them.

However, shortly after starting work, he began to see the downside of the organization’s thin staffing. The Executive Director was over-worked and stressed. Although by nature a micro-manager, necessity dictated that she delegate everything she could to her staff. And he quickly began to recognize that the organization had no formal system for monitoring the value of donated supplies for tax purposes. They relied on donors who might feel pressures from their own organizations to inflate the values.

Ben struggled with several questions at first: shouldn’t he just trust the donors? After all, they were engaging in corporate philanthropy. And how much did it really matter? The point was to get the supplies to those who needed them overseas. He didn’t want to do anything that would discourage the donations. And he felt confident his Executive Director was aware of the conflict but just didn’t see it as a priority. In fact, when instructing staff on what she needed from them with regard to reporting, she often commented that she wasn’t interested in “data,” but rather focused on relationships and real world impacts. Wouldn’t she know better than he did how to prioritize this issue? And where was the organization’s accountant on this question?

On the other hand, as time went on, Ben became quite certain that some of their donors were deceiving the IRS, and that he – and his organization – were enabling that deception. He knew he didn’t want to be part of that.

And although he was young, he was a cocky sort. In fact, it had been his outspoken identification of an accounting error during his interview that had secured him the job in the first place, despite his relative youth. Of course, that error was simply a mistake and had had no ethical implications.

What should he say, to whom, when and how?

This is an example of a value conflict the adverse consequences of which are not self-evident. If this firm is not-for-profit, its IRS filings are largely informational. On the teaching purposes. This material is part of the Giving Voice to Values curriculum collection (www.GivingVoiceToValues.org). The Aspen Institute was founding partner, along with the Yale School of Management, and incubator for Giving Voice to Values (GVV). Now Funded by Babson College. © Mary C. Gentile, 2010
other hand, if their numbers match the donors’ valuations, they well could be complicit in income fraud.

The problem lies in the fact that no real thought has been given to how the value of donations should be monitored internally. This potential for fraud will continue to exist until such time that procedures are put into place. For the protagonist, it is a canker that will not heal otherwise.

**Monopolization or Delivery on Mission (A)**

Ben was the CEO and founder of a small social enterprise called NPOBalance, which he founded with a colleague, Sam. The company has grown over a five-year period to employ two full-time and four part-time staff. The values that underpin NPOBalance were closely linked to Ben and Sam’s own personal values, namely: knowledge, honesty, trustworthiness, fairness and loyalty.

NPOBalance offered an independent service, which facilitated the donation and redistribution of accounting software products to other non-profit organizations. NPOBalance used products that were donated from a number of well-known companies as part of their corporate social responsibility (CSR) programs. They allowed NPOBalance to charge a very small percentage, as a ‘sustainability’ payment. Ben prided himself on the fact that his organization was not an agent for any one particular product or company. He felt that this independence offered his organization an advantage in attracting clients, demonstrating that their needs came first. He was agenda-free. Ben considered this independence one of the distinctive characteristics and advantages of his organization. NPOBalance worked closely with small and large non-profits, identifying their particular needs and then marrying those needs with the ‘best’ products. Delivering on this mission would, he believed, lead to performance improvement and operation efficiency not only for the individual organizations but also for the non-profit sector as a whole.

One of the key stakeholders in NPOBalance was a large company, STZ Accounts. STZ Accounts was the largest product donor to the organization, but it did not offer a complete suite of offerings and therefore did not necessarily provide the best solution for the full range of non-profits. Over the course of a number of years, STZ Accounts has been putting increasing pressure on NPOBalance to supply only their products and not those of their competitors. As Ben put it, “…we have had our pants kicked several times about our work with competitors.”

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27 These materials were prepared by Dr. Denise Crossan, Assistant Professor in Social Entrepreneurship and Director of the Masters in Business and Management, School of Business, Trinity College Dublin and Geraldine Prizeman, Researcher, Centre for Nonprofit Management, School of Business, Trinity College Dublin. This case was inspired by interviews and observations of real experiences but names and other situational details have been changed for confidentiality and teaching purposes. This material is part of the Giving Voice to Values curriculum collection (www.GivingVoiceToValues.org). The Aspen Institute was founding partner, along with the Yale School of Management, and incubator for Giving Voice to Values (GVV). Now Funded by Babson College. © Mary C. Gentile, 2010
However, if monopolized by STZ Accounts, Ben believed that NPOBalance would not remain unbiased and independent. He believed that this shift in mission would damage the organization’s reputation in the long run; NPOBalance would not have been seen as ‘trustworthy’, and instead it would be viewed as just another organization trying to sell clients something that they did not necessarily need. Loyalty would be lost.

On the other hand, there could be other implications for the organization if Ben did not respond to STZ Accounts’ insistence: one of NPOBalance’s two key competitors could accept STZ Accounts’ conditions, which could result in the loss of a major donor for the organization. Ben was very happy with STZ Accounts products and many times the clients chose their products anyway, which made him wonder: Why bother offering other products? Why not allow NPOBalance to be monopolized?

Ben wanted to maintain the independent status of his organization and he wanted to speak openly and honestly to his clients and deliver products that they need. However, he still had to prepare himself for a meeting with representatives from STZ Accounts. How could he present his decision and concerns to STZ Accounts and still retain them as major donors?

This case presents what can be described as a Wal-Mart problem or, more generally, the foreseeability of losing a firm’s independence when it comes to working with certain supplier or buyers. In all likelihood, the two protagonists were gleeful to welcome the donations of STZ Accounts given their size. However, by allowing their product donations to dominate their work and the likelihood that they shifted their attention to downstream activities instead of working to secure additional suppliers, they now find themselves in a position of relative weakness that could significantly undermine their continued operation given the thin margins on which they depend.

**Agency and Corporate Governance**

Daniel is one of a group of founding scientists of a biotechnology firm that has recently gone public with a successful IPO. After the IPO he is now the Director of Product Development, but also finds himself in the unfamiliar territory of the compensation committee of the firm. A new board member on the compensation committee has raised the issue of instituting an incentive component of pay for management that is tied explicitly with the firm’s market performance. Her argument is that such a package will allow the firm to remain competitive in the market for managerial talent in the biotechnology industry. This argument is made in the context of the

28 This case was prepared for the Giving Voice to Values program by Daniel G. Arce, Ph.D., Department of Economics, School of Economic, Political and Policy Sciences, The University of Texas at Dallas and Mary C. Gentile, Ph.D. This material is part of the Giving Voice to Values curriculum collection (www.GivingVoiceToValues.org). The Aspen Institute was founding partner, along with the Yale School of Management, and incubator for Giving Voice to Values (GVV). Now Funded by Babson College. © Mary C. Gentile, 2010
various rationales for incentive pay outlined above. Daniel is less sanguine, noting that the firm has successfully made it this far without such a program. Further, he feels that as the firm deals with products that are related to public health/safety, this responsibility should remain management’s first priority. In addition, he feels that the firm’s success has been due to research that is motivated by resolving health issues, rather than being motivated by products that provide the highest profit margin. Daniel feels that the human benefits of his firm’s activities should be the primary motivator, and that profits will follow. He is therefore against the notion that executive behavior must somehow be incentivized to create a culture of shareholder maximization. Daniel is in favor of retaining a culture that emphasizes the firm’s historical competitive advantage, which is developing innovative products that serve the public trust, rather than acting so as to maximize one’s incentive package. Daniel believes in a pro-management perspective rather than a stylized approach that overemphasizes the potential for opportunism.

This is a wonderful case that can be used to highlight the importance of firm mission and vision when it comes to a variety of issues including the retention of board members. It is clear that the protagonist feels increasing isolation from the kind of culture that the new antagonist is looking to promote with her focus on achieving wealth maximization through augmented incentives. Truly, if the firm’s mission was clear and for whose benefit and need it was established to address, this kind of issue would not so readily arise. As it is, the protagonist may well be alone in his thinking and might ultimately need to consider taking his talents elsewhere.

This is just a sampling of the scenarios that are available. Toffler too provides a whole host of scenarios but their length precludes their use for present purposes. They too provide many examples of situations where sloppy management practices have led unnecessarily to situations of value conflict.

**Conclusion**

The authors have explained why so many people consider “business ethics” as an oxymoron. We, as individuals, are wired (hard or soft) to respond to the needs of others, to seek justice and fairness for others, and ourselves and to empathize with the needs and concerns of others. We are, as recognized by Socrates, social animals with the capacity to reason. In a very real sense, financial transacting is an anathema to our humanity. It likely explains why people who have been so successful financially feel a need to give back to society from their wealth.

Given the nature of survival instincts, it seems highly unrealistic to think that good behavior is a function of increasing doses of classroom instruction on ethics. Rather these issues should be seen in terms of establishing management practices and policies that serve to minimize employees being put into situations where they experience such value conflicts. While a discussion of ethics certainly is appropriate when it comes to pedagogy in business schools, equal attention should be given to the context in which such issues were allowed to arise and the kinds of modifications that might be made to limit their likelihood of arising in the future.
1. INTRODUCTION

Most individuals who establish an individual retirement account (IRA) open the account with a bank or brokerage firm (the custodian) and are limited to investing in stocks, bonds, and mutual funds with whom the custodian has distribution agreements (“Pitfalls and Possibilities,” 2012). In down economies, the IRA account owner (“Investor”) watches the retirement account lose value, leaving the Investor feeling helpless. But what if the Investor has an expertise in managing real estate, loaning money, or running a business, but just doesn’t have the capital to so invest outside a retirement fund? There is a means by which the Investor can use the IRA assets as capital, diversify his or her retirement funds, and perhaps get a higher return that grows tax-deferred and, in some cases, tax-free. That means is a self-directed IRA (SDIRA). This paper primarily addresses the self-directed traditional IRA, with occasional reference to the Roth IRA; however, with some tweaking, many of the applications discussed in this paper are also available to Roth IRAs, SEP IRAs, 401(k)s, and other retirement plans.

II. WHAT IS THE DIFFERENCE BETWEEN AN IRA AND A SIDRA?

Most people are familiar with IRAs. Under 26 USC §408(a), an IRA is a “trust created or organized …for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements: (1) Except in the case of a rollover contribution… no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year…. (2) The trustee is a bank… or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section. (3) No part of the trust funds will be invested in life insurance contracts. (4) The interest of an individual in the balance of his account is nonforfeitable. (5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund...”

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But what is a SDIRA? According to Wynne and Humphrey (2013), “‘self-directed’ is a
descriptive term, not a legal or IRS distinction.”1 All IRAs are basically self-directed in that the
Investor can direct the investment of the IRA so long as the investment is within the IRA
custodian’s prescribed investments. According to Fischer (2013), CamaPlan’s principal Maggie
Polisano says, “The only difference between self-directed IRAs and retirement accounts
controlled by big fund management companies is who makes the decisions.”2 In the case of an
SDIRA, a custodian holds and administers the IRA, but rather than the investments being
controlled by the custodian, the Investor directs the custodian where to invest.3 An SDIRA gives
the Investor more control and access to alternative investment options, rather than just publicly
traded securities. Alternative assets might include real estate (i.e., raw land, rental properties,
commercial property, condominiums), precious metals [which, under 26 USC §408(m), must be
held by the custodian rather than the Investor], promissory notes (secured and unsecured),
private equity, businesses, and much more, depending upon the Investor’s expertise and
opportunities.4

Along with the increased investment opportunities comes responsibility. Yip (2013)
quotes Ed Slott, a CPA and author of several books on IRAs, as saying "You can't use your IRA
as your own personal piggy bank. It's tax-sheltered money, and it's subject to all these rules that
regular money is not subject to because you're getting a tax deferral."5 Breaking these rules can
cause severe consequences to the Investor and to the IRA. So, what are these rules?

First, be sure the investment is allowed in an IRA. As stated above, life insurance is not
allowed in an IRA. Collectibles also are not allowed [26 USC §408(m)]. Examples of
collectibles are art works, rugs, antiques, metals, gems, stamps, coins (unless state-issued or
minted by the Treasury Department), baseball cards, and alcoholic beverages (i.e., wine
collections). Investing in collectibles will be treated as a taxable distribution.6

With an exception for bank stock held by an IRA, as of October 22, 2004, IRAs are not
eligible owners of S corporations. The exception does not affect the IRA itself, only the S
corporation. Since the IRA is not an eligible S corporation owner, the S corporation would revert
to being a C corporation.7 In Taproot8, an IRA purchased S corporation stock in 2003 when
there was no statute or regulation in effect explicitly prohibiting IRAs from owning S
corporation stock. The court looked to Rev. Rul. 92-73 and held that because IRA trust
beneficiaries are not taxed currently on an IRA's share of the S corporation income and

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Strategies/Taxation for Accountants (WG&L), pp. 67-74
MarketiersMedia News Hub (MRKM-125141). Newstex, LLC.
persons, plan asset rules, prohibited transactions, and UBIT, UDFI, UBTI, ss.4, 32-34. IRA Planning
Strategies, LLC.
Strategies/Taxation for Accountants (WG&L), pp. 67-74.
7 Treas. Reg. §1.1361-1(h)(1)(vii); Rev. Rul. 92-73
8 Taproot Administrative Services, Inc. v. Commissioner, 133 T.C. 202 (2009)
permissible S corporation shareholder trust beneficiaries are so taxed, then IRAs are not eligible S corporation shareholders.9

Two major rules impacting an IRA are: (1) Do not do business with, partner with, or purchase anything from a disqualified person; and (2) do not enter into a prohibited transaction. A “disqualified person” is a fiduciary; the Investor’s spouse, ascendants (parents, grandparents…), and lineal descendants (children, grandchildren, …); spouses of the Investor’s descendants; the IRA trustee or custodian; an entity that is at least 50% owned by any combination of disqualified persons; and/or a 10% owner, officer, director or other highly paid employee of such an entity.10 If an entity is collectively owned 50% or more or controlled by disqualified persons, then the entity is also a disqualified person.11 Retirement plans held by disqualified persons are also disqualified persons.12 And even though the definition of family does not include all relatives (such as brothers, sisters, nieces, nephews), care must be taken so as not to give the perception of an indirect benefit to the Investor.13 Although the code14 does not specifically define the Investor as a disqualified person, the IRS has taken the position that the IRA will be disqualified if its owner enters into a prohibited transaction with the IRA.15

A “prohibited transaction” is any direct or indirect (A) sale or exchange, or leasing, of any property between the IRA and a disqualified person (whether or not the property is owned by the IRA or a disqualified person); (B) lending of money or other extension of credit between the IRA and a disqualified person; (C) furnishing of goods, services, or facilities between the IRA and a disqualified person; (D) transfer to, or use by or for the benefit of, a disqualified person of the IRA’s income or assets; (E) act by a disqualified person who is a fiduciary and who deals with the IRA’s income or assets in the disqualified person’s own interest or own account; or (F) receipt of any consideration for a disqualified person’s own personal account by any disqualified person who is a fiduciary from any party dealing with the IRA in connection with a transaction involving the income or assets of the IRA.16

There are essentially three parts to a prohibited transaction. It must take place as part of the IRA, it must involve a disqualified person, and there must be a prohibited transaction between the disqualified person and the IRA.17 A disqualified person cannot purchase anything from the SDIRA.18 A disqualified person cannot be compensated by the SDIRA or by an SDIRA-owned asset.19 A disqualified person cannot extend credit to the SDIRA unless the loan

9 Id.
10 26 USC §4975(e)(2)
11 Id.
12 Id.
14 26 USC §4975(e)(2)
16 Under 26 USC §4975(c)(1),
18 Id.
19 Id.
is a nonrecourse loan (without a guarantee) to the Investor or other disqualified person. A disqualified person cannot have personal use of the SDIRA assets (i.e., the Investor’s child cannot rent property owned directly or indirectly by the SDIRA). The SDIRA or its assets cannot be pledged to secure a disqualified person’s loan. A disqualified person may not perform sweat equity (i.e., mow yard, do repairs, remove trash) but can do administrative tasks (i.e., write checks to vendors, keep records) to service the SDIRA assets. The bottom line: disqualified persons may not derive any immediate benefit from the SDIRA.

Not following the rules exactly can cause severe consequences. An initial excise tax of 15% of the amount involved is imposed with respect to a prohibited transaction. If the prohibited transaction is not corrected, the tax is increased to 100%, calculated on the amount involved in each year of the transaction and payable by any disqualified person who participated in the transaction (other than a fiduciary acting only as a fiduciary). The taxes are not, however, applicable to the IRA – the only penalty to the IRA is that it is disqualified. But if the IRA is disqualified and the beneficiary is not yet 59 ½ years of age, there will be an early withdrawal penalty on the amount of the account, plus income tax at the Investor’s applicable rate. And even though the IRA continues to exist, an individual who pledges any amount in the IRA as security for a loan must include the taxable portion pledged in gross income as a distribution. It is also important to note that prohibited transaction restrictions are not mutually exclusive. Two prohibited transactions arising from the same event are each subject to the excise tax.

Swanson v. Commissioner is a landmark case that gives credence to the SDIRA as a viable investment tool. The sequence of events in this case is important in understanding how the prohibited transactions were avoided. After 1983, Swanson was the sole shareholder of H & S Swansons’ Tool Company (Swansons’ Tool). In 1985, Swanson arranged for the formation of Worldwide, Inc. (Worldwide), under which formation documents, Swanson was named the initial director. During this same year, Swanson arranged through Florida National Bank (FNB), as custodian, for the formation of an IRA, of which Swanson was the beneficiary (IRA#1). Swanson retained the power to direct IRA #1’s investments. Swanson directed FNB to execute a subscription agreement for 2,500 shares of Worldwide original issue stock, which upon issuance, IRA #1 became Worldwide’s sole shareholder.

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20 Id.
21 Id.
23 26 USC §4975(a)
24 26 USC §4975(b)
25 26 USC §4975(c)(3)
26 26 USC §72(t)
27 26 USC §408(e)(4); Treas. Reg. §1.408-4(d)(2)
29 Swanson v. Commissioner, 106 T.C. 76 (1996)
30 Id.
31 Id.
32 Id.
33 Id.
Swansons' Tool paid commissions to Worldwide in regard to sales. In those same years, with FNB’s consent, Swanson, as Worldwide’s president, directed Worldwide to pay dividends to IRA #1. Commissions paid to Worldwide received preferential treatment, and the dividends paid to IRA #1 were tax deferred pursuant to 26 USC §408. In 1988, IRA #1 was transferred from FNB to First Florida Bank, N.A. (First Florida), as custodian. Swansons' Tool stopped paying commissions to Worldwide after December 31, 1988 and in 1989, Swanson directed First Florida to transfer $5,000 from IRA #1 to a new IRA (IRA #2), also for the benefit of Swanson. Swanson again reserved the right to direct the investments of IRA #2. Contemporaneous with the formation of IRA #2, Swanson caused H & S Swansons' Trading Company (Swansons' Trading) to be incorporated and directed First Florida to execute a subscription agreement for 2,500 newly issued shares of Swansons' Trading stock. The shares were issued to IRA #2, which became the corporation's sole shareholder. Swansons' Trading paid $28,000 dividend to IRA #2 during 1990.

The Commissioner charged: There were deficiencies in Swanson’s Federal income taxes plus additional tax for negligence with respect to Swanson’s 1986, 1988, 1989, and 1990 taxable years. Prohibited transactions had occurred, which resulted in the termination of IRA’s #1 and #2. Swanson was a disqualified person under 26 USC §4975(e)(2)(A) as a fiduciary, because he had the express authority to control the investments of IRA #1. And, because Swanson, as an officer and director of Worldwide, directed the payment of dividends from Worldwide to IRA #1, the payment of dividends was a prohibited transaction under 26 USC §4975(c)(1)(E) as an act of self-dealing where a disqualified person who is a fiduciary deals with the assets of the plan in his own interest. Swanson directed FNB to purchase all Worldwide stock, at which time Swanson was Worldwide’s sole director, giving rise to a prohibited transaction under 26 USC §4975(c)(1)(A). Effective January 1, 1985, IRA #1 is not exempt from tax under 26 USC §408(e)(1), and the fair market value of the account is deemed to have been distributed to Swanson under 26 USC §408(e)(2)(B). The Commissioner made similar charges as to IRA #2.

Swanson responded that: (1) at all pertinent times, IRA #1 was Worldwide’s sole shareholder; (2) since the 2,500 Worldwide shares issued to IRA #1 were original issue, no sale or exchange of the stock occurred; (3) from and after the dates of his appointment as director and president of Worldwide, Swanson engaged in no activities on Worldwide’s behalf that benefited him other than as a beneficiary of IRA #1; (4) IRA #1 was not maintained, sponsored, or contributed to by Worldwide during the years at issue; (5) at no time did Worldwide have any active employees; and (6) Swanson engaged in no activities on behalf of Swansons' Trading that benefited him other than as a beneficiary of IRA #2. In March, 1993, Swanson filed a motion for partial summary judgment that no prohibited transactions had occurred with respect to IRA’s #1 and #2 and in July of 1993, the Commissioner filed a notice of no objection to petitioners'
motion for partial summary judgment, which ended the controversy on the Worldwide and Swansons’ Trading issues. The court not only ruled in favor of Swanson, but also ruled that the IRS reimburse Swanson for reasonable attorney’s fees, – a big victory for Swanson and for the SDIRA market. Neither the issuance of stock of a corporation that is a disqualified person to an SDIRA nor the payment of dividends to the SDIRA in and of itself constitutes a prohibited transaction. RIA observes that if disqualified persons, without the aid of the SDIRA, require an entity to engage in a transaction with an SDIRA, that transaction will not be a prohibited transaction.

In Peek the Petitioner did not fare as well as in Swanson, covered above. Peek and Fleck each formed an SDIRA with roll-overs from other retirement accounts. The two SDIRAs then formed a separate corporation in exchange for 50% interest each. At the point of contribution, the corporation became a disqualified person since it was owned, 50% or more by disqualified persons, the Peek IRA and the Fleck IRA. The corporation then purchased a business using cash and notes, with one note personally guaranteed by Peek and Fleck. And subsequent to the purchase, Peek and Fleck converted their IRAs to self-directed Roth IRAs. Two years later, the corporation was sold for a substantial return. After an audit, the IRS position was that the loan guarantees were prohibited transactions in that they constituted extensions of credit to the IRAs. Peek and Fleck argued they had not extended credit to the IRAs but to the corporation, which was owned by the IRAs. The court disagreed and disqualified the IRAs, causing gain from the sale of the corporation by the IRAs to be personally taxable to Peek and Fleck. And because the deficiencies assessed constituted a substantial understatement of tax, accuracy-related penalties were also imposed.

The foregoing rules and cases uphold Pondel’s claims that an SDIRA can “backfire in the hands of novice moneymen” and that managing an SDIRA is more labor intensive than leaving it in the hands of the custodian. Before investing with an SDIRA, the Investor must be secure in

43 Id.
44 Id.
45 Prohibited transactions where a plan has invested in a corporation or partnership. (2013). Federal Tax Coordinator (¶H-12529). Thomson Reuters/RIA.
46 Lawrence F. Peek, et ux., et al. v. Commissioner, 140 T.C. No. 12 (2013),
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
54 Personal guarantees made to corporation owned by IRAs were prohibited transactions disqualifying IRAs; gain from sale of corporation by disqualified IRAs taxable to guarantors; penalties imposed (Peek, TC). (2013, May 10). Federal Tax Day – Current (J.1).
his or her own expertise and must do due diligence as to the merits and risks of the investment. A savvy investor still has to realize the enormous possibilities of investment potential and perhaps tax deferral and tax savings which can be gained through the proper use of a SDIRAs. The Investor needs to hire an advisory group which is well experienced in the intricacies of SDIRAs and which will educate and guide the Advisor on working within the rules. This advisory group should always include a business/tax attorney and a CPA and sometimes a financial planner or real estate professionals. These advisors can work with the Investor on choosing the investment and assessing the qualities and risk of so investing. If the Investor decides that the SDIRA is the appropriate tool to use for the investment, then the advisory group will not only assist with the transaction but with the documentation.

A knowledgeable CPA can advise concerning tax benefits, even though tax on gains from transactions inside the account is deferred. If the investment inside the SDIRA loses money, the losses cannot be deducted. The Investor will not be eligible for capital gains treatment on profits when making withdrawals. The gains will be taxed at the individual’s ordinary income rates when the proceeds are distributed from an IRA. Two other non-deductible taxes on the income of IRAs that may be imposed are the unrelated debt-finance income tax that applies to gains on investments that are debt-financed and the unrelated business income tax (UBIT) that applies to any income derived from activity not substantially related to the taxed entity’s purpose; although rent from real property is generally exempt from UBIT. UBIT does not have to be a deterrent, because UBIT applies only to property that has accompanying debt. As the debt is reduced, the UBIT decreases proportionately.

Practical issues where an investor may need professional assistance include: The assets in the SDIRA must be valued or appraised annually. The assets owned in an SDIRA must generate enough cash flow to pay their own expenses. Writing a personal check for repairs or loaning money to the IRA are prohibited transactions that make the IRA fully taxable. The Investor also needs to consider the Investor’s age in regard to how long the investment is required to be held. Holding illiquid investments in an SDIRA poses a problem when the Investor owner reaches 70½ and is required to begin receiving distributions. In such event, the Investor may consider receiving a distribution of an undivided interest in an IRA asset rather than cash. The ownership of the asset is changed from being IRA assets to the Investor’s personal. But caution - the distribution must be made through the custodian.

The Investor also needs to find the right SDIRA custodian. The Investor is not permitted to be the custodian. There must be an independent third-party administrator who is licensed to serve as the custodian. The Investor needs to do a diligent search, because the experience,

57 26 USC §508(d)(1)
58 26 USC §514(a)
59 [26 USC §§ 512(a) and 513(a)
61 IRS Pub. 590
organization, sophistication, fees, and services offered vary among custodians. The Investor wants a custodian who is licensed, willing, experienced (including the custodian’s staff), and able to handle the Investor’s desired SDIRA investment. For example, not all custodians accept real property purchased at an auction or through foreclosure. The best custodian not only administers the SDIRA, but also educates the Investor and the Investor’s advisors. The Investor also needs to make sure the custodian will be in business as long as the IRA is in existence.

Choosing the wrong custodian may cause the Investor to become a prime candidate for fraud. In 2011, the Texas State Securities Board shut down Warr Investment Group LLC, an Austin company, for illegal and deceptive sales of securities in real estate investment programs. Warr had acquired nearly $1 million in SDIRAs, all of which were controlled by its CEO’s daughter. The investors were guaranteed an 8% annual return. PLR 201143029 addresses a situation where the taxpayer authorized a trustee-to-trustee transfer to an SDIRA. The following year, a federal investigation uncovered a scheme by the alleged custodian to defraud investors in a Ponzi scheme, part of which was offering SDIRAs while the taxpayer was not aware of the fraud until he received a victim notification from the U.S. District Court. The Investor can verify with the SEC and/or the state securities administrator whether the custodian is a qualified SDIRA custodian and if the investment is registered. The Investor should be leery of “guaranteed” returns, avoid unsolicited investment offers, and regularly verify information in the SDIRA statements and get a second opinion from an unbiased CPA or attorney.

Once a custodian is chosen, the IRA account must be opened, and all funds, including roll-over funds, must be received by the custodian before an investment request is made. Next, the Investor will deliver to the custodian an investment request, usually with custodian-provided forms. The custodian will approve or disapprove the investment. If approved, the custodian will then make the investment or purchase on behalf of the SDIRA. The IRS 200919066 addresses a situation where the investment steps were mishandled. Through a string of events based upon bad advice, the IRA rollover checks were made payable directly to the taxpayers and instead of depositing the checks with a qualified SDIRA custodian, who would then make the investment on behalf of their IRAs, the taxpayers endorsed the checks directly to the real estate development partnership. The taxpayers did not even realize that the amounts that were distributed from their respective IRAs were taxable distributions until they received their respective Forms 1099R. Because the taxpayers had received erroneous professional advice, the Service granted a 60-day period, from the issuance of its ruling allowing the taxpayer to contribute the funds into respective rollover IRAs, provided all other requirements of 26 USC §408(d)(3) (except the 60-day requirement), were met.

63 Id. At pp. 42-46
65 Id.
66 Id.
67 Id.
68 Id.
69 IRS Letter Ruling 200919066
70 Id.
71 Id.
72 Id.
Most of the discussion so far has been in regard to the custodian having sole access to the IRA assets. Each time an investment is made or a vendor is paid, the Investor fills out the custodian forms, submits them to the custodian, and hopes the custodian responds in a timely manner. Each such transaction usually generates a transaction fee payable to the custodian. A custodian-controlled SDIRA may be appropriate if there is basically one big investment that sits dormant for a while, but if there is more activity (lots being sold, rent being deposited, repairs being made), transaction fees can add up quickly.73

Recurring fees can be virtually eliminated if the custodian will allow it and if the investment can be held in what is commonly called a “checkbook IRA” entity, for which the groundwork was laid by Swanson.74 With a checkbook IRA, the Investor has access and control of the SDIRA assets for investment purposes and simply directs the checkbook IRA entity to write the check.75 A limited liability company (LLC) is usually the entity of choice. The SDIRA owns the newly created LLC, but the LLC is managed by the Investor and the SDIRA cash account is held in a normal business bank account for the LLC, and other assets are now owned and titled in the LLC’s name.76 As the LLC’s manager, the Investor signs contracts and write checks on the LLC’s behalf, just like any other business, allowing immediate response to buy a business, buy or sell real estate, make repairs, make private loans, or otherwise invest as.77 The Investor needs to understand, though, that the same rules that apply to the SDIRA also apply to the checkbook IRA LLC (i.e., disqualified persons, prohibited transactions, UBIT). “When an investor signs up for a self-directed IRA, the first thing he or she notices is the newfound investment freedom…and with great freedom comes great responsibility”.78 Five frequent mistakes made in regard to a checkbook IRA are the following: (1) Confusing the IRA with its checking account - all contributions and distributions must be made through the custodian.79 Once the LLC is created, the IRA purchases the ownership interest of the LLC (via the custodian) by a contribution/transfer of the SDIRA’s cash and/or other assets held by the custodian to the new LLC. No funds pass through the hands of the Investor. Now the IRA assets are in the LLC’s possession ready to be invested at the Investor’s discretion (“Invest IRA Funds,” 2013). Any distributions made by the checkbook IRA LLC on behalf of the SDIRA will be made directly from the LLC to the custodian. Again, no funds pass through the hands of the Investor. (2) Not staying familiar with prohibited transactions - once assets are deposited and/or transferred to the new LLC, the LLC becomes a disqualified person.80 To avoid a prohibited transaction, there can only be a one-time funding. The assets must be transferred (deeded, assigned, deposited) one time at the same time. No additional capital contributions can be made to the checkbook IRA LLC. The LLC assets must be able to create enough income so that the LLC can pay its own expenses, including the initial filing fees and legal fees to create the LLC. (3) Applying for a credit card, overdraft protection, or line of credit - the Investor has inadvertently given a personal guarantee, resulting in a prohibited transaction.81 (4) Jumping hastily into an investment – the Investor should extensively research each investment.

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73 The two different flavors of self-directed IRAs. (2012, June 20). Minyanville. Newstex, LLC.
75 The two different flavors of self-directed IRAs. (2012, June 20). Minyanville. Newstex, LLC.
76 Id.
79 Id.
80 Id.
81 Id.
opportunity.\(^82\) (5) Expecting the IRA to grow on its own - active involvement is required to maximize the return on an SDIRA.\(^83\)

Thomas Baird, an attorney in Temple, Texas, has assisted and educated Investors for many years in working with SDIRAs and checkbook IRA LLCs. He advises his clients not to be scared off by all the rules – they just need to learn the rules and follow them. Mr. Baird says his checkbook IRA LLC governing documents are customized to the circumstances. He asserts it is a more complex structure when the Investor wants to deal with the business that his or her IRA funds, but it can be done. The Investor may not be able to be in a position of control, and certain decisions may need to be made by those who are independent of the Investor. Mr. Baird includes provisions throughout his checkbook IRA LLC’s governing document that require the LLC and its owners to abide by the rules, including: (1) after the governing document is adopted, no new member may be admitted who is a disqualified person; (2) the LLC will not recognize a disposition to a disqualified person or that will result in a prohibited transaction; (3) if capital contributions are made collectively by disqualified persons and their ownership interest in the LLC will be equal to fifty percent or more, then the initial capital contribution from that individual or group of persons will be made simultaneously with the other disqualified persons; (4) no additional capital contributions will ever be made to the LLC by a disqualified person that results in a prohibited transaction; and (5) that the LLC will not engage in any transaction with an SDIRA member beneficiary(ies) owning fifty percent or more of the LLC.\(^84\) Yes, the self-directed IRA is more complex and more labor-intensive for the Investor than a custodian-controlled IRA. “A self-directed IRA is similar to a bicycle that has had the training wheels removed. It takes a little bit of education to be able to use the new set-up, but once you get the hang of it, you can really fly.”\(^85\)

CONCLUSION

Because of the complex rules and regulations which apply to an SDIRA, the Investor does need to hire experienced professionals for assistance and advice. But if the Investor has a particular expertise or opportunity to boost his or her retirement funds and is willing to take the time and energy to learn the principles and rules for investing with an SDIRA, then the SDIRA may afford a more lucrative return on the Investor’s retirement funds not otherwise available with a custodian-controlled IRA. Being in the SDIRA, it will continue to grow tax-deferred or even tax free in the case of a Roth IRA.

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\(^82\) Id.
\(^83\) Id.
\(^84\) personal communication, June 17, 2013.
\(^85\) The Top 5 Self-Directed IRA Mistakes, 2012
CAN THE UN GLOBAL COMPACT FILL THE GAP IN INTERNATIONAL CORPORATE LAW?—Multidisciplinary Insights for Success

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Abstract

Gaps in international law have resulted in transnational corporations bearing little or no direct responsibilities for their actions in host countries (De Brabandere, 2010; Slawotsky, 2012). The void in international regulation of corporate behavior cedes the area to the host country itself or to non-governmental organizations (“NGOs”). The intent of this paper is not to provide an examination of international law as it pertains to transnational business entities (Ratner, 2001; Bantekas, 2004; Mushkat, 2010; Alvarez, 2011, Stewart, 2013), or even to examine the role of the NGO in providing oversight (Adeyeye, 2010, Backer, 2010), as both have been examined extensively. Rather, this paper takes a multi-disciplinary approach to examine the unique characteristics of one of the most prominent NGOs, the UN Global Compact (UNGC), to provide insight into ways in which organizational identity theory and salience might enable it to develop its strengths and overcome its weaknesses in providing the oversight and accountability that international law cannot currently provide.

Key Words: Corporate Social Responsibility, UN Global Compact, Organizational Identity Theory, Salience
INTRODUCTION

Gaps in international law have resulted in transnational corporations bearing little or no direct responsibilities for their actions in host countries (De Brabandere, 2010; Slawotsky, 2012). The void in international regulation of corporate behavior cedes the area to the host country itself. A problem arises because multinational corporations frequently have higher revenues than their host countries’ gross domestic product (Anderson & Cavanagh, 2000), often becoming the providers of services typically performed by governments (Jamali, 2010; O’Conner, n.d.; Scherer, Palazzo & Matten, 2009). As a result, host countries may be unable or unwilling to hold companies responsible for lapses in corporate behavior, and reliance on market forces to regulate corporate social responsibility (“CSR”) may not be sufficient. Thus, a number of non-governmental organizations (NGOs) have been established to promote transnational corporate commitment to socially responsible behavior. Among these, and perhaps the most prominent, is the UN Global Compact (UNGC).

The purpose of this paper is to provide multidisciplinary insight into ways in which organizational identity theory and salience might enable a NGO to develop its strengths and overcome its weaknesses in providing the oversight and accountability that international law cannot currently provide. The paper applies these theories to the UNGC, providing an example of how NGOs could utilize the theories presented. The intent of this paper is not to provide an examination of international law as it pertains to transnational business entities (Ratner, 2001; Bantekas, 2004; Mushkat, 2010; Alvarez, 2011, Stewart, 2013), or even to examine the role of the NGO in providing oversight (Adeyeye, 2010, Backer, 2010), as both have been examined extensively.

The paper initially provides background information about CSR, with a discussion of several theories drawn from organizational management and sociology, including organizational identity, corporate identity, organizational role identity, and role salience. The paper examines the basic tenets of the UNGC, followed by a section that integrates the theories discussed with the characteristics of the UNGC to demonstrate how applying the theories presented can offer recommendations to all NGOs on ways in which they can strengthen not only their member base but their influence, in order to attract companies and to influence the CSR behaviors of those companies which operate within the gap of international law.

BACKGROUND

Improved scrutiny of the role of businesses in society has led to a multiplicity of definitions for CSR (Dahlsrud, 2008; Zenisek, 1979). For purposes of this paper, the authors have restricted the scope of their attention to a narrow focus of CSR, i.e., social responsibility as it has been defined in the context of the for-profit corporation, focusing on both conceptual definitions and operational models that address that type of entity.

Dahlsrud (2008) provides an extensive review of CSR definitions and methodological approaches that span several decades, ultimately concluding that “business has always had social, environmental and economic impacts, been concerned with stakeholders, be they the government, customers or owners, and dealt with regulators” (p. 6). For purposes of this paper, the authors have chosen to adopt a definition that seems to capture these various perspectives, defining CSR as those actions of a company that incorporate “social and environmental concerns into the company’s decision-making process, benefiting not only financial investors but also employees, consumers, and communities” (Gill, 2008, p. 452). This combined perspective supports Dahlsrud’s (2008) notion that CSR “is nothing new at a conceptual level” (p. 6).
However, Dahlsrud (2008) identifies a challenge at the operational level, noting that “[d]ue to globalization, the context in which business operates is changing at an increasingly rapid pace” (p. 6), creating a need for new CSR management tools.

The efforts of individual countries to ensure that businesses behave in a socially responsible manner have been made more difficult with the increased expansion of companies into the global market (Campbell, 2007). As noted by Anderson and Cavanaugh (2000), some companies have revenue greater than the gross domestic product of some of the countries in which they conduct business, decreasing the ability of these smaller countries to control foreign companies, and making it more important that these companies conduct business in a socially responsible manner. In addition, companies are increasingly becoming the providers of services—such as public health, education, social security, and protection of human rights—typically performed by governments (Jamali, 2010; O’Conner, n.d.; Scherer, Palazzo, & Matten, 2009).

Global concerns regarding CSR issues have resulted in a “wide range of actors and partnership building” in the area of global governance (Adeyeye, 2010). The increased difficulty of providing oversight to global firms (Pučko, 2007) requires sufficiently strong and efficient independent organizations, such as NGOs, institutional investors, social movements, activists, and the press, to bridge this gap (Campbell, 2007). Pressure exerted by these independent organizations increases the likelihood that a company will act in a socially responsible manner (Campbell, 2007). Increasingly, NGOs have begun to assume oversight responsibilities in the absence of a body of established international corporate law.

This paper identifies ways in which the UNGC can strengthen the influence it has over existing members and expand its member base, crucial if CSR is to move forward on a larger scale in countries where local regulation and enforcement may be weakest. While a number of other NGOs could have been chosen, this organization was selected for its relatively high visibility and constituency of large corporate members.

ORGANIZATIONAL IDENTITY

Organizational identity is the core of the company, its true identity, and has been defined as a system of shared meaning created through the interactions between the company’s managers and stakeholders concerning the organization’s essential, enduring, and unique characteristics (Cornelissen, Haslam, & Balmer, 2007; Scott & Lane, 2000).

Stakeholders, Organizational Roles, and Role Salience

At any given time a company is comprised of multiple organizational role identities (roles), which enable a company to respond to the demands of multiple stakeholders; however, at times these roles have contradicting goals (Pratt & Foreman, 2000). For example, managers may view the corporate role of maximizing profits as conflicting with the role of a good corporate citizen. When this occurs, it is possible that one of the roles will be deemed less important by the entity, especially if there is not a critical or powerful stakeholder to champion it (Pratt & Forman, 2000). Social psychology has explored this idea in individuals through the concept of role-identity salience, where some roles are considered more salient, and, thus, more a part of the self than other less salient roles (Callero, 1985; Stryker & Burke, 2000). In the case of a company, its stakeholders determine what roles should be most prominent to the company because the stakeholders directly influence the performance and, thus, the survival of the firm (Scott & Lane, 2000; Zahn, 1970).
Freeman (1984) defined stakeholders as, “…any group or individual who can affect or is affected by the achievement of the organization’s objective” (p. 46). Stakeholders shape and define a company’s overall organizational identity; therefore, consideration must be given to the prominence or “salience” of the stakeholder. Mitchell, Agle, and Wood (1997) proposed that by examining the stakeholders who are the most salient to the company—based on power, legitimacy, and urgency—it is possible to predict a company’s behavior. The more powerful the stakeholder, the more it has the ability to impose its will on the company; the more legitimate the stakeholder, the more society deems its actions to be proper; and, the more urgent or time sensitive the stakeholder’s needs, the greater the importance the stakeholder attaches to its claim on the company (Mitchell et al., 1997). These three elements work together so that the company’s perceptions of the stakeholder’s power and legitimacy also influence the company’s acceptance of the stakeholder’s claims of urgency. These three elements will be referred to in subsequent discussions as “power”, “legitimacy”, and “urgency”.

Ultimately, the more prominent (or salient) the stakeholder, the better it is able to influence the firm’s organizational identity (Mitchell et al., 1997; Scott & Lane, 2000), by impacting the weight the organization assigns to its various roles. Peloza and Papania (2008) find that in most cases a company’s CSR initiatives are influenced by those stakeholders the company perceives to be the most powerful, thus demonstrating a direct link between the salience of a stakeholder and the relative importance that is accorded to the roles which shape the overall identity of the organization. In the absence of legal regulation, which would arguably have a great deal of salience due to the possibility of punishment, the actor or actors that possess greater power, legitimacy, and urgency will likely be most influential in shaping the business entity’s organizational identity and behavior.

If management perceives that a role identity may become useful in the future, it will either maintain or foster that role identity (Ashforth & Mael, 1996; Pratt & Foreman, 2000), and flexibility to respond to a variety of situations may require a company to maintain several roles (Hoelter, 1985; Pratt & Foreman, 2000). Maintaining the role of social responsibility has been found beneficial in giving a company greater flexibility, with enhanced financial performance (Orlitzky et al., 2003) and a competitive advantage through improved reputation and reduced regulation (Gugler and Shi, 2009). Seemingly, at the other end of the spectrum, the 2013 Guidelines Manual—Sentencing of Organizations allows for reduced fines for firms in violation of a federal U. S. law provided that they comply with an ethics program (United States, 2013; Ferrell, Fraedrich, & Ferrell, 2005).

Although maintaining social responsibility may aid a company, it is only one of many roles a company maintains, and may be dropped by companies facing a lack of resources (Pratt & Foreman, 2000). As noted earlier, if one assumes that the primary purpose of a corporation is to maximize profits and shareholder value, then it would seem to follow that corporations will do whatever it takes to achieve this goal—perhaps even if that includes acting in socially irresponsible ways (Campbell, 2007). In such instances, to ensure the maintenance of CSR, it is vital that stakeholders promoting CSR have a high stakeholder salience, thereby increasing the likelihood that CSR becomes an integral component of a company’s overall identity. The next section will introduce the UNGC and its role in promotion of CSR.

THE UNGC

The UNGC is a voluntary, nongovernmental corporate citizenship initiative based on ten CSR principles (UNGC, 2008b) that address four areas: human rights, labor, environment, and anti-corruption. The UNGC is a partnership with the United Nations launched in 2000 and has
been described as a model that “relies on public accountability, transparency, and enlightened self-interest of companies” (Cetindamar & Husoy, 2007).

The next section of this paper analyzes the defining characteristics of the UNGC in light of the organizational and role identity theories described above in order to offer recommendations for it to strengthen not only its member base but its influence as well. These issues are explored by examining the purpose of the UNGC and the motivation, demographics, participation, and accountability of its members, including issues of salience.

**Purpose of Organization and Motivation of Members**

Setting aside the theory regarding organizational identity for a moment, it is possible to identify a variety of reasons for a company to embrace CSR, ranging from social concerns to corporate reputation risk management (Godfrey, Merrill, & Hansen, 2009; The Economist, 2008). Respondents to a survey conducted by *The Economist* (2008) identified the importance of brand reputation as the primary business reason for adoption of CSR.

Bruni (2005), however, looks beyond purely business reasons in seeking to identify the motivation for CSR. He asserts that CSR principles are typically followed for one of three different reasons. First, CSR may simply be required in order to do business, without any intrinsic motivation on the part of the company itself. A company motivated solely by business requirements, however, will cease its CSR endeavors if the business environment within which it operates ceases to require it. An alternative motivator is the company’s belief in CSR, accompanied by a low level of internal motivation that results in its abandonment of CSR initiatives in the absence of reciprocity or cooperation from others. Lastly, Bruni (2005) describes a business that may be intrinsically motivated toward CSR, with CSR constituting an integral part of its identity. For such a business, Bruni states that CSR will not be abandoned when a crisis or a drop in profits occurs. So, once again, organizational identity becomes important to the success of CSR initiatives.

Companies joining the UNGC, however, are typically motivated to follow CSR for the first two reasons identified by Bruni (2005). Businesses in developing countries tend to join because CSR provides networking and learning opportunities, and transnational corporations from industrialized countries join because it is a tool for reputation management (Cetindamar & Husoy, 2007, citing Kallinowsky), both purely business reasons for joining. Arevalo and Fallon (2008) cited findings of the UNGC Annual Review indicating that the top reasons for joining the UNGC included: (1) increasing trust in the company, (2) increasing networking opportunities, and (3) improving public relations. Of the 15% of companies that completed the Global Compact Implementation Survey used in the UNGC Annual Review, only 52% listed humanitarian concerns for joining (Arevalo & Fallon, 2008). The results of that study are consistent with the findings by Kallinowsky (2004, cited by Centindamar & Husoy, 2007) and by Arevalo and Fallon (2008). These studies reported that about half of the respondents were interested in the [environmental] principles of the UNGC and the rest joined for a mixture of economic and ethical reasons, confirming that UNGC companies were not intrinsically motivated (Bruni, 2005) to adopt CSR principles and practices, but had a low level of internal motivation. The motivation of UNGC members is only one element that has potential for influencing the UNGC’s success or failure as a surrogate for international corporate law. The constituency and participation of those members is also important.

**Constituency and Participation**

The UNGC is attempting to recruit a broad-based membership from all business sectors of multinational corporations, from both emerging market countries and industrialized nations.
It actively seeks to increase its membership by creating low barriers to joining and minimal requirements for membership retention (Bremer, 2008).

Overall, the UNGC has been successful in attracting a significant membership (Bremer, 2008; UNGC 2011b), with over 6,000 participating businesses, equally split between small and midsize business members and “company” business members (250+ employees) (UNG, 2011a; UNGC, 2011b). It does not yet, however, have strong support among large global corporations, especially in developing countries (Bremer, 2008).

Overall, the UNGC works globally, has members in a variety of sectors, and has a very strong presence in Europe (Bremer, 2008), and has succeeded in attracting a broad membership base composed of larger companies, providing it with global recognition and influence. However, it has suffered from problems with retention, especially with its small and midsize business members (UNG, 2010b), and with the degree of participation among its members (UNG, 2010c; UNGC 2011a). Central to these issues is the question of accountability.

**Accountability**

The UN designed the UNGC to be un-policed (Arevalo & Fallon, 2008), with minimal requirements for joining and maintaining membership (Bremer, 2008). For membership, a company must agree to support broad UN goals and internalize UNGC principles (UNG, 2008a). For continued membership, the UNGC requires members to renew their commitment in writing each year and to provide an annual report on efforts to comply with the UNGC (Bremer, 2008). Nonetheless, there is a low level of accountability under the UNGC. Although a predominately rules-based organization, it does not require companies to actually come into compliance with the UNGC standards to maintain their membership. While this might make the UNGC’s goal of building a large global membership more achievable, it also weakens the image of the UNGC. Recognizing this, in 2005 the UNGC implemented a set of integrity measures that were intended to promote participant ownership of the process and to protect the UN brand (UNG, 2008a). Under these measures, companies failing to submit a report within two years of joining or within two years of their last report are classified as "non-communicating" and companies that fail to file by the end of their third year are classified as "inactive" and are removed from the UNGC roster (Bremer, 2008). The integrity measures do not account for qualitative differences; rather, they are designed to deter free riding and to promote quality improvements over time (UNG, 2008a). As of 2011, 23% of members were non-communicating (UNG, 2011a).

**Organizational Identity and Salience Reprised**

While the UNGC has done an outstanding job in initially attracting members, perhaps as the result of UNGC member firms’ desire to increase their role flexibility (Hoelter, 1985; Pratt & Foreman, 2000) and to add CSR to their corporate identities, its problems with member retention would suggest that it has not been as successful in making either its own role as an external stakeholder or its message regarding CSR role identity salient to its members. If stakeholder salience is a function of three elements—power, legitimacy, and urgency—it would appear that one or more of those elements are weak with respect to the UNGC influence.

The notion of power, for example, is related to the stakeholder’s ability to impose its will. In the absence of intrinsic motivation, the UNGC would need to develop the perception among its constituencies that it has the power or ability to influence or compel CSR compliance (Mitchell et al., 1997). With respect to the element of legitimacy, the UNGC may already be regarded as having a high degree of legitimacy through its association with the United Nations (Kell & Ruggie, 1999). The element of “urgency” implies that the UNGC’s message must be
perceived by its member firms to have greater time sensitivity and to exert a more urgent claim upon the entity’s attention and resources than those of other stakeholders. In order for the UNGC to impact its member organizations’ emphasis on their CSR roles and organizational identities, the UNGC needs to improve in two areas—power and urgency.

**RECOMMENDATIONS AND CONCLUSION**

Since the motivation for most companies that join the UNGC is a mixture of financial and reputation building reasons (including risk management and corporate identity), the UNGC should focus on these areas to increase the perceptions of power and urgency. To accomplish this, the UNGC must increase its brand recognition and relevance among consumers. A good organization for the UNGC to emulate is the Fair Trade Federation, as it has managed in a relatively short period of time to ingrain its brand identity into society. If the UNGC can convince the public that purchasing items from its affiliates (as identified by use of the UNGC logo) is a way of being socially responsible, and that assurance of CSR may even be worth paying a premium for products, then the UNGC will increase its power over member firms. Smith et al., (2010) found that consumers base their assessment of a company’s CSR initiative on very little information. As a result, the loss of affiliation with the UNGC, known for promoting CSR, may be enough to influence consumers’ perceptions of a company.

Firms losing membership in the UNGC would incur a reputation loss, as well a potential financial loss. This increase in perception of the UNGC’s power would increase the UNGC’s salience as an external stakeholder, with the probable result being an increase in the salience of its message—that a CSR role identity is important to a member firm. If the member firms do not comply, the UNGC can drop them as members, thus signaling the urgency of its claims for member engagement. This recommendation requires the UNGC to take a more active role and would necessitate its policing its members, but it is this very action that would increase the UNGC’s salience with its member firms and allow it to affect significant change in the CSR actions of global companies.

A second recommendation would focus on the content of the UNGC principles themselves. The UNGC uses a deontological (rules based) approach, where the outcome is less important than the process by which it is attained, with minimal global standards directed toward a constituency with diverse cultural backgrounds. Its rules encourage positive actions, as well as proscribing behaviors that are regarded as unacceptable. In a multi-cultural and varied geopolitical climate, a rules-based approach may be easier for UNGC members to interpret and enforce, leading to increased perceptions of legitimacy. However, the UNGC must exercise caution, since, if the public views UNGC principles as a minimal standard of common business practices, consumers may not be able to differentiate between UNGC and non-UNGC companies.

Although one would hope that companies would refrain from human rights abuses and forced labor, any effort to increase the UNGC’s salience with respect to power and urgency might be ineffective with a public that cannot find a meaningful difference between UNGC and non-UNGC member companies. Therefore, further development and articulation of aspirational principles is necessary for the UNGC if it is to bridge the gap in global governance. It is in this area that the legal profession has a contribution to make. In the absence of international corporate law, the legal profession should lend its considerable expertise in drafting aspirational language and negotiating agreement with and support for principles that will motivate membership and make the loss of membership a meaningful penalty.
In the absence of strong international law, the enforcement of CSR by NGOs is vital. Applying the theories discussed in this paper can help to strengthen the contributions of NGOs, such as the UNGC, toward the promotion of CSR. Other NGOs can employ these theories to utilize their strengths and correct their weakness, thereby expanding their impact on CSR.

REFERENCES


MEASURES OF CORPORATE SOCIAL PERFORMANCE AND ETHICAL BUSINESS DECISIONS: A REVIEW AND CRITIQUE

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ABSTRACT

This paper reviews measures of corporate social responsibility. Drawing on measurement theory as well as theoretical approaches to business ethics, each measure is evaluated on its theoretical logic, objectivity, consideration of decision criteria of multiple stakeholders, suitability for hypothesis testing, and predictive potential as an indicator of impending ethical problems. Fortune’s “most admired corporations”, Kinder, Lydenberg, Domini (KLD) ratings, Reidenbach and Robin’s Multidimensional Ethics Scale (MES), content analysis of annual reports, and the Ethical Climate Index (ECI) are covered. Each of these measures has been used by researchers to reflect inclusion of ethics in business decision making.

INTRODUCTION

Empirical research depends on measures or quantification. Measures used in business ethics studies, however, have not been uniform from one study to the next. Because decision processes are difficult to observe, often empirical research is about the observed consequences of incorporating ethics into business decision making. DeMaCarty (2009) even makes the case that apparent corporate social responsibility measured by data reflects both real corporate social responsibility activities as well as skillful management that makes positive activities public while keeping negative activities hidden.

Measurement is defined by representational theory as “the correlation of numbers with entities that are not numbers” (Nagel, 1931). “Quantity and measurement are mutually defined: quantitative attributes are those possible to measure, at least in principle” (Michell, 1999). In business ethics studies, the difficulty of quantifying that which is essentially qualitative has contributed to a lack of uniformity in data used by empirical studies. When Godfrey, Hatch, & Hansen (2008), referencing a prior study by Carroll, list 25 different ways of measuring corporate social responsibility, they are in essence defining corporate social responsibility as being multifaceted. Further, some of those facets are positive while some are negative, so that an aggregate measure of corporate social responsibility might net these out and mistakenly appear to show no effect.
Measurement is complicated by the inherently multicriteria nature of business decision making. Rarely is a business decision motivated by a single decision criterion. There are various claims of multiple stakeholders, and various ways of identifying relevant ethical issues. Teske & Hallam (2009) emphasize that business decision making must incorporate multiple issues, and even the ethics issues may include consideration of multiple perspectives such as cultural relativism, subjectivism, religion, rights, justice, utilitarianism, Kantian ethics, and virtues. Kaptein (2009) measured ethics in business organizations by intentions (virtue ethics), actions (duty-based ethics), and effects (consequential ethics); as well as with reference to the stakeholder model having impact on society, suppliers, financiers, customers, and employees.

While multicriteria decision making has been treated in a systematic, quantitative way in operations management (see for example Deckro, R. F. & Hebert, J. E., 1990), in business ethics multicriteria analysis is still fairly unstructured. Orlitzky (2011) compared studies investigating the relationship between corporate social responsibility and corporate social performance in different publications. He attributed some of the differences in the findings of different studies to differences in varying measurement and research strategies; the discipline of the publishing journal made a difference as well.

Summarizing, a set of measurement attributes is needed to capture the various facets of ethics in business decisions. A good measure should include multiple criteria to reflect multiple underlying ethical philosophies and stakeholders, be theoretically logical, objective, suitable for testing hypotheses to facilitate empirical research, and perhaps most importantly have predictive potential as an indicator used to forestall impending ethical crises. Each of these attributes will be discussed in turn. Then the measures used by empirical studies about inclusion of ethics in decision making will be systematically reviewed. Each will be evaluated on how well it reflects multiple criteria, its theoretical rigor, objectivity, use in empirical research, and predictive ability.

MEASUREMENT CRITERIA

Multiple criteria

Since there are multiple stakeholders, there may be multiple consequences, not necessarily all simultaneously positive or all simultaneously negative. Therefore consequentialist or teleological ethics implies multi-criteria measurement. Also, there are multiple principles that may apply to a business decision. Therefore deontological ethics, based on principles, also implies multi-criteria measurement. Justice or fairness may appear different to different stakeholders as well, again implying multi-criteria measurement. For references to the multicriteria nature of business ethics, see Godfrey, Hatch, & Hansen (2008), Carroll (1999), Kaptein (2009), and Reidenbach & Robin (1990).

Theoretically logical

Ideally, we would like any measure used to indicate the extent of inclusion of ethics in business decision making to reflect the logic of theories describing how ethics applies to business decisions. In other words, the measure should satisfy the representational theory of measurement. As such, any measure should reflect the theoretical definition of business ethics: it should reflect consequences to stakeholders; it should reflect widely acknowledged principles (rights and duties); it should reflect fairness (procedural, compensatory, and distributive justice).

Objective
As with any measurement scheme, a measure of business ethics is useful to the extent that it is objective. Would someone else be able to replicate the same measure independently? Is it consistent over time? Is it consistent among businesses? Is it consistent among industries?

**Suitable to test hypotheses**

Objectivity is important because, as a practical matter, we would like to be able to use the measure to make empirical comparisons. Has a business become more ethical over time? Is the business different under one CEO than another? Is the average (or best, or worst) in one industry different from another industry? “Information theory recognizes that all data are inexact and statistical in nature”, defining measurement as “a set of observations that reduce uncertainty where the result is expressed as a quantity” (Hubbard, 2007). When measurements are reported with mean and statistics the information theory definition is being implied. Based on information theory there is not a clear distinction between estimation and measurement. Researchers need a measure that can be used to test hypotheses.

**Predictive potential**

Board members, regulators, managers, and researchers alike would ideally prefer a measure that is predictive. Even though some studies examining the corporate social performance - corporate financial performance linkage observe performance ex post where the goal of the research is to examine consequences, nevertheless, it would be preferable if the measure used could also be predictive. It would be nice to learn from past performance how to see the next ethical lapse coming, not just to see scandals in the rear-view mirror.

**MEASURES OF CORPORATE SOCIAL RESPONSIBILITY**

**Fortune’s Most Admired Corporations “responsibility to community and environment”**

In the 1980’s Fortune magazine started to publish a list of the “most admired corporations”. The list was compiled based on responses of financial analysts and senior executives to a request to rate companies on a list of dimensions, including one for “responsibility to community and environment”. About 300 firms are included, although the exact number varies over time. Wood (1995) says it represents only “community and environmental reputation among the business community” and not overall corporate social performance, considering that it is derived from business community respondents. It may be therefore be subject to self-reporting bias. The list may be regarded as a measure of overall management, not only corporate social performance, and is highly correlated with other measures, financial performance for example (Brown and Perry, 1995).

The Fortune rankings have been used empirically by Spencer and Taylor (1987) and by McGuire, Sundgren, and Schneeweis (1988) to analyze the relationship with firms’ financial performance. Wartick (1992) used the Fortune data to study how media exposure is related to changes in perceptions of corporate responsibility.

McGuire, Sundgren, and Schneeweis (1988) examine both prior and subsequent financial performance; thus approaching the idea of using this data as a predictive indicator.

The Fortune ranking is not tied to theory. It is a one dimensional composite, which is convenient; but it does not reflect the multidimensional nature of business ethics. Regarding objectivity, the series has a long history with a stable definition. It is, however, a subjective rating scheme, with responding business professionals subject to the possibility of self-reporting
bias. Baucus (1995) points out a shortcoming of this long history – that included firms have changed somewhat over time, along with the included industries and response rate of the raters.

A similar measure is the Annual Survey of 100 Best Corporate Citizens which is Business Ethics Magazine’s ranking of leading ethical performers from the Russell 1000 Index of publicly-listed U.S. companies.

**Kinder, Lydenberg, Domini (KLD)**

Kinder, Lydenberg, Domini (KLD), a social choice investment advisory firm, first developed a set of Corporate Social Performance ratings in 1991. The ratings originally covered community relations, environment, employee relations, women and minority issues, product liability, military contracting, nuclear power, South African involvement. It has more recently been updated to include community relations, the environment, employee relations, human rights, diversity, product characteristics, and corporate governance. Currently, there are more than 3000 companies in the annual rating, including all companies in the S&P 500. The rating scale includes “blank” for no information or not important, “moderate” for concern or strength, or “strong”, followed by the reasons for that rating.

The ratings are based on internal information from responses to a questionnaire sent to investor relations offices, and from annual reports, 10K reports, quarterly reports, proxy statements, special reports on corporate social performance areas like the environment. Also ratings reflect external information from the business press, such as articles in Fortune, Wall Street Journal, Business Week, trade magazines, general media, Chronicle of Philanthropy, EPA newsletters, academic journals, National Law Journal, external surveys and ratings like Working Mother’s 100 best companies for women to work for.

Sharfman (1996) combined KLD data into single scores by adding, and by weighted sums, both with and without nuclear, military, and South Africa. Sharfman (1996) found that KLD data correlated with Fortune data, but explained less than 50% of the variance. Better correlation was without nuclear, military, and South Africa; perhaps a foreshadowing of the updated version of the list. A precursor to the KLD data is Lydenberg, et al (1985).

The KLD data is deliberately multidimensional and looks at impact on a number of stakeholders. It is objective since the raters are outside the firm. One of the disadvantages of the KLD ratings, ironically, is the multidimensional set of categories. These dimensions are not systematically based on theory. Change in the included dimensions is symptomatic of this. Also the summary index implies that all dimensions measured have equal weights.

KLD data has been used empirically to test hypotheses by many researchers because it covers many firms over many years. Graves & Waddock (1997) used it to study empirical linkages between financial and social performance. Recent examples include Harjoto and Jo (2011) who used the KLD data empirically to explore the linkage among corporate social responsibility, governance, and firm performance. Erwin (2011) used the KLD data to compare corporate social responsibility performance with the content of corporate ethics codes. Hong and Andersen (2011) used the KLD data to explore the relationship between corporate social performance and corporate financial performance. Notably, they separated measures for positive (strengths) social actions and negative (concerns) social actions.
Multidimensional Ethics Scale (MES)

The Multidimensional Ethics Scale was developed by Reidenbach and Robin (1990). It started with a multidimensional ethics inventory scale that was developed theoretically. It was based on five philosophical concepts of ethics including: justice (3 items), relativism (5 items), egoism (7 items), utilitarianism (9 items), and deontology (6 items). Each was scored on a five-point Likert scale. They collected survey responses to three scenarios involving ethical dilemmas. One involved repairs just after an expired warranty; the second, a salesman who exaggerates; and the third, raising retail grocery prices on the day welfare checks were received in the area. A group of students were surveyed using the thirty-item instrument. Then a group of local managers was surveyed the same way. The results statistically reduced to eight items. Four items reflect broad-based moral equity: fair/unfair, just/unjust, acceptable/unacceptable to my family, morally/not morally right. Two items reflect relativist ethics: traditionally acceptable/unacceptable, culturally acceptable/unacceptable. Two items were deontological, reflecting the idea of a “social contract”: violates/does not violate an unspoken promise, violates/does not violate an unwritten contract. Utilitarianism and egoism dropped out, not showing statistical significance.

The multidimensional ethics scale starts out theoretical, since it is based a priori on philosophical constructs. It was then made empirical by virtue of the survey methodology through which some items that theoretically reflected ethical decision making dropped out when tallying how respondents actually included ethics in decisions. This might indicate either that various theoretical measures of ethics are redundant, or that people don’t often use the whole array of ethical measures when making choices. The Multidimensional Ethics Scale is clearly multidimensional. It does not, however, address the question of how the multiple dimensions should be weighted, even assigning weights of zero to those that dropped out of consideration in the empirical survey, although those items seemed a priori to have theoretical merit. On the other hand, at least some of the measures were empirically verified.

The survey of responses to hypothetical scenarios is open to the possibility of self-reporting bias, as what people say they would do when presented with a hypothetical scenario may not be the same as what they would actually do when faced with a real, personal dilemma. It is ambiguous as to whether the included vs. excluded items from the original thirty are true or simply those that people regularly use.

Cohen, J., Pant, L., & Sharp, D. (1993) extended Reidenbach and Robin’s Multidimensional Ethics Scale from marketing to accounting and to a wider group of survey respondents. They added four accounting scenarios involving conflict of interest and inside information. In this study, a utilitarian factor was also important. Apparently, the operating dimensions from the multidimensional scale are not stable among different decision makers. They also found a “halo effect” when comparing what respondents said they would do themselves and what they expected their colleagues to do. This highlights the hypothetical and subjective nature of results using Reidenbach and Robin’s Multidimensional Ethics Scale. As a measure of behavioral intent, it is not a measure of actual behavior. For this reason the MES is unlikely to be useful as a predictive measure for a firm or industry.

Content Analysis of Annual Reports

Some researchers have created measures of business ethics from annual reports. Bowman and Haire (1975) measured the proportion of lines of prose devoted to social responsibility issues.
Abbot and Monsen (1979) created a social involvement disclosure (SID) scale based on twenty-eight issues in six categories: environment, equal opportunity, personnel, community involvement, products, and other.

Since the researchers creating the measures are outside the firms being measured, content analysis is objective relative to the firm, although not to the researcher. Given multiple categories of social responsibility, it is multicriteria. Their work was empirical and descriptive; it is described in Carroll (1999). As this was not the intended use of annual reports, content analysis lacks theoretical logic. Posturing is possible by the firm writing the annual report; it may thus be biased by omission or inclusion. For these reasons, content analysis is not likely to have predictive value.

The Ethical Climate Index (ECI)

The Ethical Climate Index developed by Arnaud (2010) is based on surveys of employees from different departments in different organizations in the southeast United States. It includes responses to five questions on Collective Moral Sensitivity—Norms of Moral Awareness, e.g. people are aware of ethical issues; seven questions on Collective Moral Sensitivity—Norms of Empathetic Concern, e.g. feel sorry for someone’s problems; five questions on Collective Moral Judgment—Focus on Self; five questions on Collective Moral Judgment—Focus on Others; eight questions on Collective Moral Motivation, e.g. power and company success vs. ethical values; and six questions on Collective Moral Character, e.g. assume responsibility. Since ECI starts a priori with a theoretical list, it is both multidimensional and grounded in theory of moral decision making. As it is based on employee surveys about their own firms, there is the possibility of self-reporting bias.

Kaptein (2009) also surveyed employees’ perceptions of a list of unethical behaviors and traced empirically how ethical culture of organizations changed in the period between 1999 and 2004.

The ethical climate index lends itself to predictive use about firm decision making because it reflects conditions and organization culture under which internal decisions are made.

Mixed Results in Empirical Research

There are mixed results in empirical research with these various measures of business ethics. Given the diverse array of measurement schemes, it is not surprising that different empirical researchers come to different conclusions. In fact, Orlitzky (2011) found that “the empirical evidence on the relationship between corporate social performance and corporate financial performance differs depending on the publication outlet in which that evidence appears”.

CONCLUSION

A comprehensive measure of business ethics would ideally include: multiple criteria, theoretical logic, objectivity, suitability for hypothesis testing, and predictive potential. A summary of characteristics for measures that have been used in empirical research is shown in Table 1. None is a single unambiguous measure of business ethics, a measure that at once has all five characteristics noted above. In the absence of a comprehensive measure, it is advisable to acknowledge which measurement characteristics present and which are absent when conducting business ethics and corporate social responsibility research. It should be acknowledged that business ethics is a multidimensional concept and needs a multidimensional measure to reflect its
presence/absence or flag an impending problem. A recommendation that follows from this analysis is that empirical research on corporate social responsibility be conducted using multiple measures as one measure alone is likely to miss some perspectives.

Additionally, there has been very little research to date on the predictive potential of any score of the ethical content of a firm’s business decision making, as Table 1 indicates. This would be a fruitful area for future research. Certainly a measure that could be a leading indicator of ethical failures and the financial problems that sometimes follow ethical lapses would be valuable.

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THE BURSTING EDUCATION BUBBLE: AN UNWELCOMED MESSAGE OF THE COMING BRAVE NEW WORLD OF ACADEME

ROBERT K. ROBINSON *
DAVE L. NICHOLS **
STUART SCHAFER ***
ALETA CRAWFORD ****

1. INTRODUCTION

The Higher Education Bubble, a term which has gained currency in the popular press, a phenomenon in which the demand for a college education, after experiencing a period of rapid expansion, appears to be heading for a period of contraction.1 From a strictly economic and financial perspective, a bubble occurs in a market when an asset’s price deviates significantly from its intrinsic value.2 The eventual result is the value of the asset plummets. Evidence suggests this is occurring in higher education as consumers are increasingly questioning the value of a college degree compared to its costs. This manuscript identifies the major factors contributing to this contraction and their likely consequences for colleges and universities across the United States. In doing so, it examines some state government responses to declining enrollments and presents strategies that institutions of higher learning have adopted in response. It concludes with the authors’ prognostication of the Bubble’s effect on future demands for business faculty and programs.

II. FACTORS LIKELY TO AFFECT ENROLLMENTS IN THE NEAR FUTURE

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There is no single factor contributing to the decline in demand for a college education. Rather, there are multiple factors working in concert.

A. Decline in the Traditional College Age Population
The first factor affecting college enrollments is the simple demographic fact that the pool of potential traditional students is in decline. The Baby Boom Echo, the term for the children of the Baby Boom which peaked in 2009. This generation represents the second largest generation in American history. Its members are known as Millennials or Generation Y.

Census projections indicate the segment of the population from which traditional college age students (18 to 24 year-olds) is drawn will decline through the year 2020 (see Table 1). Only eleven states are projected to have a 10% or more increase in this 18-24 year-old segment during the period 2005 to 2030.

B. Rising College Tuition Costs
Another factor contributing to declining enrollments is the rising cost of tuition and fees. Tuition has steadily risen over the past five years (2008-2013). Tuition for private 4-year college was up 13 percent beyond overall inflation, while public four-year college tuition is up 27 percent beyond overall inflation. Average tuition cost in 2013 for private four-year universities was $30,094 compared to $8,893 for public four-year universities ($22,203 for out-of-state).

C. Rising Student Loan Debt
Closely coupled with rising tuition cost is the commensurate student debt burden. Total federal student loan debt in August 2013 was $1.2 Trillion. This figure is greater than consumer credit card debt for the same period, and more than the total auto loan debt held by consumers. The outstanding student loan debt has doubled since 2007.

At the same time student debt is growing, beginning salaries for recent college graduates are declining. The median salary for graduates in 2010 was $27,000 (compared to $30,000 for those who graduated in 2008). Roughly 85% of college graduates move back into their parent’s

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7 Steve Odland, College Costs Out Of Control, FORBES,
8 THE COLLEGE BOARD, TRENDS IN COLLEGE PRICING 2013 at 3 (2013).
10 FEDERAL RESERVE BANK OF NEW YORK, STUDENT LOAN DEBT BY AGE GROUP, March 29, 2013 (http://www.newyorkfed.org/studentloandebt/).
home. This is likely to be exacerbated by high student debts combined with lower paying job opportunities.

D. High Unemployment of Recent College Graduates

High unemployment (under- or mal-employment) is an issue resulting in general dissatisfaction among many recent college graduates. In May 2013, the official unemployment rate (U-3) for college graduates under age 25 was 7%. However, over 16% of them hold only part-time positions. According to the Chronicle of Higher Education, nearly 37% of recent graduates hold jobs not requiring a college degree. It should be noted that underemployment is often degree specific. STEM (science, technology, engineering and mathematics) degrees such as accounting, engineering, computer sciences remain in high demand. On the other hand, liberal arts degrees like anthropology, fine arts, philosophy, and music continue to experience low demand.

E. Growing Skeptic a College Degree no Longer Offers an Economic Return.

Finally, there is a growing perception a college education no longer offers an economic return. Consumers of higher education are beginning to question the traditional expectations of the benefits afforded the holder of a college degree.

Historically, college degrees have been assumed to impart skills valued in the workplace, hence, an entrée to better paying jobs. Nearly 80% of incoming freshmen list “preparing students for careers” as the most important reason for going to college. Though this may be true for many degrees, especially those offered in professional schools, it may not be the case for “softer” degrees. As previously noted, graduates with degrees in engineering tend to earn more than those with degrees in the humanities. College degrees have also been considered a surrogate for providing a credential indicating the holder’s ability to show up on time and perform as instructed. It must also be recognized that increases in college enrollments have coincided with a period where high schools have increasingly failed to provide graduates with the skills necessary to succeed in college. Universities are competing in an applicant pool in which more applicants are less prepared for college-level work. The growth of remedial programs serves to delay graduation, divert resources to noncollege classes and drive up college costs.

17 ROBERT C. DICKeson, Prioritizing Academic Programs and Services: Reallocation Resources to Achieve Strategic Balance, at 44 (2010).
19 April A. Wimbeg, Comparing the Education Bubble to the Housing Bubble: Will Universities be too Big to Fail? 51 U. LOUISVILLE L. REV. at 196-7 (2012).
Additionally, college graduates are assumed to have access to a useful social network while in school which will later enable them to secure jobs.\textsuperscript{21} If a college’s degree programs do not offer an economic value for the consumer (students & parents), they will not come. A college degree is no longer a guarantee for a higher paying job to afford a home, a car, or attain a middle-class lifestyle.\textsuperscript{22} Yet it requires a substantial investment of both time and money. Meanwhile, this is occurring at a time in which students are taking on loan debt they may never be able to afford to repay. This situation is likely to result in either declining demand for the service, consumers exerting pressure for lower costs, or both.

III. CONSUMERS’ REACTION TO THE BUBBLE

Given the aforementioned factors, it is not surprising consumers for higher education are beginning to be more than vocal about their general dissatisfaction with the current state of affairs.

A. Consumers Seek Lower Cost Alternatives

Some consumers seek to reduce cost by seeking substitute services. A lower cost alternative to four-year universities already exists in the form of community colleges. Among the lower cost alternatives to four-year universities and colleges is for a student to attend a community college for the first two years. Citing a Student Loan Marketing Association Corporation survey, the Wall Street Journal reports that in 2014 more families were sending their students to community colleges.\textsuperscript{23} Many students can moderate the expensive cost of a four-year degree by spending their freshman and sophomore years in the local community college and paying lower tuition costs.\textsuperscript{24} Living at home, by itself, enhances cost reduction, in doing so, the student dramatically avoids the expenses of dormitories and meal plans. The downside for four-year institutions is the diminution of their freshman and sophomore enrollments.

Another lower cost alternative is for the student to pursue an online degree. Numerous non-traditional institutions (a.k.a. private-for-profit colleges) offer a wide variety of online business degree programs at both the graduate and undergraduate level. Some examples include, Capella University, New England College of Business and Finance, University of Phoenix, Walden University.\textsuperscript{25} The attraction of such degrees is the convenience for the consumer. He or she can stay in their home and have greater control over the time in which the material is accessed. As a consequence of allegations of fraud and overcharging, the United States Department of Education, Office of the Inspector General (OIG) began a compliance audit on several private-for-profit online providers.\textsuperscript{26}

\textsuperscript{21} Paul Osterman, The Promise, Performance and Policies of Community Colleges, REINVENTING HIGHER EDUCATION: THE PROMISE OF INNOVATION 141-142 (Ben Wildavsky, Andrew Kelly & Kevin Carey eds., 2012).
\textsuperscript{22} DON PHILABAUM, THE UNEMPLOYED GRAD at 25-26 (2012).
\textsuperscript{24} THE COLLEGE BOARD, TRENDS IN COLLEGE PRICING (2013).
\textsuperscript{25} 2013 For-Profit Online College Rankings, GUIDE TO ONLINE SCHOOLS (http://www.guideonlineschools.com/online-colleges/for-profit)
\textsuperscript{26} S. COMM. ON HEALTH, EDUC., LAB. AND PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (2012).
In response to the popularity of these online degrees, some traditional schools have modified or expanded many programs to an online format. A search of the U.S. News and World Report website identifies the following institutions in the State of Texas offering online bachelor’s degrees: Angelo State University, LeTourneau University, Midwestern State University, Sam Houston State University, Stephen F. Austin State University, Sul Ross State University, Texas Tech University, University of North Texas, University of Texas at San Antonio, and University of Texas of the Permian Basin.27

B. Consequences for Colleges and Universities

From a traditional university’s perspective, consumers seeking low cost alternatives create a situation of seeing the glass as half empty or half full. Those institutions which choose to ignore the evidence of a bubble and continue to maintain the status quo may very well experience the consequences of declining enrollments. The increased attractiveness of community colleges will result in declining freshmen and sophomore enrollments. These institutions should expect a decline in total enrollments as students avail themselves of the other previously mentioned alternatives. Smaller private and regional public universities are already experiencing these declines.

As rising college costs garner more attention in the popular media, consumers are likely to put greater pressure on elected officials to intervene in order to control costs by fiat. One of the first options seized upon by state legislatures or boards of regents is to streamline redundant programs at the state level.

As a labor intensive industry, it is difficult to make higher education more productive, hence, more cost effective. Three of the more commonly recommended solutions to this dilemma (drawn from the private sector) are: (1) use fewer permanent workers, (2) increase the use of information technology, and (3) re-engineer key processes to eliminate nonessential or inefficient ones.28 For universities, public or private, this translates to: (1) using fewer tenure-track faculty, (2) resorting to more online course delivery methods, and (3) eliminating degree programs and courses with insufficient demand.

This has already resulted in some states eliminating duplicative degree programs among their public colleges and universities.29 In some instances institutions may be subject to oversight and evaluation for possible consolidation with other institutions, or elimination. As an example, the State of Texas will merge the University of Texas-Pan American with the University of Texas-Brownsville to form the University of Texas–Rio Grande Valley in 2015.30

In 2011, eleven degree programs, including Management Information Systems, were eliminated at the University of Southern Mississippi due to budget cuts and declining student

28 Dominic Brewer & William C. Tierney, Barriers to Innovation in Higher Education in REINVENTING HIGHER EDUCATION 11-40 (Ben Wildavsky, Andrew Kelly & Kevin Carey eds., 2012).
demand. More scrutiny will be placed on evaluating individual programs, particularly those determined not to be adding to the mission of the university. Such programs are likely to be identified as candidates for elimination.

All of this is indicative of consolidation in the higher education industry as the market becomes mature and organizations begin to merge or drop out. All markets will experience consolidation. This stage of an industry’s life cycle occurs when major competitors begin to emerge and focus their attention on increasing revenue and market share. For higher education, consolidation is occurring now.

IV. THE ACADEMY’S REACTION TO THE BUBBLE

A. Denial

A predictable response to the advent of disagreeable news is denial. Often the responses are: there is no bubble, or the demand for higher education is not diminishing. To contend things will continue into the future as they have in the past is a recipe for disaster. As previously noted, enrollments are being contracted for many institutions and program eliminations are a reality for many academics.

Another form of denial is to claim any talk of an education bubble is politically motivated, part of an alleged libertarian/right-wing plot. Any mention of an education bubble can be attributed to anti-intellectual elements attempting to panic potential students.

Finally there is the response to declare the alleged bubble is based on erroneous data. Here it is argued that results are vastly overstated. If there is a decline in enrollments, it is a temporary phenomenon.

B. Pushback

Many universities are going to attempt to maintain the status quo until it is no longer tenable. A prevailing argument is although traditional delivery methods are expensive, there is
no adequate alternative to them\(^{37}\) and alternatives to traditional classrooms will result in lower quality education.

V. COST REDUCTION STRATEGIES FOR UNIVERSITIES

Whether mandated by state legislatures, boards of regents or proactively pursued, most institutional responses focus on reduction and efficient use of remaining resources. The Center for College Affordability and Productivity provided a policy paper in 2010 offering suggestions as to how governments and institutions of higher learning could implement steps to reduce operating expenses in order to pass the cost savings on to the consumer.\(^{38}\) The authors have taken the liberty of highlighting those recommendations which can be directly pursued by individual universities (see Table 2).

A. Efficient Use of Existing Resources

Cost efficiency can be accomplished in a number of ways, but the most common are: reduce administrative staff, eliminate unnecessary programs, eliminate excessive academic research, or outsource services.

Increasing teaching loads is the simplest solution to reducing payroll expenses for instructional faculty. Increasing a faculty member’s teaching load from nine hours per semester to twelve hours per semester automatically increases productivity by 24%, thus lowering operating expenses. Three faculty members can now cover the course load previously covered by four. The trend has already begun.

There is an obvious dark side to this proposition. There will be an anticipated demand for more compensation for more work. Administrators should note that an increase in pay would be offset by the savings in benefit costs by not having to hire additional faculty (or by reductions in the instructional staff).

Improving facility utilization has focused attention on how much institutions are using existing classrooms. The idea that higher classroom utilization (measured in hours per week) is better than less. If an existing classroom utilization is only at 50% capacity (i.e., it is only being used 20 hours per week on the average), how can an institution justify the building of a new classroom building. Both the new building’s construction, plus the maintenance of that building after it is built, are expensive propositions. Better utilization of existing facilities would obviously reduce the need for new construction as well the acquisition of the additional operating costs.

Closer examination will be placed on current delivery methods of courses, particularly entry level and principles courses. The emphasis will be on more cost effective delivery methods like Massive Open Online Courses (MOOC) and compressed video to replace large auditorium lecture.\(^{39}\)


B. Use Technology to Reduce Costs

Increasing cost efficiency can be achieved through more efficient means of course delivery such as more online classes and MOOCs. Though there is fear, and perhaps justifiably, that this will disrupt traditional teaching methods and course delivery, it has already been adopted by many universities. Will this create competitive turbulence within the education industry? Absolutely. Clay Christensen draws the analogy of new classroom technology as having the same effect as cell phones replacing landlines.40 But it may also be argued that PowerPoint replaced the chalkboard and did not create a major restructuring of the industry. However, the effect of PowerPoint was not a reduction in the demand for classroom instructors.

One advantage of technological innovation is that cost savings may be realized by turning to online or electronic textbooks. Online textbooks and related course material are gaining popularity and significant savings in textbook costs.41

It is important at this juncture to intrude a caveat. Panaceas rarely are. So it is with the panacea of online education. Online education is not going to be an effective case of one size fits all, and empirical studies indicate that it is efficacious only for students with specific learning styles.42 Students with visual and read/write learning styles do better in an online environment than those with aural (learn by listing) and kinesthetic (learn by doing) learning styles.43 This may partially explain the high dropout rates associated with online courses.

There is also the issue of whether prospective employers value online degrees. Though this particular issue is beyond the scope of this paper, the reader should be aware that one study indicated that 96% of surveyed businesses preferred business degrees from traditional programs over online bachelor’s degrees.44 Additionally, hiring in academe demonstrates a prejudice favoring traditional terminal degrees over online degrees, indicating an impression that distance education is less rigorous and credible, and more inferior to traditional postgraduate degrees.45 Though this may have an overall chilling effect on online degree programs, it is unlikely to stifle online courses within a traditional degree framework.

CONCLUSIONS

The authors see the following scenarios playing out. The competition for an ever shrinking student applicant pool will intensify. Smaller institutions, public and private, will increasingly compete with the larger state schools and well renowned private schools. For many of the smaller institutions which cannot effectively compete, this is likely to result in closure or consolidation.

State legislatures will continue to attempt to placate constituents with quick fix solutions to difficult problems. All public institutions can expect cuts in the higher education budget, and

43 Id. at 226.
45 Alice G. Yick, Pam Patrick and Amanda Costin, Navigating Distance and Traditional Higher Education: Online Faculty Experiences. 6 THE INTERNATIONAL R. OF RESEARCH IN OPEN AND DISTANCE LEARNING 12 (2005).
many may find themselves confronted with outcome-based budgets. There may be tuition caps in many states. Though well-endowed schools will do better than those without, the majority of university administrators will be under pressure to further cut their operating expenses (see Table 2). This will only intensify the competition for scarce resources.

It is further anticipated that greater pressure will be placed on institutions to justify not only their degree programs, but individual courses are also likely to come under scrutiny. Though some of this pressure will come from external sources (boards of regents, state legislatures, etc.), some will be internally driven as university administrators attempt to balance their budgets. If revenues cannot be increased (i.e., student enrollments increased), then costs must be reduced. Thus, it is reasonable to assume that, for some institutions, class sizes and teaching loads may continue to increase, as will reliance on non-tenured track faculty.

Like it or not, the education bubble is bring a paradigm shift to higher education. Those who realize its implication can prepare, those who do not will be caught off guard.
Table 1: Census Projections of Population 18-24 Year-Olds, 2000-2050

Table 2: Ways in which Universities Can Reduce Cost of Higher Education

- Reduce Resource Utilization
  - Reduce Administrative Staff
  - Eliminate Unnecessary programs
  - Eliminate Excessive Academic Research
  - Outsource Services
- Efficiently Use Existing Resources
  - Increase Teaching Loads
  - Improve Facility Utilization
  - Encourage Timely Degree Completion
- Use Technology to Reduce Costs
  - More Efficient Methods of Course Delivery (Online Classes & MOOCs)
  - Reduce Textbook Costs
  - Use Course Management Tools